

Opportunities to Protect Public Interest in Public Infrastructure:

Review of Regulatory Frameworks in Sri Lanka



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Design and layout by Dinuk Senapatiratne.

The Verité Research team would like to acknowledge and appreciate the following individuals for providing helpful feedback, suggestions, and comments to support the completion of the regulatory review report.

Amali Rajapakse, Bhagya Wickramasinghe, Chathushika Wijeyesinghe, Christy Perera, Dilani Alagarathnam, Dr. Sumith Pilapitya, Hafsa Hudha, Iromi Perera, Karin Fernando, Kithmina Hewage, Kulasabanathan Romeshun, Namal Ralapanawe, Ravi Ratnasabapathy, Sajeewa Chamikara, Sakuntala Kadirgamar, Shahrzad Majdameli, Shamila Rathnasooriya, Shyamala Gomez, Sriyanie Wijesundara, Thilan Wijesinghe, and Winoth Lakshan.

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Opportunities to protect public interest in public infrastructure : review
of regulatory frameworks in Sri Lanka / Uween Jayasinha... [et al.] ; ed. by
Subashini Abeysinghe ... [et al.] . - Colombo : Verite Research, 2021
93 p. ; 21 cm.

ISBN 978-624-5514-04-5

i . 352.53 DDC 23 ii. Jayasinha, Uween (co. author)
iii. Abeysinghe, Subashini (ed.)

1. Finance, Public – Sri Lanka 3. Public interest – Sri Lanka
2. Infrastructure (Economics) – Sri Lanka

ISBN: 978-624-5514-04-5

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Email comments to: publications@veriteresearch.org

Cover photo: courtesy of Road Development Authority, Central Expressway Project Section II'

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List of Acronyms

| | |
|-------|---|
| ADB | Asian Development Bank |
| BOI | Board of Investment of Sri Lanka |
| CAO | Chief Accounting Officers |
| CAPC | Cabinet Appointed Procurement Committee |
| CCA | Coast Conservation Act |
| CCAC | Coastal Conservation Advisory Council |
| CCD | Coastal Conservation Department |
| CEA | Central Environmental Authority |
| CERC | Cost Estimate Review Committee |
| CIDA | Construction Industry Development Authority |
| CSO | Civil Society Organization |
| DENR | Philippines Department of Environment and Natural Resources |
| DG | Director General |
| DPF | Department of Public Finance |
| DS | Divisional Secretary |
| e-GP | electronic-Government Procurement |
| EIA | Environment Impact Assessment |
| EIAR | Environment Impact Assessment Report |
| EMC | Environmental Monitoring Committee |
| EMP | Environmental Monitoring Plan |
| FA | Foreign Agency |
| FFA | Foreign Funding Agency |
| FIDIC | International Federation of Consulting Engineers |
| GGTP | Government Guidelines on Tender Procedure |
| GPMCM | Guide to Project Management and Contract Management |
| GRM | Grievance Redressing Mechanism |
| IAIA | International Association for Impact Assessment |
| ICB | International Competitive Bidding |
| IEE | Initial Environmental Examination |
| IEER | Initial Environmental Examination Report |
| IPF | Investment Project Financing |
| JICA | Japan International Cooperation Agency |
| LAA | Land Acquisition Act |
| LAR | Land Acquisition Regulations |

| | |
|-------|--|
| LARC | Land Acquisition and Resettlement Committees |
| LKR | Sri Lankan Rupees |
| MOF | Ministry of Finance |
| MLD | Ministry of Lands |
| MMT | Multi-Partite Monitoring Team |
| NAPPP | National Agency for Public Private Partnerships |
| NEA | National Environment Act |
| NER | National Environmental Regulations |
| NCB | National Competitive Bidding |
| NIRP | National Involuntary Resettlement Policy |
| NPA | National Procurement Agency |
| NPC | National Procurement Commission |
| OCDS | Open Contracting Data Standard |
| OCP | Open Contracting Partnership |
| ODA | Official Development Assistance |
| OECD | Organization for Economic Co-operation and Development |
| PAA | Project Approving Authority |
| PAB | Procurement Appeals Board |
| PC | Procurement Committees |
| PE | Procurement Entities |
| PEA | Project Executing Agency |
| PF | Public Finance |
| PG | Procurement Guidelines |
| PM | Procurement Manual |
| PP | Project Proponent |
| PPP | Public Private Partnerships |
| RAP | Resettlement Action Plan |
| RDA | Road Development Authority |
| RTI | Right to Information |
| SBD | Standard Bidding Documents |
| SCF | Standard Contract Forms |
| SIA | Social Impact Assessments |
| SLRPA | State Lands (Recovery of Possession) Act |
| SS | Superintendent of Surveys |
| TEC | Technical Evaluation Committee |
| TOR | Terms of Reference |
| UDA | Urban Development Authority |
| USD | United States Dollars |
| VFM | Value for Money |
| WB | World Bank |

Executive Summary

Investment in infrastructure is vital for development. However, in the context of weak governance, investments in large and complex infrastructure projects can become a fertile ground for corruption and result in costly, poor quality infrastructure that fails to meet the intended objectives. Therefore, sound regulatory frameworks that promote good governance and allow for effective public participation in decision-making processes are critical for ensuring that investments in infrastructure benefit the public and generate value for money (VFM).

The broad definition of VFM includes striking a balance between the effective, efficient, and economical use of resources while giving due consideration to the impact that such investments have on the environment, alongside social considerations relating to equity and access. Public and civil society participation can help to ensure that investments in infrastructure are undertaken in a sustainable and inclusive manner. They can also help to reduce the cost of monitoring for the government, reduce information gaps which lead to otherwise avoidable challenges that derail or delay projects, and help to build trust between the citizens, contractors and the government. It is important to note however, that the benefit of public participation is limited when such engagement is captured by

special interest groups; furthermore, the likelihood of capture is higher when the access to information is low, confidence in the existing structures and officials is low, and the existing regulatory frameworks offer zero or limited formal, structured opportunities for public participation in infrastructure projects.

The objective of this report is to provide a baseline understanding of the current regulatory frameworks governing the procurement of large infrastructure projects in Sri Lanka, identify gaps and weaknesses in the existing frameworks, and locate opportunities available for the public and civil society organisations (CSOs) to bridge the identified gaps and ensure that the investment decisions made by the government adequately reflect the interests and concerns of the public. The report focuses on three critical areas in the project lifecycle: procurement, environmental impact assessment, and involuntary resettlement.

The regulatory framework: a brief overview

The regulatory framework for public procurement in Sri Lanka is not based on the legislative enactments of Parliament and is governed instead by cabinet approved guidelines. Specifically, these include the 2006 Procurement Guidelines: Goods and Works (PG

2006), 2006 Guidelines for Procurement of Pharmaceuticals & Medical Devices, and 2007 Guidelines for Selection & Employment of Consultants. The guidelines are accompanied by two procurement manuals: the 2006 Procurement Manual (PM 2006) and the 2007 Consulting Services Manual. Amendments and policy directives of the guidelines are published as supplements and circulars by the Department of Public Finance (DPF) of the Ministry of Finance. All procuring entities (PEs) – i.e., government ministries, departments, statutory authorities, local authorities, state owned enterprises, and other entities wholly or partly owned by the government – are required to adhere to the procedures set out by the PG 2006 and PM 2006 when undertaking infrastructure procurement.

It is important to note that there are other guidelines that become relevant for projects funded by foreign funding agencies (FFAs) and projects that originate as unsolicited proposals. For projects funded by FFAs, the PG 2006 states that if the FFA mandates the use of its own procurement guidelines, they prevail over the PG 2006. The PG 2006 and PM 2006 do not make any reference to infrastructure projects that originate as unsolicited proposals. However, Part II of GGTP 1998 (II GGTP 1998), which outlines the guidelines applicable for infrastructure projects undertaken as PPPs, refer to unsolicited proposals under Reference 237. The process outlined mandates that from project finalisation onwards, unsolicited proposals must follow the same procedure as solicited projects as outlined in PG and PM 2006. However, the guidelines allow for deviations from this process with cabinet approval.

The National Procurement Commission established in 2015 oversaw the drafting of two new procurement guidelines: one for Goods, Works, Services, and Information Systems, and the other for Selection and Employment of Consultants. Both were published as Extraordinary Gazettes in October 2019. However, the guidelines are not in force as they did not obtain the required approval from the parliament.

In addition to the procurement guidelines, the

Construction Industry Development Act No. 33 of 2014 specifies regulations for the industry. The Construction Industry Development Authority (CIDA) established by the Act oversees the activities of the construction industry and prepares the standard bidding documents that must be used for construction contracts.

According to the 35th supplement to the PM 2006, locally funded projects above LKR 500 million and foreign funded projects LKR 1,000 million require the establishment of a Cabinet Appointed Procurement Committee (CAPC). The procurement lifecycle for projects above these value thresholds as outlined in PG 2006 can be divided into three stages: the procurement preparation stage, the tendering stage, and the contract management stage.

During the procurement preparation stage, PG 2006 requires the PE to confirm that it has carried out Initial Environment Examinations (IEE)/Environmental Impact Assessments (EIAs) and all other project preparedness activities such as the formulation of feasibility studies and the completion of land acquisition, resolved compensation and resettlement issues before making a request for the appointment of a procurement committee and entering the tendering stage.

EIAs are one of the most important activities that must be completed during the procurement preparatory stage and is discussed in detail in this report. It is crucial to identify, predict, evaluate and mitigate the biophysical, social and other relevant effects of a development project before major decisions are taken to commit to its implementation. Sri Lanka's EIA framework is governed primarily by two key laws: the National Environmental Act No. 47 of 1980 (NEA) and the Coastal Conservation Act No. 57 of 1981 (CCA). The CCA governs EIAs of projects in coastal areas, while the NEA governs such assessments in all other areas of the country. The National Environmental (Procedure for Approval of Projects) Regulations (NER) passed in 1993 under the NEA sets out the procedure for preparing and publishing Initial Environmental Examination Reports ('IEER') and Environmental

Impact Assessment Reports (EIAR) and the process is overseen by the Central Environmental Authority (CEA). The projects that fall under the CCA are within the purview of the Coast Conservation Department (CCD). It is important to note however, that large-scale projects that are typically carried out in coastal areas, such as port/harbour constructions, fisheries projects, and the construction of tourist resorts, are prescribed as projects which must follow the NEA/NER procedure. While the process outlined by NEA and CCA are similar in many respects, in certain areas the CCA provisions are weaker in comparison to NEA. These include the lack of a formal scoping process set out in the CCA, lack of provisions for holding public hearings, and lack of provisions that require the formulation of Environmental Management Plans.

Land acquisition and resettlement is another crucial activity that must be completed during the procurement preparation stage and is discussed in detail in this report. When large scale projects require the acquisition of vast tracts of land, the occupying communities are compelled to be involuntarily resettled. The National Involuntary Resettlement Policy (NIRP) was introduced in 2001 to address the policy gaps that existed in involuntary resettlement. The NIRP was formally approved by the Cabinet of Ministers on 24 May 2001, making it the applicable state policy in respect of involuntary resettlement. However, despite being a comprehensive framework, the NIRP is only a government 'policy', and does not have the force of law.

While acquisition and taking possession of land for development purposes is contemplated in several laws of Sri Lanka, the Land Acquisition Act (LAA) and the regulations passed thereunder in 2008 and 2013 are the most common mechanism by which private lands are acquired. Other laws that refer to matters related to land acquisition and resettlement are the State Lands (Recovery of Possession) Act No. 7 of 1979, the Urban Development Act No. 41 of 1978, the Urban Development Projects (Special Provisions) Act No. 2 of 1980, the National Environmental Act No. 47 of 1980 and the Board of Investment Act No. 4 of 1978.

With the completion of project preparatory activities, the procurement entity or the project proponent can request the appointment of a procurement committee. The next stage of the procurement life cycle, the tendering stage spans from the invitation of bids to the decision by the cabinet of ministers on the winning bid. The final stage i.e., contract management, commences with issuance of the letter of acceptance to the selected bidder and ends with the issuance of the certificate of completion. The Guide to Project Management and Contract Management (GPMCM) for Infrastructure Development Projects (Works) published by the Ministry of Finance in 2017 serves as a first reference point for project staff managing the contracts.

Gaps and weaknesses

Access to Information

The limited availability of and access to information throughout the procurement lifecycle is a key weakness in the current framework. There are three factors that limit access to information: first, gaps in information disclosure requirements; second, limited compliance with mandatory disclosure requirements; and third, difficulties encountered in accessing disclosed information.

Gaps in information disclosure requirements include the failure to publish procurement plans, review body decisions, as well as information pertaining to the performance of the procurement system (e.g., benchmarking and monitoring reports). Pertaining to EIAs, the procurement entity or the project proponent is not required to disclose information related to screening and scoping assessments to the public. Guidelines issued by the CEA urge the dissemination of information in summarised forms during the scoping stage, but these recommendations do not have the force of law and are not binding on project approving agencies or project proponents. Certain documents relating to the screening and scoping stage, such as the TOR and the final scoping reports, are occasionally

disclosed along with the EIAR on a purely discretionary basis. The limited information disclosed during the screening and scoping stage can significantly hamper opportunities for the affected communities and CSOs to meaningfully engage in the EIA process. Further, the responses of the project proponent to comments made by the public after inspecting the EIA reports are not routinely disclosed as well, making it challenging to ascertain if the concerns were adequately addressed. In relation to involuntary resettlement, the Land Acquisition Act does not require the disclosure of resettlement action plans (RAPs) unless it is a project that falls within the purview of the NEA, which then requires disclosure as per the national environment regulations.

Although the current regulatory framework mandates the publication of certain types of information in relation to procurement, the report finds the level of compliance with such mandatory information disclosure requirements to be low. For example, pertaining to procurement, the guidelines require the publication of tender notices and the publication of award of contracts. The Right to Information (RTI) Act requires the respective government agencies to publish project information such as cost, duration, source of funds, loan amount, interest rate, project components, benefits, execution agency, name of the contractor and the contract value. In addition, the RTI Act also requires the relevant line Ministry to provide updated information throughout the project development and implementation stages in response to a written request made by a citizen.

The difficulty encountered in accessing disclosed information is a problem that manifests in several ways. The limited availability of information in the local languages (Sinhala and Tamil), and such information being available primarily in English, significantly limits the accessibility of such information to the public: according to the data published by the Department of Census and Statistics, only 30.8% of the Sri Lankan population aged 10 and over possesses the ability to read and write in English. This absence of public information

in the local languages arises due to two reasons. First, the regulations themselves have gaps, where in certain instances there is no mandatory requirement to publish the information in all three languages (Sinhala, Tamil and English). Second, even when there is such a requirement, the report finds that the level of compliance is low. Difficulties encountered in locating the information disclosed is another problem that limits access to information: the frequent and ad-hoc changes made to institutional structures compel the public to navigate through the numerous websites of government agencies to glean information on procurement matters. Further, information available online in electronic format is limited, increasing the time and cost expended in searching for information.

Public/CSO participation

The report identifies three major gaps that undermine meaningful public and civil society participation in environmental impact assessment processes in Sri Lanka. Although regulatory guidelines contemplate broad participation in scoping, such participation is rare in practice. Public hearings are not contemplated under the CCA framework, but the NEA framework allows for public hearings in situations where further analysis of the EIAR is required. According to key informants, despite the provisions in the NEA, public hearings are hardly ever conducted. These factors increase the likelihood of environmental issues and impacts that are specific to the proposed project and the communities concerned not being properly identified and adequately addressed in the final assessment.

The limited time provided for the public to contribute during scoping and EIA Report inspections is another drawback that undermines effective public and civil society participation. For example, the scoping process under the NER must be completed by the Project Approving Authority (PAA) within 30 days. The period for public inspection of the EIAR is limited to 30 days in both the NEA and CCD frameworks.

The current EIA framework does not provide an

opportunity for the public to administratively challenge the decision of the PAA to grant approval for a project. Key informants noted that this compels affected communities to take legal action, which can be more costly and time consuming than utilising administrative provisions to challenge the decision.

As discussed above, the lack of generally applicable grievance redressing mechanisms (GRM) within the land acquisition and resettlement framework is a significant drawback. Although the Land Acquisition and Regulatory Committees (LARC) system provides for communities to make representations to specialised administrative committees regarding claims for compensation assistance for resettlement, and any other grievances in respect of the resettlement process, it is not generally applicable and has to be specifically applied to projects by the Ministry of Lands. As such, there is no GRM that is generally accessible to communities.

Ad-hoc consultations with affected communities is another drawback in the current process. The LAA makes no reference to early consultation with communities to identify affected persons and their concerns during land acquisition. Only the NIRP contemplates the full communal participation at all stages of a project. However, the NIRP is selectively applied. This issue is further exacerbated in situations where the lands are acquired on an 'urgent' basis. According to the key informants, in the past and in recent times, the government has relied on laws that enable the urgent acquisition of land for development purposes. In such circumstances, the issues and sensitivities of affected persons and communities are not adequately considered. At present, the legal framework governing involuntary resettlement in Sri Lanka does not make specific reference to CSO participation. Thus, decision makers are not obligated, or duty bound to include CSOs when formulating and implementing resettlement programs.

Another gap is the lack of provision to consider the sensitivities of marginalised groups. The NIRP only

recognises that 'gender equality and equity should be ensured and adhered to throughout the policy application'. However, the sensitivities of other groups, such as persons with disabilities, elderly persons, and indigenous communities are not specifically required to be considered.

Appointing technical experts

The limited transparency in appointing technical experts is another drawback identified in the current EIA framework. Both the NEA and the CCA frameworks include technical reviews, but the process of vetting and selecting the members of such committees is not based on any published/objective criteria and neither the NEA nor the CCA provide any guidance on the composition of such committees. Although independent experts and academics are appointed to such committees on occasion, this is not the standard practice.

Monitoring and Evaluation

The report identifies the EIA framework to be particularly weak in providing for effective monitoring and oversight. Both the NEA and the CCD are silent on how project implementation is monitored. The NEA only states that an Environmental Monitoring Plan (EMP) must be prepared by a PAA after it has granted approval for a project. The CCA does not contain any requirements relevant to monitoring. Thus, there does not appear to be a binding system by which EIAR compliance is monitored, and project implementation is evaluated in Sri Lanka.

Determination of compensation

With respect to involuntary resettlement, several weaknesses are identified in the current provisions on compensation. Lack of a broad policy that specifically deals with compensating resettled communities is one of the weaknesses. At present only the Land Acquisition Regulations (LAR) 2013 provides for formulae and guidelines on assessing compensation.

However, the LAR 2013 is applied discretionarily and only to certain projects. The definition of “affected persons” under the LAA is narrow and eligibility to claims for compensation and other entitlements is limited to persons who are physically relocated from their land because of acquisition by the state. It excludes persons who may be compelled to resettle due to impacts on the use of land and natural resources caused by development projects. The NIRP was introduced to address such weaknesses in the LAA; for example, the NIRP recognises that a person may be ‘affected’ even without direct impacts to his land. It envisages that an affected person is any person who is ‘displaced by changes to use of land, water or other resources caused by development projects.’ However, as the NIRP is a policy document that has no force of law, there is no obligation to adopt this definition and according to key informants, the NIRP is currently applied selectively.

Revisions to Institutional and Regulatory Framework

The stability and the predictability of the procurement process is significantly undermined by ad-hoc and frequent revisions to institutional and regulatory frameworks. The institutions regulating and monitoring public procurement and PPPs have been in constant flux due to the multitude of revisions introduced within short periods of time. For example, the National Procurement Agency (NPA) was the agency responsible for regulating public procurement activities from 2004 to 2007. After the NPA was abolished in 2007, its functions were transitioned to the DPF which functioned as the central agency until 2015. With the establishment of National Procurement Commission (NPC) in 2015, the NPC and the DPF both seem to have been involved in the procurement process until the NPC was abolished in October 2020. At present, it is unclear which institution is responsible for carrying out the tasks performed by the NPC. Similar ad-hoc revisions have also occurred in institutions managing PPPs. While the infrastructure projects that originated as PPPs come under the purview of Ministry of Finance (MOF), different activities have been carried out by different agencies at different points in time. Initially

PPP were managed by the Board of Investment (BOI) under the purview of MOF. However, between 2010 to 2015, a Standing Cabinet Appointed Review Committee (SCARC) was appointed to review unsolicited proposals that made a significant impact to the development agenda of the country. The SCARC ceased to function in 2015, and in 2017, the National Agency for Public Private Partnerships (NAPPP) was established with the objective of creating a single facilitation point for all PPP projects including those that originated as unsolicited proposals. The NAPPP ceased to function in 2020, and it is unclear as of now, which agency has overtaken its functions.

Ad-hoc changes have also been introduced to the regulatory framework. Currently, 37 supplements and 25 circulars are applicable to PG and PM 2006. However, not all supplements and 25 circulars are currently in force due to significant overlaps. Given that there is no unified, updated version of the guidelines, any interested party must go through all applicable supplements and circulars to read the currently applicable regulations.

Foreign Funding Agency (FFA) guidelines

The report also identifies that the current provision which allows for the guidelines of FFAs to take precedence over national guidelines can potentially undermine the country’s ability to secure VFM, especially in instances where such provisions compel the country to adopt a lower standard. It is important to note that in relation to EIA and resettlement processes, the existing Acts do not allow for adoption of lower standards than what is provided for in the national framework, making the adoption of the national framework mandatory. However, there is nothing to prevent the government from adopting higher standards, if the FFA guidelines requires to do so. However, the same is not true of procurement, especially in relation to the process followed in the selection of contractors. Competitive bidding is a core principle embodied in PG 2006 for the selection of contractors. While multilateral lending agencies such as the WB

and the ADB reflect a similar emphasis on competitive bidding, bilateral lending agencies seem to deviate from this principle. The competitive element of the bidding process is eroded by 'tied' loans (or export credit lines) offered by bilateral lending agencies. These loans have conditions that restrict bidding to contractors from the lender's country of origin. For example, analysis by Verité Research found that infrastructure projects funded by 28 out of 35 high value bilateral loans taken out during the period 2005-2018 were procured without a competitive bidding process.

Another key concern that the report identifies in relation to deviations from the competitive bidding process is the entertainment of unsolicited proposals. For example, analysis by Verité Research found that 13 out of 28 bilateral tied loans were used to fund infrastructure projects that originated as unsolicited proposals submitted by contractors from the country of the lender. The weak legal frameworks governing unsolicited proposals in Sri Lanka pose a significant challenge in sustaining competition and securing VFM. The country's regulatory framework does not lay down clear guidelines to regulate unsolicited proposals.

Electronic Government Procurement

Sri Lanka is a late comer to the electronic government procurement in the South Asian region. Currently, an e-GP platform named PROMISE is under development. While there are plans to expand into large infrastructure projects in the future, the platform is at present limited to shopping procurements.

Opportunities for public/CSO engagement

In comparison to other countries, there is limited opportunity available for formal engagement by the public and civil society organisations in the procurement lifecycle of large infrastructure projects in Sri Lanka. For example, several developing countries in Asia and Africa have formally introduced avenues for direct CSO engagement via pre-procurement

consultations and post-procurement monitoring mechanisms. While such opportunities are not available in Sri Lanka, the limited opportunities that are available for CSO and public engagement are categorised under three topics in this report: Opportunities to advocate for legal and policy reform, opportunities to enhance transparency and drive accountability, and opportunities to represent interests and concerns of the public.

A major factor that prevents the country from reaping the full benefits of public investments made in public infrastructure is the weak governance that results from gaps in the regulatory framework. The review of the current framework undertaken in this report highlighted numerous gaps and weaknesses in the regulatory framework governing the procurement of large infrastructure in Sri Lanka. Thus, a key area that civil society can contribute to is in advocating for an improved regulatory and policy environment.

It is important to note that CSOs and conservation groups have already been involved in engaging both the public and the government in enhancing the EIA frameworks of Sri Lanka. Advocacy efforts can take a top-down or bottom-up approach or be a combination of both. The former includes creating awareness and advocating for changes directly with parliamentarians, parliament committees and senior policy makers, while the latter involves creating public awareness about the problem, its impact and solutions, via traditional and social media. Given the limited opportunities provided for formally engaging with the procurement process in Sri Lanka, CSOs have increasingly resorted to mobilising support in the media and amongst the public to create public pressure. In interviews with key informants, it was indicated that resorting to informal means of redress, such as using the media to influence public opinion, is an effective means of remedying environmentally injurious activities.

The report identifies the limited access to vital information as a key factor that undermines effective public participation and accountability. CSOs can contribute

to addressing this weakness in the existing frameworks by bridging the identified information gaps. Additionally, CSOs can play a role in providing independent oversight, exposing malpractice, and ensuring that due process is followed. The right to information provided through the Right to Information (RTI) Act is a valuable tool that can be used and has already been deployed by many organisations to bridge information gaps and to enhance accountability to the public.

Lastly, CSOs can represent interests and concerns of the public by utilising the available enquiry and legal processes to influence policies, regulations and greater compliance with the existing regulatory frameworks. The current regulatory frameworks offer several opportunities for CSOs to engage with the procurement process to ensure that the interests and concerns of the public are adequately addressed. For example, the PM 2006 states that, general inquiries can be submitted to the PE about the procurement policy, procedures, and guidelines. Such inquiries received by the PE are referred to the DPF. As per the National Environment Regulations, the PAA is obligated to undertake the scoping process, which envisages consultation with public and private stakeholders to foster open discourse on the environmental impacts and mitigatory measures of the proposed project. Thus, scoping consultations constitute a platform by which stakeholders can engage with relevant actors to influence the outcomes of the impact assessment process. Guidelines issued by the CEA state that scoping must be undertaken by the PAA and the PP by conducting both 'formal' and 'informal' meetings/hearings. While neither the NER nor the CCA sets out a legally mandated monitoring procedure or mandates that such monitoring procedures should involve participation by the public, reports suggest that monitoring meetings and site visits with stakeholders are conducted during the implementation of certain projects.

One of the fundamental steps of the EIA process is inspection and review of the EIAR by the public prior

to approval of the project. Under the NER, the public is entitled to request a copy of the EIAR for more comprehensive review and analysis. The NER also mandates that the PP responds to all comments made by CSOs and the public on the EIAR.

The public and civil society can also make use of the opportunities provided in the guidelines of foreign donors/lenders to represent the interests and concerns of the public. Some of the key foreign funding agencies that fund infrastructure in Sri Lanka such as the World Bank, Japan International Cooperation Agency and the Asian Development Bank have their own environment and social frameworks and guidelines. These guidelines contemplate a higher degree of public and CSO participation in many aspects of environmental assessments and information disclosure. It is also important to note that some FFAs such as the World Bank, ADB, and JICA also have their own grievance redress mechanisms (GRMs) that are accessible to the public. These GRMs allows for complaints to be lodged directly with the respective funding agency, if a project funded by that agency has or is likely to have adverse effects on any individual, community, or the environment.

Finally, the public and the civil society can make use of the rights provided for by the Constitution to challenge action/omission of government agencies if they are illegal or infringe upon the Fundamental Rights of the people. For example, if any decision/omission taken in respect of the EIA process is illegal, unreasonable, or contrary to the procedure set out in law, the decision can be challenged by a Writ Application in the Court of Appeal. Decisions concerning large-scale infrastructure projects have already been challenged through Writ Applications and Fundamental Rights Applications

Introduction

Investments in public infrastructure, such as water supply, sanitation, transport, power generation, and telecommunications, are critical for development. However, public infrastructure projects frequently fail to meet their intended objectives, timelines, and budgets, and inadequately reflect the interests and concerns of the public that funds them, due to poor governance frameworks. Weak governance can also make investments in large and complex infrastructure projects fertile ground for corruption, which results in costly, poor quality infrastructure with limited benefits to the people.¹ Research finds that “on average, countries waste about 1/3rd of their infrastructure spending due to inefficiencies” and “over half of these losses could be made up through better infrastructure governance”.² Therefore, sound regulatory frameworks that promote good governance and allow for effective public and civil society participation in decision-making processes are vital for ensuring that

public investments in infrastructure result in benefits to the public.

Value for Money (VFM) provides a useful framework to evaluate whether the investments in infrastructure are undertaken in a sustainable and inclusive manner and contribute to the economic growth and development of the country. The broad definition of VFM includes striking a balance between the effective, efficient, and economical use of resources while giving due consideration to the impact that such investments have on the environment, alongside social considerations relating to equity and access. There is a growing realisation that the non-adherence to concerns relating to the environmental and social impacts of infrastructure projects can lead to considerable long-term costs.³ Although the current procurement guidelines of Sri Lanka do not make explicit reference to VFM, the guidelines state that the procurement process should maximise

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1. Website of the Department of Government Printing, 'Procurement Guidelines 2018', at http://www.documents.gov.lk/files/egz/2018/5/2070-15_E.pdf, [Last accessed on 19 November 2020].
 2. Ibid.
 3. The International Institute for Sustainable Development (IISD), 'Value for Money in Infrastructure Procurement: The costs and benefits of environmental and social safeguards in India', January 2014, at: iisd.org/system/files/publications/value_for_money.pdf, [Last accessed on 06 November 2020].

“economy, timeliness and quality”, adhere to “rules, regulations and good governance”, and provide “fair, equal and maximum opportunity for eligible interested parties to participate in Procurement”.⁴ The draft procurement guidelines gazetted in 2019, which are yet to be approved by the parliament, state that the purpose of the guidelines is “to establish governing principles and procedures to ensure value for money”.⁵

Providing formal, structured opportunities for early, effective, and genuine public and civil society participation in the decision-making process is important to ensure that investments in infrastructure generate VFM and reflect the needs and concerns of the public. Well-structured and well-executed consultation can enhance project legitimacy, bring a sense of shared ownership, create opportunities for communities to advocate for their benefits and provide incentives for good governance.⁶ Public and civil society participation help enhance the quality of projects (e.g. the use of appropriate material and procedures), reduce the cost of monitoring for the government, reduce information gaps that lead to otherwise avoidable challenges that derail/delay projects, and help build trust between the citizens, contractors and the government.⁷ Such engagements help improve political support for projects, alleviate public resistance, and assist in the customization of projects to better respond to local needs and conditions.⁸

It is important to note, however, that ensuring public participation is effective and genuine and able to

generate the expected outcomes and benefits is not an easy undertaking. The common challenges faced by government agencies internally, which undermine effective and genuine public engagement, include limited resources (both human and financial), limited time provided to conduct consultations, and political pressure to fast-track projects. Common external challenges include the risk of public and civil society organisations being captured by powerful and influential special interest groups,⁹ and the lack of interest or limited participation by the public resulting from a lack of time and an absence of trust in the process. Therefore, taking measures to address these challenges and building confidence among the public in the process are important to prevent public participation from becoming a mere window-dressing exercise.

The objective of this report is to provide a baseline understanding of the regulations and institutions governing the procurement of large infrastructure projects in Sri Lanka, focusing on procurement, compliance with environmental regulations, and involuntary resettlement. The report provides an overview of the current regulatory framework, identifies its gaps and weaknesses, and highlights opportunities available for the public and civil society to address the identified gaps and ensure that the decisions made by the government adequately reflect the interests and concerns of the public. By doing so, the report aims to increase transparency and understanding of the infrastructure procurement process in Sri Lanka and its limitations.

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4. Website of the Ministry of Finance, ‘Procurement Guidelines 2006’, at https://www.treasury.gov.lk/documents/procurement/ProcurementGuidelines2006_amded12June.pdf [Last accessed on 13 November 2020].
 5. Website of the Department of Government Printing, ‘Procurement Guidelines 2018’, at http://www.documents.gov.lk/files/egz/2018/5/2070-15_E.pdf, [Last accessed on 19 November 2020].
 6. OECD, ‘Getting Infrastructure Right: the ten key governance challenges and policy options’ (2016), at: <https://www.oecd.org/gov/getting-infrastructure-right.pdf>, [Last accessed on 15 Feb 2021].
 7. World Bank, ‘Citizen Engagement During Public Procurement Implementation in Bangladesh’, at: <https://wbnpf.procurementinet.org/featured/citizen-engagement-during-public-procurement-implementation-bangladesh>, [Last accessed on 06 November 2020].
 8. Eric J. Boyer, David M. Van Slyke, Juan D. Rogers, ‘An Empirical Examination of Public Involvement in Public-Private Partnerships: Qualifying the Benefits of Public Involvement in PPPs’, *Journal of Public Administration Research and Theory*, Volume 26, Issue 1, January 2016, p.45–61, at <https://academic.oup.com/jpart/article-abstract/26/1/45/2614457?redirectedFrom=fulltext>, [Last accessed 06 on November 2020].
 9. Website of the UNDP, ‘Citizen Engagement in Public Service Delivery, The Critical Role of Public Officials’, 2016, at https://www.undp.org/content/dam/undp/library/capacity-development/English/Singapore%20Centre/GCPSE_CitizenEngagement_2016.pdf

The report comprises three sections: 1) the Public Infrastructure Procurement Framework; 2) the Environmental Impact Assessment Framework; and 3) the Involuntary Resettlement Framework. Each of these

sections includes three sub-sections: the legal and institutional framework, gaps and weaknesses, and opportunities for public and civil society engagement.

1

Public Procurement Framework

This section outlines the regulatory framework and the procurement lifecycle applicable to large infrastructure projects. In this chapter, large infrastructure projects are defined as those above LKR 500 million if it is a locally funded project and above LKR 1,000 million if it is a foreign funded project.¹⁰ This is based on the current thresholds set out by the 35th supplement to the Procurement Manual 2006 (PM 2006) which states that the projects above these thresholds require appointment of a Cabinet Appointed Procurement Committee (CAPC) for review and approval.¹¹

The chapter is divided into three sub-sections. The first section outlines the regulatory and institutional framework governing procurement of large infrastructure in Sri Lanka. The second section discusses the key gaps and weaknesses in the current framework. The final section identifies opportunities available within the existing framework for the public and CSOs to

contribute to enhance the VFM of the public money spent on public infrastructure.

1.1. Regulatory & Institutional Framework

1.1.1. Regulatory Framework

The regulatory framework for public procurement in Sri Lanka is not governed by any legislative enactments of Parliament.¹² The process relies on a set of guidelines that are formulated and periodically updated, with the approval of the Cabinet of Ministers. It is important to note however, that the guidelines have been recognised as having the force and effect of law by the Supreme Court.¹³ The following guidelines are currently applicable for public procurement:

- 2006 Guidelines for Procurement of Pharmaceuticals & Medical Devices;

10. Website of the Department of Public Finance, 'Supplement 35 to the Procurement Manual', (2020), at <http://122.255.3.82/documents/10181/329538/Supplement+35-dated+25.03.2020/206c9101-a96b-4c76-88f9-8266d43d453e> [Last accessed on 16 November 2020].

11. Ibid.

12. Verité Research, 'E-Government Procurement', (2017), at <https://www.veriteresearch.org/wp-content/uploads/2018/05/Verite-Research-E-procurement-enabling-business-through-efficient-systems.pdf> [Last accessed on 18 November 2020].

13. ADB, 'Procurement Capacity Assessment – Sri Lanka: Health System Enhancement Project', p.5, at <https://www.adb.org/sites/default/files/linked-documents/51107-002-sd-02.pdf> [Last accessed on 24 Feb 2021].

- 2006 Procurement Guidelines (PG 2006): Goods and Works; and
- 2007 Guidelines: Selection & Employment of Consultants.

The guidelines are accompanied by two procurement manuals, the 2006 Procurement Manual (PM 2006) and the 2007 Consulting Services Manual. The PG 2006 and PM 2006 are currently applicable for the procurement of infrastructure projects.¹⁴ Amendments are published as supplements by the Department of Public Finance (DPF) of the Ministry of Finance (MOF). As of 13 November 2020, 36 such supplements have been issued.¹⁵ In addition to these supplements, government circulars issued by the DPF also supplement the PG 2006 and PM 2006 (Refer Annexures 01 and 02).

All procuring entities (PEs) are required to adhere to the procedures set by PG 2006 when undertaking any procurement.¹⁶ PEs that engage in procurement can be any one of the following organisations:

- Government ministries, departments, or statutory authorities;
- Provincial councils or local authorities;
- Government corporations, or government owned companies; and
- Any other body wholly or partly owned by the

Government of Sri Lanka (GOSL) or where the GOSL has effective control of such body.¹⁷

However, the PG 2006 allows the PE to deviate from these guidelines for projects funded by foreign agencies. If the foreign agency mandates the use of its guidelines, such guidelines will take precedence over the PG 2006.¹⁸

For Public Private Partnerships (PPPs), the 1998 Guidelines on Private Sector Infrastructure Projects are applicable.¹⁹ The regulatory framework recognises unsolicited proposals only for PPPs and is discussed in detail in Section 1.3.²⁰ Exhibit 1 provides a broad overview of the procurement regulatory framework in Sri Lanka.

The National Procurement Commission (NPC) was established in May 2015 following the enactment of the 19th Amendment to the Constitution of Sri Lanka. In 2017, the NPC oversaw the drafting of two new procurement guidelines with the assistance of the Asian Development Bank (ADB) and other stakeholders.²¹ These “2019 Procurement Guidelines (PG 2019)” were published in October 2019 as an Extraordinary Gazette.²² However, the guidelines are not in force as they did not obtain parliamentary approval. With the passing of the 20th Amendment to the Constitution, on 22 October 2020 the NPC was abolished, and further discussion on the guidelines have since ceased.²³ The role of the NPC is discussed in detail in the Section 1.1.2.

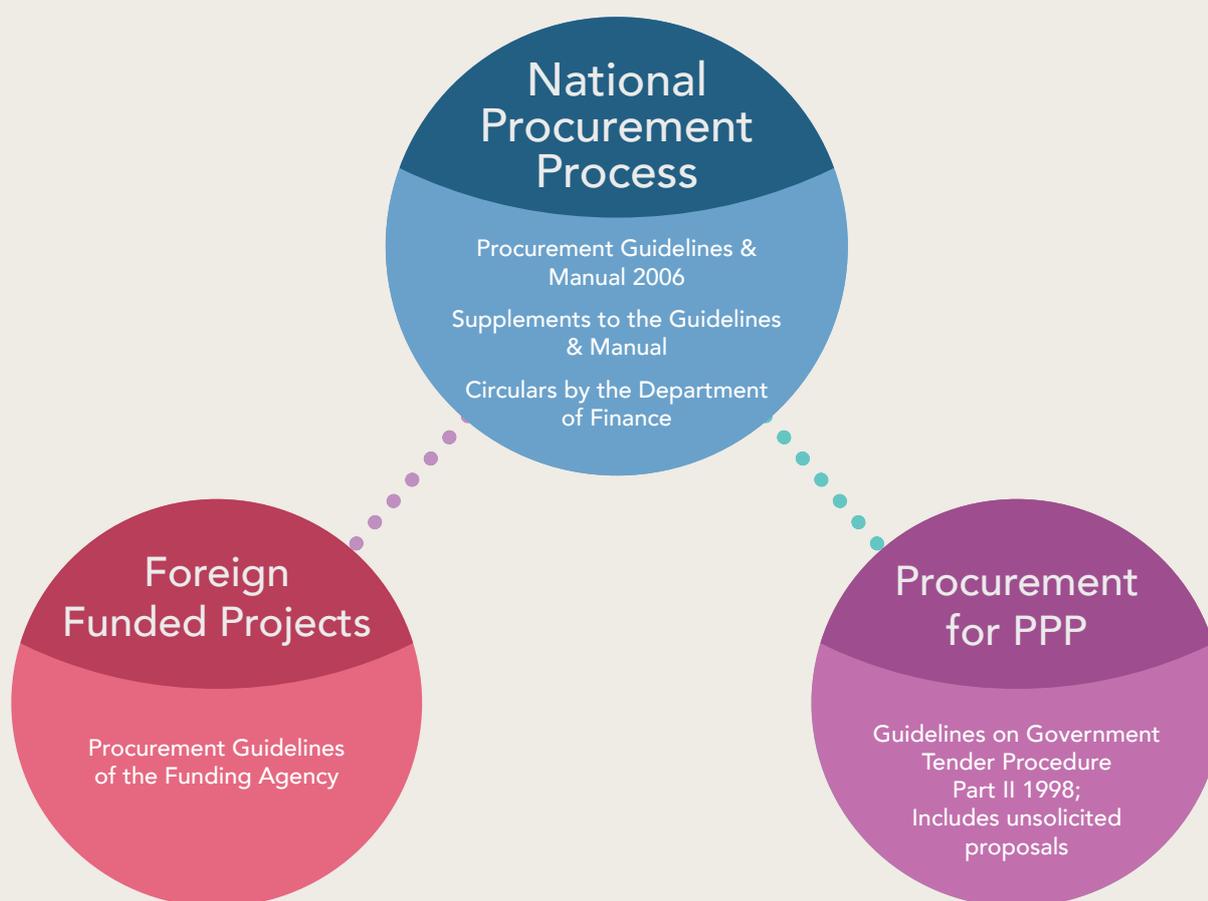
14. Website of the Ministry of Finance, 'Procurement Guidelines 2006', at http://122.255.3.82/documents/57687/174939/ProcurementGuidelines2006_amed12June.pdf/4417f549-2a8d-45d1-b3a6-0560db79a87f [Last accessed on 13 November 2020] ('PG 2006'), and National Procurement Agency, 'Procurement Manual' (2006), at http://122.255.3.82/documents/57687/174939/ProcurementManual2006_20060817_with_Sup8.pdf/5d-0563ed05b1-4629-9937-db8e160aac29 [Last accessed on 13 November 2020] ('PM 2006').
15. Website of the Ministry of Finance, 'Supplementary Documents', at <http://122.255.3.82/web/guest/supplementary-documents> [Last accessed on 18 November 2020].
16. Guideline 1.1.1, PG 2006.
17. PG 2006, p. xi.
18. Guideline 1.3.3, PG 2006.
19. Website of the Ministry of Finance, 'Guidelines on Government Tender Procedure - Part II', at <http://oldportal.treasury.gov.lk/documents/57687/174939/Part+II+Private+Sector+Infrastructure+Projects.pdf/0ae4613e-8fd3-4639-b032-b8e9111bb71d> [Last accessed on 13 November 2020] ('II GGTP 1998').
20. Refer Section 1.3 below.
21. Website of the NPC, 'Annual Report – 2017', at <https://www.nprocom.gov.lk/web/images/pdf/annual2018/Ann2017/Annual-Report-2017-E.pdf> [Last accessed on 18 November 2020].
22. Website of the NPC, 'Procurement Guidelines - 2019', p. i, at https://www.nprocom.gov.lk/web/images/pdf/notice/2144-68_E.pdf [Last accessed on 18 November 2020] ('PG 2019').
23. 20th Amendment to the Constitution, 1978 Constitution of Sri Lanka.

The Construction Industry Development Act No. 33 of 2014 (CIDA Act) specifies regulation for construction contracts and stakeholders.²⁴ The Act mandates the use of Construction Industry Development Authority (CIDA) Standard Bidding Documents (SBDs) for all construction contracts except for those between GOSL owned entities and foreign contractors or consultants.²⁵ The CIDA SBDs have been drafted based on the Standard Contract Forms (SCF) published by the International Federation of Consulting Engineers (FIDIC).²⁶

1.1.2. Institutional Framework

The entities involved in the public procurement process can be categorised into two types based on the scope of functions: (1) institutions responsible for procurement; and (2) institutions responsible for the regulation and oversight of the procurement process.

Exhibit 1: Regulatory Framework of Large Infrastructure Projects



24. Section 1 (2), The Construction Industry Development Act No. 33 of 2014 at https://www.srilankalaw.lk/YearWisePdf/2014/CONSTRUCTION_INDUSTY_DEVELOPMENT_ACT_No_33_OF_2014.pdf [Last accessed on 13 February 2021] ('CIDA Act').

25. See Ministry of Finance, 'Guide to Project Management and Contract Management for Infrastructure Development Projects (Works) implemented by the Government of Sri Lanka', (2017), p. 32, at <http://122.255.3.82/documents/10181/369961/Final-GPMCM.pdf/eb399e7f-a1cf-42cd-bfb1-9cb-5003c77de> [Last accessed on 16 November 2020].

26. Ibid, p. 46.

Institutions responsible for public procurement

The responsibility of the task of procurement lies with the secretaries of the respective line ministries, who act in the capacity of Chief Accounting Officers (CAO) of the ministries.²⁷ A similar responsibility may be accorded to the Chief Secretaries of the provincial councils when applicable.²⁸

PEs coordinate procurement activities throughout the procurement lifecycle. The PEs are responsible for the preliminary arrangements, communications, preparation of bidding documents and providing administrative support to committees.²⁹ The Procurement Committee and the Technical Evaluation Committees appointed are jointly responsible for overseeing procurement planning and the bidding process.

The appeal process for public procurement is administered by the Procurement Appeal Board (PAB) under the presidential secretariat.³⁰ Any representations made by unsuccessful bidders after the announcement of the successful bid can be made to the PAB.³¹ The PAB will conduct hearings and submit its recommendations to the Cabinet of Ministers who will then make the final decision.³²

Institutions responsible for regulation and oversight

Institutional oversight over procurement is primarily provided by the MOF and at present this falls under the purview of Department of Public Finance (DPF) within

the Ministry. In addition to MOF, the National Audit Office, and parliamentary committees such as the Committee on Public Finance, Committee on Public Accounts and Committee on Public Enterprises also function as oversight institutions for matters related to public finance (including public procurement) in general.

From 2004-2007, the National Procurement Agency (NPA) was responsible for regulating public procurement activities. After the abolishment of the NPA in December 2007, its functions were transferred to the DPF as per the Public Finance Circular No: PF/429 from March 2008 onwards.³³

The NPC which was established in May 2015 following the enactment of the 19th Amendment to the Constitution of Sri Lanka was tasked with the formulation of policy, independent oversight, and monitoring of the public procurement process.³⁴ Its functions also included hearing complaints by stakeholders and the public.³⁵ As mentioned earlier, the NPC was abolished with the passing of the 20th Amendment to the Constitution on 22 October 2020.³⁶ As of now, it is unclear as to which agency is responsible to carry out the functions that fell under the purview of the NPC.³⁷

The Construction Industry Development Authority established by CIDA Act recommend and formulate national procurement guidelines related to the procurement of works, goods, and services in relation to the construction industry.³⁸ Registration with CIDA is mandatory for national bidders in construction

27. Guideline 2.2, PG 2006.

28. JICA, 'Study on Public Procurement Systems and Capacity in South Asian Countries, Final Report' (2013), p. 179, at <http://open.jicareport.jica.go.jp/pdf/12087599.pdf> [Last accessed on 16 November 2020].

29. Guideline 2.3, PG 2006.

30. Guideline 8.3, PG 2006.

31. Guideline 8.4, PG 2006.

32. Ibid.

33. Public Finance Circular No: PF/429, at <https://oldportal.treasury.gov.lk/documents/10181/49383/429e/d9c322d9-cc8a-4927-8eaf-5d78a-98ca282?version=1.0> [Last accessed on 26 November 2020].

34. Guideline 2.1.1, PG 2019.

35. Key Informant Interview.

36. 20th Amendment to the Constitution, 1978 Constitution of Sri Lanka.

37. Key Informant Interview.

38. Sections 12 and 13, CIDA Act.

procurement.³⁹ Pursuant to Section 57 of the CIDA Act, the Authority has consistently published rules and regulations specifying processes applicable to the construction industry.⁴⁰ Further, the National Policy on Construction formulated under the provisions of the CIDA Act, mandates CIDA to establish appropriate procurement practices in the construction industry.⁴¹

1.1.3. Procurement Lifecycle

The procurement lifecycle of a large infrastructure project can span several years depending on the complexities of the project. The lifecycle can be separated into three stages: 1) Procurement Preparation;

2) Tendering; and 3) Contract Management. A detailed graphical representation of the procurement lifecycle is provided in Annexure 04.

Procurement preparation stage

Procurement preparation broadly involves preliminary arrangements, preparation of the bidding documents, appointment of procurement committees and procurement planning. For a large infrastructure project this can take more than 75 weeks.⁴² Exhibit 2 outlines the key activities carried out during this stage and the key agencies responsible.

Exhibit 2: Procurement Preparation Stage

| Procurement activity | Responsible agency and minimum time taken ⁴³ | Key components |
|--|---|---|
| 1. Procurement preparedness & planning | 75 weeks | |
| 1.1. Preliminary arrangements | PE | <ul style="list-style-type: none"> ▪ Preparation of feasibility studies, Environment Impact Assessments (EIAs), Social Impact Assessments (SIAs) ▪ Obtaining necessary clearances ▪ Resolving land acquisition and resettlement |
| 1.2. Confirmation of funding | PE | <ul style="list-style-type: none"> ▪ Confirming funding in concurrence with the line ministry, ▪ MOF and Foreign Funding Agency (FFA) if applicable funding in concurrence with the line ministry, MOF and Foreign Funding Agency (FFA) if applicable |
| 1.3. Appointment of procurement committees | PE/DPF | <ul style="list-style-type: none"> ▪ Request for appointment sent by the PE/line ministry to the DPF ▪ Appointment of procurement committees by the Cabinet of Ministers⁴⁴ |

39. Part V, CIDA act, No. 33 of 2014.

40. See generally, Website of CIDA, 'Home Page, at https://www.cida.gov.lk/index_en.html [Last accessed on 18 November 2020] and Rules and Regulations published under CIDA act, at [https://www.cida.gov.lk/newsevents/354\)%202057-05_E%20CIDA%20Gazette.pdf](https://www.cida.gov.lk/newsevents/354)%202057-05_E%20CIDA%20Gazette.pdf) https://www.cida.gov.lk/index_en.html [Last accessed on 18 November 2020].

41. Website of the CIDA, National Policy on Construction, at [https://www.cida.gov.lk/newsevents/272\)%20NATIONAL%20POLICY%20ON%20CONSTRUCTION%20ENGLISH.pdf](https://www.cida.gov.lk/newsevents/272)%20NATIONAL%20POLICY%20ON%20CONSTRUCTION%20ENGLISH.pdf) [Last accessed on 24 January 2020].

42. PM 2006, p. 72.

43. An approximate timeframe for each stage and activity is formulated by utilizing the average timeframe provided by the PM 2006 but it must be noted that the time frame varies depending on the specificities of the project. See Ibid.

44. See generally, Guidelines 2.7-2.8, PG 2006, PM 2006 p. 9 and 22, and Department of Public Finance, 'Supplement 35 to the Procurement Manual', (2020), at <http://122.255.3.82/documents/10181/329538/Supplement+35-dated+25.03.2020/206c9101-a96b-4c76-88f9-8266d43d453e> [Last accessed on 16 November 2020] for further details.

| Procurement activity | Responsible agency and minimum time taken ⁴³ | Key components |
|--|---|---|
| 1.4. Preparation of bidding documents | PPE | <ul style="list-style-type: none"> Prepared using the applicable SBD In procurements funded by FFA, SBDs are mandated by the FFA |
| 1.5. Procurement planning | CAPC/TEC | <ul style="list-style-type: none"> Preparation of procurement planning documents^[45] Confirming procurement method and types of bidding^[46] |
| 1.6. Confirmation of bidding documents | CAPC/TEC | <ul style="list-style-type: none"> Scrutinize, amend, and confirm draft bidding documents prepared by the PE |

Tendering stage

Tendering stage extends from the publication of the invitation to bid to the finalisation of the winning bid. In a large infrastructure project, this stage will

be conducted primarily by the CAPC and the TEC and will span more than 60 weeks subject to project specific processes.⁴⁷ Exhibit 3 outlines the key steps in the procurement stage and the agencies responsible.

Exhibit 3: Tendering Stage

| Procurement activity | Responsible agency and minimum time taken ⁴⁸ | Key components |
|---|---|--|
| 2. Tendering | | |
| 2.1. Invitation to bid/Invitation to prequalify | PE/CAPC | <ul style="list-style-type: none"> International Competitive Bidding (ICB): publishing in a national newspaper with wide circulation, relevant websites, using international platforms such as the UNDB⁴⁹ and dgMarket⁵⁰ and extending such invites to embassies and trade representatives of countries with potential contractors National Competitive Bidding (NCB): advertising in at least one widely circulated national newspaper, DPF website,⁵¹ and other relevant websites |
| 2.2. Prequalification (if applicable) ⁵² | PE/CAPC/TEC 11 weeks (15 if FFA involved) | <ul style="list-style-type: none"> Preparation of prequalification documents Evaluation of bids Inviting successful pre-qualified bidders to submit detailed proposals |

45. See generally, Chapter 4, PG and PM 2006 for further details.

46. See generally, Chapter 3, PG and PM 2006 for further details.

47. PM 2006, p. 72.

48. An approximate timeframe for each stage and activity is formulated by utilizing the average timeframe provided by the PM 2006 but it must be noted that the time frame varies depending on the specificities of the project. See Ibid.

49. Website of the UNDB, at <https://devbusiness.un.org/> [Last accessed on 04 January 2020].

50. Website of dgMarket, at <https://www.dgmarket.com//> [Last accessed on 04 January 2020].

51. The guidelines refer to the NPA website, which now reads as the DPF website. It must be noted that the DPF does not have a separate website but uses the MOF website as a platform.

52. Conducted for large and complex projects where the cost of developing bids for detailed specifications may be detrimental to small contractors. See PM 2006, p. 61.

| Procurement activity | Responsible agency and minimum time taken ⁴⁸ | Key components |
|---|---|---|
| 2.3. Bidding | PE 12 weeks | <ul style="list-style-type: none"> ▪ Issuance of bidding documents ▪ Pre-bid meetings to provide clarifications to potential bidders ▪ Clarifications and modifications of bidding documents ▪ Alternative bid submission (optional)⁵³ |
| 2.4. Public opening of bids | CAPC or Bid Opening Committee ⁵⁴ | |
| 2.5. Bid evaluation | TEC 13-14 weeks | <ul style="list-style-type: none"> ▪ Evaluation of bids⁵⁵ ▪ Evaluation of the technical and financial resource ▪ Capacity of the bidder submitting the lowest evaluated⁵⁶ ▪ Preparation of the bid evaluation report |
| 2.6. Clarification and confirmation of the bid evaluation report | CAPC weeks (6 if FFA involved) | <ul style="list-style-type: none"> ▪ Clarification and confirmation of the contents of the bid evaluation report ▪ Recommendation of contract award to the secretary to the line ministry after confirmation of the report |
| 2.7. Communication of intent to award to bidders | Secretary to the line ministry Within one week of CAPC recommendation | <ul style="list-style-type: none"> ▪ Inform all bidders in writing of the winning bidder |
| 2.8. Informing Cabinet of the decision regarding the winning bidder | Secretary to the line ministry Within two weeks of CAPC recommendation (within 4 weeks if there are unsuccessful bidder representations) | <ul style="list-style-type: none"> ▪ Submission of a memo to the Cabinet of Ministers informing the recommendation of CAPC in consultation with the minister |
| 2.9. Evaluation of appeals | PAB 4 weeks | <ul style="list-style-type: none"> ▪ Submission of independent report to Cabinet of Ministers after investigating the appeals made by the unsuccessful bidders ▪ Endorsing or rejecting CAPC decision with alternative recommendations |
| 2.10. Final decision by Cabinet | Cabinet of Ministers 4 weeks | <ul style="list-style-type: none"> ▪ Secretary to the Cabinet of Ministers communicates decision to the Secretary of the line ministry |

53. An alternative bid by a bidder will be considered as a separate bid from the bidder's original bid. However, the alternative bid will not be considered in the bid evaluation process. An alternative bid is considered only if the bidder's original bid is deemed to be the winning bid. See PM 2006, p. 130.

54. While the CAPC is vested with the responsibility of opening the bids, it may delegate the responsibility to a Bid Opening Committee. The Bid Opening Committee is appointed with the concurrence of the CAPC and will comprise of a minimum of two members. Refer Guideline 6.3.3, PG 2006.

55. See generally, Chapter 7, PG and PM 2006 for further details.

56. CIDA registration under the appropriate grade can also function as a pre/post qualification criterion. See Guideline 5.3.5, PG 2006.

BOX 1**Applicability of electronic government procurement (e-GP) systems and processes**

e-GP refers to managing the procurement process via electronic systems by converting the existing manual/paper-based processes to digital/electronic processes. This transition is expected to enhance VFM by contributing to greater transparency, efficiency, and reduction of costs for government.⁵⁷

The PG 2006 and PM 2006 allow the PE to carry out limited procurement activities electronically with prior concurrence of the CAPC.⁵⁸ The activities specified are the advertising process, the publishing of procurement invitations, inspection of pre-qualification applications and bidding documents and the provision of clarifications.⁵⁹ The PG 2006 explicitly prohibits the electronic submission of bids.⁶⁰

The Public Finance Circular No 08/2019 (PF 08/2019) announced the establishment of an e-GP system in Sri Lanka called the Procurement Management Information System or 'PROMISE'.⁶¹ The objective of the platform is to gradually accommodate a fully electronic end-to-end public procurement mechanism including the submission of bids and the payment of procurement-related fees. It aims to function as a central hub for procurement matters in the future. The circular mandated all PEs to register with PROMISE before 31 January 2020.⁶² On September 2020, the MOF called upon suppliers to register before 31 December 2020 as its intention was to make the e-GP platform mandatory in due course.⁶³ As at 24 December 2020, there are 1,032 confirmed registered vendors and 121 confirmed registered PEs.⁶⁴

Exhibit 4: Progress of e-GP in Selected South Asian Countries in 2017⁶⁵

| Feature | Afghanistan | Bangladesh | Bhutan | India | Nepal | Pakistan | Sri Lanka |
|---|-------------|------------|--------|-------|-------|----------|-----------|
| Procurement portal(s) dedicated to public procurement | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | x |
| Electronic submission of Bids | x | ✓ | x | ✓ | ✓ | x | x |
| Electronic opening of Bids | x | x | x | ✓ | x | x | x |

57. Verité Research, 'E-Government Procurement', (2017), at <https://www.veriteresearch.org/wp-content/uploads/2018/05/Verite-Research-E-procurement-enabling-business-through-efficient-systems.pdf> [Last accessed on 18 November 2020].

58. Guideline 9.8, PG 2006.

59. Ibid.

60. Ibid.

61. Website of the Ministry of Finance, Public Finance Circular No: 08/2019, at <http://oldportal.treasury.gov.lk/documents/10181/49383/PFD-2019-08E/85131f3b-5d82-4993-82b3-19bd5148c134?version=1.0> [Last accessed on 26 November 2020].

62. Ibid.

63. Website of PROMISE, 'About the System', at https://promise.lk/?p=front_cont&a=about_b1 [Last accessed on 18 November 2020].

64. Website of PROMISE, 'Registered Procuring Entities and Vendors', at https://promise.lk/?p=front_cont&a=registered_procuring_entities [Last accessed on 24 December 2020].

65. International Bank for Reconstruction and Development, 'Benchmarking Public Procurement', (2017), pp. 52-53, 64-65, 68-69, 122-123, 164-165, 172-173, and 200-201, at <http://documents1.worldbank.org/curated/en/121001523554026106/Benchmarking-Public-Procurement-2017-Assessing-Public-Procurement-Regulatory-Systems-in-180-Economies.pdf> [Last accessed on 18 November 2020].

| Feature | Afghanistan | Bangladesh | Bhutan | India | Nepal | Pakistan | Sri Lanka |
|---|-------------|------------|--------|-------|-------|----------|-----------|
| Winning bidder can sign the procurement contract through an online platform | x | x | x | x | x | x | x |
| Supplier can request a payment online through an online platform | x | x | x | ✓ | x | x | x |

Source: World Bank – Benchmarking Public Procurement 2017

While the PROMISe platform is registering vendors and PEs, it is currently limited to only shopping procurements for goods and services.⁶⁶ The initial development is planned to be completed by May 2021 and a subsequent test run of three years will focus on implementation and trouble shooting.⁶⁷ While it is to be an end-to-end trilingual hub for all procurement, it is still in the conceptual stages for major works.⁶⁸ To successfully conduct e-GP for large infrastructure projects, broad ranging institutional, regulatory and technological reforms are needed.⁶⁹ These developments cannot be expected in the near future.

Contract management stage

The contract management stage starts with the execution of the contract agreement and ends with the certification of completion issued by the engineer or the consultant of the project, who is appointed by the PE through the contract to administer the project on its behalf.⁷⁰ The MOF has published the Guide

to Project Management and Contract Management (GPMCM) for Infrastructure Development Projects (Works) implemented by the Government of Sri Lanka. The GPMCM is intended to serve as a first reference point to project staff to manage projects effectively and efficiently.⁷¹ Exhibit 5 outlines the key steps involved in the process and the responsible agencies.

66. Key Informant Interview with a project official.

67. Ibid.

68. Ibid.

69. Ibid.

70. Website of the Ministry of Finance, 'Guide to Project Management and Contract Management for Infrastructure Development Projects (Works) implemented by the Government of Sri Lanka', (2017), at <http://122.255.3.82/documents/10181/369961/Final-GPMCM.pdf/eb399e7f-a1cf-42cd-bfb1-9cb5003c77de> [Last accessed on 16 November 2020].

71. Ibid., p. i.

Exhibit 5: Contract Management Stage

| Procurement Activity | Responsible Agency & Min. time taken ⁷² | Key components |
|---|--|--|
| 3. Contract Management ⁷³ | PE 100 weeks | |
| 3.1. Letter of Acceptance | PE | <ul style="list-style-type: none"> ▪ Ensuring adequate budgetary provisions to cover the cost ▪ Issuance of a formal letter of acceptance to the successful bidder ▪ Initiating the formation of a valid and binding contract between parties |
| 3.2. Execution of Contract Agreement ⁷⁴ | PE | <ul style="list-style-type: none"> ▪ Signing of the contract agreement |
| 3.3. Publication of Contract Award | PE | <ul style="list-style-type: none"> ▪ Publication of following contract details in at least one widely circulated national newspaper, DPF website and the Government Gazette <ol style="list-style-type: none"> 1. Description of the works 2. Total number of received bids 3. Name of successful bidder 4. Contract value 5. In case of an award to a foreign contractor, the name of the local agent⁷⁵ |
| 3.4. Appointment of the Engineer | PE | <ul style="list-style-type: none"> ▪ An engineer (who is not a party to the contract) is appointed by the PE for contract administration |
| 3.5. Contract Administration ⁷⁶ | | <ul style="list-style-type: none"> ▪ The engineer oversees the execution of the contractual obligations by parties to the contract⁷⁷ |
| 3.6. Approval and certification of variations to contracts during implementation (if necessary) | PE/CAPC/TEC | <ul style="list-style-type: none"> ▪ The head of the department or project director can approve a variation of maximum ten percent of the contract award if the value is less than LKR 250 million for projects funded by the GOSL and LKR 500 million for projects funded by a FFA respectively⁷⁸ ▪ CAPC (assisted by the relevant TEC) must approve if the aggregate of the variation equals or exceeds ten percent of the contract award value or if it exceeds the value thresholds referred to above⁷⁹ with the recommendations of the Cost Estimate Review Committee (CERC)⁸⁰ |

72. An approximate timeframe for each stage and activity is formulated by utilizing the average timeframe provided by the PM 2006 but it must be noted that the time frame varies depending on the specificities of the project. See PM 2006, p. 72.

73. The GPMCM defines Contract management as the effective completion of contractual obligations.

74. Contract Agreement is the fundamental document of the contract, and specifies terms and conditions, and remedies for breach of contract. See GPMCM, p. 6.

75. Guideline 8.10.1, PG 2006.

76. The GPMCM differentiates between the phrases Contract Management and Contract Administration where the latter refers to the activities assigned to the Engineer. See GPMCM, p. 7.

77. General Principles of Sri Lankan Contract law applicable. See Ibid, p. 9.

78. PM 2006, p. 140 and Public Finance Circular No: 01/2019, at <https://oldportal.treasury.gov.lk/documents/10181/49383/PFD-2019-01+%282%29.zip/d3b55558-9be0-43df-8d7b-bb616500cafb?version=1.0> [Last accessed on 25 December 2020].

79. Ibid.

80. Website of the Ministry of Finance, Public Finance Circular No: 01/2019, at <https://oldportal.treasury.gov.lk/documents/10181/49383/PFD-2019-01+%282%29.zip/d3b55558-9be0-43df-8d7b-bb616500cafb?version=1.0> [Last accessed on 25 December 2020]

| Procurement Activity | Responsible Agency & Min. time taken ⁷² | Key components |
|-----------------------------------|--|---|
| 3.7. Defects notifications period | | <ul style="list-style-type: none"> After issuing the Taking-over certificate, a stipulated period of time is allocated to notify the contractor of any defects |
| 3.8. Performance certificate | Engineer/ Consultant | <ul style="list-style-type: none"> After the successful completion of construction and the expiry of defects notification period, the engineer/consultant shall issue a certificate of completion⁸¹ |

1.1.4. Unsolicited Proposals

Unsolicited proposals are an alternative to the traditional competitive bidding process for infrastructure projects. An unsolicited proposal is 'a proposal made by a private party to undertake a PPP project, submitted at the initiative of the private firm, rather than in response to a request from the government'.⁸² Research indicates that unsolicited proposals play an important role in infrastructure development in Sri Lanka. For example, a study by Verité Research on 50 high value loans taken by the GOSL between 2005-2018 to finance infrastructure found that 26 percent of the funds secured through loans were used to finance large infrastructure projects that originated as unsolicited proposals.⁸³

Regulatory framework

The PG 2006 and PM 2006, which govern all procurement actions, do not make any reference to unsolicited proposals. However, Part II of the Government Guidelines on Tender Procedure 1998 (Part II GGTP 1998), which provides the regulatory framework governing

private sector infrastructure projects, refers to unsolicited proposals.⁸⁴ As these guidelines are applicable to infrastructure projects that are financed/developed by the private sector, under the current regulatory framework, unsolicited proposals can only be entertained for infrastructure projects wholly or partly implemented by the private sector. Private infrastructure projects are somewhat vaguely defined in Part II GGTP 1998 and there is no reference made to PPPs. The Public Finance Circular No. 02/2019 (PF 02/2019) amended Part II GGTP 1998, incorporating PPPs. The amended guidelines are now referred to as the guidelines applicable to 'private sector infrastructure projects on public private partnership basis'. Further, the circular provides greater clarity on the type of projects that fall within the purview of these guidelines (Refer Annexure 03 for details).⁸⁵

According to Part II GGTP 1998, an unsolicited proposal should contain the basic information required by a public institution to assess the viability of the project.⁸⁶ If a need for such a proposal justifiably exists, the relevant line ministry must publicly advertise and call for proposals for projects addressing the identified need.⁸⁷

81. Guideline 8.12.2, PG 2006.

82. World Bank, Public Private Partnership Legal Resource Centre, at [https://ppp.worldbank.org/public-private-partnership/ppp-overview/ppp-procurement-bidding/unsolicited-proposals/unsolicited-proposals#:~:text=An%20unsolicited%20proposal%20\(USP\)%20is,a%20request%20from%20the%20government.](https://ppp.worldbank.org/public-private-partnership/ppp-overview/ppp-procurement-bidding/unsolicited-proposals/unsolicited-proposals#:~:text=An%20unsolicited%20proposal%20(USP)%20is,a%20request%20from%20the%20government.) [Last accessed on 18 November 2020].

83. Verité Research, 'Financing Infrastructure: The (non) Concessionality of Concessional Loans, (2020), at <https://www.veriteresearch.org/publication/financing-infrastructure-the-non-concessionality-of-concessional-loans/> [Last accessed on 24 December 2020].

84. Website of the Ministry of Finance, 'Guidelines on Government Tender Procedure - Part II' - Reference 237, at <http://oldportal.treasury.gov.lk/documents/57687/174939/Part+II+Private+Sector+Infrastructure+Projects.pdf/0ae4613e-8fd3-4639-b032-b8e9111bb71d> [Last accessed on 13 November 2020] (II GGTP 1998).

85. Website of the Ministry of Finance, Public Finance Circular No: 02/2019, at <http://oldportal.treasury.gov.lk/documents/10181/49383/PFD-2019-02.pdf/d613748e-370b-46dd-99cf357b788d0908?version=1.0> [Last accessed on 26 November 2020].

86. Reference 237 (b), II GGTP 1998.

87. Ibid.

The party that made the unsolicited proposal will then be given the opportunity to modify the original proposal to suit the needs and objectives identified by the public agency involved.⁸⁸

It is emphasized that no decision should be taken solely based on the unsolicited proposal without conducting a publicly advertised invitation for proposals. However, the guidelines allow for deviations from the above process with cabinet approval, under urgent and exceptional circumstances.⁸⁹ Furthermore, unsolicited proposals must follow the same procedure as solicited proposals during the project finalisation stage. This includes the issuance of a letter of intent, approval of pre-feasibility and feasibility studies, and the signing of contracts.⁹⁰ From this point onwards, there will be no difference between the process applicable for unsolicited and solicited proposals.⁹¹

Institutional framework

The overall supervision of the PPP process was carried out by the Board of Investment of Sri Lanka (BOI) under the supervision of the MOF.⁹² In 2017, this authority was transferred to a newly established institution under the MOF: the National Agency for Public Private Partnerships (NAPPP).⁹³ The Agency was to act as “the

single facilitation point for all stakeholders” for PPP projects.⁹⁴ NAPPP was drafting new PPP guidelines in line with global best practices, including a comprehensive framework for unsolicited proposals. However, NAPPP was shut down in 2020 before finalising the new guidelines.⁹⁵

As stipulated in the Part II GGTP 1998, all matters relating to a particular PPP will be conducted by a Cabinet Appointed Negotiating Committee (CANC).⁹⁶ The CANC will be assisted by a Project Committee, which will be primarily tasked with the preparation of the Request for Proposal (RFP) for CANC approval.⁹⁷ The role played by CANC and PC in PPPs are similar to that of the CAPC and TEC in public procurement respectively.⁹⁸ Given that unsolicited proposals are only entertained in PPPs, all such proposals will follow the above-mentioned institutional process.⁹⁹

From 2010-2015, a Standing Cabinet Appointed Review Committee (SCARC) functioned as an advisory body on proposals that made a significant impact to the development agenda.¹⁰⁰ Proposals were reviewed by SCARC prior to the initiation of the project and the appointment of the CANC and the PC.¹⁰¹ The SCARC is no longer in operation post 2015 and has not been replaced with another framework.¹⁰²

88. Ibid.

89. Ibid.

90. Ibid.

91. Reference 283, II GGTP 1998.

92. Reference 226, II GGTP 1998.

93. Key Informant Interview.

94. Website of the Ministry of Finance, Public Finance Circular No: 02/2019, p. 2, at <http://oldportal.treasury.gov.lk/documents/10181/49383/PFD-2019-02.pdf/d613748e-370b-46dd-99cf357b788d0908?version=1.0> [Last accessed on 26 November 2020].

95. Key Informant Interview.

96. Reference 232, II GGTP 1998.

97. Reference 233, II GGTP 1998.

98. Key Informant Interview.

99. Ibid.

100. Ministry of Finance, ‘Annual Report’, (2013), at <https://www.treasury.gov.lk/documents/publications/annualReports/2013/2013.pdf> [Last accessed on 20 February 2020].

101. Ibid.

102. Ibid.

BOX 2**Swiss Challenge Procedure for Unsolicited Proposals**

On 26 December 2016, the DPF published its 30th supplement to the procurement guidelines amending Reference 237 of Part II GGTP to introduce the Swiss Challenge procedure for unsolicited proposals.¹⁰³ The Swiss Challenge is an open tender process system conducted after receiving an unsolicited proposal. As a reward for taking initiative, the proposer receives the right to match the most responsive bid of the open tender process to be awarded the contract.¹⁰⁴

However, pursuant to a cabinet decision made in August 2018, a circular issued by the DPF on 25 September 2019 abolished the Swiss Challenge Procedure citing that it is “not practical and there are deficiencies in procedure whilst it takes considerable time to evaluate the project proposals”.¹⁰⁵ The Cabinet of Ministers intended to replace the Swiss Challenge Procedure with a new mechanism; however, as such a mechanism has not yet been introduced, unsolicited proposals will be processed under the aforementioned mechanism in Part II GGTP 1998 amended as at 2019.¹⁰⁶

1.1.5. Projects Funded by Foreign Funding Agencies (FFAs)

Guideline 1.3.3 of PG 2006 lays down the procedure for the applicability of FFA guidelines in a foreign funded project. Foreign Funded projects are defined as ‘a project fully or partly financed by an FFA.’¹⁰⁷ An FFA is any multilateral or bilateral agency entering into an agreement with the GOSL.¹⁰⁸ In the case of a conflict between the provisions of the PG 2006 and FFA guidelines or when the FFA mandates the use of such guidelines, Guideline 1.3.3 of PG 2006 states that such FFA Guidelines should take precedence.

The PG 2019 which has not yet been approved by the Parliament has modified the exemption to FFA guidelines by mandating that ‘the PE shall not apply Guidelines of any Funding Agency, if the funding is loan/credit financing, where substantial achievement of the objectives as specified in Clause 1.2 above is not feasible.’¹⁰⁹ The objectives referred to in Clause 1.2

include transparency, efficiency, accountability, citizen engagement and anti-corruption. This seems to indicate an unrealized intention to strictly regulate possible deviations from national guidelines in projects not funded through grants, to ensure the borrowing country is able to secure VFM.

Selected conflicts between National and FFA guidelines

This section provides examples of some notable conflicts between PG 2006 and the guidelines of five leading FFAs that provide funding for infrastructure development in Sri Lanka; the World Bank (WB), the Asian Development Bank (ADB), China Exim Bank, Indian Exim Bank, and Japan International Corporation Agency (JICA). Between 2005-2018, these five FFAs accounted for 82 percent of the value of loans provided for infrastructure with China accounting for 33 percent, the ADB for 17 percent, Japan 18 percent, the WB 7 percent and India 7 percent.¹¹⁰

103. Website of the Ministry of Finance, Letter No. PFD/PPP/Guidelines/2019 dated 25.09.2019, Department of Public Finance, at <https://oldportal.treasury.gov.lk/documents/10181/329538/pfd-sup30-letter20200618/a9e05477-fadd-4833-a22f-638bb6e61f15> [Last accessed on 26 November 2020].

104. Public Private Infrastructure Advisory Facility, ‘Unsolicited Proposals: An Exception to the Public Initiation of Infrastructure Procurement’, (2014), at <https://ppp.worldbank.org/public-private-partnership/library/ppiaf-unsolicited-proposals-%E2%80%93-exception-public-initiation-infrastructure-ppps-analysis-global-trends-and-lessons-learned> [Last accessed on 18 November 2020].

105. Website of the Ministry of Finance, Letter No. PFD/PPP/Guidelines/2019 dated 25.09.2019, Department of Public Finance, at <https://oldportal.treasury.gov.lk/documents/10181/329538/pfd-sup30-letter20200618/a9e05477-fadd-4833-a22f-638bb6e61f15> [Last accessed on 26 November 2020].

106. Ibid and Key Informant Interview with Senior-level government official.

107. PG 2006, p. xi.

108. Ibid.

109. Guideline 1.3.1, PG 2019, p. 15A.

110. Verité Research, ‘Financing Infrastructure: The (non) Concessionality of Concessional Loans’, (2020), at <https://www.veriteresearch.org/publication/financing-infrastructure-the-non-concessionality-of-concessional-loans/> [Last accessed on 24 December 2020], p. 4.

a. Deviations from competitive bidding

Exhibit 6: Procurement Methods Followed in Implementing Projects Funded By 50 Foreign Loans

| Lender | Value (USD Mn) | Number of loans | | | | | Value of loans (percent of the total) | | | |
|-------------------------------------|----------------|-----------------|--|---|------------------------------|--------------------------------|--|---|------------------------------|--------------------------------|
| | | Total | International Competitive Bidding (Untied) | Bidding Restricted to suppliers from lender's origin (Tied) | Unsolicited Proposals (Tied) | Contractor pre-selected (Tied) | International Competitive Bidding (Untied) | Bidding Restricted to suppliers from lender's origin (Tied) | Unsolicited Proposals (Tied) | Contractor pre-selected (Tied) |
| ADB | 1,791 | 11 | 11 | - | - | | 100 | - | - | |
| World Bank | 647 | 4 | 4 | - | - | | 100 | - | - | |
| China | 6,236 | 18 | - | 1 | 12 | 5 | - | 8 | 54 | 38 |
| India | 1,117 | 3 | - | 2 | - | 1 | - | 63 | - | 37 |
| Japan | 3,140 | 13 | 7* | 6* | - | | 44 | 56 | - | |
| Calyon Credit Agricole CIB (France) | 137 | 1 | - | - | 1 | | - | - | 100 | |
| Total | 13,068 | 50 | 22 | 9 | 13 | 6 | 29 | 23 | 27 | 21 |

Extracted from the Verite Research, *Financing Infrastructure: The (non) Concessionality of Concessional Loans*, (2020), p. 11

Source: Information provided by the External Resources Department of the Ministry of Finance and the responses received to requests for information filed under the Right to Information Act No. 12 of 2016 with respective implementing agencies of the projects in the Government.

*For some of the Japanese projects there were instances where conflicting information was available on the procurement methods for the projects in the information made available by the project implementing agencies when compared to that of the respective websites of the lending agencies. In such instances the information from the lending agencies has been used in the analysis.

Competitive bidding is a core principle embodied in PG 2006.¹¹¹ While multilateral lending agencies such as the WB and the ADB reflect a similar emphasis for competitive bidding, bilateral lending agencies seem to deviate from this principle. The competitive element of the bidding process is eroded by 'tied' loans and export credit lines offered by bilateral lending agencies. These loans have conditions that restrict bidding to contractors from the lender's country of origin. The research finds that Sri Lanka has also

entertained bids that originated as unsolicited proposals from contractors of the lender's country when projects are funded through bilateral tied loans. For example, a study carried out by Verité Research in 2020 highlights that while projects funded by ADB and WB loans went through a competitive bidding process to select a contractor, in projects funded via tied loans from bilateral lending agencies in China, India and Japan, bidding was restricted to contractors from the lender's country (Refer Exhibit 6).¹¹²

111. See generally, Guidelines 1.2.1 and Chapter 3, PG 2006.

112. Verité Research, 'Financing Infrastructure: The (non) Concessionality of Concessional Loans', (2020), at <https://www.veriteresearch.org/publication/financing-infrastructure-the-non-concessionality-of-concessional-loans/> [Last accessed on 24 December 2020].

While specific conditions are based on the respective project, established policies of FFA can be identified based on guidelines and practices. Exhibit 7 is a

modified extract from the MOF Annual Report 2013 which lays down the methods of procurement for all the major FFAs.¹¹³

Exhibit 7: Procurement Methods, Guidelines and Policies Used by FFAs

| | Source of Funding | Procurement Methods | Guidelines and Policy |
|--------------------|--|--|--|
| Multilateral Funds | World Bank | ICB - \geq USD 10 Mn ¹¹⁴ NCB - $<$ USD 10 Mn ¹¹⁵ Shopping/Request for Quotations/Community Participation etc. - \leq USD 50,000 ¹¹⁶ | WB Procurement Guidelines Procurement Plan is mandatory and requires the WB's approval before implementation <ul style="list-style-type: none"> NCB documents as developed by the CIDA are used for NCB procurements subject to certain modifications as agreed in the Financing Agreement. |
| | Asian Development Bank | ICB $>$ USD 5 Mn ¹¹⁷ NCB $<$ USD 5 Mn ¹¹⁸ | ADB Procurement Guidelines Contract awards require the concurrence of the ADB |
| Bilateral Funds | Japan International Corporation Agency/ Japan Bank for International Corporation | ICB ¹¹⁹ or mutually agreed at the time of loan formulation | JICA Procurement Guidelines Contract awards require the concurrence of JICA Civil works not less than 1bn: JICA review and concurrence is needed for PQ document, bid document, result of bid evaluation, and contract award. |
| EXIM Banks | China | Designated Chinese contractor (single source) ¹²⁰ | Designated contractor's capability and project viability is screened by the CANC and PC Funding terms are negotiated by the Department of External Resources, Ministry of Finance Sri Lanka |
| | India | Competitive bidding conducted by the borrower – participation limited to contractor established under Indian Law. ¹²¹ | The specifications prepared by the contractor will be matched with the specifications of the Implementing Agency and both parties jointly prepare the procurement plan. |

Source: Ministry of Finance Annual Report 2013

113. Ministry of Finance, 'Annual Report', (2013), Tables 6.20 and 13.5, pp. 247-248 and 550-551, at <https://www.treasury.gov.lk/documents/publications/annualReports/2013/2013.pdf> [Last accessed on 20 February 2020].

114. Randomly selected procurement plans from 2017-2019 indicated that thresholds for ICB were within the range of USD 7.5-10 Mn and from 0.05 Mn up to the ICB threshold for NCB. See generally, <http://documents1.worldbank.org/curated/en/906011548669635174/pdf/Sri-Lanka-SOUTH-ASIA-P156021-Ecosystem-Conservation-and-Management-Procurement-Plan.pdf>, <http://documents1.worldbank.org/curated/en/923721568802580642/pdf/Sri-Lanka-SOUTH-ASIA-P163714-General-Education-Modernization-Project-Procurement-Plan.pdf>, <http://documents1.worldbank.org/curated/en/845411587623815193/pdf/Sri-Lanka-SOUTH-ASIA-P132833-Transport-Connectivity-and-Asset-Management-Project-Procurement-Plan.pdf> [Last accessed on 20 February 2020].

115. Ibid.

116. Ibid.

117. Randomly selected procurement plans 2010 – 2019 indicated that the thresholds for ICB were within the range of USD 2-3 Mn and from 0.1 Mn up to the ICB threshold for NCB. See generally, <https://www.scdp.lk/pdf/sudp/51297-001-pp-en.pdf>, <https://www.adb.org/sites/default/files/project-document/77340/44201-012-sri-pp.pdf>, <https://ewdata.rightsindevelopment.org/files/documents/02/ADB-47381-002.pdf>, <https://www.adb.org/sites/default/files/project-document/63809/38356-013-pp-20151125.pdf> and https://www.adb.org/sites/default/files/project-documents/37378/37378-013-pp-en_0.pdf [Last accessed on 20 February 2020].

118. Ibid.

119. Study done by Verité Research in 2020 noted that projects were also carried out through ICB, Supra note 88.

120. Observation: No update based on official sources.

121. Website of the Ministry of Finance India, 'Guidelines on Lines of Credit extended by the Government of India to various countries under the Indian Development and Economic Assistance Scheme (IDEAS)', Guideline C (ii), at <https://www.eximbankindia.in/assets/pdf/loc/GOI-Guidelines-on-LOC.pdf> [Last accessed on 20 February 2020], ('EXIM India Guidelines').

Even though unsolicited proposals were strictly applicable for private infrastructure projects, public procurements funded by foreign loans entertained unsolicited proposals as well.¹²² Therefore, PF 02/2019 amended the II GGTP to explicitly exclude such projects from being classified as PPPs,¹²⁹ and post circular regulations do not entertain unsolicited proposals for public procurement. However, as noted before, deviations to the regulations are permitted with cabinet approval.

b. Information disclosure

Information disclosure requirements mandated by PG 2006 are not identical to those required by FFAs. The WB and ADB provide greater publicly accessible information, while India's and Japan's requirements closely align with national requirements. There was no publicly accessible official document to ascertain the information disclosure requirements of Chinese funded projects.

Exhibit 8: Comparison of FFA Guidelines and National Guidelines on Information Disclosure

| Points of Comparison | PG and PM 2006 ¹²⁴ | WB ¹²⁵ | ADB ¹²⁶ | JICA ¹²⁷ | India ¹²⁸ | China ¹²⁹ |
|---|-------------------------------|-------------------|--------------------|---------------------|----------------------|----------------------|
| Online access to guidelines and policies | ✓ | ✓ | ✓ | ✓ | ✓ | - |
| Procurement plans | x | ✓ | ✓ | x | x | - |
| Tender documents | x | ✓ | ✓ | ✓ | ✓ | - |
| Selection and evaluation criteria | ✓ | ✓ | ✓ | ✓ | ✓ | - |
| Contract award | ✓ | ✓ | ✓ | ✓ | ✓ | - |
| Contract modifications/Tracking procurement spending/Audits | x | ✓ | ✓ | - | x | - |

Source: Relevant FFA Websites and Guidelines

122. Ibid.

123. Website of the Ministry of Finance, Public Finance Circular No: 02/2019, at <http://oldportal.treasury.gov.lk/documents/10181/49383/PFD-2019-02.pdf/d613748e-370b-46dd-99cf357b788d0908?version=1.0> [Last accessed on 26 November 2020].

124. See infra Exhibit 17.

125. World Bank, 'Procurement Regulations for IPF Borrowers, Guidelines 4.1-4.3, 5.22-5.25, 5.50 and 5.95, at <http://pubdocs.worldbank.org/en/178331533065871195/Procurement-Regulations.pdf> [Last accessed on 18 November 2020] ('WB Guidelines').

126. Asian Development Bank, 'Procurement Regulations for ADB Borrowers, Appendix 2, 3, and 5, at <https://www.adb.org/sites/default/files/procurement-regulations-adb-borrowers.pdf> [Last accessed on 18 November 2020] ('ADB Guidelines').

127. Website of JICA, 'Guidelines for Procurement under Japanese ODA Loans, Guideline 5.12, at https://www.jica.go.jp/english/our_work/types_of_assistance/oda_loans/oda_op_info/guide/handbooks/c8h0vm0000a0e0x8-att/201204_chapter2_en.pdf [Last accessed on 18 November 2020] ('JICA Guidelines').

128. Website of the Ministry of Finance India, 'Guidelines on Lines of Credit extended by the Government of India to various countries under the Indian Development and Economic Assistance Scheme (IDEAS)', p. 11, at <https://www.eximbankindia.in/assets/pdf/loc/GOI-Guidelines-on-LOC.pdf> [Last accessed on 20 February 2020], ('EXIM India Guidelines'), Guidelines C (i) and D, and LOC Group, EXIM Bank of India, 'Procurement under GOI Supported Lines of Credit (LOCs) – Dos and Don'ts for Procurement', at <https://www.eximbankindia.in/assets/pdf/loc/2017/Dos%20and%20Donts%20for%20Procurement%20under%20LOCs.pdf> [Last accessed on 18 November 2020].

129. Could not locate information.

c. Usage of standard bidding documents

Most FFA guidelines require the use of SBDs prepared by the FFA. Following is an overview of such requirements in the selected FFAs.

Exhibit 9: SBD Requirements by FFAs

| FFA | Guideline No. | Requirement |
|------------------------|---------------------|--|
| World Bank | 2.12 ¹³⁰ | Borrowers must use SBDs issued by the bank with minimal approved changes. If no relevant SBD is issued by the Bank, then internationally recognized SCF shall be used. For NCBs, national SBDs may be used. ¹³¹ |
| Asian Development Bank | 23 ¹³² | Borrowers must use SBDs issued by the bank when mandated in the procurement plans. If no relevant SBD is issued by the Bank, then internationally or nationally recognized SCF shall be used. |
| JICA | 4.01 ¹³³ | Borrowers must use SBDs issued by JICA with minimal approved changes. If no relevant SBD is issued by JICA, then internationally recognized SCF shall be used. |

Source: Relevant FFA Guidelines

The CIDA Act mandates the use of CIDA SBDs for all construction contracts in Sri Lanka except for those between GOSL owned entities and foreign contractors.¹³⁴ As noted in the GPMCM, this creates a conflict with PG 2006 as the latter, through the operation of the FFA exemption in Guideline 1.3.3 allows for FFA SBDs

if mandated by the FFA.¹³⁵ Therefore, unless clarified, the CIDA Act, as a legislation will take precedence over the guidelines. Currently, SBDs of FFAs are used for domestic contractors in projects funded by FFAs.¹³⁶ Therefore, the practical application of the CIDA Act for CIDA SBDs for works contracts remains unclear.

1.2. Gaps and Weaknesses

1.2.1. Ad-hoc Changes to the Institutional Framework

The institutional framework for procurement in Sri Lanka has consistently been in flux with multiple ad-hoc changes. Further, the lack of clear transition of functions carried out by organizations that have been closed down has exacerbated the problem.

At present there is no dedicated institution overseeing public procurement in Sri Lanka. The NPA was one such dedicated institution created in 2004 but subsequently closed in 2008.¹³⁷ In 2015, the NPC was established under the 19th Amendment to the Constitution and abolished in 2020 with the 20th Amendment to the Constitution.

130. Guideline 2.12, WB Guidelines.

131. Key Informant Interview.

132. Guideline 23, ADB Guidelines.

133. Guideline 4.01, JICA Guidelines.

134. GPMCM, p. 32.

135. Ibid.

136. Key Informant Interview.

137. National Procurement Commission, 'Strategic Plan 2019-2021', (NPC, 2019), at <https://www.nprocom.gov.lk/web/images/pdf/ActionPlan/stratplan-npc.pdf> [Last accessed on 18 November 2020].

Similarly, for PPPs, the SCARC was appointed in 2010 to review unsolicited proposals but was discontinued by 2015.¹³⁸ While the NAPPP was established in 2017 to coordinate the PPP framework and formulate policy, it was abolished in 2020.¹³⁹

When the NPC and the NAPPP were abolished, both institutions were finalizing new guidelines for public procurement and PPPs, respectively.¹⁴⁰ With these institutions ceasing to function, the fates of these guidelines remain uncertain.

1.2.2. Ad-hoc Changes to the Regulations

Since the PG 2006 and PM 2006 are not legislative instruments, the process of amendments to the guidelines can be introduced via a circular published by the MOF or DPF with the approval of the Cabinet of Ministers. As seen in Annexures 01 and 02, there are currently 35 such supplements and approximately 25 circulars on the DPF website. Since these numerous amendments are not combined into a unified document, one must go through all the supplements and circulars to understand the legal framework governing procurement processes. As mentioned in Sections 1.1 and 1.2, processes and institutions have been introduced and abolished within short time periods, making the procurement system unstable and unpredictable.

The global best practices recommend conducting stakeholder/public consultations when amending public procurement systems.¹⁴¹ However, the amendments to Sri Lanka's procurement system have occurred without a process in place for such consultations.

1.2.3. Limited Access to Information

Access to information is vital for effective public

engagement in a procurement process. However, access to information in the public procurement process is limited at present due to the following issues:

- Gaps in information disclosure requirements
- Limited compliance with mandatory disclosure requirements
- Difficulties encountered in accessing disclosed information

Each issue is explored in detail below.

Gaps in information disclosure requirements

Access to information is critical for effective CSO/public engagement. The international best practices recommend making information on procurement consistently accessible to the public throughout its lifecycle.¹⁴² This includes disclosure of the following types of information:

- Information on the public procurement system (e.g., institutional frameworks and regulations)
- Information on specific procurements (e.g., procurement plans, tender notices, and contract awards)
- Information on the performance of the public procurement system (e.g., benchmarks and monitoring)

The PG 2006 and PM 2006 mandate the disclosure of information pertaining to the public procurement system and information on specific procurements (Refer Exhibit 10).

138. Website of the Department of Public Finance, 'Supplement 23 to the Procurement Manual', (2011), at <https://www.treasury.gov.lk/documents/procurement/supplements/ProcuManSupple23.pdf> [Last accessed on 20 February 2021].

139. Website of Daily Mirror, 'Govt. to shut down PPP unit, Policy Development Office', 16 January 2020, at <http://www.dailymirror.lk/business-news/Govt-to-shut-down-PPP-unit-Policy-Development-Office/273-181303> [Last accessed on 27 January 2021].

140. Key Informant Interview.

141. Organization for Economic Cooperation and Development, 'Recommendation of The Council On Public Procurement, (2015), Recommendation VI (i), OECD Recommendations, at <https://www.oecd.org/gov/public-procurement/OECD-Recommendation-on-Public-Procurement.pdf> [Last accessed on 18 November 2020] ('OECD Recommendations').

142. Recommendation II (ii), OECD Recommendations.

Exhibit 10: Mandated Information Disclosure Requirements

| Category | Information description | PG 2006/PFP Circular no. | Medium |
|--|-------------------------|--------------------------|---|
| Information on the public procurement system | Regulations | De Facto | MOF Website |
| | Defaulting suppliers | 8.11 | DPF Website |
| | Blacklisted bidders | 5.3.4 | DPF Website |
| | SBD | 5.3 | Approved list in DPF Website. Available for purchase form CIDA |
| Information on specific procurements | Tender notices | 3.1/3.2 | One national newspaper DPF Website |
| | Contract awards | 8.10 | One national newspaper DPF Website/PROMISE Government Gazette |
| | Procurement plans | PFP 08/2019 | Advance Procurement Notices, Procurement Notices, Contract Awards |

Source: PG and PM 2006

A WB study benchmarking public procurement in 2017 highlights that there is less publicly available (online) information about the procurement system

and specific procurements in Sri Lanka compared to its South Asian counterparts – Afghanistan, Bangladesh, Bhutan, India, Nepal and Pakistan.¹⁴³

Exhibit 11: Online Accessibility of Procurement Information in Selected South Asian Countries (2017)

| Materials publicly accessible online | Afghanistan | Bangladesh | Bhutan | India | Nepal | Pakistan | Sri Lanka |
|--|-------------|------------|--------|-------|-------|----------|----------------|
| Laws | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Procurement plans | x | ✓ | x | ✓ | x | ✓ | x |
| Calls for tender | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Tender documents | x | ✓ | x | x | ✓ | x | x |
| Award notice | ✓ | ✓ | x | ✓ | ✓ | ✓ | ✓ |
| Publishing first tier review body decisions | x | x | x | ✓ | x | x | x |
| Publishing second tier review body decisions | ✓ | ✓ | x | ✓ | ✓ | x | No Second Tier |

Source: World Bank – Benchmarking Public Procurement 2017

The current guidelines and the manual do not mandate the publication of information pertaining to the performance of the public procurement system. The

DPF through the Annual Report of the MOF, has published some insight into the performance of the public procurement system annually. However, as shown in

143. International Bank for Reconstruction and Development, 'Benchmarking Public Procurement', (2017), at <http://documents1.worldbank.org/curated/en/121001523554026106/Benchmarking-Public-Procurement-2017-Assessing-Public-Procurement-Regulatory-Systems-in-180-Economies.pdf> [Last accessed on 18 November 2020].

Exhibit 12, the type and level of information disclosed varies significantly across the years. The 2019 edition notably omits most information disclosed in the preceding years.¹⁴⁴

Information on unsolicited proposals is not easily

accessible. The information is not provided in most MOF Annual Reports with the notable exception of the MOF Annual Report of 2013 which listed the unsolicited proposals entertained during the year in detail including the project cost, project proponent and the source of funding.¹⁴⁵

Exhibit 12: Annual Performance of Public Procurement Systems Published in Ministry of Finance Annual Reports¹⁴⁶

| MOF Annual Report | Type of Information | | | | | | | |
|-------------------|--|---|-----------------------------------|-----------------------------------|-------------------------------|--|--|---|
| | Total Government Procurement Expenditure | Sectoral Distribution of Public Procurement | Procurements by Source of Funding | Ministries with major procurement | Data on Efficiency and Delays | Details on Procurement Committees ¹⁴⁷ | Regulatory Amendments and Policy Changes | Number of Appeals received by the Procurement Appeals Board |
| 2011 | x | x | x | x | x | x | ✓ | x |
| 2012 | ✓ | x | x | x | x | ✓ | ✓ | x |
| 2013 | ✓ | ✓ | ✓ | x | x | ✓ | ✓ | x |
| 2014 | ✓ | ✓ | ✓ | ✓ | x | x | ✓ | x |
| 2015 | ✓ | x | ✓ | ✓ | x | x | ✓ | x |
| 2016 | ✓ | x | x | ✓ | x | x | ✓ | x |
| 2017 | x | x | x | ✓ | ✓ | ✓ | ✓ | ✓ |
| 2018 | x | x | x | ✓ | ✓ | x | ✓ | x |
| 2019 | x | x | x | x | x | x | ✓ | x |

Source: Ministry of Finance Annual Reports from 2011 - 2019

Limited compliance with existing information disclosure requirements

The disclosure of certain types of information relating to procurement has been made mandatory by the guidelines governing procurement processes and by the Right to Information Act No. 12 of 2016 (RTI Act). However, poor compliance with mandatory information disclosure requirements by respective government agencies further limits access to information.

Information disclosure requirements provided for in the procurement guidelines

The current regulatory framework of government procurement requires the information specified in Exhibit 13 to be disclosed to the public. Part II GGTP 1998 also requires publication of this information in relation to unsolicited proposals.¹⁴⁸ The proactive disclosure of this information is vital to enable the public to independently verify whether procurement is fair and

144. Ministry of Finance, 'Annual Report', (2019), pp. 182-183, at <https://www.treasury.gov.lk/documents/publications/annualReports/2019/Annual%20Report%202019-20200625-rev2-eng.pdf> [Last accessed on 20 February 2020].

145. Ministry of Finance, 'Annual Report', (2013), p. 557, at <https://www.treasury.gov.lk/documents/publications/annualReports/2013/2013.pdf> [Last accessed on 20 February 2020].

146. See generally reports available at, Website of Ministry of Finance, 'Annual Reports', at <https://www.treasury.gov.lk/p/annual-reports> [Last accessed on 24 December 2020].

147. Some of the included details are: Number of procurements by type of committee, CAPC in progress by stage, Cost variations by CAPC, Details on SCAPC procurements, Value Thresholds by type of committee. See *Ibid.*

transparent. Therefore, monitoring compliance with the disclosure requirements can play an important role in enhancing transparency and holding government accountable.

The PG 2006 makes it mandatory to publish contract awards above the contract value of LKR 250 million on the NPA Website.¹⁴⁹ After the NPA was closed down, this obligation rests with the DPF. As the DPF does not have its own website, the information is made available through the MOF website. While the section on procurement notices is up to date, the section on procurement awards has not been updated since 2015.¹⁵⁰ The MOF is currently transitioning the above information from the MOF webpage to the PROMISE platform.

Information disclosure requirements under RTI Act

The RTI Act requires respective ministers to share all information relating to the project available within the ministry, with the public and with any persons who are likely to be affected by such projects three months prior to its commencement.¹⁵¹ In the case of an urgent project, information should be provided one week prior to the commencement of the project. A 'project' referred to in the Act means 'any foreign funded projects exceeding USD 100,000 and locally funded projects exceeding LKR 500,000.'¹⁵² In addition to the proactive disclosure requirements,¹⁵³ the RTI Act also requires the minister to provide updated information throughout project development and implementation in response to written requests made by citizens.¹⁵⁴

Regulation No. 20 promulgated under the Section 41 (2) of the RTI Act mandates the proactive disclosure of public procurement information such as 'detailed information on public procurement processes, criteria

Exhibit 13: Information Disclosure Requirements Provided in the Current Procurement Framework

Tender Notice

- ICB
 1. One widely circulated national newspaper
 2. Relevant Websites
 3. UNDB and Development Gateway's dg Market
- NCB
 1. One widely circulated national newspaper
 2. Relevant Websites
- MOF Website/ PROMISE
- Procuring Entity and line ministry Website
- Bidding Documents should be free for inspection and any potential bidder may purchase

Publication of Contract Award

- At least one widely circulated national newspaper
- Government Gazette
- PE and line ministry Website
- MOF Website
- PROMISE

148. References 237 and 283, II GGTP 1998.

149. Guideline 8.10.2, PG 2006.

150. Website of the Ministry of Finance, 'Procurement Awards', at <https://oldportal.treasury.gov.lk/web/guest/procurement-awards> [Last accessed on 18 November 2020].

151. Section 9, paragraph 1 of the Right to Information Act, No 12 of 2016 at https://www.rti.gov.lk/images/resources/RTI_Act_Sri_Lanka_E.pdf.

152. Ibid., Section 9, Paragraph 3

153. Ibid., Section 9.

154. Ibid., Section 9, paragraph 2(a)

and outcomes of decision making on tender applications; copies of contracts, and reports on completion of contracts.¹⁵⁵

The proactive disclosure requirement stated in the RTI Act is given further clarity by Circular No. MNPEA 04/2018 and the attached guidelines which specify the type of information that should be made public and the way the information should be disclosed.¹⁵⁶ The information that should be proactively disclosed, according to the circular, includes the following:

- Total cost estimate
- Expected duration of the project
- Name of funding agency
- Loan amount
- Interest rate
- Project components
- Expected benefits of the projects
- Implementation agency
- Execution agency
- Name of the contractor
- Value of the contract

The circular lists the following as some of the options that can be used to disclose such information to the public.

- Publishing information in the relevant ministry/department websites in all three languages

- Displaying billboards at project sites
- Discussing the benefits of the project in multimedia

A study by Verité Research in 2017 on proactive disclosure under the RTI Act by 53 cabinet portfolios and the offices of the President and the Prime Minister found the compliance on proactive public procurement disclosure to be low.¹⁵⁷ For disclosures under Section 9 of the RTI Act which mandates disclosure of information on projects to be initiated, all public authorities scored less than 35 percent on a scale of 1–100 percent.¹⁵⁸ The study also scored the public authorities 22 percent for the publication of tenders and 5 percent for the publication of awards.¹⁵⁹ It noted that even in the publishing of tenders, the disclosed details ranged across public authorities, lacking a consistent format of information disclosure.¹⁶⁰ While some government agency websites have a dedicated RTI proactive disclosure section, most have only updated tender notices.¹⁶¹

Although the agencies are required to publish information in all three languages (Sinhala, Tamil and English), the websites of most ministries and departments fail to comply with this requirement and most of the information is available primarily in English.¹⁶² This problem extends to the access of the regulatory framework as well. Both the DPF website and the PROMISE platform only provide the English versions of PG 2006 and PM 2006 supplements.¹⁶³ Only some of the circulars published by the DPF are made available in all three languages.¹⁶⁴ Given that only 30.8 percent

155. Regulation No. 20, Regulations promulgated under the Right to Information Act, No 12 of 2016 at https://www.rti.gov.lk/images/re-sources/2004-66_E_feb.pdf [Last accessed on 18 November 2020].

156. Circular No. MNPEA 04/2018, Ministry of National Policies and Economic Affairs, at <https://www.rti.gov.lk/images/circulars/mnpea042018.pdf> [Last accessed on 18 November 2020].

157. Verité Research, 'Online Proactive Disclosure under the RTI Act in Sri Lanka: A Monitoring Framework and Baseline Assessment', (2018), at <https://www.veriteresearch.org/wp-content/uploads/2018/07/Online-Proactive-Disclosure-under-the-RTI-Act-in-Sri-Lanka.pdf> [Last accessed on 18 November 2020].

158. Ibid, pp. 18-21.

159. Ibid., pp. 49-50.

160. Ibid.

161. For example, Website of the Ministry of Irrigation, at <http://www.irrigationmin.gov.lk/> [Last accessed on 18 November 2020].

162. For example, Website of the Ceylon Electricity Board, 'Tender Notices', at <https://ceb.lk/tender-notice/en> [Last accessed on 27 December 2020].

163. Website of the Ministry of Finance, 'Supplementary Documents', at <https://oldportal.treasury.gov.lk/web/guest/supplementary-documents> [Last accessed on 28 December 2020] and Website of PROMISE, 'Procurement Manual 2006', at https://promise.lk/?p=front_cont&a=g4 [Last accessed on 28 December 2020].

164. Website of the Ministry of Finance, 'Circulars – Public Finance Department', at <https://oldportal.treasury.gov.lk/public-finance-department> [Last accessed on 28 December 2020].



Image courtesy of Road Development Authority, New Kelani Bridge Project

of the Sri Lankan population aged ten and over possess the ability to read and write in English, the lack of trilingual publishing of information has a significant impact on public accessibility of information.¹⁶⁵

Difficulties in accessing disclosed information

Difficulty in locating published information undermines the value and usefulness of such information. In addition to poor compliance with disclosure requirements, the lack of a centralised repository of information and the frequent changes made to the institutions overseeing procurement functions make it difficult for the public to readily access procurement-related information that is published. Currently, one must navigate through the numerous websites of government agencies to be informed on procurement matters. Since government websites do not have a uniform structure or format, such information is found under various titles and subcategories. Furthermore,

to be up to date on procurement-related decisions, one must browse through cabinet decisions and government gazettes individually as this information is not collated and published in a centralised location.

In relation to amendments and circulars affecting the procurement framework, while supplements to the PG 2006 and PM 2006 are updated and accessible directly through the MOF website, circulars published by the MOF relating to procurement matters are not similarly accessible via a direct link.¹⁶⁶ This makes it challenging to locate circulars published amending the procurement guidelines/manual. This study finds that some circulars (e.g., the NPC Supplement – I issued on 24 October 2017 amending guideline 5.4.6 of PG 2006) are not available on the DPF website or the PROMiSe platform.¹⁶⁷

Furthermore, to obtain annual procurement information of large infrastructure projects, one must access

165. Website of the Department of Census and Statistics, 'Population Tables – Census of Population and Housing', (2012), Table 33, p. 148, at <http://www.statistics.gov.lk/pophousat/cph2011/pages/activities/reports/finalreport/population/finalpopulation.pdf> [Last accessed on 20 February 2020].

166. Website of the Ministry of Finance, 'Procurement Manual', at <https://oldportal.treasury.gov.lk/web/guest/Procurement-Manual> [Last accessed on 28 December 2020] and Website of the Ministry of Finance, 'Circulars – Public Finance Department', at <https://oldportal.treasury.gov.lk/public-finance-department> [Last accessed on 28 December 2020].

167. Website of the NPC, NPC Supplement – I to the Procurement Manual, at https://www.nprocom.gov.lk/web/images/pdf/NPC_Supplement_01_to_the_Procurement_Manual-2006-Goods_Work.pdf [Last accessed on 27 December 2020].

various government publications such as the Annual Reports of the MOF and the Auditor General and the various publications by the Department of External Resources to name a few.¹⁶⁸

Box 3 outlines some of the initiatives proposed to address the gaps identified in this section.

BOX 3

Steps Proposed in the Draft PG & PM 2018 to Address Gaps in the Current PG & PM 2006

Two important initiatives are included in the draft PG 2018 and PM 2018 to address some of the gaps discussed above: a) the establishment of an e-GP system, and b) the adoption of the Open Contracting Data Standard (OCDS).¹⁶⁹

a. e-GP System

The PG 2018 and PM 2018 provide for a comprehensive e-GP mechanism. It allows for procurement plans to be published online with all procurement documents available to be downloaded.¹⁷⁰ Furthermore, clarifications, correspondence, and amendments to the procurement documents during the bidding period will be made through an online platform with the record of pre-bid conferences and public bid opening minutes being published online available to download.¹⁷¹ The PM 2018 provides for the gradual transition into the e-GP platform with the PE having the discretion to decide the extent of the use (partial or full use) of the platform.¹⁷²

b. OCDS

The OCDS is a far-reaching proposal included in the draft PG and PM 2018.¹⁷³ It is a product of the Open Contracting Partnership (OCP), an independent not-for-profit organization which originated through the WB in 2015. The data standards support the publishing of government contracting data in an accessible manner for a wide range of stakeholders by defining a common data model, which simplifies data collection and categorization. The objectives of the OCDS are to achieve VFM, increase trust and transparency and provide citizens the opportunity to access, review and monitor spending through public access to procurement data.¹⁷⁴ It has operations in national procurement systems of over 30 countries including developing nations such as Nepal, Nigeria and Uganda, providing a user-friendly portal with in-depth analysis into the public procurement process.¹⁷⁵

PM 2018 additionally mandates inclusion of details of contracts awarded through non-competitive platforms.¹⁷⁶

168. See generally, Website of Ministry of Finance, 'Annual Reports', at <https://www.treasury.gov.lk/p/annual-reports> [Last accessed on 24 December 2020], Website of National Audit Office, 'Annual Reports', at <http://www.auditorgeneral.gov.lk/web/index.php/en/annual-reports> [Last accessed on 24 December 2020] and Website of The Department of External Resources, 'Publications/Reports', at http://www.erd.gov.lk/index.php?option=com_content&view=article&id=56&Itemid=220&lang=en#other-reports [Last accessed on 24 December 2020].

169. Chapters 13 and 14, PG 2018 and PM 2018.

170. Guideline 13.1, PG 2018.

171. Ibid.

172. PM 2018, p. 240.

173. Guideline 14.1, PG 2018.

174. Website of Open Contracting Partnership, 'What is open contracting' at <https://www.open-contracting.org/what-is-open-contracting/> [Last accessed on 18 November 2020].

175. Website of Open Contracting Partnership, 'Worldwide', at <https://www.open-contracting.org/worldwide/#/> [Last accessed on 18 November 2020].

176. PM 2018, p. 252.

1.2.4. Limited Opportunities for Public/CSO Participation

An evident gap in the public procurement process in Sri Lanka is the limited opportunity available for formal engagement by CSOs in comparison to other countries. For example, several developing countries in Asia and Africa have formally introduced avenues for direct CSO engagement via pre-procurement consultations and post-procurement monitoring mechanisms.¹⁷⁷ For instance, Section 13, Article V of the Philippines' Procurement Reforms Code 2003 makes participation of impartial civilian observers compulsory at all stages of the procurement process.¹⁷⁸ The observers can come from approved private sector groups in the relevant sector or an NGO and must register themselves and make necessary declarations.¹⁷⁹ In Mongolia, the Public Procurement Law of Mongolia was amended in 2011 to formally include civil society in bid evaluation and contract monitoring.¹⁸⁰ Studies by the Partnership for Transparency in the Philippines and Latvia have shown CSO engagement to have a positive impact on cost reduction and post-project quality control.¹⁸¹

1.2.5. Risk of Foreign Lending Agency Guidelines undermining VFM

As discussed in section 1.1.5, the procurement guidelines mandated by the FFA prevail over the national guidelines. However, the phrase 'procurement guidelines' is undefined. In some instances, conditions put by the foreign funder in loan agreements stipulate procurement procedures. This is when the funder does not have published guidelines or deviates from rules

in published guidelines. Therefore, certain loan conditions may operate as procurement guideline. Such deviations can impact the ability of the country to achieve VFM, especially if they require Sri Lanka to adopt a lower standard. An example can be instances where the mandated guidelines of the FFA or agreed upon loan conditions prevent the country from procuring goods and services through a competitive bidding process. For example, analysis by Verité Research found that infrastructure projects funded by 28 out of 35 high value bilateral loans taken out during the period 2005-2018 were procured without a competitive bidding process. The research also found that 13 of these loans were used to fund projects that originated as unsolicited proposals submitted by contractors from the country of the lender.¹⁸²

1.2.6. Weak Legal Framework Governing Unsolicited Proposals

Research by the WB into unsolicited proposals find them to pose a significant challenge in sustaining competition and creating VFM.¹⁸³ Thus to ensure that projects procured through unsolicited proposals reflect public interest it is critical to have in place centralised, established, and clear regulation and policies governing management of such proposals.¹⁸⁴ However, in the Sri Lankan context, the regulatory framework does not lay down clear guidelines to regulate unsolicited proposals. Even though PF Circular 02/2019 established explicit definitions, the lack of a replacement mechanism for the Swiss Challenge procedure and the uncertainty surrounding the Draft Guidelines for PPP compiled by the NAPPP and NPC due to their

177. World Bank, 'Why Reform Public Document?', (2012), at https://www.worldbank.org/content/dam/Worldbank/document/MNA/Why_Reform_Public_Procurement_English.pdf [Last accessed on 18 November 2020].

178. Cadapan-Antonio, Myrish T., Participation of Civil Society In Public Procurement: Case Studies From The Philippines', *Public Contract Law Journal*, Summer 2007, Vol. 36, No. 4 (Summer 2007), pp. 629-665 at https://www.jstor.org/stable/25755429?seq=1#metadata_info_tab_contents [Last accessed on 18 November 2020].

179. Ibid.

180. Website of the World Bank, 'Voluntarily Tying Government's Hands: Civil Society Oversight of Procurement in Mongolia', at <https://blogs.worldbank.org/governance/voluntarily-tying-government-s-hands-civil-society-oversight-of-procurement-in-mongolia> [Last accessed on 18 November 2020].

181. Website of the Partnership for Transparency, 'Civil Society Monitoring of Public Procurement', at <https://www.ptfund.org/programs/procurement/> [Last accessed on 27 December 2020].

182. Verité Research, 'Financing Infrastructure: The (non) Concessionality of Concessional Loans', (2020), at <https://www.veriteresearch.org/publication/financing-infrastructure-the-non-concessionality-of-concessional-loans/> [Last accessed on 24 December 2020].

183. World Bank, 'Review of Experiences with Unsolicited Proposals in Infrastructure Projects', (2017), at <http://pubdocs.worldbank.org/en/246961488983068025/Experience-Review-Report-Final-Draft-March-7-2017.pdf> [Last accessed on 18 February 2020].

184. Ibid.

abolition results in an inadequate and outdated body of regulations.

As noted in section 1.4.1, procurement of public infrastructure projects financed by foreign loans have occurred through unsolicited proposals even though the regulatory framework only recognized unsolicited proposals for PPPs. Even though PF 02/2019 explicitly prohibits such unsolicited proposals, it is unclear whether it is adhered to in practice or deviated from, with cabinet approval.¹⁸⁵ Furthermore, in the past, the BOI has maintained a development project pipeline to entertain PPPs.¹⁸⁶ This is in line with the best global practices.¹⁸⁷ It is unclear whether following the abolishing of the NAPPP whether such activity is continued.¹⁸⁸

Finally, the mechanism to evaluate unsolicited proposals is unclear. Currently, while it may be implied that there is no preferential treatment to the private party initiating the unsolicited proposal after the abolishing of the Swiss Challenge procedure, government practice suggest that unsolicited proposals lack a structure and evaluation mechanism.¹⁸⁹ The objective of the draft PPP guidelines were to set a more competitive assessment structure for unsolicited proposals along with detailed guidelines for benchmarking and evaluating USPs in line with global practices.¹⁹⁰ While there are many alternatives to the Swiss Challenge procedure, it is key to clearly establish the incentive structure to ensure transparency and competition.¹⁹¹

1.3. Opportunities for Public/ CSO Engagement

The procurement preparation stage of a large infrastructure project includes preliminary arrangements such as the conducting of Environmental and Social Impact Assessments, land acquisition, and resettlement. Opportunities available for CSO/public engagement during the procurement preparation stage is discussed in detail in Section 2 and 3 of this report. Opportunities available for CSOs to influence the procurement process to enhance VFM is discussed in this section under the following three categories.

1. Opportunities available to advocate for legal and policy reform.
2. Opportunities available to enhance transparency and drive accountability.

3. Opportunities available to represent public interest via:

- a. The Complaints Procedure under the current procurement process, and
- b. Writ applications and Fundamental Rights Applications.

1.3.1. Advocating for Legal and Policy Reform

CSOs can contribute to the creation of an improved regulatory and policy environment through research and advocacy. The gaps and limitations in the current legal framework highlighted in Section 1.5 above are examples of the types of reforms that CSOs can advocate for

185. Key Informant Interview.

186. Ibid.

187. International Bank for Reconstruction and Development/ World Bank and International Finance Corporation, 'Policy Guidelines For Managing Unsolicited Proposals in Infrastructure Projects – Volume II Guidelines for the Development of a Policy for Managing Unsolicited Proposals in Infrastructure Projects', (2018), p. 6, at https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/UnsolicitedProposals_Volume2_Guidelines_WEB%20%281%29.pdf [accessed on 18 February 2020].

188. Key Informant Interview.

189. Ibid.

190. Ibid.

191. See generally International Bank for Reconstruction and Development/ World Bank and International Finance Corporation, 'Policy Guidelines For Managing Unsolicited Proposals in Infrastructure Projects', (2018), at <https://ppp.worldbank.org/public-private-partnership/library/policy-guidelines-managing-unsolicited-proposals-infrastructure-projects> [Last accessed on 18 November 2020], for comparisons between incentive methods such as Automatic Shortlisting, Bonus Point System and Swiss Challenge].

to enhance VFM and thereby protect public interest in public infrastructure projects. The CSOs can advocate for reforms using research conducted by them or information gathered by them or using research and information generated by any other credible organisation. The advocacy efforts can take a top-down or bottom-up approach (or a combination of both); the former includes creating awareness and advocating for changes directly with parliamentarians and senior policy makers, while the latter can occur by creating public awareness about the problem, impact and the solutions via traditional and social media to generate public demand to address the identified problems/gaps. Top-down approaches involving the members of parliament (MPs) can be made with individual parliamentarians through parliamentary questions, private members' motions and, private members' bills.¹⁹² MPs can also pose questions to the Ministerial Consultative Committees headed by the respective minister.¹⁹³ The Committee on Public Petitions receives petitions by the general public through MPs on unjust decisions by public officials.¹⁹⁴ Furthermore, the Committee on Public Accounts, Committee on Public Enterprises, and Committee on Public Finance act as vehicles for transparency and accountability through publishing of reports and findings – prompting legal and policy reform through public discourse.¹⁹⁵

1.3.2. Enhancing Transparency and Accountability

As noted above, limited compliance with disclosure requirements, difficulty in accessing disclosed information and the existence of significant gaps in information disclosure requirements,¹⁹⁶ provide

opportunities for CSOs to function as public oversight bodies that monitor the disclosure of procurement related information by public authorities.

Therefore, CSOs can:

- Monitor compliance to mandated disclosure requirements;
- Bridge information gaps using RTI applications for reactive disclosures; and
- Advocate for higher levels of disclosure by demonstrating the benefits of protecting public interest and enhancing VFM.
- Spotlighting issues in the media

Reactive RTI Disclosures are a crucial mechanism for CSOs and public to obtain undisclosed information. Frequent use of reactive RTI disclosures by CSOs to bridge compliance gaps in information will increase public access to procurement information. Furthermore, RTI requests can also be used to bring to light possible malpractices that occur within the public procurement process.

Spotlighting of issues in the media is a popular avenue to raise public awareness and demand on identified issues. While CSOs often use the media to generate public interest on various subject areas such as environmental concerns as noted in Section 2, accountability and transparency in public procurement has not been a popular topic. While spotlighting may potentially result in unnecessary politicization of issues, it is seen

192. See generally, Website of Parliament of Sri Lanka, 'Business of Parliament – Parliamentary Questions' at <https://parliament.lk/en/business-of-parliament/parliamentary-questions> [Last accessed on 18 November 2020], Website of Parliament of Sri Lanka, 'Business of Parliament – Private Members' Motions' at <https://parliament.lk/en/how-parliament-works/business-of-parliament/private-member-s-motions> [Last accessed on 18 November 2020] and Website of Parliament of Sri Lanka, 'Business of Parliament – Private Members' Bills' at <https://parliament.lk/en/how-parliament-works/private-members-bills> [Last accessed on 18 November 2020].

193. Website of Parliament of Sri Lanka, 'Ministerial Consultative Committees' at <https://parliament.lk/en/how-parliament-works/private-members-bills> [Last accessed on 18 November 2020].

194. Website of Parliament of Sri Lanka, 'Committee on Public Petitions' at <https://parliament.lk/en/component/committees/committee/showCommittee?id=364&type=committee&Itemid=106> [Last accessed on 18 November 2020].

195. Website of Parliament of Sri Lanka, 'List of Committees for Special Purposes' at <https://parliament.lk/en/component/committees/committee?id=3&type=category&Itemid=106> [Last accessed on 18 November 2020].

196. See supra Section 1.5.

as an effective tool to gain attention of policy makers and regulators who might not be otherwise approachable through established avenues of communication.

Through the above, CSOs can help enhance the transparency of the public procurement process and drive accountability. Furthermore, advocating to fast track the ongoing implementation of the PROMISE platform and its extension to works contracts will result in a significant increase in publicly available information.

1.3.3. Representing Interests and Concerns of the Public

Submission of general inquiries

According to the PM 2006, general inquiries can be submitted to the PE about the procurement policy, procedures, and guidelines. Such inquiries received by the PE are referred to the NPA (now the DPF).¹⁹⁷ However, neither the PG 2006 nor the DPF website provides information as to who is eligible to make such inquiries or the process in place for how such inquiries will be addressed.

During the existence of the NPC, it entertained complaints and queries from the public regarding procurement matters.¹⁹⁸ In 2018, 34 requests for interpretation or clarification of procurement guidelines were received, out of which 33 were answered.¹⁹⁹ Since

the abolishing of the NPC, it is unclear whether the DPF has carried out this function.

Given that the guidelines allow the public to submit general inquiries to the DPF, CSOs can utilise this avenue to communicate policy concerns. Public knowledge of and frequent use of this avenue may result in the DPF establishing a clear mechanism to submit general inquiries in the future.

Legal redress through courts

The Constitution allows the decisions of government agencies to be challenged if they are illegal, arbitrary, unreasonable or infringe upon the fundamental rights of the people. If a decision taken during the public procurement process is illegal, unreasonable, or contrary to the procedure set out in the law, the decision can be challenged by a Writ Application in the Court of Appeal.²⁰⁰ If the decision infringes the fundamental rights of the people, it can be challenged in the Supreme Court.²⁰¹ Decisions concerning large-scale infrastructure projects have been challenged through Writ Applications and Fundamental Rights Applications.²⁰² Actions of public officials throughout the procurement lifecycle can also be challenged through the Public Trust Doctrine and acts and regulations mandating standards of conduct such as the Establishment Code, Public Contracts Act No. 3 of 1997, and The Bribery Act.²⁰³

197. PM 2006, p. 107.

198. Key Informant Interview.

199. NPC, 'Annual Report – 2018', at <http://www.nprocom.gov.lk/web/images/pdf/annual2018/NPC-Annual-Report-2018-E.pdf> [Last accessed on 18 February 2020], p. 8.

200. Article 140, 1978 Constitution of Sri Lanka.

201. Article 126, 1978 Constitution of Sri Lanka.

202. See generally, *Wijebanda v. Conservator General of Forests* [2009] 1 Sri.L.R. 337, *Environmental Foundation Limited v. Central Environmental Authority* [2006] 3 Sri.L.R. 57, *Public Interest Foundation v. Central Environmental Authority* [2001] 3 Sri.L.R. 330, *Amarasinghe v. The Attorney-General* [1993] 1 Sri.L.R. 376.

203. GPMCM, pp. 2-5

2

Environmental Impact Assessment Framework

The consideration of the environmental impacts of development projects is crucial for sustainability and determining the feasibility of development projects. Large scale development activities can potentially disrupt eco-systems, increase pollution, and exhaust natural resources. Such impacts can devastate flora and fauna and affect the lives and livelihoods of local communities, ultimately rendering further development unsustainable. It is for this reason that mitigating the impacts on the environment feature prominently in infrastructure procurement discourse.

A fundamental tool used by regulators to ensure sustainable development is the Environmental Impact Assessment (EIA). The International Association for Impact Assessment (IAIA) defines an EIA as “the process of identifying, predicting, evaluating, and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made”.²⁰⁴ Thus,

an EIA is a comprehensive and analytical study of all the impacts of a development activity and the measures and alternatives that can be adopted to mitigate such impacts.²⁰⁵

The growing realization of the importance of environmental considerations in procurement in Sri Lanka is reflected in the draft procurement guidelines published in 2018. The guidelines refer to green procurement, i.e., the procuring of goods, works and services that cause minimal adverse environmental impacts. With the inclusion of green procurement in the 2018 guidelines, Sri Lanka has for the first time explicitly incorporated environmental considerations into the procurement process. It is referred to in the guidelines as a means for achieving VFM, and calls for the integration of environmental performance considerations into the procurement lifecycle in the areas of planning, procurement, use and disposal.²⁰⁶ However, as mentioned in Chapter 1 of this report, the 2018 guidelines have not been approved by the

204. International Association for Impact Assessment (IAIA), ‘What is Impact Assessment?’, at https://www.iaia.org/uploads/pdf/What_is_IA_web.pdf [Last accessed on 13 November 2020]

205. Kevin S. Hanna, ‘Environmental Impact Assessment: Process, Setting and Efficacy’, published *Environmental Impact Assessment: Practice and Participation*, Second Edition (OUP, 2009), p. 10; T. Yang, *The Emergence of the Environmental Impact Assessment Duty as a Global Norm and General Principle of Law*, p. 529, 70 *Hastings Law Journal* 527 (2019).

206. National Procurement Commission, ‘Procurement Guidelines 2018’, Guideline 15., at http://www.documents.gov.lk/files/egz/2018/5/2070-15_E.pdf, [Last accessed on 19 November 2020] (‘PG 2018’).

parliament, and hence not operational at present.

This chapter provides an overview of the EIA framework currently operational in Sri Lanka. The chapter is divided into three parts. First, it provides an overview of the EIA framework. Second, it explores the gaps

in the EIA framework and analyses how such gaps impact public engagement. Third, it identifies the modes and mechanisms available for the public and civil society to engage with the EIA framework within the current framework.

2.1. Legal & Institutional Framework

According to the Procurement Manual 2006, the Procurement Entity, as part of its procurement preparation activities must complete an Initial Environment Examination (IEE) or Environment Impact Assessment (EIA) prior to making a request for the appointment of a procurement committee to commence procurement.²⁰⁷ Sri Lanka has introduced EIA frameworks under two separate laws: The National Environmental Act No. 47 of 1980 and the Coast Conservation Act No. 57 of 1981. These two laws form the regulatory framework that governs the environment impact assessments in relation to development projects.

2.1.1. The National Environment Act

The National Environment Act No. 47 of 1980 (NEA) establishes the Central Environmental Authority and makes provisions for the protection and management of the environment.²⁰⁸ The NEA sets out the environment impact assessment framework for all areas except the North Western Province²⁰⁹ and the coastal

areas. This impact assessment framework is applicable to several types of projects, which have been specifically prescribed by the Minister of Environment based on their magnitude and location of implementation.²¹⁰

In 1993, the National Environmental (Procedure for Approval of Projects) Regulations (NER) were passed under the NEA which sets out the procedure for preparing and publishing Initial Environmental Examination Reports ('IEER') and Environmental Impact Assessment Reports (EIAR).²¹¹ The key steps in the procedure set out by the NER are listed in Exhibit 14 below. This procedure is undertaken primarily by prescribed Project Approving Agencies (PAA),²¹² under the supervision of the Central Environmental Authority (CEA).²¹³ Projects that fall within the ambit of the Mines and Minerals Act are also required to follow the procedure set out in the NER, while projects that located within one mile of any National Reserve may also be required to follow a separate but similar EIA procedure set out in the Fauna and Flora Protection Ordinance.²¹⁴

207. National Procurement Agency, 'Procurement Manual' (2006), p. 6, at http://122.255.3.82/documents/57687/174939/ProcurementManual2006_20060817_with_Sup8.pdf/5d0563ed-05b1-4629-9937-db8e160aac29 [Last accessed on 13 November 2020] ('PM 2006').

208. National Environment Act No. 47 of 1980, at <http://www.cea.lk/web/images/pdf/acts/act47-80.pdf> as amended by Act No. 56 of 1988, at <http://www.cea.lk/web/images/pdf/acts/act56-88.pdf> [Last accessed on 13 November 2020]. ('NEA')

209. The operation of the NEA is suspended in the North Western Province. The EIA process in the North Western Province is governed by the North Western Province Environmental Statute No. 12 of 1990, enacted by the North Western Provincial Council. However, the North Western Province has adopted similar environmental standards and criteria as those prescribed by the Central Environmental Authority.

210. Order dated 18 June 1993 made under 23Z of the NEA as published in Gazette Extraordinary No. 772/22, at <http://www.cea.lk/web/images/pdf/eiaregulations/reg772-22.pdf>, as amended by Order dated 27 October 1999 as published in Extraordinary Gazette Notification No. 1104/22, at <http://www.cea.lk/web/images/pdf/eiaregulations/reg1104-22.pdf> [Last accessed on 13 November 2020].

211. National Environmental (Procedure for Approval of Projects) Regulations No. 01 of 1993, made under Section 23CC of the NEA as published in Extraordinary Gazette Notification No. 772/22, at <http://www.cea.lk/web/images/pdf/eiaregulations/reg772-22.pdf> [Last accessed on 13 November 2020].

212. Order dated 18 June 1993 made under Section 23Y of the NEA as published in Gazette Extraordinary No. 772/22, at <http://www.cea.lk/web/images/pdf/eiaregulations/reg772-22.pdf> [Last accessed on 13 November 2020].

213. Section 10(1)(a), NEA.

214. Section 61, Mines and Minerals Act No. 33 of 1992; Section 9A, Flora and Fauna Protection Ordinance No. 02 of 1937, as amended by Act No. 49 of 1993.

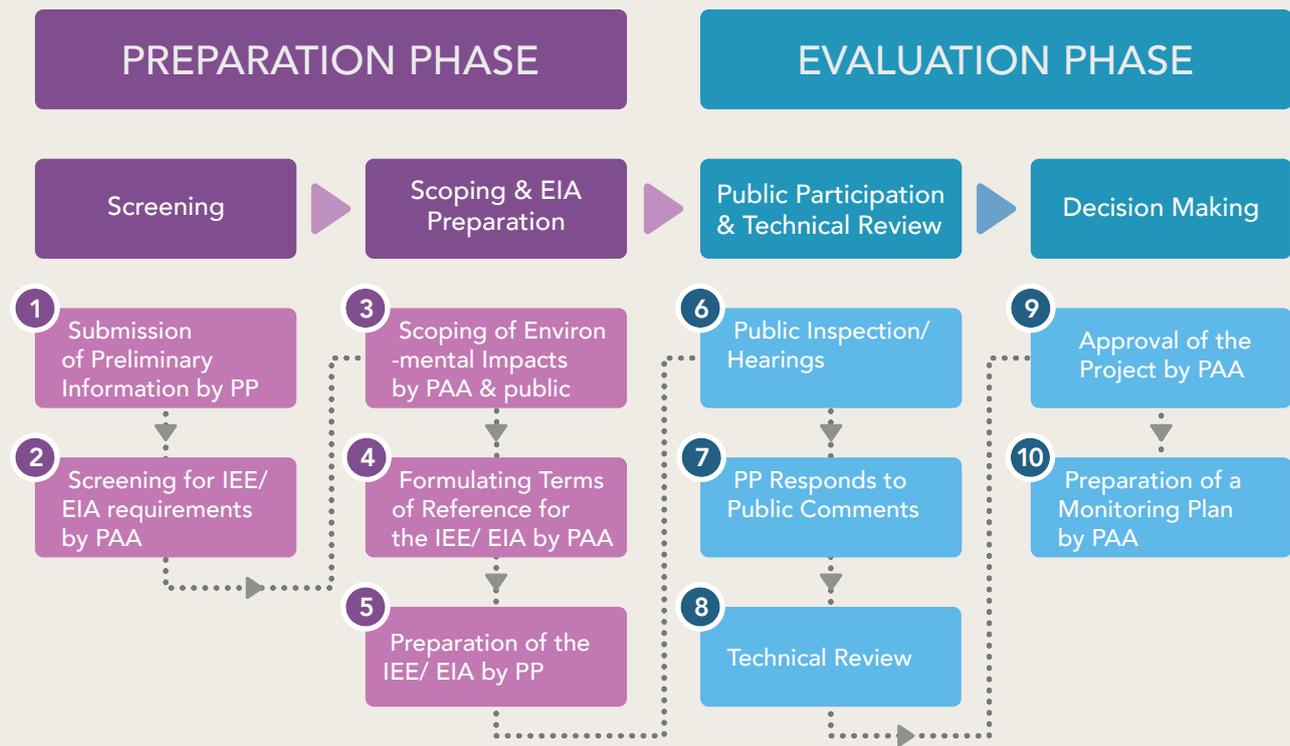
2.1.2. The Coast Conservation Act

The Coast Conservation Act No. 57 of 1981 (CCA)²¹⁵ is applicable to all areas which constitute the 'coastal zone'.²¹⁶ The CCA establishes the Coastal Conservation Department (CCD) and sets out the impact assessment procedure to obtain a 'permit' for a proposed project in the coastal zone.²¹⁷ The assessment is undertaken primarily by the Director-General (DG) of the CCD, with the recommendations of the Coastal Conservation Advisory Council (CCAC).²¹⁸ The key steps in the impact assessment procedure of the CCD are outlined in Exhibit 15.

2.1.3. Key Differences between the NEA and CCA Frameworks

In principle, the procedures under the NEA and CCA are similar: both incorporate the key stages of screening, public inspection, technical review, and decision-making. Nevertheless, there are several differences between these two processes, which are identified in Exhibit 16 below. However, it must be noted that large scale projects which are typically carried out in coastal areas, such as port/harbour constructions, fisheries projects, and the construction of tourism resorts, are prescribed as projects which must follow the NEA/NER procedure.²¹⁹

Exhibit 14: Key Stages of the EIA Procedure in the NER



215. The Coastal Conservation Act No. 57 of 1981 at <http://citizenslanka.org/wp-content/uploads/2016/02/Coast-Conservation-Act-No-57-of-1981-E.pdf>, as amended by Act No. 49 of 2011, at [https://www.srilankalaw.lk/YearWisePdf/2011/COAST_CONSERVATION_\(AMENDMENT\)_ACT_NO_49_OF_2011.pdf](https://www.srilankalaw.lk/YearWisePdf/2011/COAST_CONSERVATION_(AMENDMENT)_ACT_NO_49_OF_2011.pdf) [Last accessed on 13 November 2020] ('CCA').

216. See, Section 42, CCA, where the 'coastal zone' is defined as 'the area lying within a limit of three hundred meters landwards of the Mean High Water line and a limit of two kilometers seawards of the Mean Low Water line and in the case of rivers, streams, lagoons, or any other body of water connected to the sea either permanently or periodically, the landward boundary shall extend to a limit of two kilometers measured perpendicular to the straight base line drawn between the natural entrance points thereof and shall include the waters of such rivers, streams and lagoons or any other body of water so connected to the sea.'

217. Section 14(1), CCA.

218. Sections 16(1) read with Sections 7(1)(a) and 7(1)(c), CCA.

219. See projects listed in National Environmental (Procedure for Approval of Projects) Regulations No. 01 of 1993, supra note 11.

Exhibit 15: Key Stages of the EIA Procedure in the CCD

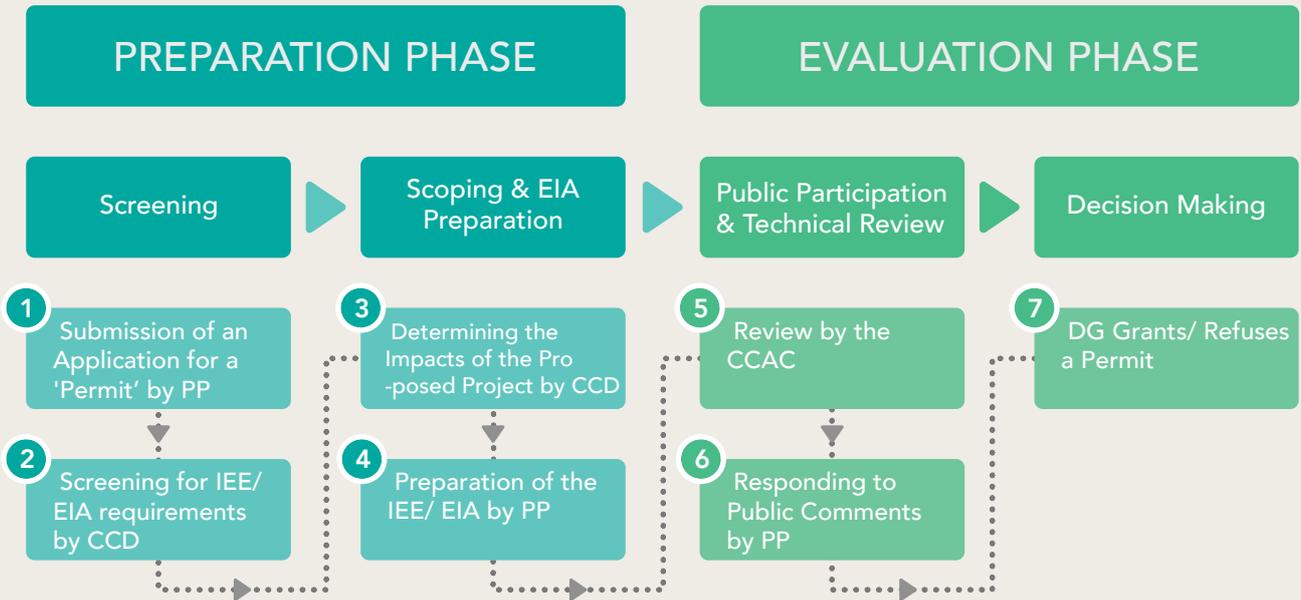


Exhibit 16: Key Differences between the NEA and CCA Frameworks

| Key aspect of the EIA procedure | NEA/NER procedure | CCA procedure |
|---|---|---|
| Determining if the project requires an EIA or IEE | The PAA determines this based on the list of projects prescribed by the Minister. | The DG determines this at his discretion. |
| Scoping the potential impacts of the proposed project | Contemplates a formal scoping and review process with public participation. | There is no formal scoping process set out in the CCA. |
| Formulating EIA/IEE Terms of Reference (TOR) | It is statutorily required that the PAA draft the TOR after scoping the project. | There is no requirement for a TOR to be drafted by the CCD. |
| Conducting public hearings on the Environment Impact Assessment Report (EIAR) | Public hearings may be held, though they are not mandatory. | The holding of public hearings is not contemplated in the law. |
| Technical review of the EIAR or the Initial Environment Examination Report (IEER) | A committee is appointed for each project to conduct the technical review. | The CCAC, which is a standing advisory body, conducts the technical review. |
| Preparing an Environmental Monitoring Plan (EMP) | The PAA is required to formulate an EMP within 30 days of granting approval to a project. | The DG or CCD is not required to formulate an EMP. |

2.2. Gaps and Weaknesses

Although the EIA frameworks adopted in Sri Lanka appear to cover key stages of the project cycle, legal analysis and interviews with key informants revealed several gaps and weaknesses. These gaps and weaknesses restrict meaningful public participation and independent oversight. The lack of such participation and oversight can undermine the quality, accuracy, and integrity of the EIA process, and may result in unforeseen costs, such as irreversible ecological harm, pollution, and compromised sustainability. Such costs diminish the value for money of development projects that are otherwise seen as beneficial to society.

These gaps and weaknesses will be identified with respect to their impact on:

1. Access to information
2. Encouraging public participation
3. Improving transparency
4. Grievance handling and monitoring

2.2.1. Limited Access to Information

Access to information remains critical for meaningful public engagement and accountability. The research identifies three factors that undermine access to information: 1) non-disclosure of PP responses to public comments on EIAR 2) gaps in the disclosure requirements at the screening and scoping stage and during the EIAR inspection stage, 3) limited access to information online and 4) limited access to information in local languages.

Non-disclosure of PP responses to public comments on EIAR

The public is entitled to comment on an EIAR under the NEA and the CCA frameworks.²²⁰ While NEA framework requires the PP to respond to comments made by the public, the CCA framework does not expressly require the PP to meaningfully respond to the comments made by the public. However, as previously highlighted, the responses of the PP under the NEA framework are not routinely disclosed to the public.²²¹ Therefore, CSOs and members of the public who made comments on an EIAR will be unable to ascertain if their concerns were adequately addressed by the PP. This erodes the transparency of the impact assessment and evaluation.

Gaps in the disclosure requirements at the screening and scoping stage

The NEA and CCA do not require the PP or government agencies to disseminate information on the proposed project during screening and scoping. Despite the environmental assessments being a pre-requisite to initiate procurement under the PM and PG of 2006, there is no obligation that such assessments be disclosed to the public. Most activities in the preparatory phase of an EIA (preliminary/feasibility studies, screening, and scoping) are conducted with a degree of exclusivity, in that publicity is not given to planning and pre-feasibility.²²² Certain documents relating to the screening and scoping stage, such as the TOR and the final scoping reports, are occasionally disclosed along with the EIAR on a purely discretionary basis.²²³

Guidelines issued by the CEA urge the dissemination of information in summarised forms during scoping.²²⁴

220. Section 11(i), NER; Section 16(2D), CCA.

221. Interview with Dr. Sumith Pilapitiya, *supra* note 198.

222. Interview with Ms. Hafsa Hudha, Attorney-at-Law and former Legal Officer of Environmental Foundation Limited on 10 December 2020; Interview with Mr. Sajeewa Chamikara, Director of the Environment Conservation Trust and Legal Officer of Movement of Land & Agricultural Reform on 16 December 2021.

223. Interview with Ms. Hafsa Hudha, *supra* note 195.

224. Central Environmental Authority, *Guidance for Implementing the Environmental Impact Assessment (EIA Process)* p. 9-10, No. 2: A General Guide for Conducting Environmental Scoping, 2003 ('CEA Guidelines').

However, these guidelines do not have the force of law and are not binding on PAAs and PPs. In these circumstances, PAAs do not strictly conform to guidelines on disseminating information and, as such, obtaining crucial information on proposed projects during the screening and scoping stage is often very challenging.²²⁵ It was also noted that the inclination to disclose information varies from institution to institution and can depend on a variety of external factors.²²⁶

The limited information disclosure during the screening and scoping stage can significantly hamper opportunities for the affected communities/CSOs to meaningfully engage in the EIA process. It can result in the omission of critical environmental issues and the derailment/delay of the project at a later stage, when the public/affected communities become aware of such issues.

Gaps in disclosure requirements during EIA inspection

The law primarily provides for the public to be notified of the EIA via a Gazette or a daily newspaper.²²⁷ However, responses of the PP to comments made by the public after inspecting the EIA are not routinely disclosed to the public.²²⁸ Therefore, the responses of the PP to public comments cannot be independently assessed. CSOs and members of the public who made comments on an EIA will be unable to ascertain if their concerns were adequately addressed by the PP. Moreover, it was also highlighted that the reports/findings/conclusions of the Technical Evaluation Committee are also not generally disclosed.²²⁹

These gaps in information disclosure at the crucial stage of EIA inspection can severely undermine the overall effectiveness of EIA inspection and evaluation.

Limited access to information online and in local languages

There is no guidance given to PAAs and PPs on how to make an EIA more accessible in terms of language or improving ease of access by electronic means.

EIAs are often prepared in English, and as such, may not be comprehended by members of the public. Census data from 2012 indicates that only 30 percent of the population is literate in English. In view of the technical nature of EIAs, such language constraints can further diminish meaningful public comment on the EIA. EIAs are generally not translated into local languages, and when such translations are made available, they are often of poor quality.²³⁰

These gaps exist contrary to the Constitution and Official Language Policy of Sri Lanka, which recognises Sinhala and Tamil as 'official and national languages' and requires public records to be maintained in the national languages.²³¹

2.2.2. Limited Opportunities for Public/CSO Participation

It is universally accepted that environmental and social impact assessments of any kind must involve participation from the public. However, research reveals that there are three major gaps that undermine

225. Interview with Dr. Sumith Pilapitiya, Lead Environment Specialist at the World Bank and former Director-General of the Department of Wildlife of Sri Lanka, on 20 October 2020.

226. Interview with Ms. Hafsa Hudha, *supra* note 195.

227. Section 11(i), NER; Section 16(2D), CCA.

228. Interview with Dr. Sumith Pilapitiya, *supra* note 198.

229. Interview with Ms. Hafsa Hudha, *supra* note 195; Interview with Mr. Sajeewa Chamikara, *supra* note 195; Interview with Ms. Shiranee Yasaratne, former Deputy Director General of the Central Environmental Authority, Country Representative of IUCN Sri Lanka and Coordinator of the Regional Business and Biodiversity Programme of IUCN Asia on 11 January 2021.

230. Interview with Mr. Sajeewa Chamikara, *supra* note 195.

231. Articles 19 and 22, The Constitution, 1978; Department of Official Languages, 'Official Languages Policy' at http://languagesdept.gov.lk/oldweb/index.php?option=com_content&view=article&id=53:languages-policy-ta&catid=9&lang=en&Itemid=304 [Last accessed on 27 January 2021].

meaningful participation in environmental impact assessment processes in Sri Lanka:

Participation in scoping is not open to the public

Although regulatory guidelines contemplate broad participation in scoping, public intervention in scoping is rare in practice. Key informants have indicated that PAAs do not usually display much effort in making a wide round of consultations with the public/CSOs.²³² Moreover, invitations to scoping meetings are not open and are usually offered only to high-level organisations and government officials.²³³ Thus, environmental issues and impacts that are specific to the project and communities in concern are not likely to be fully explored. The CEA overcomes these issues by forwarding a standard TOR, which is either overbroad or too restrictive in some instances.²³⁴ Consequently, the EIAR is often too comprehensive and/or not focused on specific issues and impacts that are likely to result due to project implementation.²³⁵ Both these outcomes significantly undermine the meaningful assessment of the environmental impacts of development projects, and can further reduce the effectiveness of reviewing and commenting on EIARs.

Lack of public hearings

As highlighted above, the NEA framework allows for public hearings to be held in situations where further analysis of the EIAR is required. Public hearings are not contemplated under the CCA framework.

As opposed to the opportunity provided to review a highly technical EIAR and provide comments in writing, the possibility of making collective representations at public hearings provides a better platform for the affected communities/persons to express their concerns. It was also highlighted that public hearings can serve as a platform for affected communities that were not adequately considered during the scoping phase to ensure that their concerns are voiced.²³⁶

However, public hearings are hardly ever conducted.²³⁷ It was further indicated that public hearings are held only in circumstances where there is significant public pressure to inquire further into the EIAR.²³⁸ It was further revealed that ecological reasons alone do not generally spur a public reaction that would pressurise the officials to hold public hearings, and that other reasons, such as the resettlement of communities, were often necessary to mobilise communities.²³⁹

Mandatory public hearings in other countries

| | |
|-------------|--|
| Philippines | The relevant stakeholders have to be invited for public hearings that are held for the specific purpose of inspecting the EIAR |
| New Zealand | A public hearing is mandatory if any stakeholder requests that a public hearing be held |
| Pakistan | EIAR inspection must be done through public hearings held at least 30 days after the publication of the EIAR |
| India | EIAR inspection is undertaken by both public hearings and unilateral commenting on the EIAR |
| Thailand | Any stakeholder can request the public authorities to hold a public hearing at any stage of the EIA |

232. Interview with Ms. Ashani Basnayake, Trustee of the Federation of Environmental Organisations on 14 December 2020; Interview with Dr. Sumith Pilapitiya, *supra* note 198; Mr. Sajeewa Chamikara, *supra* note 195.

233. *Ibid.*

234. Interview with Ms. Shiranee Yasaratne, *supra* note 205.

235. *Ibid.*

236. Interview with Mr. Sajeewa Chamikara, *supra* note 195.

237. Interview with Dr. Sumith Pilapitiya, *supra* note 198; Interview with Mr. Sajeewa Chamikara, *supra* note 195.

238. *Ibid.*

239. *Ibid.*

Limited time provided for the public to contribute to scoping and inspect the EIAR

A further drawback is that the scoping process under the NER must be completed by the PAA within 30 days.²⁴⁰ As previously highlighted, proper scoping requires extensive information gathering and multi-level consultation to determine the TOR for an EIAR. A standard EIAR is extremely voluminous and is prepared with the input of experts, engineers, contractors, and consultants. For instance, EIARs of large-scale projects such as the Uma Oya irrigation project and the Port City project comprised multiple volumes and several annexures. Thus, a standard EIAR is a highly technical and complex inter-disciplinary report that necessitates substantial background knowledge in order to be comprehended.

The period for public inspection of the EIAR is limited to 30 days in both the NEA and CCD frameworks. A CSO that has not participated in the scoping of the project will, therefore, have only 30 days to conduct independent studies and meaningfully comment on the EIAR. However, a period of 30 days may be insufficient to conduct comprehensive/independent studies and obtain inputs from stakeholders, especially in relation to large and complex infrastructure projects. As EIARs are not usually made available online or in electronic format, physically traveling to the locations where the EIAR is located and manually studying the information therein requires additional time, making the 30-day period extremely insufficient. While specifying time limits is certainly necessary to ensure bureaucratic efficacy, it has been noted that the 30-day time limit may be unrealistic in most cases, considering the highly technical and field intensive nature of the EIA process.

BOX 4

***EIAR Review Timeframes of Other Countries*²⁴¹**

Most other countries set out timeframes for the public to inspect an EIAR and submit their comments/objections. For instance, Finland provides a period of seven weeks (49 days) for public inspection, and the United Kingdom provides a period of ten weeks (70 days) for public inspection with a possibility of extension.

However, some countries, such as Philippines, Pakistan, and New Zealand do not impose any specific timeframes for public inspection of EIARs.

Excessive discretion granted to the Director-General of the CCD

As highlighted above, the CCA vests complete discretion in the DG of the CCD to determine if a proposed project requires an IEE or an EIA. This is in stark contrast to the NEA, which lists out projects, based on their nature and magnitude, that require an IEE or EIA under the NER procedure. The discretion granted to the DG of the CCD is unreasonably excessive and can

lead to situations where adequate impact assessments are not conducted.

The recent controversy regarding the failed beach nourishment project in Mount Lavinia exemplifies this issue. This project was conducted without any IEE or EIA, as the DG of the CCD has decided that the project was a 'soft solution' to prevent erosion, despite the project costing approximately LKR 800 million. Commentators have strongly criticised the

240. Section 6(iii), NER.

241. United Nations Economic Commission for Europe, Guidance on Public Participation in Environmental Impact Assessment in a Transboundary Context (2006), p. 18, at <https://unece.org/DAM/env/documents/2006/eia/ece.mp.eia.7.pdf> [Last accessed on 05 March 2021].



Image courtesy of Road Development Authority, Central Expressway Project Section II

manner this project was approved without any impact assessment.²⁴²

2.2.3. Limited Transparency in Appointing Technical Experts

Both the NEA and the CCA frameworks include technical reviews. Under the NEA framework, a Technical Committee is appointed to review an EIAR.²⁴³ Similarly, under the CCA framework, the technical committees of the CCD and the CCAC (an inter-department, inter-disciplinary advisory body) conduct technical reviews of an EIAR.²⁴⁴

However, the process of vetting and selecting the members of such committees is not based on any published/objective criteria.²⁴⁵ Neither the NEA nor the CCA provide any guidance on the composition

of such committees. It was also revealed that these technical committees often exclusively comprise officials from related government agencies, without any independent input.²⁴⁶ Although independent experts and academics are appointed to such committees on occasion, this is not the standard practice.²⁴⁷

2.2.4. Gaps in Grievance Handling and Monitoring

Lack of opportunity for the public to administratively challenge decision to approve a project

In Sri Lanka, the law does not provide for an opportunity to administratively challenge the decision of the PAA to grant approval for a project. As a matter of practice, the PAA and the relevant line ministry afford the PP an opportunity to appeal when approval is not

242. Ranasinghe P and Gunawardana M, Importance of Environmental Impact Assessments and the turmoil in our coasts, DailyFT, 13 May 2020, at <http://www.ft.lk/columns/Importance-of-Environmental-Impact-Assessments-and-the-turmoil-in-our-coasts/4-700089> [Last accessed on 05 March 2021]; Gomes J, What's happening at Mount Lavinia Beach?, The Sunday Morning, 26 April 2020, at <https://www.themorning.lk/whats-happening-at-mount-lavinia-beach/> [Last accessed on 05 March 2020].

243. Website of the Central Environment Authority of Sri Lanka, 'Environmental Impact Assessment (EIA) Procedure in Sri Lanka', at <http://www.cea.lk/web/en/environmental-impact-assessment-eia-procedure-in-sri-lanka> [Last accessed on 13 November 2020].

244. Section 6 and Section 16(2A), CCA.

245. Ibid.

246. Interview with Dr. Sumith Pilapitiya, supra note 198.

247. Interview with Ms. Hafsa Hudha, supra note 195.

granted for a project.²⁴⁸ Thus, the PP can call on the PAA to reconsider rejecting a project, without having to take legal action. However, such a mechanism is not afforded to the public; that is, if a project is approved, the public cannot request the PAA to reconsider the decision.²⁴⁹ This compels affected communities to take legal action, which can be more costly than utilising administrative provisions to challenge the decision.²⁵⁰

Lacuna on EIA monitoring and oversight

Both the NEA and the CCD are silent on how project

implementation is monitored. The NER only states that an Environmental Monitoring Plan (EMP) must be prepared by a PAA after it has granted approval for a project. The CCA does not contain any requirements relevant to monitoring.²⁵¹ Key informants have indicated that even though the TOR of a EIA requires the creation of EMPs, such EMPs are not usually prepared by the PAA along with the EIA.²⁵² Thus, there does not appear to be binding system by which EIA compliance is monitored and project implementation is evaluated in Sri Lanka.

BOX 5

Robust Monitoring Mechanisms – Examples from Other Countries

In the Philippines, the law provides a comprehensive framework for monitoring. The EMP is regarded as a necessary component of the EIA and must be prepared by the PP.²⁵³ The monitoring of project implementation is undertaken by the provincial/regional officers of the Philippines Department of Environment and Natural Resources with a Multi-Partite Monitoring Team (MMT).²⁵⁴ An MMT is established for every project, and comprises representatives of affected communities, NGOs, and regional officials.²⁵⁵ The composition of the MMT is determined by agreement between the PP, approving agencies and stakeholders.²⁵⁶ The MMT is 'tasked to undertake monitoring of compliance with [the environmental approval] conditions as well as the EMP.'²⁵⁷ Additionally, the PP is required to exercise self-monitoring and submit bi-annual monitoring reports.²⁵⁸

In New Zealand, the monitoring of development projects is delegated to the local authorities.²⁵⁹ These local authorities are obligated to keep records and information for monitoring purposes.²⁶⁰ Additionally, the local authorities must publish a compilation of all information on monitoring and follow-up activities within periods not exceeding five years.²⁶¹

In Pakistan, the project approval is conditional on the PP submitting an EMP which provides for monitoring, reporting, and auditing.²⁶² Further, a mandatory condition of the approval is that the project

248. Interview with Mr. Sajeewa Chamikara, *supra* note 195.

249. *Ibid.*

250. *Ibid.*

251. Regulation 14, NER.

252. Interview with Mr. Sumith Pilapitiya, *supra* note 198.

253. Section 5.2.1, Philippines EIA Rules.

254. Section 9.1, Philippines EIA Rules.

255. *Ibid.*

256. *Ibid.*

257. *Ibid.*

258. Section 9.2, Philippines EIA Rules.

259. Section 35(2), NZ RMA.

260. Section 35(3), NZ RMA.

261. Section 35(2A), NZ RMA.

262. Section 14(1), Pakistan EIA Regulations.

complies with the EIAR.²⁶³ Moreover, the PP is permitted to commence implementation only after executing a written undertaking to comply with all approval conditions.²⁶⁴ The relevant environmental agency is authorised to carry out site inspections and call for information on the machinery and procedures used in construction and request that the EMP be revised, if necessary.²⁶⁵ During implementation, the PP must submit annual reports with a view to showing compliance with the conditions of the approval.²⁶⁶ Even upon the completion of the project, the PP is required to submit a report proving that it has complied with the EIAR.²⁶⁷

2.3. Opportunities for Public/CSO Engagement

This section provides an analysis of the opportunities available for the public and Civil Society Organisations (CSOs) to engage with the EIA processes of Sri Lanka. It is divided into three parts: opportunities available in the 1) NEA Framework, 2) CCA Framework, and 3) opportunities available within the general administrative and legal processes of the country.

2.3.1. Advocating for Legal and Policy Reforms

As discussed in detail in Section 2.1, there are numerous gaps and weaknesses in the current framework that undermine the ability of the country to reap the full benefits of these projects and ensure the country gets VFM for the public money spent on public infrastructure.

A key contribution that CSOs can make to protecting the public interest in public infrastructure is to actively advocate for amendments to the existing legislation to address the existing gaps and weaknesses like those identified in Section 2.1. As mentioned in Section 1.6, the CSOs can do this by engaging directly with key

decision makers of the government (e.g. ministers, policy makers, parliamentarians) as well as by generating public demand for such reforms by creating awareness among the public of the implications of such gaps and importance of addressing them.

It is important to note that CSOs and conservation groups in Sri Lanka have already been involved in engaging both the public and the government in enhancing the EIA frameworks of Sri Lanka. This has included research into the strengths and weaknesses of the relevant laws and institutions and advocating for reform,²⁶⁸ and advocating for higher standards of environmental protection in courts.²⁶⁹ This is another avenue available for CSOs to engage with key decision makers.

2.3.2. Enhancing Transparency and Accountability

Using the Right to Information Act to enhance transparency and accountability

The Right to Information Act (RTI) of Sri Lanka enables the requesting of information relating to public affairs.²⁷⁰ The Act also makes it mandatory for government agencies to proactively disclose information

263. Section 13(1), Pakistan EIA Regulations.

264. Section 13(2)(b), Pakistan EIA Regulations.

265. Section 14(2), Pakistan EIA Regulations.

266. Section 19(2), Pakistan EIA Regulations.

267. Section 19(1), Pakistan EIA Regulations.

268. At present, The Asia Foundation (TAF) is conducting a study of Sri Lanka's legal and policy frameworks on environmental impact assessments with a view to increase public participation and efficiency.

269. See generally, judgements delivered by the Supreme Court in the *Bulankulama v. Secretary, Minister of Industrial Development* [2000] 3 Sri.L.R. 243; *R. G. Kariyawasam v. Central Environmental Authority, S.C. (F.R.) Application No. 141/2015, S.C. Minutes of 04 April 2019*.

270. Section 3 read with Section 24(1), Right to Information Act No. 12 of 2016 ('RTI Act').

relating to public affairs.²⁷¹ Regulations passed under the RTI Act expressly require public authorities to proactively disclose, in digital/electronic format, information on 'open meetings' with the public, 'mechanisms for consultations and public participation in decision making', and any decisions that 'directly affect the public'.²⁷² CSOs and the public can make applications to request information on development projects and even request that the relevant PAA proactively disclose information relating to the EIA process of past and ongoing development projects.

Thus, CSOs can use the RTI Act to obtain a steady stream of information with respect to environmental impact assessment processes, function as an independent check against decision makers and track the progress of such processes.

Bridge the information gap and empower affected communities/public

CSOs can also serve as intermediaries in providing information to the public. CSOs have the capacity to obtain information, through RTIs or networking, and to present such information in forms that are digestible to the public. For instance, CSOs can prepare pamphlets and other summarized forms of technical information regarding environmental impact assessments and distribute information to affected communities, with a view to driving public participation. Such awareness raising and educational campaigns have been highlighted as being effective in encouraging the public to participate in EIA processes.

Spotlighting issues in the media

CSOs and activists have increasingly resorted to mobilising support in the media and amongst the public to create public pressure. It was indicated that resorting to informal means of redress, such as using the media to influence public opinion, is an effective means of remedying environmentally injurious activities.²⁷³ Civil society has been instrumental in creating public awareness and activism on crucial matters such as deforestation and animal welfare legislation by spotlighting issues in the mainstream media and on social media.

Spotlighting issues in the media and creating public pressure has proven to be an especially effective strategy in instances where environmental decisions are perceived to be expedited or "rushed" by the government. The recent civil society pushback against the decision of the government to vest vast tracts of forest lands in regional offices is an exemplary example in this regard. The decision to vest such forest lands in regional offices was without any proper divestiture plan or policy which preserved their ecological value. This issue was highlighted extensively in both social media and the mainstream media by CSOs and conservation groups, who also simultaneously instituted legal action against certain key government officials. Backed by the resulting public outcry, conservation groups and CSOs were able effectively engage with government officials and are presently observing the formulation of divestiture plans for these forest lands.²⁷⁴

271. Sections 7 to 10, RTI Act.

272. Regulation 20, Regulations promulgated under the Right to Information Act No. 12 of 2016, published in Extraordinary Gazette Notification No. 2004/66 dated 03 February 2017, at <http://www.parliament.lk/files/rti/regulations-20170203-2004-66-en.pdf> [Last accessed on 01 March 2021].

273. Interview with Dr. Sumith Pilapitiya, supra note 198.

274. See generally, Website of Economy next, 'Government decision "disastrous for forests and biodiversity" -Environmentalists', 14 November 2020, at <https://economynext.com/government-decision-disastrous-for-forests-and-biodiversity-environmentalists-75949/> [Last accessed on 27 December 2020]; Website of Daily Mirror, 'Cancellation of 05/2001 and 02/2006 circulars Forest, DWC lands now come under purview of Land Commissioner General – Wildlife Secy', 12 November 2020, at http://www.dailymirror.lk/print/front_page/Cancellation-of-052001-and-022006-circulars-Forest-DWC-lands-now-come-under-purview-of-Land-Commi/238-199708 [Last accessed on 27 December 2020]; Website of the Sunday Island, 'CEJ now takes aim at proposed forest rape by the state', 01 December 2020, at <https://island.lk/cej-now-takes-aim-at-proposed-forest-rape-by-the-state/> [Last accessed on 27 December 2020]; Website of Earthlanka.lk, 'CEJ files writ application in the Court of Appeal', 30 November 2020, at https://www.earthlanka.net/index.php?option=com_content&view=article&id=2397%3Acej-files-writ-application-in-the-court-of-appeal&catid=41%3Amediainfo&Itemid=60&lang=en [Last accessed on 27 December 2020].

2.3.3. Representing Interests and Concerns of the Public

The NEA, CCA and the general law of Sri Lanka provide Five (05) opportunities for the public to participate and be consulted during the EIA process:

Participation at formal and informal consultations held during scoping stage

A key component of the preparation phase is environmental and project 'scoping', which entails the gathering of preliminary information for the purposes of formulating the TOR for an IEER/EIAR.

As per the NER, the PAA is obligated to undertake the scoping process, which envisages consultation with public and private stakeholders to foster open discourse on the environmental impacts and mitigatory measures of the proposed project. Thus, scoping consultations constitute a platform by which stakeholders can engage with relevant actors to influence the outcomes of the impact assessment process. Guidelines issued by the CEA state that scoping must be undertaken by the PAA and the PP by conducting both 'formal' and 'informal' meetings/hearings. In this context, 'formal' consultations are interpreted to mean scheduled meetings/hearings with key stakeholders who are specifically invited by the PAA and PP. The CEA guidelines urge the participation of CSOs, local interest groups, representatives of affected communities, and government officials at formal consultations.²⁷⁵ It is recommended that at least one 'formal' consultation should be held during project scoping. However, participation at 'formal' consultations does not appear to be possible without an invitation. Nevertheless, by submitting observations/objections in respect of the

project during feasibility and pre-feasibility stages, CSOs can increase the likelihood of being invited for scoping meetings. 'Informal' meetings are interpreted to mean random consultations with individuals and smaller groups. These meetings are usually held with parties that are directly and indirectly affected by the project but can extend to officials and experts in the government and private sector. KIIs also revealed that CSOs that proactively engaged in holding key actors accountable are more likely to be invited for formal scoping meetings, rather than be approached by the PAA or PP in an informal manner.

As mentioned in Section 2.2.3, the CCA framework does not expressly contemplate a formal 'scoping' process. In practice, the scoping process is undertaken by the Planning Committee and other technical committees of the Coastal Conservation Department (CCD).²⁷⁶

Responding to calls for inspection & review of the EIAR

One of the fundamental steps of the EIA process, is that an EIAR has been inspected and reviewed by the public before the proposed project can be approved. The NER and the CCA indicate that the public should be notified of the publication of the EIAR by way of Gazette and newspaper notifications. Through these notifications, the public must be invited to inspect and comment on the EIAR.²⁷⁷ This provides an opportunity for the CSOs to inspect the EIAR of a proposed project and make comments within a period of 30 days.²⁷⁸ Under the NER, public is entitled to request a copy of the EIAR for more comprehensive review and analysis.²⁷⁹ The NER also mandates that the PP responds to all comments made by CSOs and the public on the EIAR.²⁸⁰

275. Central Environmental Authority, *Guidance for Implementing the Environmental Impact Assessment (EIA Process)*; No. 2: A General Guide for Conducting Environmental Scoping, 2003 [CEA Guidelines], p. 7.

276. Environmental Assessment and Management Framework (EAMF) for the Eco-Systems Conservation and Management Project (ESCAMP) of the Ministry of Mahaweli Development and Environment (MoMDE), Ministry of Sustainable Development and Wildlife (MoSDW) Forest Department (FD) and Department of Wildlife Conservation (DWC), Sri Lanka (January 2016), at <https://www.escamp.lk/wp-content/uploads/2017/11/ESCAMP-Environmental-Assessment-and-Management-Framework-1.pdf> [Last accessed on 13 November 2020], p. 56.

277. Regulations 11(i) and 11(ii), NER.

278. Regulation 11(i), NER.

279. Regulation 11(iii), NER.

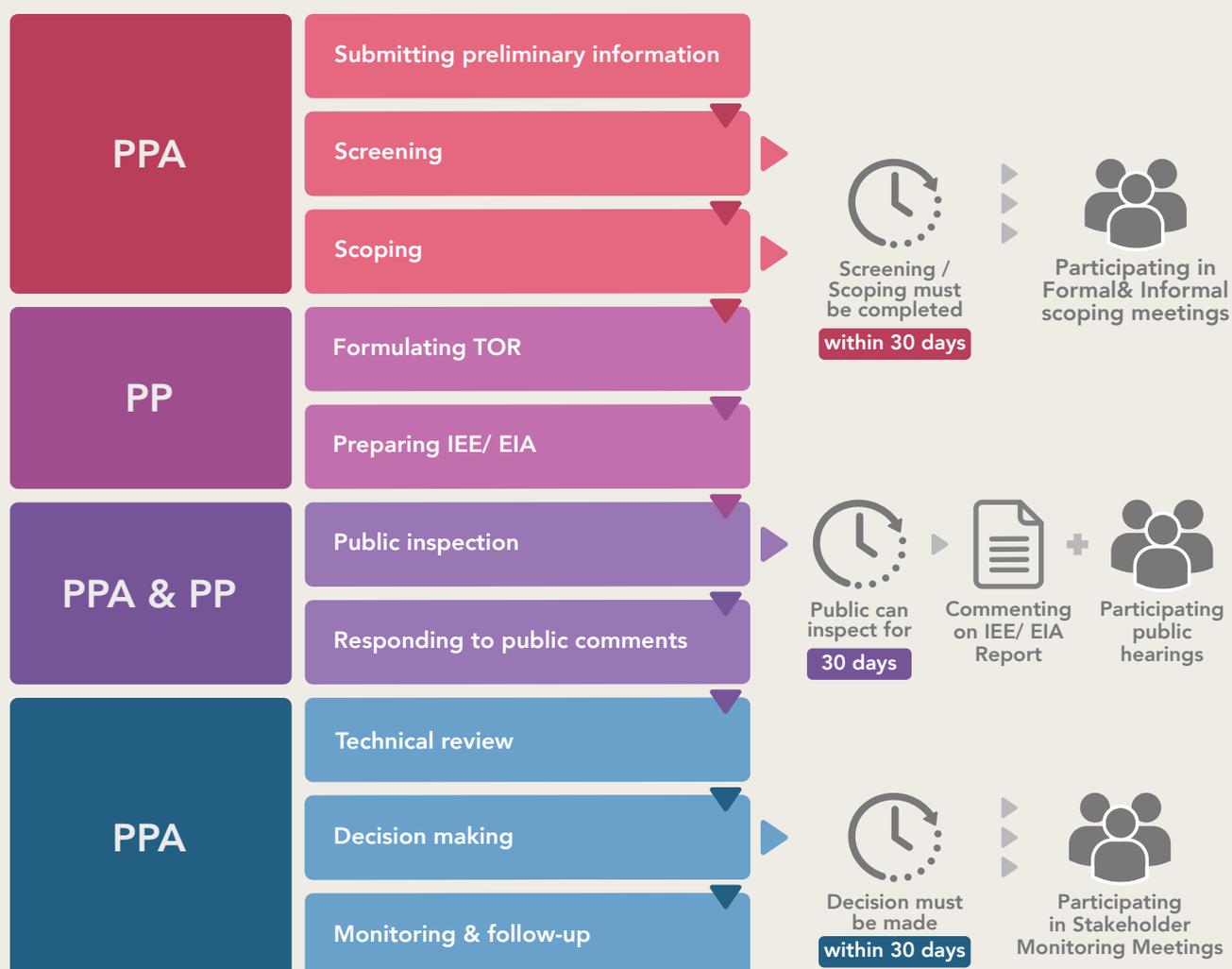
280. Regulation 12, NER.

Given the technical nature of EIARs, this provides an opportunity for CSOs with expertise and capacity to represent public interest by educating the affected communities/persons and preparing submissions/comments in writing with their inputs.²⁸¹

Under the NER, the PAA also has the discretion to hold public hearings to further inquire into the EIAR.²⁸² Public hearings are a forum where stakeholders can effectively engage and debate with decision-makers

and other stakeholders on EIA matters. Public hearings serve as a platform where stakeholders can take stock of the varying interests and opinions at play and strive to strike a balance. This provision is an opportunity available for CSOs to mobilise the support of the public and other stakeholders to exert pressure on the PAA to exercise its discretion to conduct public hearings on the EIAR. By contrast, the CCA does not contemplate the holding of public hearings.

Exhibit 17: Points of Engagement in the EIA Framework of the NEA



281. Interview with Ms. Hafsa Hudha, supra note 195; Interview with Mr. Sajeewa Chamikara, supra note 195.

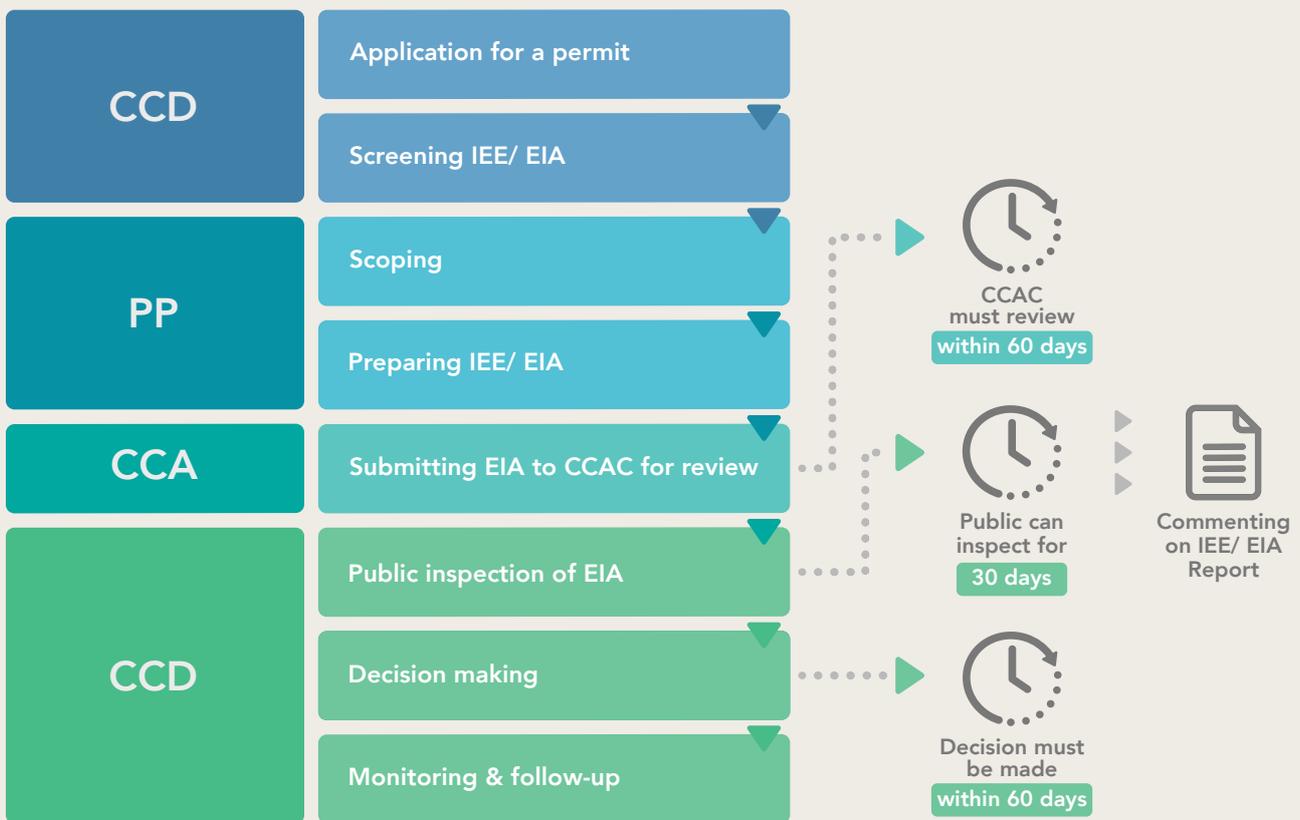
282. Ibid.

Participating in stakeholder monitoring meetings

Project monitoring is the process of ‘evaluation, management and communication of the environmental performance of a project’, i.e., after the project has been approved and implementation has commenced.²⁸³ Neither the NER nor the CCA sets out a legally mandated monitoring procedure or mandates that such monitoring procedures should involve participation by the public. However, reports suggest that monitoring meetings and site visits with stakeholders are conducted during the implementation of certain projects.²⁸⁴

Under the NER, the PAA has to prepare an Environmental Monitoring Plan (EMP) for each project, within 30 days of granting approval for the project.²⁸⁵ EMPs that are available in the public domain, as well as EMPs that were requested from the CEA, suggest Environmental Monitoring Committees (EMC) are named in the EMP. The function of the EMC is to oversee the implementation the EMP and this is done by stakeholder meetings and site visits, among other activities. This presents a potential opportunity for CSOs/ members of the public to participate at project monitoring activities. Through Right to Information applications, Verité Research requested for details of

Exhibit 18: Points of Engagement in the EIA Framework of the CCD



283. Website of the IAIA, ‘EIA Follow-up International Best Practice Principles’ (July 2007), at https://www.iaia.org/uploads/pdf/SP6_1.pdf [Last accessed on 13 November 2020], p. 1

284. CEA, ‘Annual Report – 2016’, p. 37-38, at <http://203.115.26.10/2019/AnnualReport/CEAE2016.pdf> [Last accessed on 13 November 2020].

285. Regulation 14, NER.



Image courtesy of Road Development Authority, Central Expressway Project Section II

the monitoring committees of the several large-scale development projects. However, as at the date of finalising this report, the EMC details of only two projects were obtained. These two EMCs comprised exclusively representatives of government agencies/offices and representatives of donor agencies.²⁸⁶

Representing the public interest via writ applications and fundamental rights applications

The Constitution allows for any action/omission of government agencies to be challenged if they are illegal or infringe upon the Fundamental Rights of the people. If any decision/omission taken in respect

of the EIA process is illegal, unreasonable, or contrary to the procedure set out in law, the decision can be challenged by a Writ Application in the Court of Appeal.²⁸⁷ If any decision/commission infringes the Fundamental Rights of the people, an Application can be made to the Supreme Court.²⁸⁸ Decisions concerning large-scale infrastructure projects have been regularly challenged by independent organisation and individuals through Writ Applications and Fundamental Rights Applications.²⁸⁹

The courts have shown an inclination to relax procedural rules when such applications are filed in the public interest.²⁹⁰ Thus, even if CSOs are not directly

286. Minutes of the Matara-Kataragama Railway Extension Project – Phase I, as contained in Letters dated 06 May 2019, 21 May 2018, 30 March 2016, 04 March 2016, 27 August 2015, 30 July 2015 and 27 November 2014 as disclosed by Letter dated 09 October 2020 bearing Reference No. MT/01/06/01 (III @@@@) issued by the Central Environmental Authority in response to Verité Research's Right to Information Application dated 25 August 2020; See also, Ministry of Highways, Road Development Authority. 'Environmental Management Plan for Southern Transport Development Project' 2007, pp. 11-12.

287. Article 140, 1978 Constitution of Sri Lanka.

288. Article 126, 1978 Constitution of Sri Lanka.

289. See generally, *Environmental Foundation Limited v. Central Environmental Authority* [2006] 3 Sri.L.R. 57, *Public Interest Foundation v. Central Environmental Authority* [2001] 3 Sri.L.R. 330, *Amarasinghe v. The Attorney-General* [1993] 1 Sri.L.R. 376; *Ravindra Kariyawasam v. Central Environmental Authority*, S.C.(F.R.) Application No. 141/2015, S.C. Minutes of 04 April 2019. As at the time of writing this report, CSOs had also instituted the following cases C.A. (Writ) Application No. 21/2018 (against landfilling of the Thalagama lake); C.A. Writ (Application) No. 478/2015 (in respect of a mini hydro power plant in Eli Hatha); S.C.(F.R.) Application No. 243/2017 (in respect of solid waste disposal in the Muthurajawala marsh).

290. *Ibid.*

or indirectly affected by a decision/omission relating to the environment, Writ and Fundamental Rights Applications can be filed by CSOs in the 'interest of the public'. However, in its application to courts, CSOs must make a good faith disclosure of all their interests and motivations relating to the matters forming part of the application.

It was also pointed out that, in certain instances where CSOs have challenged the implementation of a development project, the courts had appointed interim monitoring committees comprising representation from the litigants.²⁹¹ Considering that the monitoring process of infrastructure projects is not regulated in law, CSOs can attempt to independently monitor improperly implemented projects through the courts. Through such independent interim monitoring, the status quo can be maintained until the court grants

final relief.

Using the space provided for CSOs by foreign donor/lending in their guidelines

Most large-scale infrastructure projects in Sri Lanka are funded with the assistance of lending/donor agencies, such as the World Bank, the Japan International Cooperation Agency (JICA), the Asian Development Bank (ADB) and the China Export-Import Bank (China EXIM Bank). Each of these agencies have their own environmental assessment guidelines that recognise that the implementation of infrastructure projects must fully comply with local environmental assessment laws.²⁹² Nevertheless, these guidelines do state that the agencies may require the borrower country to adopt higher standards/best practices, where necessary.²⁹³

| Organisation | Early and regular disclosure of information in local languages | Preparation of stakeholder engagement processes | Consultation meetings with stakeholders | Stakeholder involvement in project monitoring | Grievance redressing systems |
|-----------------|--|---|---|---|------------------------------|
| World Bank | ✓ | ✓ | ✓ | ✓ | ✓ |
| JICA | ✓ | ✓ | ✓ | | ✓ |
| ADB | ✓ | ✓ | ✓ | ✓ | |
| China EXIM Bank | ✓ | | ✓ | ✓ | |

Notably, these guidelines contemplate a greater degree of information disclosure, public and CSO participation key aspects of environmental assessments.²⁹⁴

Some of the FFAs such as the World Bank also have grievance redressing mechanisms of their own, which allows the individuals and communities to submit

291. Interview with Ms. Ashani Basnayake, supra note 213.

292. The World Bank, 'Environmental and Social Framework', (2017), p. 17, at <http://documents1.worldbank.org/curated/en/383011492423734099/pdf/The-World-Bank-Environmental-and-Social-Framework.pdf> [Last accessed on 27 January 2021] ('WB Guidelines'); Japan International Cooperation Agency, 'Guidelines for Environmental and Social Considerations', (April 2010), p. 15, at https://www.jica.go.jp/english/our_work/social_environmental/guideline/pdf/guideline100326.pdf [Last accessed on 27 January 2021] ('JICA Guidelines'); Asian Development Bank, 'Environment Assessment Guidelines', (2003), at <https://www.adb.org/sites/default/files/institutional-document/32635/files/environmental-assessment-guidelines.pdf> [accessed on 27 January 2021] ('ADB Guidelines'); China Export and Import Bank, 'Guidelines for Environmental and Social Impact Assessments of the China Export and Import Bank's Loan Projects', (2007), Article 12, at <https://archive.internationalrivers.org/resources/guidelines-for-environmental-and-social-impact-assessments-of-the-china-export-and-import> [Last accessed on 27 January 2021] ('China EXIM Bank Guidelines'). See also, China Banking Regulation Commission, Green Credit Guidelines, (24 February 2012), at <http://www.cbrc.gov.cn/EngdocView.do?docID=3CE-646AB629B46B9B533B1D8D9FF8C4A> [Last accessed on 27 January 2021].

293. WB Guidelines, p. 10; AIIB Guidelines, p. 21-22; JICA Guidelines, p. 14; ADB Guidelines, p. 10-11; China EXIM Bank Guidelines, Art. 12(4).

294. The guidelines of the WB, AIIB, JICA, ADB and China EXIM Bank generally recognize multi-party consultation and participation through the project cycle. This includes, early and continuous participation in aspects such as scoping, EIA review, monitoring and evaluation.

complaints directly to the funding agency if the project is having adverse effects on them or the environment.²⁹⁵ CSOs can, thus, use this space provided by lending/donor agencies to engage with the EIA

process more meaningfully. In view of decision-makers being required to comply with and regularly report to lending/donor agencies, exploiting this space is likely to be effective and met with minimal resistance.

295. World Bank, 'Grievance Redress Service, Finding Solutions Together', at <http://pubdocs.worldbank.org/en/135711605818475692/GRS-brochure-2020.pdf> [Last accessed 24 February 2021].

3

Involuntary Resettlement Framework

Large-scale development projects often require vast tracts of land, both for the implementation of projects and to serve as buffer zones. However, the lands selected for projects may already be occupied or used by local communities. In circumstances where such occupied lands are essential for the implementation of development projects, the occupying communities are involuntarily resettled by the state.

Involuntary resettlement is defined as the unavoidable displacement of people without their consent, or where resettlement is consented to only because refusing to be resettled would be impractical.²⁹⁶ Thus, involuntary resettlement contemplates all forms of displacement of people arising from development projects. Usually, a displaced community will be integrated into a host community so that affected persons can re-establish themselves in a functioning environment.

Involuntary resettlement can result in the loss of shelter, means of income, social security, and opportunities

for empowerment. Such adverse consequences mitigate the overall sustainability of any development brought about by the project. Therefore, resettlement must be carried out in a manner that is equitable, fair, and receptive to the issues and sensitivities of the affected communities and the host communities. According to the Procurement Manual (PM) 2006,²⁹⁷ prior to commencing procurement and appointing a procurement committee, the procurement entity (PE) should confirm that it has resolved land acquisition, compensation, and resettlement issues.

While specific aspects of involuntary resettlement vary according to the nature of the project and the affected community, resettlement programs generally contemplate:²⁹⁸

1. The acquisition of lands and the constructions built on such lands;
2. The physical relocation of the occupants of such lands; and

296. NIRP, 'Policy Principles'.

297. Website of the Ministry of Finance, PM 2006, p. 6, at <https://oldportal.treasury.gov.lk/web/guest/Procurement-Manual>

298. Ibid.

3. The granting of economic rehabilitation and compensation to support the restoration of livelihoods.

This chapter is divided into three sections. The first section provides an overview of the legal framework

governing involuntary resettlement in Sri Lanka. The second section outlines the key gaps in the current process. The third section outlines the opportunities available for public/CSO engagement in the resettlement process.

3.1. Legal & Institutional Framework

Sri Lanka has several laws that provide for the eviction and relocation of people under various circumstances. Generally, however, the acquisition of land and involuntary resettlement for development purposes will be governed by the following:

1. Land Acquisition Act No. 9 of 1950
2. State Lands (Recovery of Possession) Act No. 7 of 1979
3. Urban Development Act No. 41 of 1978
4. Urban Development Projects (Special Provisions) Act No. 2 of 1980
5. National Environment Act No. 47 of 1980
6. National Involuntary Resettlement Policy
7. Other laws

3.1.1. Land Acquisition Act (LAA)

The LAA²⁹⁹ facilitates the acquisition of private land by the state, while setting out the rights of persons affected by such acquisitions. The fundamental premise of the LAA is that private lands can be acquired

by the state only for a 'public purpose'.³⁰⁰ As such, the public is notified before the proposed acquisition of any land, and all affected persons are given the opportunity to object to the acquisition.³⁰¹ The LAA also provides for lands to be acquired on an 'urgent' basis on Order of the Minister.³⁰² Affected persons are not afforded an opportunity to object to 'urgent' acquisitions of land. However, such lands can be reverted to the original owners/occupiers if the land is not acquired and used by the state within a reasonable time.³⁰³

The acquisition of lands is undertaken by the Ministry of Lands (MLD), based on requests for land by government agencies. The MLD conducts the acquisition process through an acquiring officer, usually the relevant Divisional Secretary (DS) and Superintendent of Surveys (SS) of the area in which the lands sought to be acquired are located.

The LAA framework requires an affected person to establish a legal claim to the land in order to obtain compensation and other entitlements.³⁰⁴ For this purpose, administrative inquiries are held by the acquiring authority, which is usually the relevant DS. Thus, the LAA specifically excludes non-title holders (squatters) from its ambit.³⁰⁵ Consequently, the burden of furnishing documentary and other evidence to prove ownership, residence, servitudes, interests and any

299. Land Acquisition Act No. 09 of 1950, at <https://www.lawnet.gov.lk/land-acquisition/> [Last accessed on 30 November 2020] ('LAA').

300. Section 2(1), LAA.

301. Section 4(1) and 4(4), LAA.

302. Section 38, LAA.

303. Section 39, LAA.

304. Section 7 read with Section 9, LAA.

305. Website of the Ministry of Finance, 'Framework Development and Infrastructure Financing to Support Public Private Partnerships – Resettlement Policy Framework', (April 2018), p. 44-45, at <http://treasury.gov.lk/documents/10181/272149/RPF-NAPPP++For+disclosure.pdf/aa720af8-413f-4394-9ec7-1693ff487bc3> [Last accessed on 30 November 2020].

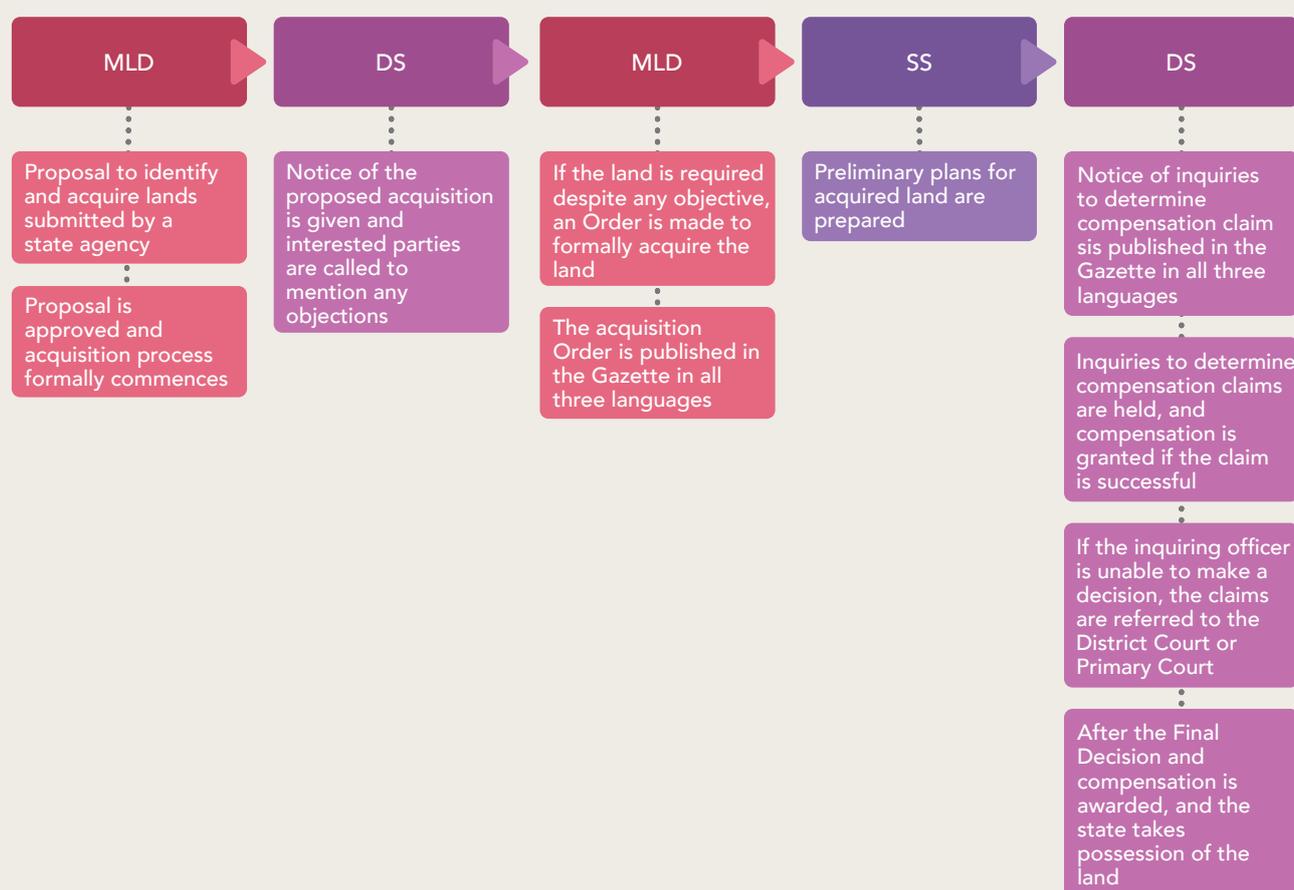
income derived from the land rests solely with the affected person.³⁰⁶

Determination of compensation

Under the LAA all affected persons are granted compensation at market value for the loss of land and fixed assets arising from an acquisition.³⁰⁷ Documented loss of income from the land is also compensated under the LAA.³⁰⁸

The compensation package under the LAA was enhanced by the Land Acquisition Regulations of 2008 (LAR 2008)³⁰⁹, which were passed under Section 63(2)(f) of the LAA. The 2008 LAR provides a clear formula for the payment of compensation on the basis of market value of the land.³¹⁰ The 2008 LAR also introduced payments covering reconstruction costs and business losses, compensating injurious affection and severance.³¹¹

Exhibit 19: Land Acquisition Process Under the LAA



306. Section 9, LAA.

307. Section 45, LAA.

308. Ibid.

309. Land Acquisition Regulations 2008 made under Section 63(2)(f) of the LAA and published in Gazette Extraordinary No. 1596/12 dated 07 April 2009, at <http://extwprlegs1.fao.org/docs/pdf/srl134058.pdf> [Last accessed on 30 November 2020] ('2008 LAR').

310. Regulation (1), 2008 LAR.

311. Regulation (2) and (3), 2008 LAR.

The Land Acquisition Regulations of 2013 (LAR 2013)³¹² further enhanced the compensation package by introducing comprehensive compensation formulae and guidelines.³¹³ Significantly, the LAR 2013 also established the system of Land Acquisition and Resettlement Committees (LARC) comprising the DS, a nominee of the Surveyor General, a nominee of the Chief Valuer, and an officer of the MLD not below the rank of Assistant Secretary.³¹⁴ The LARC is, thus, a grievance redressing mechanism at the divisional level that is tasked with hearing and determining claims in respect of resettlement and compensation. A Super LARC was also established at the national level, comprising high ranking officials, which hears appeals from the LARCs.³¹⁵

However, the LAR 2013 are applied only to prescribed projects at the discretion of the government.³¹⁶ The gazette in which the LARC 2013 was published lists 18 projects to which it applies, and thereafter the LARC 2013 has been selectively applied to other projects by the Cabinet of Ministers. Such decisions by the Cabinet of Ministers are routinely disclosed and further reported in the media. It is unclear if there are any objective factors that are considered when determining whether the LAR 2013 is to be applied to a project. As such it appears to be applied at the discretion of the government.

3.1.2. State Lands (Recovery of Possession) Act (SLRPA)

The SLRPA contemplates the recovery of possession of state lands that are occupied without authorisation. The SLRPA permits a competent authority to issue

a 'quit notice' on any person who is in unauthorised possession or occupation of any state lands.³¹⁷ Upon the issuing of a 'quit notice', the unauthorised person is required to vacate the premises within 30 days.³¹⁸ The state is entitled to institute legal proceedings to forcibly evict any person who does not comply with a 'quit notice'.³¹⁹ The SLRPA does not contemplate the granting of compensation for fixed structures on the land, loss of income, or on any other basis. However, any person who can claim ownership or an interest in the said land is permitted to institute legal proceedings against the state to be compensated for any damages.³²⁰

3.1.3. Urban Development Authority Act

This Act created the Urban Development Authority (UDA) of Sri Lanka and contemplates the identification and declaration of a 'development area' to commence economic and physical development thereon. The Act states that where any land under a 'development area' is required for a purpose of the UDA, such land will be 'deemed required for a public purpose' and can be acquired under the LAA.

The Act provides that compensation will be paid based on the market value of the land on the date that the land was declared a part of a 'development area' increased by 50 percent of the difference between that market value, and the market value of the land or interest therein on the date of: 1) notice being given to the public of the intention to acquire the land, or 2) in the case of an urgent acquisition, on the date of the Order published to that effect.

312. Land Acquisition (Payment of Compensation) Regulations 2013, made under Section 63(2)(f) of the LAA and published in Gazette Extraordinary No. 1837/47 dated 22 November 2013, at http://countrysafeguardsystems.net/sites/default/files/Land%20aquisition%20regulations%202013_0.pdf [Last accessed on 30 November 2020] ('2013 LAR').

313. Regulation 4, 2013 LAR.

314. Regulation 3, 2013 LAR.

315. Regulation 5, 2013 LAR.

316. Regulation 2, 2013 LAR.

317. State Lands (Recovery of Possession) Act No. 07 of 1979, at <http://extwprlegs1.fao.org/docs/pdf/srl37387.pdf> [Last accessed on 30 November 2020] ('SLRPA').

318. Section 3, SLRPA.

319. Section 5, SLRPA.

320. Section 12 and 13, SLRPA.

3.1.4. Urban Development Projects (Special Provisions) Act No. 2 of 1980

The Urban Development Projects (Special Provisions) Act was enacted for the purposes of enabling urgent acquisition of land for development projects. Under this Act, the president can, when recommended by the Minister of Urban Development, declare any particular land or area as being 'urgently' declared for an urban development project. A person aggrieved by a declaration of this nature is prevented from seeking any substantive or interim relief from the court, other than in respect of compensation or damages. However, the Act permits such a declaration to be challenged in the Supreme Court within a period of one month.

3.1.5. National Environmental Act (NEA)

As mentioned in the previous chapter, Project Approving Agencies (PAA) and the Central Environmental Authority (CEA) are required to call for impact assessment reports for projects of a prescribed magnitude.³²¹ Any development activity that contemplates the resettlement of more than 100 families requires an environmental impact assessment report (EIAR) under the National Environmental (Procedure for Approval of Projects) Regulations (NER).³²²

An EIAR is prepared following a scoping process with the involvement of the affected community.³²³ The EIAR is also made available to the public for comment. Approval for the project is granted by the PAA only after the comments of the public have been considered.³²⁴

3.1.6. National Involuntary Resettlement Policy (NIRP)

In 2000, the Asian Development Bank (ADB) collaborated with the government of Sri Lanka to address policy gaps in respect of involuntary resettlement.³²⁵ This process culminated in the NIRP, which was formally approved by the Cabinet of Ministers on 24 May 2001.³²⁶ Additionally, the NIRP has been confirmed as being the applicable state policy in respect of involuntary resettlement.³²⁷

The NIRP requires that a comprehensive Resettlement Action Plan (RAP) is formulated by the Project Executing Agency (PEA) in circumstances where more than 20 families will be affected.³²⁸ Even in situations where less than 20 families are affected, a RAP of lesser detail is required.³²⁹ The NIRP sets out a number of policy principles that are required to underpin a RAP. These include:

- Avoiding involuntary resettlement as much as possible, and resettling people and communities only when it is unavoidable.
- All displaced people should be given assistance to re-establish themselves, restore their income, improve their quality of life, and be integrated with host communities.
- Full involvement of displaced people in selecting sites for relocation, determining compensation and other livelihood assistance, and exploring

321. Order dated 18 June 1993 made under 23Z of the NEA as published in Gazette Extraordinary No. 772/22, at <http://www.cea.lk/web/images/pdf/eiaregulations/reg772-22.pdf>, as amended by Order dated 27 October 1999 as published in Gazette Extraordinary No. 1104/22, at <http://www.cea.lk/web/images/pdf/eiaregulations/reg1104-22.pdf> [Last accessed on 13 November 2020].

322. National Environmental (Procedure for Approval of Projects) Regulations No. 01 of 1993, made under Section 23CC of the NEA as published in Gazette Extraordinary No. 772/22, at <http://www.cea.lk/web/images/pdf/eiaregulations/reg772-22.pdf> [Last accessed on 13 November 2020] ('NER').

323. Regulation 6, NER.

324. Regulations 11(i) and 11(ii), NER.

325. Verité Research, *The National Involuntary Resettlement Policy: Dispelling Misconceptions and Assessing Compliance*, September 2014, p. 3, at <https://www.veriteresearch.org/wp-content/uploads/2018/05/National-Involuntary-Resettlement-Policy-September-2014-Print-version.pdf> [Last accessed on 30 November 2020].

326. Ministry of Finance, *supra* note 25, p. 45-46.

327. Letter dated 31 January 2013 (LD/NIRP/01) by W.K.K. Kumarasiri, Secretary, Ministry of Lands to all Chief Secretaries; National Plan of Action for the Implementation of LLRC Recommendations – Responsibilities by Thematic Area (June, 2013), p. 12.

328. NIRP, see 'Scope'.

329. *Ibid*.

development options.

- Replacement land must be offered as compensation for loss of land. Cash compensation must be granted where replacement land is unavailable.
- Compensation must be paid fully and promptly, and cover all replacement costs for loss of land, fixed structures, other assets, and income (inclusive of transaction costs).
- Non-titleholders of lands are entitled to be treated fairly and justly.
- Integration of gender considerations and concerns of vulnerable groups to all RAPs.

Under the NIRP framework, several processes are contemplated and designated to specified institutions/actors.³³⁰

The NIRP also calls for internal and external monitoring and evaluation of the implementation of a RAP. Internal monitoring is required to be undertaken by the PEA, which must evaluate implementation, budgets, consultations, and delivery of entitlements to affected

persons.³³¹ External monitoring should be undertaken by an independent party and include an assessment of the overall outcomes of all resettlement activities.³³² The NIRP also sets up a Steering Committee, comprising representatives of the MLD, CEA and the PEAs, which oversees overall implementation.³³³

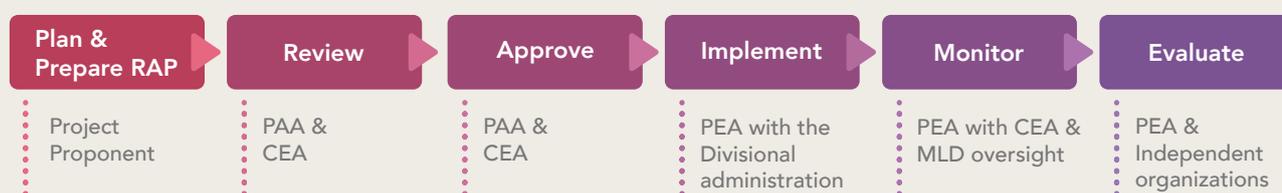
Despite its comprehensive framework, the NIRP is only a government ‘policy’, and does not have the force of law. The NIRP states that the MLD should take steps to amend the LAA in line with the NIRP, but no such amendments to the LAA have been enacted.

3.1.7. Other Laws

While the aforesaid legal and policy framework constitute the major mechanisms that deal with land acquisition and resettlement in Sri Lanka, several other laws also contemplate the acquisition of private lands.

For instance, the Board of Investment Law No. 4 of 1978 states that the government shall acquire under the LAA on behalf of the Board of Investment, where such land is required for any purpose of the Board of Investment.³³⁴ The Urban Settlement Development Authority No. 36 of 2008 states that any land in an

Exhibit 20: Procedure of RAP Formulation Under the NIRP



330. NIRP, see ‘Institutional Responsibilities’.

331. NIRP, see ‘Monitoring and Evaluation’.

332. Ibid.

333. NIRP, see ‘Institutional Responsibilities’.

334. Section 28, Board of Investment Act No. 4 of 1978.

urban area that is required for a purpose of the Urban Settlement Development Authority shall be deemed required for a 'public purpose' and may be acquired by having recourse to the LAA.³³⁵ Similar provisions are found in the Road Development Authority Act No. 73 of 1981, where lands required by the RDA can be acquired through the LAA.³³⁶

3.2. Gaps and Weaknesses

Sri Lanka's resettlement framework has remained largely unchanged since the 1980s. As such, this framework falls short of the best practices that facilitate better and more equitable planning and implementation of resettlement programs. Some of the major gaps and weaknesses in Sri Lanka that undermine equitable resettlement are:

3.2.1. NIRP Has No Force of Law and Is Selectively Applied

As indicated earlier, the NIRP was introduced by the government as a response to the weaknesses in the LAA. It is for this reason that the NIRP specifically mandates the MLD to take measures to incorporate the principles of the NIRP as an amendment to the LAA.³³⁷ However, to date, the LAA has not been amended in line with the NIRP, despite assurances by the government.³³⁸

Because the NIRP has no force of law, it has been observed that the NIRP is applied selectively.³³⁹ It was noted that the policy principles of the NIRP were

applied in full in certain projects, while the same level of application was lacking in other projects.

The NIRP encapsulates several key principles which safeguard the interests of affected communities and are crucial for equitable resettlement. These include full and fair compensation, assistance and aid in relocation, provision of replacement lands, full participation by affected communities, and consideration of gender sensitivities.³⁴⁰ The lack of these vital principles in the LAA, SLRPA and NEA legal frameworks mitigates against the equitable relocation and resettlement of communities.

3.2.2. Ad-hoc Consultations with Affected Communities

The LAA makes no reference to early consultation with communities to identify affected persons and their concerns. Only the NIRP contemplates the full communal participation at all stages of a project.³⁴¹ However, the selective application of the NIRP results in inconsistent levels of consultation with the affected communities. Previous studies on selected projects reveal that affected communities were inadequately consulted, or that public consultation was severely delayed till after planning had been completed, or that engagement with the public gradually decreased.³⁴² Consultations with the affected communities are also highly inconsistent and often commenced after planning of the project had been completed.³⁴³ However, projects that are externally funded prove to be an exception, as lending agencies urge in-dept

335. Sections 24 and 25, Urban Development Settlement Authority Act No. 36 of 2008.

336. Section 22, Road Development Authority Act No. 73 of 1981.

337. NIRP, see 'Institutional Responsibilities'.

338. See generally: Iromi Perera, Land Acquisitions for Public Purpose in Post-War Sri Lanka, Law & Society Trust 2020, at <https://lslanka.org/images/publications/reports/Land%20Acquisitions%20for%20a%20Public%20Purpose%20in%20Post-War%20Sri%20Lanka.pdf> [Last accessed on 21 January 2021], p. 44; Iromi Perera, Forced Evictions in Colombo: High-rise Living, Centre for Policy Alternatives, May 2015, at https://www.cpalanka.org/wp-content/uploads/2015/05/High-rise-living_report-FINAL.pdf [Last accessed 21 January 2021].

339. Interview with Ms. Iromi Perera, Asia Consultant at the Bank Information Center D.C and Director of the Colombo Urban Lab on 20 November 2021; Verité Research, supra note 142, p. 14-18.

340. NIRP, see 'Policy Principles'.

341. NIRP, see 'Policy Principles'.

342. Verité Research, supra note 142, p. 16; N. Godamunne, Development and displacement: the national involuntary resettlement policy (NIRP) in practice, 33/36 Sri Lanka Journal of Social Sciences 37, p. 47-49, at <https://sljss.sjoi.info/article/10.4038/sljss.v35i1-2.7351/galley/5689/download/> [Last accessed on 05 March 2021]; Jayantha Perera, Amarasena Gamaathige and Chamindra Weerackody, Challenges in Implementing Best Practices in Involuntary Resettlement: A Case Study in Sri Lanka, Asian Development Bank 2016, p. 190-192, at <https://www.adb.org/sites/default/files/publication/218976/best-practices-resettlement-sri.pdf> [Last accessed on 21 January 2021].

343. Interview with Ms. Iromi Perera, supra note 354.

consultations with communities at all key stages of a project.³⁴⁴

There is also uncertainty on the level of consultation with host communities. None of the legal frameworks require the participation of host communities when formulating RAPs and implementation programs. Only the NIRP alludes to host community participation to enable the integration affected persons.³⁴⁵

It has been revealed that this issue is further exacerbated in situations where the lands are acquired on an 'urgent' basis.³⁴⁶ The procedure that is prescribed to acquire land 'urgently' bypasses the legal provisions that require consultation, thereby disallowing affected communities to voice their concerns. In the past and in recent times, the government has relied on laws that enable urgent acquisition of land for development purposes.³⁴⁷ In such circumstances, the issues and sensitivities of affected persons and communities are not adequately considered, and has resulted in protracted litigation and delays in project implementation.³⁴⁸

3.2.3. Non-disclosure of RAPs

The RAPs and resettlement implementation plans are not required to be disclosed under the LAA unless it is a project that falls within the purview of the NEA, which then requires the project to follow the NER procedure. As a result, project documents are not routinely released to the public. Previous studies and key informants have confirmed that the RAPs and resettlement implementation plans of several projects were not disclosed to affected communities.³⁴⁹ As a result, affected communities are unable to review and comment on such plans before they are set in motion. In such situations, issues and sensitivities that

are particular to affected communities may not be considered by decision makers.

3.2.4. Weaknesses in the Current Compensation Mechanisms

The provision of compensation is vital in re-establishing the lives and livelihoods of affected communities. Compensation must be equitable and must not only consider the pecuniary losses faced by communities, but also the sacrifice these communities make in the interest of the larger public.

Land ownership and possession in Sri Lanka is complex.³⁵⁰ In rural and agricultural contexts, communities hold lands by deeds, government grants or permits, or by simply having inhabited lands over generations. Groups such as tenant cultivators and farmers also have interests in these lands despite not having ownership of such lands. In the urban context, many settlements have been formed over the years, which have their own communal identity, despite the individual members not possessing formal title to the lands on which they reside. In each of these instances, the computation of compensation for land acquisition differs in light of the varying rights and interests over the lands.

However, Sri Lanka lacks a broad policy that specifically deals with compensating resettled communities.³⁵¹ At present only the LAR 2013 provides for formulae and guidelines on assessing compensation. However, the LAR 2013 is applied discretionarily and only to certain projects. Thus, generally, the computation of compensation is undertaken by committees set up by the Valuation Department. These committees do not use any uniform formulas or guidelines when

344. Ibid.

345. NIRP, see 'Policy Principles'.

346. Interview with Ms. Namal Ralapanawa

347. See, Extraordinary Gazette Notifications bearing No. 1846/41 dated 22 January 2014, No. 1859/4 dated 22 April 2014, No. 1967/15 dated 18 May 2016, No. 2065/63 dated 06 April 2018, and No. 2199/11 dated 27 October 2020.

348. Jayantha Perera, Amarasena Gamaathige and Chamindra Weerackody, *supra* note 365, p. 220.

349. Interview with Ms. Iromi Perera, *supra* note 354; Verité Research, *supra* note 142, p. 16.

350. Interview with Ms. Iromi Perera, *supra* note 354; Interview with Mr. Sajeewa Chamikara, *supra* note 195.

351. Interview with Mr. Sajeewa Chamikara, *supra* note 195.

computing compensation, resulting in compensation being inconsistently awarded or being significantly inadequate.³⁵²

3.2.5. Lack of Grievance Redressing Mechanisms (GRM)

Under the two-tiered LARC system, communities can make representations to specialised administrative committees regarding claims for compensation assistance for resettlement and any other grievances, and be entitled to appeal to a higher tier in they are unsatisfied with a decision of the lower tier. While the LARC system has been highlighted as a successful

mechanism to determine these matters³⁵³, the LARC system is not generally applicable and has to be specifically applied to projects by the MLD.³⁵⁴ As such, there is no GRM that is generally accessible to communities. The LAA framework, sans the LAR system, contemplates administrative inquiries exclusively for disputes of ownership and claims for compensation. Grievances pertaining to resettlement are not specifically considered and redressed. It has been suggested that a robust GRM 'will be in a much better position than a court to resolve project-related issues, because its members have good local knowledge, and its approach is to resolve issues through consultation and mediation.'³⁵⁵

BOX 6:

GRMs required by FFAs³⁵⁶

The guidelines enforced by several FFAs specifically call for the establishment of specialised GRMs that enable affected persons and communities to voice their grievances:

| FFA | GRM | Higher Tier to Appeal to |
|------------|-----|--------------------------|
| World Bank | ✓ | ✓ |
| ADB | ✓ | ✓ |
| JICA | ✓ | |

3.2.6. Narrow Definition Used to Identify 'Affected Persons'

Under the LAA, rights to make claims for compensation and other entitlements is limited to persons who are physically relocated from their land because of acquisition by the state. However, a person may be compelled to resettle due to impacts on the use of land and natural resources caused by development projects. Such persons may not receive due compensation

or entitlements under the LAA, as they would not fall within the narrow interpretation of an 'affected person'.

However, the NIRP recognises that a person may be 'affected' even without direct impacts to his land. It envisages that an affected person is any who is 'displaced by changes to use of land, water or other resources caused by development projects.'

352. Ibid.

353. Jayantha Perera, Amarasena Gamaathige and Chamindra Weerackody, *supra* note 365, p. 227.

354. Regulation 2, 2013 LAR.

355. Jayantha Perera, Amarasena Gamaathige and Chamindra Weerackody, *supra* note 365, p. 237.



3.2.7. Limited Opportunities for Formal Participation of CSOs

At present the legal framework governing involuntary resettlement in Sri Lanka does not make specific reference to CSO participation. Thus, decision makers are not obligated or duty bound to include CSOs when formulating and implementing resettlement programs. Due to this reason, decision makers often avoid involving CSOs because of pre-conceived notions against the motives of CSOs. In contrast, multilateral lending agencies such as the ADB and the World Bank contemplate the greater involvement of CSOs possessing the relevant expertise and experience.

3.2.8. The Concerns of Marginalised Groups Are Not Specifically Addressed

A critical gap in the NIRP is the lack of provision to consider the sensitivities of marginalised groups. The NIRP only recognises that ‘gender equality and equity

should be ensured and adhered to throughout the policy application’. However, the sensitivities of other groups, such as persons with disabilities, elderly persons, and immigrants are specifically required to be considered. In any event, as stated before, the NIRP has no force of law and is applied in an ad hoc manner.

Resettlement can grossly impact and exacerbate the issues faced by marginalized groups.³⁵⁷ It was recommended that resettlement plans and policies must provide for and contemplate the granting of co-ownership to men and women of family units, specialized compensation schemes for persons requiring special protection, and assisted integration into host communities.³⁵⁸

356. Asian Development Bank, ‘Involuntary Resettlement Safeguards: A Planning and Implementation Good Practice Sourcebook’, November 2012, p. 49-51, at <https://www.adb.org/sites/default/files/institutional-document/32827/files/ir-good-practices-sourcebook-draft.pdf> [Last accessed on 30 November 2020] (‘ADB Sourcebook’); World Bank, Involuntary Resettlement Sourcebook: Planning and Implementation in Development Projects, 2004, p. 338-339, at <https://openknowledge.worldbank.org/bitstream/handle/10986/14914/301180v110PAPE1ettlement0sourcebook.pdf?sequence=1&isAllowed=y> [Last accessed on 21 January 2021] (‘World Bank Sourcebook’); JICA Guidelines.

357. Interview with Ms. Iromi Perera, *supra* note 354; Consultation with Ms. Shyamala Gomez, Executive Director of The Centre for Equality and Justice and gender-rights activist, on 22 January 2021.

358. *Ibid.*

3.3. Opportunities for Public/ CSO Engagement

While the legal framework does not provide for opportunities for CSO participation, there are opportunities available for the public or CSOs to engage outside the legal framework. Such opportunities are discussed in this section under following three broad categories: 1) opportunities to advocate for legal and policy reforms, 2) opportunities to drive transparency and accountability and 3) opportunities to represent interests and concerns of the affected persons.

3.3.1. Advocating for Legal and Policy reforms

As discussed in detail in Section 3.2, there are numerous gaps and weaknesses in the current framework that undermine the equitable resettlement of communities, which in turn adversely impacts the value for money of development projects.

CSOs can contribute to addressing these gaps and weaknesses by actively advocating for reforming the present legislative and policy framework governing land acquisition and resettlement. CSOs can pursue this end by directly engaging with decision makers (ministers, members of parliament and local authorities, and officials of development agencies). CSOs can also assist in driving the creation of a body of jurisprudence on land rights and the rights and protections afforded to persons displaced by development. CSOs can contribute to reinvigorating this body of jurisprudence by advocating for higher standards in the courts of law.

Additionally, CSOs can also drive such reforms by drawing public attention to weaknesses in the current framework, and the inequitable outcomes that befall communities due to such weaknesses. This can include engaging with the media and create greater public awareness of these issues, which in turn, can be escalated to public demand for reforms and relief.

3.3.2. Enhancing Transparency and Accountability

Using provisions in the RTI Act to enhance transparency

As noted in the previous chapters, the RTI Act can be used to acquire information about projects and related land acquisition and resettlement plans. Key informants mentioned that they had made use of the RTI Act and its provisions to legally request decision-makers to disclose information relating to development projects and aspects relating to resettlement. Despite the administrative inefficiencies and delays experienced, the RTI Act serves as a useful tool for the public to bridge the information gap.

Spotlighting issues and generating public demand for reform

The spotlighting of issues remains a key method used by CSOs to highlight problems and issues and demand solutions.³⁵⁹ By actively reporting on such matters and attracting media attention to non-compliance and the inequitable treatment of affected communities, CSOs have influenced public dialogue on matters of resettlement.³⁶⁰ Through this process, civil society has, in certain instances, connected affected communities with elected officials and created platforms for meaningful dialogues and conflict resolution.³⁶¹

3.3.3. Opportunities to Represent the Interests and Concerns of the Public

The legal and policy framework on involuntary resettlement in Sri Lanka provides at least four (04) opportunities for public participation and consultation:

359. Ibid.

360. Ibid.

361. Ibid.

Opportunities available to participate during the planning stage of the project

With respect to projects that require the resettlement of over 100 families, CSOs can participate in the planning and evaluation stages of the project, as these projects must follow the NER procedure. In such projects, the MLD works in coordination with the CEA, PAAs and PEAs to acquire lands, formulate RAPs, and determine the claims for compensation for relocation and other impacts. Because the NER allows public participation in project scoping and impact assessments, as well as final report evaluations, CSOs can engage with a range of actors and provide inputs to the resettlement process.

Opportunities provided for by the foreign lending agencies and regional organisations

CSOs appear to have greater opportunities for engaging in the resettlement processes pursuant to externally financed development projects, depending on the lending partner. There are two reasons for this:

1. Sri Lanka's Procurement Guidelines stipulate that the procurement requirements imposed by lending agencies must be adhered to:

Sri Lanka's Procurement Guidelines state that, where a foreign lending agency requires compliance with its own procurement guidelines, the guidelines of the lending agency shall supersede any local guidelines. Organisations such as the World Bank (WB) and the ADB mandate the formulation of RAPs wherever resettlement is contemplated and encourage active

CSO participation throughout the project cycle. Key informants indicated that these lending organisations require PEAs to publish RAPs and other project documents and conclude land acquisition prior to procurement.³⁶²

2. The guidelines of several key lending agencies contemplate active participation of CSOs in the resettlement process.

The guidelines of several key foreign lending agencies that have been involved in the development of infrastructure in Sri Lanka contemplate a wider role for CSOs than provided for in the local framework. For instance, the guidelines set by the ADB contemplate the participation of qualified CSOs in a multitude of aspects of resettlement. In its draft Involuntary Resettlement Good Practices Sourcebook, the ADB calls for CSO and NGO participation in data collection,³⁶³ consultation and coordination at key stages of the project,³⁶⁴ facilitating discussions/dialogue with affected communities and disseminating information,³⁶⁵ resettlement implementation,³⁶⁶ livelihood restoration,³⁶⁷ and monitoring and evaluation.³⁶⁸ Similarly, the World Bank's Resettlement Sourcebook identifies 'NGOs or organisations of civil society working in the area' as 'key stakeholders in a resettlement program' and states that 'designing effective resettlement programs is difficult without the involvement of key stakeholder; implementing them is even more so.'³⁶⁹ The Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects published by the Organisation for Economic Cooperation and Development (OECD) also recognises that there may be 'considerable scope for involving non-government

362. Interview with Ms. Namal Ralapanawa

363. ADB Sourcebook, p.14.

364. *Ibid.*, p. 48 and 69.

365. *Ibid.*, p. 48.

366. *Ibid.* p. 49.

367. *Ibid.*, p. 62-66.

368. *Ibid.* p. 73.

369. World Bank Sourcebook, p. 337

organisations in planning, implementing and monitoring resettlement',³⁷⁰ while encouraging the support of NGOs representing affected populations when planning resettlement programs.³⁷¹

In several instances, the government has formulated resettlement programs/policies in line with the guidelines of foreign lending agencies with respect to particular projects/categories of projects.³⁷²

Certain civil society groups and experts are also affiliated with regional and international networks and organisations, which monitor development financing and compliance. Such institutions include the Centre for Financial Accountability, the NGO Forum of the ADB, and the Bank Information Centre. Local groups benefit from these affiliations by accessing a wider platform and knowledge base on monitoring development projects and their social implications. Such initiatives can enhance the credibility and visibility of local CSOs and experts when participating in resettlement planning and implementation.

Supporting communities by providing legal advice

Despite the lack of space for independent participation in Sri Lanka's resettlement frameworks, there is no express prohibition against CSO involvement in supporting affected parties with representing their interest. Thus, CSOs are informally involved in resettlement programs as a means of bridging some of the gaps in the existing legal/policy framework. In most cases, independent individuals/organisations do this of their own volition or at the request of affected communities.

Although the mechanism under the LAA and the 2013 LAR are accessible only to affected persons, certain independent groups and organisations have assisted affected communities in legally challenging matters pertaining to acquisitions and resettlement in the courts. These efforts have included the provision of legal assistance and instituting Writ and Fundamental Rights Applications in the public interest on behalf of the communities.

Assisting affected communities by bridging the information gap

The land acquisition and resettlement process contemplated under the LAA is complex. The LAA process involves several institutions and actors such as Divisional Secretaries, PEAs, PAAs, LARCs, the Super LARC, and the MLD. Moreover, establishing claims for compensation and other entities requires a working knowledge of inquiry procedures, rights and obligations at such inquiries, and the admissibility of documents and other evidence to establish such claims.

Often, members of affected communities are unaware of applicable procedures and processes, which severely negates their ability to make effective representations. It was revealed that members of underprivileged communities lacked understanding of essential matters such as establishing title to lands or proving income generated through lands to the LARCs.³⁷³ This issue is compounded by the LAA and CEA not obligating project proponents, PEAs or PAAs to carry out information and educational campaigns on the project. In many cases, information is disseminated in local

370. OECD, Development Assistant Committee, 'Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects', p. 10, at <https://www.oecd.org/dac/environment-development/1887708.pdf> [Last accessed on 30 November 2020].

371. *Ibid.*, p. 8.

372. GoSL, Colombo Light Rail Transit Project: Resettlement Action Plan, 20 July 2018, at https://www.jica.go.jp/english/our_work/social_environmental/id/asia/south/srilanka/c8h0vm0000ad5d0w-att/c8h0vm0000d40mux.pdf [Last accessed on 10 February 2021]; GoSL, Framework Development and Infrastructure Financing to Support Public Private Partnerships, July 2018, at <http://documents1.worldbank.org/curated/en/217371525338067142/pdf/SFG4316-RP-REVISED-PUBLIC-disclosed-7-24-18.pdf> [Last accessed on 10 February 2021].

373. Interview with Ms. Iromi Perera, supra note 343; Interview with Mr. Sajeewa Chamikara, supra note 195.

languages well after project planning has concluded and implementation is imminent.³⁷⁴

One of the key roles played by civil society in Sri Lanka is that of facilitating the dissemination of information to empower affected communities. Establishing claims for compensation and other entitlements requires technical knowledge that people would not ordinarily possess. Key informants have revealed that civil society has made efforts to assist affected communities by carrying out information and education campaigns on

proposed projects. These include selecting community leaders and educating them on their rights and the mechanisms available to redress their grievances and concerns. CSOs have also undertaken the distribution of manuals among affected communities, containing basic information on land acquisition procedure and making claims to prove ownership and interests in lands. Civil society can simplify technical information and provide information in the local languages to make it more accessible to affected communities.

374. Ibid.

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ANNEXURES

Annexure 1 List of Applicable Supplements

to PG and PM 2006, and II GGTP 1998 as of 24 December 2020³⁷⁵

| Supplement no. and date | Superseding supplement no. | Publisher | Applicable Procurement Guidelines | Amended Procurement Guideline no. | Topic | Description | Link |
|-------------------------|----------------------------|-----------|-----------------------------------|-----------------------------------|--|--|--|
| 7, 2006-10-11 | 1 | NPA | PG/PM | 2.7.4, 2.7.5, 2.7.6 | Ministry, Department, Project Procurement Committees | Allowing the CAO to increase the number of members in the mentioned procurement committees by adding subject specialists. | http://oldportal.treasury.gov.lk/documents/57687/174433/ProcuManSupple7.pdf/409d9103-9eaa-46c4-b62a-0d6b055e165f |
| 8, 2006-10-11 | | NPA | PG/PM | 2.7.1 | Cabinet Appointed Procurement Committees | Specifying the details to be included under Cost Estimates in the request for appointment of CAPC/TEC. | http://oldportal.treasury.gov.lk/documents/57687/174433/ProcuManSupple8.pdf/2a4b7bd0-4361-4086-9fe5-3a42cf7639f1 |
| 9, 2007-05-04 | | NPA | PG/PM | 5.3.5 | ICTAD Registration as Equivalent Post Qualification Criteria | Inclusion of ICTAD registration criteria for contracts with less than 1 year of construction. | http://oldportal.treasury.gov.lk/documents/57687/174433/ProcuManSupple9.pdf/4791d9f8-32e5-4ca2-ba5d-3eb324138fc4 |
| 13, 2007-10-03 | | NPA | PG/PM | 1.5 | Laws Applicable to Procurement Actions | Reference to the following sections in Public Contracts Act, No. 3 of 1987, which are applicable for every public contract that exceeds five million rupees. | http://oldportal.treasury.gov.lk/documents/57687/174433/ProcuManSupple13.pdf/7a056fce-3ec1-4595-a2c2-3178139bab07 |
| 14, 2007-10-03 | | NPA | PG/PM | 8.13.4 | Variation to Contracts | Replacing the explanation on variation of contracts. | http://oldportal.treasury.gov.lk/documents/57687/174433/ProcuManSupple14.pdf/02ecb37e-ad53-4fa4-845d-19d221dfe70b |
| 15, 2007-11-01 | | NPA | PG/PM | 5.4.14 | Dispute Resolution | Inclusion - The place of arbitration shall be decided in terms of Section 16(l) of the Arbitration Act. | http://oldportal.treasury.gov.lk/documents/57687/174433/ProcuManSupple15.pdf/bedcd436-9637-43ff-9efc-80e7b150167a |
| 17, 2008-04-30 | | DPF | PG/PM | 7.9.5 | Priority Preference to Local Bidders | Priority Preference to Local Bidders Participating in Contract works with Domestic Funding pursuant to 'Mahinda Chinthana Idiri Dekma'. | http://oldportal.treasury.gov.lk/documents/57687/174433/ProcuManSupple17.pdf/b2f7a279-ffac-43a0-a4ba-d80cfd7acdb9 |
| 19, 2010-09-06 | | DPF | PG/PM | 9.3 | Repairs to Motor Vehicles and Equipment | Addition of a provision regarding repairs to Motor Vehicles and Equipment. | http://oldportal.treasury.gov.lk/documents/57687/174433/ProcuManSupple19.pdf/369737a0-baab-4ef3-9858-936a18b6e691 |
| 22, 2011-03-09 | 12 | DPF | PG/PM | 3.9.1 | Method of Awarding Direct Contracts to Community Based Organizations | Superseded by PF/452 dated 2011-09-27, & then by Circular 01/2012 dated 2012-01-05. ³⁷⁶ | 2012 circular in Sinhala ³⁷⁷ : http://oldportal.treasury.gov.lk/documents/10181/49383/01_2012S+%281%29.pdf/5ef61279-4cb6-499b-baf0-52963d7d221f?version=1.0 |

375. As available in the Ministry of Finance Website. See Ministry of Finance, 'Procurement Manuals – Supplementary Documents', at <https://www.treasury.gov.lk/p/procurement-supplements/1> [Last accessed on 20 February 2020].

376. The supplement is unavailable on the DPF Website. Circular details provided in Annexure 2.

377. English Circular unavailable on the DPF website.

List of Applicable Supplements

| Supplement no. and date | Super- seding supple- ment no. | Pub- lisher | Applicable Procure- ment Guidelines | Amended Procure- ment Guideline no. | Topic | Description | Link |
|--|--|----------------|--|---|---|---|---|
| 23, 2011-05-12 | | DPF | II GGTP 1998 | 237 | Guidelines to be used by line ministries or government agencies when dealing with unsolicited/ standalone development proposals | Inclusion of Guidelines prepared by SCARC to deal with unsolicited/ standalone development proposals. | http://oldportal.treasury.gov.lk/documents/57687/174433/ProcuManSupple23E.pdf/fe290c9e-e095-4f7a-acec-525f360d1d3e |
| 24, 2012-03-21 | | DPF | PG/PM | 8.3, 8.4 | Appeals against Contract Awards recommended by the CAPC | Explanation on the appeal process against a contract award made by the CAPC. | http://oldportal.treasury.gov.lk/documents/57687/174433/ProcuManSupple24E.pdf/d9e0bfa0-b1f9-468e-81e4-a1b7ed221893 |
| 26, 2012-08-08 | | DPF | PG | 3.4.5 | Small Value Procurements for Sri Lanka Missions Abroad | For small value procurements when using shopping method of procurement. | http://oldportal.treasury.gov.lk/documents/57687/174433/ProcuManSupple26E.pdf/c3238b23-34ae-45c1-8d6d-4593091c7edb |
| 27, 2012-08-08 | | DPF | PG | 2.8.1 | Composition of Technical Evaluation Committee (TEC) | Imposing a limit of three concurrent appointments to TEC per officer and related inclusions. | https://oldportal.treasury.gov.lk/documents/57687/174433/ProcuManSupple27E.pdf/f337042a-72b4-4ffd-b590-b06ffa7337a3 |
| 29, 2016-01-25 | 18 | DPF | PM/PG | 5.44, 5.46, 5.48 | Advance Payment for Works and Goods Contracts, Retention Money in Works Contracts and Performance Security | Updates the respective processes mentioned. | http://oldportal.treasury.gov.lk/documents/57687/174433/ProcuManSupple29.pdf/b29f2255-e957-40c3-926d-4a2645023de1 |
| 30 cancellation letters, 2016-12-26 ³⁷⁸ | | DPF | II GGTP 1998 | N/A | Cancellation of the Swiss Challenge Procedure for Unsolicited Proposals | Supplement 30, which introduced the Swiss Challenge Procedure for Unsolicited Proposals is abolished. ³⁷⁹ | http://oldportal.treasury.gov.lk/documents/10181/329538/pfd-sup30-letter20200618/a9e05477-fadd-4833-a22f-638bb6e61f15 |
| 31, 2017-03-15 | | DPF | PG/PM | 4.2.3 | Time Frame for Procurement Actions | Updated the existing time frames for ICB/NCB Procurement actions. | http://oldportal.treasury.gov.lk/documents/10181/329538/ProcuManSupple31/5f8375d0-7662-487d-827b-25464ed74d5a |
| 32, 2017-03-15 | 25>10 | DPF | | 2.9.1 | Payments for members of committees | Updated payment amounts of Procurement Committees, Negotiating Committees, Technical Evaluation Committees/ Project Committees, staff officers and other officers assisting procurement activities. | http://oldportal.treasury.gov.lk/documents/10181/329538/ProcuManSupple32A/d872c64a-fa66-42ac-a648-2de351a96df5 |
| NPC – 1, 2017-10-24 ³⁸⁰ | 29 | NPC | PG/PM | 5.4.6 | Retention Money in Works Contracts | Updated the process in Supplement 29. | https://www.nprocom.gov.lk/web/images/pdf/NPC_Supplement_01_to_the_Procurement_Manual-2006-Goods_Work.pdf |
| 35, 2020-03-25 | 34>33>28>21/20>16>11>6>5>3>2 | DPF | | 2.14.1 | Authority limits of Procurement Committees for Contract Award Recommendation/Determination | Updated authority limits under Open Competitive Bidding Procedure, Shopping Procedure, Direct Contracting or Repeat Orders | http://oldportal.treasury.gov.lk/documents/10181/329538/Supplement+35-dated+25.03.2020/206c9101-a96b-4c76-88f9-8266d43d453e |
| 36, 2020-10-28 | | DPR and NPC | PG | 5.3.11 | Bid Security | Addition of Foreign EXIM Bank as an approved agency for bid securities. | http://122.255.3.82/documents/10181/900499/supplement36-20201028-eng/fe34dd00-7160-45e4-9d54-b347d8a9eb9f |

378. This is an amendment to the GGTP.

379. The supplement is unavailable on the DPF Website. Circular details provided in Annexure 3.

380. Application ambiguous as the circular has not been mentioned among others in the MOF website or the PROMISE platform and has been deleted from the NPC website as well.

Annexure 2

List of Applicable Supplements

to PG and PM 2006, and II GGTP 1998 as of 24 December, 2020³⁸¹

| Circular no. and date | Superseding supplement/circular no. | Applicable Procurement Guidelines | Amended Procurement Guideline no. | Topic | Description | Link |
|------------------------------------|-------------------------------------|-----------------------------------|-----------------------------------|--|---|--|
| PF/429, 2008-0-17 | N/A | PG/PM | - | Transferring Procurement Activities from the NPA to the DPF | From 01 March 2008, All functions of the NPA are transferred to the DPF including all references in PG and PM 2006. | https://www.treasury.gov.lk/documents/circular-gazette-acts/circulars/publicFinanceDepartment/2008/429e.pdf |
| PF/429 (i), 2009-06-04 | N/A | PG/PM | - | Follow up to PF/429 | The expressions "National Procurement Agency" and "Chairman/Chief Executive Officer" in all existing guidelines, manuals and circulars changed to "Department of Public Finance of the General Treasury" and "Director General of Public Finance" respectively. | https://www.treasury.gov.lk/documents/circular-gazette-acts/circulars/publicFinanceDepartment/2009/PF429(i)E.pdf |
| PF/442, 2010-04-30 | 17 | PG/PM | 7.9.5 | Priority Preference to Local Bidders Participating in Contract Works with Domestic Funding | Increase domestic preference from 10 percent to 15 percent for domestic bidders. | https://www.treasury.gov.lk/documents/circular-gazette-acts/circulars/publicFinanceDepartment/2010/PF442E.pdf |
| PF/444, 2010-08-04 | | II GGTP | - | Appointment of the Standing Cabinet Appointed Review Committee (SCARC) to monitor Unsolicited Proposals | Lists the appointed members of the committee and mandates the SCARC on proper process for unsolicited proposals. All proposals will go through the SCARC. | https://www.treasury.gov.lk/documents/circular-gazette-acts/circulars/publicFinanceDepartment/2010/444E.pdf |
| PF/444(i), 2011-05-16 | | II GGTP | - | Issuance of Supplement 23 detailing mechanism for Unsolicited Proposals | Details on Supplement 23 provided in Annexure 01. | https://www.treasury.gov.lk/documents/circular-gazette-acts/circulars/publicFinanceDepartment/2011/Circ444(i)E.pdf |
| PF/452, 2011-09-27 | 23 | PG/PM | 3.9.1 | Method of Awarding Direct Contracts to Community Based Organizations | No details available. | No link available. |
| 01/2012, 2012-01-05 | PF/452 | PG/PM | 3.9.1 | Method of Awarding Direct Contracts to Community Based Organizations | Updated methods by superseding supplement 23 and PF/452. | Circular in Sinhala and Tamil ³⁸² : Sinhala: https://www.treasury.gov.lk/documents/circular-gazette-acts/circulars/publicFinanceDepartment/2012/01_2012S%20(1).pdf Tamil: https://www.treasury.gov.lk/documents/circular-gazette-acts/circulars/publicFinanceDepartment/2012/01_2012T.pdf |
| 01/2013, 2013-01-02 | | PG/PM | 7.9.6 | Granting Preference for Locally Manufactured Goods Offered by the Local Bidders who Participate in the Supply Contracts under Domestic Funds | Encouraging purchase of locally manufactured goods. | https://www.treasury.gov.lk/documents/circular-gazette-acts/circulars/publicFinanceDepartment/2013/01_2013E.pdf |
| Circular Letter No: 02, 2013-10-17 | | PG/PM | 5.3.11 | Bid Securities and Guarantees issued by construction guarantee fund | Measures to enforce guideline conditions. | https://www.treasury.gov.lk/documents/circular-gazette-acts/circulars/publicFinanceDepartment/2013/PFD_Letter_02.pdf |
| PFD/PMD/Gen/003, 2014-05-29 | 20, 21 | PG/PM | 2.14.1 | Authority Limits of District Procurement Committees | Repealed by Supplement 33. | https://www.treasury.gov.lk/documents/circular-gazette-acts/circulars/publicFinanceDepartment/2014/PFD-PMD-Gen-003-01e.pdf |

381. As available in the Ministry of Finance Website. See Ministry of Finance, 'Circulars – Public Finance Circular', at <https://www.treasury.gov.lk/public-finance-department-circular#2021> [Last accessed on 20 February 2020].

382. English Circular unavailable on the DPF website.

List of Applicable Supplements

| Circular no. and date | Super- seding supple- ment/ circular no. | Appli- cable Pro- cure- ment Guide- lines | Amend- ed Pro- cure- ment Guide- line no. | Topic | Description | Link |
|---|---|---|---|--|---|---|
| 04/2016, 2016-03-16 | | PG/PM | - | Procurement of Works up to LKR 50 million from Regional Contractors under Domestic Funds | Limit invitation of bids of contracts with a value of up to LKR 50 million with regional contractors. | https://www.treasury.gov.lk/documents/circular-gazette-acts/circulars/publicFinanceDepartment/2016/PFD-2016-04.pdf |
| 06/2016, 2016-06-17 | | PG/PM | 6.11 (a) | Revision of non-refundable Tender Deposits | Non-refundable fees to be charged for bidding documents are revised with concurrence of the NPC. For projects with a Total Estimated Cost of above LKR 100 million, the Minimum amount is LKR 100,000 and the Maximum is LKR 500,000. | https://www.treasury.gov.lk/documents/circular-gazette-acts/circulars/publicFinanceDepartment/2016/PFD-2016-06.pdf |
| 04/2016 (i), 2016-09-30 | 04/2016 | PG | 2.8.1 | Procurement of Works up to LKR 50 million from Regional Contractors under Domestic Funds | Repealed and updated subjects covered in Circular no. 04/2016. Further details provided including the equivalent CIDA grade. | https://www.treasury.gov.lk/documents/circular-gazette-acts/circulars/publicFinanceDepartment/2016/PFD-2016-04-i-E.pdf |
| 08/2016, 2017-01-16 | | PG/PM | 2.2.1 | Addressing delays in finalizing tenders in the government tender procedure | Current issues identified and PE are given struct instructions and recommendations to address delays and improve efficiency in the procurement process. (Annexure 1 of the Circular) | https://www.treasury.gov.lk/documents/circular-gazette-acts/circulars/publicFinanceDepartment/2017/PFD-2016-08.pdf |
| 01/2017, 2017-04-04 | | PG/PM | - | Amendments to Accelerate the Government Procurement Process | Issuance of Supplements 31, 32 and 33. | https://www.treasury.gov.lk/documents/circular-gazette-acts/circulars/publicFinanceDepartment/2017/PFD-2017-01.pdf |
| 01/2017, 2017-08-25 | 31, 32, and 33 - 01/2017, | PG/PM | | Accelerating the Government Procurement Process | Mandated three actions to facilitate the acceleration of procurement actions by supporting supplements 31, 32 and 33 and Circular no. 01/2017. | https://www.treasury.gov.lk/documents/circular-gazette-acts/circulars/publicFinanceDepartment/2017/PFD-2017-01-i.pdf |
| PFD Circular Letter No: 04, 2017-10-09 | 01/2013 | PG/PM | 7.9.6 | Preference for Domestically Manufactured Goods | Noted that circular no. 01/2013 and guideline 7.9.6 have not been followed. Emphasised the need to adhere to said guidelines. | https://www.treasury.gov.lk/documents/circular-gazette-acts/circulars/publicFinanceDepartment/2017/PFD-Letter-04.pdf |
| 05/2018, 2018-10-23 | | PG/PM | | Introduction of an Electronic Government Procurement (e-GP) System into the Sri Lankan Public Sector | Preparatory actions for the establishment of an e-GP system mandated. These include the appointment of Liaison Offices at PE and collection of baseline data. | https://www.treasury.gov.lk/documents/circular-gazette-acts/circulars/publicFinanceDepartment/2018/PFD-2018-05.pdf |
| Public Finance circular Letter No: 05, 2018-11-16 | 05/2018 | PG/PM | | Introduction of and Electronic Government Procurement (e-GP) System into the Sri Lankan Public Sector | Amendment of the time frame to submit information. | https://www.treasury.gov.lk/documents/circular-gazette-acts/circulars/publicFinanceDepartment/2018/Circular%20Letter%20No%2005.pdf |
| 01/2019, 2019-02-05 | 14 | PG/PM | 4.3, 8.13.4, | Guidelines applicable to adopt a uniform mechanism to review total cost estimates (Prior Review) and Contract Variations (Post Review) of Development Projects | Establishment of the Cost Estimate Review Committee and the process for the preparation of Total Cost Estimates and Post Contract Cost Variations. | https://www.treasury.gov.lk/documents/circular-gazette-acts/circulars/publicFinanceDepartment/2019/PFD-2019-01%20(2).zip |
| 02/2019, 2019-03-26 | | II CGTP | Refer- ence 225, 226, 232, 233 | Amendment to Part II of Government Tender Procedure on Private Sector Infrastructure Projects Related to Public Private Partnership (PPP) basis | Provide definition for PPP, Establishment of the National Agency for Public Private Partnership, and clarifying roles of CANC and Project Committees. | https://www.treasury.gov.lk/documents/circular-gazette-acts/circulars/publicFinanceDepartment/2019/PFD-2019-02.pdf |
| 04/2016 (ii), 2019-05-08 | 04/2016 (i) | PG/PM | 2.8.1 | Procurement of Works up to LKR 50 million from Regional Contractors under Domestic Funds | Repealed and updated subjects covered in Circular no. 04/2016 (i). Further details provided including the equivalent CIDA grade. | https://www.treasury.gov.lk/documents/circular-gazette-acts/circulars/publicFinanceDepartment/2019/1.pdf |

List of Applicable Supplements

| Circular no. and date | Superseding supplement/circular no. | Applicable Procurement Guidelines | Amended Procurement Guideline no. | Topic | Description | Link |
|-----------------------|--|-----------------------------------|-----------------------------------|---|--|---|
| 08/2019, 2019-12-17 | Public Finance circular Letter No: 05, 05/2018 | PG/PM | | Implementation of the Electronic Government Procurement (e-GP) System in Sri Lanka | Implementation of the PROMISE E-GP system – www.promise.lk. | https://www.treasury.gov.lk/documents/circular-gazette-acts/circulars/publicFinanceDepartment/2019/PFD-2019-08E.pdf |
| 03/2020, 2020-10-09 | 04/2016 (ii) | PG/PM | | Policy on Supporting Domestic Industries | Establishing policies to support Software and Hardware, Construction, and Furniture and allied products Industry. Policy for construction industry adheres to circular no. 04/2016 (ii). | https://www.treasury.gov.lk/documents/circular-gazette-acts/circulars/publicFinanceDepartment/2020/pfd-cir-03-2020-20201009-eng.pdf |
| 04/2020, 2020-11-09 | 03/2020 | PG/PM | | Granting Special Preference for Public Enterprises when submitting bids under the Competitive Bidding procedure | Whenever a public enterprise submits a bid under competitive bidding procedure, it will be granted a 15 percent preference. | https://www.treasury.gov.lk/documents/circular-gazette-acts/circulars/publicFinanceDepartment/2020/pfd-cir-04-2020-20201109-eng.pdf |

Annexure 3

Definition of Public Private Partnerships (PPPs)

According to current guidelines issued by MOF (Part II GGTP 1998), unsolicited proposals can only be entertained with respect to PPP projects. Until 2019, however, the regulations did not provide for a clear definition of what type of project could be considered a “PPP project”. The Part II GGTP 1998 indicated that any BOO/BOT/BOOT project could qualify as a PPP project.

In 2019, through the circular PF 02/2019, the MOF provided a clear definition of what would be considered a PPP project. The circular defines a PPP as:

“a special contractual arrangement between a GoSL entity and a private investor, for providing a public infrastructure asset or service, in which there is

- *an appropriate transfer of risk to the private investor and*
- *where the private investor bears investment and management responsibility on a long-term basis.*

In a PPP, the private investor is typically tasked with the design, construction, financing, operation and management of a capital asset to deliver a service to the GoSL entity or directly to private end users. The private investor will receive either a stream of payments from the GoSL entity or through charges levied directly on the private end users, or both, for its efforts in undertaking the investment and management.

Unlike in the case of a typical procurement of goods or services, in a PPP, there is a continuing role for the public and private sector entities. In a PPP, the private investor is expected to be a long-term project participant in the development, construction, management and operation of the project. As a result, the ‘partnership’ between the public and private can last for 10-35 years, which is considered as the concession period (the “Concession Period”), depending on the envisaged investment and the projected revenue streams. In many cases, after the concession period, the asset created by private investment is transferred back to the GoSL.”³⁸³

The definition, in addition to specifying which projects are included, also specifies the types of projects that cannot be considered PPPs.³⁸⁴ Projects excluded from the PPP definition are:

- 1.** *“Any project where the GoSL provides a direct sovereign guarantee to the lending institution of the private investor’s debt;*
- 2.** *Projects where the GoSL Entity is managing or operating the infrastructure facility;*

383. Amendment to Guideline 225, Public Finance Circular No: 02/2019, at <http://oldportal.treasury.gov.lk/documents/10181/49383/PFD-2019-02.pdf/d613748e-370b-46dd-99cf-357b788d0908?version=1.0> [Last accessed on 26 November 2020], p. 3.

384. Ibid.

- 3.** *Projects where the GoSL procures an infrastructure asset under traditional procurement methods using public funds, loans, grants, gifts, donations, contributions or similar receipts. (In a PPP, the GoSL procures the infrastructure services and not the asset, which typically will be transferred after the expiry of the long-term concession period);*
- 4.** *Sale or long-term lease of any GoSL asset unless such sale or lease is governed by a long-term concession agreement with specific performance criteria by the parties to such agreement. A land lease agreement is therefore not a concessionary agreement;*
- 5.** *Short-term design and construction contracts (typically two to four years), paid for by the GoSL or via financing arrangement guaranteed by the State;*
- 6.** *Projects where the GoSL is liable for construction time and cost overruns. (In a PPP, it is the private investor that is responsible for construction time and cost overruns);*
- 7.** *Projects where there are no on-going performance standards to be met by the private investor;*
- 8.** *Projects where the GoSL has to pay the private investor for the capital costs of the project up-front and low on-going maintenance payments via a management contract with the private investor once the project is commissioned. (In PPPs, the payment profile is relatively even, reflecting the level of service provision over the longer term of the contract)."³⁸⁵*

385. Ibid., pp. 3-4.

Annexure 4 Procurement Lifecycle

