

# BILL

No. 605

## An Act respecting the Transparency and Accountability of Public-Private Partnerships

(Assented to )

### Preamble

WHEREAS the residents and taxpayers of Saskatchewan have a right to know how their money is spent;

WHEREAS it is in the best interest of the residents and taxpayers of Saskatchewan to receive the best value for their tax dollars in the government procurement of Crown infrastructure, goods or services on their behalf;

WHEREAS cost savings or value for taxpayers' money has not been realized or has been the subject of audit and dispute in other jurisdictions in public-private partnership projects;

WHEREAS public-private partnership arrangements generally require governments to both long-term use of a private facility as well as guaranteed-payment contracts that last in the range of 30 years;

WHEREAS up-front independently verified transparency and accountability ensure that public money is not used for contracts or arrangements that are kept secret from the public; and

WHEREAS the Government of Saskatchewan is pursuing the public-private partnerships method for major capital projects:

THEREFORE HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Saskatchewan, enacts as follows:

### Short title

1 *The Public-Private Partnerships Transparency and Accountability Act.*

### Interpretation

2(1) In this Act:

(a) **“major capital project”** means a project that:

(i) involves the creation or development of a public work or improvements to a public work; and

(ii) has a projected total cost – including the costs of any contract renewals or extensions, project add-ons and future phases planned for the project, even if they are not included in the initial procurement for the project – of \$20,000,000 or more;

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- (b) **“P3 procurement method”** means a method of procurement that involves the use of a public-private partnership to effect the procurement;
- (c) **“private sector entity”** means:
  - (i) any person or organization other than:
    - (A) a public sector entity;
    - (B) the Government of Canada or of a jurisdiction outside Saskatchewan, or an entity controlled by a similar government; and
  - (ii) a combination of two or more such persons or organizations acting as a group;
- (d) **“public-private partnership”** or **“P3”** means a contractual arrangement between a public sector entity and a private sector entity for the procurement of a public work or improvements to a public work that:
  - (i) is an arrangement under which:
    - (A) the private sector entity assumes responsibility for all or substantially all of at least two of the following aspects of the project:
      - (I) its design;
      - (II) its construction;
      - (III) the long-term private sector financing for its construction;
      - (IV) the activities related to its long-term operation;
      - (V) its long-term maintenance; and
    - (B) at least one of the aspects of the project for which the private sector entity assumes responsibility is its long-term operation or maintenance, or the long-term financing for its construction; or
  - (ii) is a type of arrangement prescribed by regulation;
- (e) **“public sector entity”** means:
  - (i) the Government of Saskatchewan;
  - (ii) a regional health authority or an affiliate, as defined in *The Regional Health Services Act*;
  - (iii) a university, college, institute, board of education, the conseil scolaire or any other educational institution or body in Saskatchewan;
  - (iv) an institution or body that derives its funds in whole or in large part from the Government of Saskatchewan;
  - (v) any other institution or body designated by the Lieutenant Governor in Council as a public sector entity for the purposes of this Act;

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- (f) **“public work”** means any work that is constructed or maintained:
  - (i) for a public purpose by or on behalf of a public sector entity; or
  - (ii) for the purposes of a public sector entity.
- (2) For the purpose of the definition **“major capital project”**, the projected total cost of a project includes the cost or projected cost of any related project for which the public sector entity has used, is using or is intending to use the P3 procurement method. For this purpose, two projects are related if:
  - (a) the projects involve the same public work or similar or related public works at the same location;
  - (b) the public sector entity is planning or has planned one of the projects when it initiates the procurement process for the other project; and
  - (c) the same or similar private sector entities could reasonably be expected to submit bids or proposals for both projects.
- (3) For the purpose of this Act, a consultant engaged under section 6 or appointed under section 8 is deemed to have a significant connection with each of the following persons and organizations;
  - (a) a person who is the spouse, common-law partner, child, parent, brother or sister of the consultant;
  - (b) a person who is an employee or partner of the consultant, or a member of the consultant’s board of directors;
  - (c) a corporation or other organization in which the consultant or any of the persons described in clause (a) or (b), or any combination of those persons, has a significant economic interest.
- (4) For the purpose of this Act, the procurement process for a project is initiated when a public sector entity issues a request for qualifications or proposals, call for tenders, or other document in response to which a private sector entity may make a submission for qualification, or submit a proposal or bid, in relation to the project.

**Purpose**

**3** The purpose of this Act is to ensure an independent evaluation and public reporting of value for taxpayers in public-private partnership projects, and to introduce transparency and accountability to the public-private partnership method of building major capital projects.

**Crown bound**

**4** This Act binds the Crown.

**Independent accountability**

**5(1)** The Public Accounts Committee of the Legislative Assembly shall by unanimous vote select and appoint an external consultant to perform the role of an independent accountability mechanism for each capital project that uses the P3 procurement method.

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(2) The salary and costs associated with the consultant and the independent accountability mechanism are to be borne by the private sector partners.

**Preliminary analysis and public consultation**

6(1) Before selecting a P3, public-private partnership approach for a major capital project to which this Act applies, a public sector entity must do the following:

- (a) have a public sector comparator prepared for the project in accordance with the regulations with a detailed substantiation of any assumptions;
- (b) analyze the viability and the expected risks, costs and benefits of using the P3 procurement method, taking into account the factors prescribed by regulation, if any;
- (c) prepare a full value-for-money and business case analysis for the P3 compared to a detailed public sector comparator, which must include the total and full-life cycle costs, nominal annual costs of the P3, the actual nominal cost obligations each year that a government would incur, full disclosure and substantiation of risk transfer and assumptions, full disclosure on cost of credit to taxpayers – both credit of a private partner and public credit;
- (d) analysis of the local economic impact;
- (e) prepare a report of the analysis required by pursuant to this section, which is to include a statement of the expected results.

(2) If a P3 model is selected by a public sector entity and before initiating the procurement process for a major capital project to which this Act applies, the independent accountability mechanism must do an up-front review and analysis of:

- (a) all preliminary analysis, information and reports prepared by the public sector entity in subsection (1); and
- (b) review and seek any other relevant information as required, with full access to the public sector entity's information as required.

(3) Following its review and analysis the independent accountability mechanism shall report its analysis publicly to the Assembly through the Public Accounts Committee including items contained in this section, including a statement of the expected results.

(4) If a consultant assists in meeting the requirements of subsection (1), neither the consultant, nor any person or organization with whom the consultant has a significant connection, shall:

- (a) submit, or assist in the preparation of, a response to the public sector entity's request for qualifications or proposals, call for tenders or any other document that initiates the procurement process for that project;
- (b) participate in the provision of any goods, services or construction to be provided for that project by the successful proponent or bidder; or
- (c) be appointed as the consultant to perform the role of the independent accountability mechanism under section 8 for that project.

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(5) If, after completing the requirements of this section, the public sector entity still wishes to proceed with the P3 procurement method, it must:

- (a) make information about the project and the report under subsection (1) publicly available, but without disclosing information that, if disclosed, could jeopardize the public sector entity's ability to realize the best value for money through a competitive procurement process; and
- (b) provide a reasonable opportunity for members of the public to comment on it.

**Procurement laws and policies**

7(1) If a public sector entity decides to use the P3 procurement method for a project, the procurement of goods, services and construction for that project must proceed in accordance with this Act and the procurement laws, agreements, policies and procedures that apply to the entity.

(2) There must be a minimum of three bidders on all P3 projects.

**Independent accountability mechanism and Provincial Auditor review**

8(1) A public sector entity that uses the P3 procurement method for a major capital project must engage and allow the independent accountability mechanism to conduct its reviews.

(2) The private sector entity must disclose and share all information in its possession for the independent accountability mechanism to work.

(3) The functions of the independent accountability mechanism must include the following:

- (a) advising the public sector entity on the procurement process for the purpose of ensuring that it is conducted with openness, transparency, integrity and accountability;
- (b) reviewing each request for qualifications or proposals, call for tenders or other document soliciting responses from private sector entities, including the processes described in that document for evaluating the responses to it;
- (c) assessing the extent to which the procurement process, including the selection of the successful proponent or bidder, conformed to:
  - (i) the procurement solicitation documents; and
  - (ii) the applicable procurement laws, agreements, policies and procedures;
- (d) making recommendations to the public sector entity regarding the timing and content of its public reports about the project;
- (e) preparing a final report to the public sector entity that:
  - (i) summarizes the process of the independent accountability mechanism under the terms of the appointment;
  - (ii) describes the review of the procurement solicitation documents and the evaluation of the responses of the independent accountability mechanism;

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- (iii) summarizes the findings about the procurement process of the independent accountability mechanism; and
  - (iv) sets out the recommendations referred to in clause (d)
  - (f) preparing, in accordance with the regulations, a summary of the terms of the contract or contracts awarded by the public sector entity to the successful proponent or bidder in the procurement process;
  - (g) report publicly on the process and any concerns with regard to the fairness of process, the effectiveness of the process, value for money or the public sector entity;
  - (h) any additional duties required pursuant to this Act.
- (4) The public sector entity must:
- (a) submit the final report and contract summary of the independent accountability mechanism to the Provincial Auditor for review and comment and, upon receiving the Provincial Auditor's comments, make the report and summary, together with the Provincial Auditor's comments, publicly available; and
  - (b) continue to make them publicly available throughout the term of the public-private partnership with annual reports of the P3.
- (5) Neither the person performing the role of the independent accountability mechanism for a project, nor any person or organization with whom the person performing the role of the independent accountability mechanism has a significant connection, shall:
- (a) submit, or assist in the preparation of, a response to the public sector entity's request for qualifications or proposals, call for tenders or any other document that initiates the procurement process for that project; or
  - (b) participate in the provision of any goods, services or construction to be provided for that project by the successful proponent or bidder.

**Public sector entity to report on project**

**9(1)** A public sector entity that uses the P3 procurement method for a major capital project must prepare a report on the results for that project in accordance with the regulations:

- (a) as soon as is reasonably practicable after construction is completed, but no later than two years after it is completed;
- (b) at least once every two years during the term, including any renewals, of the public-private partnership established for that project; and
- (c) within six months after the termination of the public-private partnership or within any longer period allowed by regulation for that type of project.

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- (2) The public sector entity must:
- (a) submit each report under subsection (1) to the Provincial Auditor for review and comment and, upon receiving the Provincial Auditor's comments, make the report, together with the Provincial Auditor's comments, publicly available; and
  - (b) continue to make the reports and comments publicly available throughout the term of the public-private partnership and for one year after the end of that term.
- (3) *The Cost of Credit Disclosure Act* and the regulations apply with any necessary modification.

**Provincial Auditor's powers and duties**

**10(1)** For the purpose of enabling the Provincial Auditor to review and comment on a report and contract summary of the independent accountability mechanism under section 8 or the report of a public sector entity under section 9:

- (a) the Provincial Auditor is entitled to access:
    - (i) all documents and records of, or in the possession or control of, the independent accountability mechanism; and
    - (ii) all documents and records of, or in the possession or control of, the public sector entity, that the Provincial Auditor considers relevant to the review; and
  - (b) if the Provincial Auditor believes on reasonable grounds that the independent accountability mechanism, the public sector entity or any other person or organization has information relevant to the review, the Provincial Auditor may require the person, entity or organization to provide that information;
- (2) Sections 9, 24, 25 and 26 of *The Provincial Auditor Act* apply, with necessary changes, in relation to the Provincial Auditor's powers and duties under this section as if they were powers and duties under that Act.
- (3) The Provincial Auditor may submit a report about a review under section 8 or 9 to the Assembly if it is in the public interest to do so, but must allow at least 14 days for the public sector entity to review and comment on the report before finalizing it for submission to the Assembly.

**Response to Provincial Auditor's recommendations**

**11** If the Provincial Auditor's comments about a report under section 8 or 9 include a recommendation for the public sector entity, the public sector entity must:

- (a) consider the recommendation and adopt a response to it;
- (b) if its response is to implement the recommendation or some other measure, set a time frame for that implementation; and
- (c) make a description of that response publicly available along with the report and the Provincial Auditor's comments;
- (d) attend as a witness if called upon.

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**Regulations**

**12** The Lieutenant Governor in Council may make regulations:

- (a) prescribing one or more types of arrangements for the purpose of the definition “public-private partnership” in subsection 2(1);
- (b) prescribing requirements for public sector comparators that are required under clause 6(1)(a);
- (c) prescribing factors to be considered when analyzing the viability and the expected risks, costs and benefits of using the P3 procurement method, as required by clause 6(1)(b);
- (d) respecting the public consultation process required by subsection 6(5), including requiring a public sector entity to prepare and publish a report on its public consultation;
- (e) prescribing information to be included in a contract summary under clause 8(3)(f);
- (f) respecting reporting required by section 9;
- (g) respecting any matter the Lieutenant Governor in Council considers necessary or advisable to carry out the purpose of this Act.

**Coming into force**

**13** This Act comes into force on assent