

Infrastructure Concession Regulatory Commission (ICRC)

**GUIDANCE
ON
CONTRACT DISCLOSURE**

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List of Abbreviations and Acronyms

FOI: Freedom of Information

ICRC: Infrastructure Concession Regulatory Commission

1. Introduction

1.1 Disclosure of Information

The Commission was established by the Infrastructure Concession Regulatory Commission (Establishment, ETC) Act 2005 to regulate and monitor infrastructure contracts. Section 20 of “the Act” provides a mandate to the ICRC to take custody of all concession agreements under the Act. A number of concession contracts have been signed between ministries, departments and agencies (MDAs) and private entities in the last few years. These contracts are in various sectors such as airports, roads and ports, etc. These contracts are now in the possession of the Commission.

In order to make information on infrastructure concessions easily accessible to the general public, the Commission has now decided to make all non-confidential information of the contracts publicly available on its website.

1.2 Objectives of Disclosure

Disclosure can educate Nigerians on the salient features of the contract, agreed standards of service and the actual performance levels achieved. Disclosure of performance indicators with their targeted levels can help put pressure on providers to perform well. As users get more educated about the contracts through regular disclosure of information, service provision through the public-private partnership procurement would gain greater acceptance in the country.

Disclosure of contract documents places a responsibility on the MDAs to ensure that value for money is obtained throughout the life of the contract and services are performed at the levels agreed to in the contract. It also places a greater responsibility on public authorities to ensure implementation of the contract. The decision to proactively disclose contract information will also help the Commission and MDAs involved to streamline their information systems and spend more effort and time in collecting, organizing and managing data.

Disclosure of contract information may have a positive effect on the bidding process for future projects as it has the potential of increasing the confidence of the private sector which then leads to greater participation.

1.3 Confidential Information

PPP contracts would contain sensitive commercial information and the Commission is prohibited from disclosing trade secrets, commercial or financial information which are confidential or any information which may if disclosed would interfere with contractual or other negotiations of a third party, and proposal or bids for any contract which may have adverse effects on a procurement process. Please see (Section 15 (1) of the Freedom of Information Act 2011).

1.4 Challenges Associated with Disclosure

Apart from the issues associated with confidential information discussed in section 1.3 above, there can be other challenges associated with disclosure. PPP contracts are usually long term with periods of up to 25 years. The information disclosed would remain in the public domain for a long period of time and would need to be updated regularly during the project lifecycle. Typically, PPP contracts have several schedules containing technical information which would require breaking down into simple language to make it more comprehensible to the public

These reasons make infrastructure PPP contract disclosure technically, as well as administratively, challenging. The following issues need to be carefully considered:

- (i) matters to be proactively disclosed
- (ii) formats/template for disclosure
- (iii) inclusion of standard disclosure provisions in contracts
- (iv) procedures for validating information before proactive disclosure
- (v) protection of confidential information through application of exemptions under the FOI Act 2011.

The extent of disclosure of performance assessments would be related to the efficiency of collection of performance information.

1.5 Framework for Disclosure

While Nigerian PPP infrastructure contracts are concise and full disclosure of the contracts will be relatively easy in practice, disclosure of full legal contracts may still not make contract information comprehensible to the public who may find it difficult to interpret the legal clauses

and schedules correctly. Project and contract information can be disclosed in a systematic and organized manner through the use of contract and project summaries.

The aim of this guidance is to provide a suggested framework for officials dealing with the disclosure of information relating to infrastructure concessions, along with a recommended template, for the proactive disclosure of project and contract information.

2. Guidance on Disclosure of Contract Information

2.1 Application of Guidance

2.1.1 These guidelines will apply to all PPP infrastructure procurements procured by any Ministry, Agency, Corporation or body, or any public entity authorized to do so¹ under section 1 of the Act.

2.2 Specific disclosures with timelines

2.2.1 The Commission will place the signed Concession Agreement² in the public domain within 30 days of Financial Close³, with the exception of confidential information as provided in clause 2.5 below.

2.2.2 The ICRC shall prepare and disclose Project Summaries with key project and contract information within 60 days of Financial Close⁴. Project Summaries will be prepared as detailed in clause 2.4.

2.2.3 The Commission will place the reports submitted by the Independent Engineer/ contract manager and performance reports submitted by the Concessionaire, Lessee or private entity⁵ on project performance in the public domain within 30 days of receipt of the reports. The public entity [ICRC] will also endeavor to disclose promptly following receipt, user surveys or other assessments of the project by external agencies. These reports will remain in the public domain for a period of [insert period in years/months or the fulfilment of another condition such as the next report becoming available].

2.2.4 The Commission will disclose the audited annual financial statements of the private entity to the contract within 30 days of receipt of the same. The audited reports will be disclosed only in the case of those contracts where the concession or lease payments made by the private entity to the public entity, or any payments made by the public entity to the private entity, are related to the demand or earnings or gross profits of the private entity.

¹ The terms Grantor or Lessor, Ministry, Agency, Corporation ,body or public entity are used interchangeably throughout the guidance and will mean the public entity in a public- private partnership lease, concession contract or agreement.

² The term will also include concessions, leases and any other form of PPP.

³ Financial Close will have the same meaning as defined in the specific PPP Contract being disclosed. PPP Contracts usually provide that Financial Close must be achieved within 180 days of the execution of the agreement. However, the period of 30 days prescribed here will start from the date on which the project actually achieved Financial Close.

⁵ The terms Concessionaire, Lessee and private entity are used interchangeably throughout the guidance and will mean the private entity in a public-private partnership lease, concession contract or other PPP agreement

2.2.5 The Commission will place all approved variations in the PPP Agreement mentioned in clause 2.2.1 in the public domain within 60 days of such variation having been agreed to and signed into contract by the parties. The Commission will also update the project summary with the approved variations mentioned in clause 2.4 within 60 days of approval of such variations.

2.2.6[All information required to be disclosed by the Commission under sections 2.2.1 to 2.2.5 will be provided promptly to the Commission by the public entity as soon as it becomes available].

2.3 Method of Disclosure

2.3.1 Documents to be disclosed by the Commission will be placed on the website of the ICRC. All documents relating to performance to be disclosed by the public entity shall, in addition, be placed on the website of the public entity. A hard copy of the documents can be made available for viewing in the PPP Resource Center of the Commission.

2.3.2 All information shall be validated following the procedure described in clause 2.6 before disclosure.

2.4 Project Summary

2.4.1 The Project Summary will be in four parts.

- Part I will contain basic project information.
- Part II will contain specific contract information.
- Part III will contain information on actual performance of the project.
- Part IV will contain information on contract variation. (if any)

2.4.2 Information in Parts III and IV will not be available at financial close, but will need to be added and updated. Information on actual performance will be added to the project summary within 30 days of the first anniversary of the date of execution of the agreement. It will be updated at least annually.

2.4.3 The template at Annexure 1 can be used for preparation of the Project Summary.

2.4.4 Each Concession or PPP project may have distinctive features that may require minor modifications in the template. Minor variations in the template may be undertaken with the approval of the Commission.

2.4.5 Confidential Information shall be excluded from the Project Summary.

2.5 Confidential Information

2.5.1 Confidential information includes any information that is exempt from disclosure under the Freedom of Information Act 2011. This includes information relating to the commercial confidence, trade secrets or intellectual property of the Concessionaire, which could harm the competitive position of the Concessionaire.

2.5.2. The Commission or the public entity shall not have any obligation to disclose confidential information, unless the Commission receives the consent of the custodian of the information or larger public interest warrants the disclosure of such information.

2.5.3 The Commission and the public entity will jointly decide on the information to be excluded from disclosure before such disclosures are effected.

2.5.3 The reasons for redaction should be clearly recorded in each case against each redacted clause. This information will also be displayed in the Project Summary in the format suggested in the template at Annexure 1.

2.5.4 The ICRC shall provide guidance to any MDA concluding PPP Agreements to clarify at the beginning of the procurement process through the use of standardized disclosure clauses, as part of the RfP, their intention to disclose project and contract information, with the exception of exempt information.

2.6 Validation of Information Prior to Proactive Disclosure

2.6.1 The Commission shall in consultation with the parties, verify the accuracy of the information to be disclosed before such disclosures are made.

2.6.2 All contracts shall be checked to ensure exclusion of confidential information prior to disclosure.

ANNEXURE 1: TEMPLATE FOR PROJECT SUMMARY

Cover Page

This should state that it is a Project Summary of an infrastructure concession with the name of the project and the date of the Summary. A photograph or stylized depiction of the project, where available, can be used on the cover page.

Disclaimer

A disclaimer should appear on the first page of the document following the cover page; suggested language for the disclosure is as follows. :

DISCLAIMER

This summary should not be relied on as a complete description of the rights and obligations of the parties to the project and is not intended for use as a substitute for the contracts.

List of Abbreviations and Acronyms

This should contain all the abbreviations and acronyms used and their full forms, but need not define or give any other information about the terms used.

Introduction

The introduction can include summary information about the infrastructure concession and its framework and the format of the project summary. It should preferably be brief.

Part 1: Project Information

1.1 Basic Information

1.1.1 Project overview

[Include project name, status, name of the public entity signing the agreement, the name of the concessionaire, period of concession, main activities to be performed by the concessionaire and the public entity]. On project status something to this effect can be stated: " The project status on [insert date] is as follows: [Insert status here as in financial close/ under construction/ operational/ contract suspended/ under dispute/ contract expired/ contract cancelled]. More detailed information on current project status can be found in section 3.1 of this report". The date and status will need to be updated as information comes in about change of status or further progress of the contract.

1.1.2 Total project value

[Give the total estimated project cost. Give breakup of the cost in terms of the construction and operation costs as estimated in the agreement. Specify if these are subject to change. In some cases as in port and airport projects, the contract may not contain the estimated value of the work. In such cases, this section may be excluded.]

1.1.3 Brief description of the proposed work

[Describe the scope of the work in terms of geographical location, the items of infrastructure to be built or developed etc.]

1.1.4 Payments

[Describe the Concession/Lease /other payments payable to the public entity by the private entity according to the terms of the Agreement. In contracts where payments are made by the public entity to the private entity, this section may be used for the purpose of giving information on these also.]

1.1.5 Main project benefits

[Give details of the condition of the asset at project commencement and the expected benefits]

1.2 Tender Process

1.2.1 Description of tender process

[Give the headline details of the tender process including the various steps followed and the main criteria for selection. Confine the description to half a page. Give any available links to the details of the process. Also include the number of bidders shortlisted following the EoI and the number selected through the RfP process].

1.2.2 Dates of various milestones during the tender process [Give dates of the following milestones:]

Date of Request for EoI:

Date of approval by FEC:

Date of Issue of Letter of Award (LoA):

1.2.3 Brief information on the institutional structure for approval

[Give brief information on the institutional structure for approval of the projects and the approval process before the projects come to FEC for final approval]

Part 2: Contract Information

2. 1 Basic Contract Information

2.1.1 Contract milestones

[Give the dates of the following contract milestones. Give actual dates where the milestone is past along with the date provided or expected in the contract. This will give an indication whether the contract is moving according to the timelines stated]

Date of Execution of the Concession Agreement:

Effective Date: Date of Fulfillment of conditions precedent:

Construction Commencement Date:

Construction Period:

Date of Financial Close:

Start Date of Concession:

Date of Expiry of the Concession:

2.1.2 The Concession contract and parties to the contract with contact details

[Mention the names of the parties to the concession contract and their contact details with a diagrammatic representation of the contractual relationships for better understanding. A diagram depicting contractual roles and relationships in a road concession, for example, could look somewhat like this:]

[The contact details for each party can be given in the following format, Contact details of the ICRC Contract Compliance Centre can also be provided:]

Concessionaire/Lessee/ Private Party Contact Details Address: Telephone: e-mail: ICRC Address: Telephone:	Public Entity Contact Details Address: Telephone:
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2. 2 Shareholding and related issues

2.2.1 Shareholders of the concessionaire

[Give names of shareholders and proportion of shares held]

2.2.2 Provisions for equity transfer

[Concession contracts usually require permission for changes in equity structure. Mention these here.]

2. 3. Land and Asset Transfers to Concessionaire

[Give details of assets transferred on lease or other basis by the Grantor to the Concessionaire]

2. 4 Revenues

2.4.1 Rights to collection of user charges

[State the rights transferred to the Concessionaire for collection of user charges. In some contracts, for example road contracts, there may be several ancillary services that are performed by the private entity in addition to the primary service of operating and maintaining the road for which user charges can be collected. The same may be true of airport contracts. In all such cases, information pertaining to all rights of the private entity to collection of user charges should be included in this sub-section]

2.4.2 Rate setting

[Include information on rate setting and review mechanisms]

2.5 Risk Allocation

[List some selected key risks with information on who bears the risk. The following tabular format can be used with a short preceding paragraph describing some of the risks that the public entity shares.]

Risk Category	Concessionaire	Grantor
Risks associated with project preparation		
Permits/Approvals Risk		
Provision of Utilities Risk		
Construction Risk		
Completion Risk		
Cost Overrun Risk		
Technical Risk		
Force Majeure Risk		
Operational Risk		
Financing Risk		
Demand Risk		
Environmental Risk		
Termination Risk		

2. 6. Expected Performance and Provision for Penalties

2. 6.1 Expected levels of performance

[State 10-12 minimum expected performance criteria with agreed period for correction of failures against each in the format given below]:

Minimum Expected Performance Criteria	Agreed Correction Period for Failure

2.6.2 Reporting and performance monitoring

[Describe who will monitor the contract and how]

2. 6.3 Penalties/Incentives

[State major categories of breach of contract or failure of performance and the associated penalties provided in the contract in the following format. In certain contracts, there may be provision for incentives based on performance and these may be stated appropriately using the format given below]:

Failure/description of higher level of performance	Penalties/ Incentives

2. 7. Dispute Resolution, Default and Termination

2.7.1 Dispute resolution

[Give a short description of the institutional structure/mechanisms provided in the contract for resolution of disputes.]

2. 7.2 Events of default and termination

[Describe the procedure for termination in brief, mention in brief the main events of default under the major categories-- Concessionaire's events of default, Grantor's events of default and any other events leading to termination. State the termination payments against each in brief. The following format may be used:]

Main events of default

Procedure for termination

Termination payments

The termination payments for the events leading to default and termination either due to the Concessionaire or due to the Grantor or due to other reasons are described below:

Party and Events of default	Termination payment

2.7.3 Transfer clauses at expiry of contract

[State details of handover of assets back to state, required condition of assets, provisions for continuity of operations, provisions relating to the costs of termination/transfer, responsibility of private entity for defects/defects liability.]

2.8 Redactions

[This part of the summary would be prepared on the basis of the agreed redactions between the public entity and the private entity. The following format may be used (it is suggested that the schedule containing the financial calculations may be redacted if necessary after discussion with the private entities concerned in each case:)]

Clause no.	Element redacted	Applicable FOI Act 2005 clause	Reason for redaction

Part 3: Implementation Information

3.1 Actual Project Performance

[Give details of actual year-wise performance against key indicators. A few major indicators can be selected for the purpose of this summary rather than reporting on all of the indicators where the number of indicators is high]

The actual year-wise performance achievement against key indicators was as follows:

Construction Phase				
Performance indicators	Year 1		Year n	
	Target	achievement	target	achievement
Operational Phase				
Performance Indicators	Year 1		Year n	
	target	achievement	target	achievement

3. 2 Performance Failures

[State instances of performance failure during the year and the penalty in the following format:]

The following instances of performance failure/breach of contract were noticed during the given year with penalty imposed and paid as shown:

Yr	Description of failure or breach	No. of events	Penalty (amount in Naira)	Penalty paid Yes/No

3. 3 Performance Assessments

[Provide links to reports of IE and any other performance reports and user satisfaction surveys available for the project. Where the office of the Auditor General for the Federation of Nigeria has carried out an audit of the PPP, a link to the audit report may also be provided here]

Link to IE reports

Link to audit reports

Link to other performance reports/user satisfaction surveys

Part 4: Contract Variations

[Give details of variations in the contract as they happen along with the clause numbers where the variation has taken place and the date the variation came into effect in the following format]:

Contract Clause No.	Description of Variation	Date Variation came into effect

Process followed for validation of disclosed information

[State the process followed for checking data for accuracy before proactive disclosure]

	Yes/No	Date
Review and Sign-off by the ICRC		

