

of Pakistan. The list shall comprise of independent professional firms of repute with substantial experience in projects similar to the Project. PKHA shall, within seven (7) Days of receipt of the said list, shortlist two (2) firms and communicate the same to the Concessionaire within two (2) Days. The Concessionaire shall within seven (7) Days thereafter (a) select a shortlisted entity to be the Independent Auditor, (b) in consultation with PKHA and the Financiers, finalize the fees and other terms of appointment of the Independent Auditor, and (c) jointly with the Financiers, enter into the IA Contract with *inter alios* the Independent Auditor and PKHA on the finalized fee and other terms of appointment.

- 5.6.6 The Financiers shall remain a Party to the IA Contract till the Financing Termination Date. On the Financing Termination Date, the Financiers shall cease to become a party to the IA Contract, and shall undertake all actions and execute all instruments whatsoever required by the Parties to ensure that the Financiers cease to remain a party to the IA Contract.
- 5.6.7 The duration of the appointment of the Independent Auditor (or the replaced Independent Auditor, as the case may be) shall be until the Transfer Date, unless otherwise agreed in writing by the Parties. The term of the appointment of a chartered accountancy firm as the Independent Auditor shall be for a maximum period of three (3) years and such chartered accountant firm may serve for a maximum of two (2) consecutive terms.
- 5.6.8 The Parties agree to cooperate with each other generally in relation to all matters within the scope of or in connection with the functions of the Independent Auditor. All instructions and representations issued or made by either Party to the Independent Auditor shall be simultaneously copied to the other Party and each Party shall be entitled to attend all inspections performed by and meetings involving the Independent Auditor.
- 5.6.9 Subject to Section 24 [*Dispute Resolution Procedure*], the Parties agree to act in accordance with the advice, recommendations, opinions, decisions and determinations of the Independent Auditor, in so far as the same are in accordance with the terms of its appointment and this Agreement, any advice, recommendations, and determinations of the Independent Auditor shall be conclusive as to the matters set out therein and be binding on the Parties. All instructions and representations issued or made by either Party to the Independent Auditor shall be simultaneously copied to the other Party and each Party shall be entitled to attend all inspections performed by and meetings involving the Independent Auditor.

5.7 INDEPENDENT CONSULTANT

- 5.7.1 The Concessionaire shall, six (6) Months prior to the Expiry Date or within seven (7) Days of issuance of the Termination Notice (to the extent such Termination Notice is served after the Project Completion Date), as the case may be, forward to PKHA, a list of five (5) firms/companies/bodies corporate who are eligible and willing to act as the Independent Consultant and PKHA shall have the right in respect of these firms/companies/bodies corporate to seek presentations and such other information from them as it deems necessary. The list shall comprise of independent Persons of repute with substantial experience in projects similar to the Project. PKHA shall, within fourteen (14) Days of receipt of the said list, shortlist two (2) of the firms and communicate the same to the Concessionaire. The Concessionaire shall within seven (7) Days thereafter (a) select a shortlisted entity to be the Independent Consultant, (b) in consultation with PKHA and the Financiers, finalize the fees and other terms of appointment of the Independent Consultant, and (c) jointly with the Financiers, enter into the IC Contract with *inter alios* the Independent Consultant and PKHA on the finalized fee and other terms of appointment.



- consultation with PKHA, finalize the fees and other terms of appointment of the Independent Consultant, including the required qualifications and job experience of its key personnel, and (c) jointly with the Financiers (if applicable) enter into the Independent Consultant contract with *inter alios* the Independent Consultant and PKHA on the finalized fee and other terms of appointment.
- 5.7.2 The Independent Consultant shall have such duties and responsibilities as set out in Section 22 [*Handback*].
- 5.7.3 The remuneration, cost and expenses of the Independent Consultant shall be shared by the Concessionaire and PKHA equally and shall be paid directly to the Independent Consultant by the Concessionaire and PKHA, the detailed process for which shall be set out in the Independent Consultant contract.
- 5.7.4 The duration of the appointment of the Independent Consultant shall be until the issuance of the Handback Certificate.
- 5.7.5 The Parties agree to cooperate with each other generally in relation to all matters within the scope of or in connection with the functions of the Independent Consultant. All instructions and representations issued or made by either Party to the Independent Consultant shall be simultaneously copied to the other Party and each Party shall be entitled to attend all inspections performed by and meetings involving the Independent Consultant.
- 5.7.6 Subject to Section 24 [*Dispute Resolution Procedure*], the Parties agree to act in accordance with the advice, recommendations, opinions, decisions and determinations of the Independent Consultant, in so far as the same are in accordance with the terms of its appointment and this Agreement, any advice, recommendations, and determinations of the Independent Consultant shall be conclusive as to the matters set out therein and be binding on the Parties.
- 5.8 **EMPLOYMENT OF TRAINED PERSONNEL**
- 5.8.1 The Concessionaire shall ensure that the personnel engaged by it in the performance of its obligations under this Agreement are at all times properly trained for their respective functions.



6. EFFECTIVENESS OF THIS AGREEMENT, CONDITIONS PRECEDENT AND DATES AND DURATION

6.1 EFFECTIVENESS

6.1.1 This Agreement shall come into force on the Effective Date to the extent of the rights and obligations of the Parties which relate to the Financial Close Period, as expressly stated in this Agreement; provided, that this Agreement shall come into effect in respect of the rights and obligations of the Parties in relation to the period commencing from the Take-Over Date to the Expiry Date, on the Take-Over Date.

6.2 CONDITIONS PRECEDENT FOR FINANCIAL CLOSE

6.2.1 The achievement of Financial Close shall be subject to the fulfilment of the following Conditions Precedent:

(a) the Concessionaire has:

- (i) delivered to PKHA the Financial Close Bond within one (1) Month of the Effective Date;
- (ii) executed the Shareholders' Agreement, if any, within three (3) Months of the Effective Date;
- (iii) procured all the Consents required to be procured by it for achieving Financial Close and maintained the same with full effect, within six (6) Months of the Effective Date;
- (iv) procured all the Consents required to be procured by it to commence the Works on the Concession Area for the duration of the Construction Period and maintained the same with full effect, within six (6) Months of the Effective Date; and
- (v) entered into the IE Contract and the IA Contract;

(b) PKHA has:

- (i) handed over to the Concessionaire Vacant Possession of the Partial Concession Area, free of all Encumbrances and together with the Ancillary Rights, on the Effective Date for execution of the Preliminary Works by the Concessionaire;
- (ii) funded the Initial PKHA Funding Amount in the Class B Equity Subscription Account on the Effective Date;
- (iii) disbursed the Subordinate Financing in the Subordinate Financing Account on the Effective Date;
- (iv) established and delivered to the Concessionaire the Balance Sheet and the Initial PKHA Funding Amount Financial Instrument on the Effective Date;



- (v) given the Concessionaire access to the Concession Area, within seven (7) Days of the Effective Date, to enable the Concessionaire to, *inter alia*, conduct technical and financial studies and other feasibility studies on the Project, soil investigation of the Concession Area and other preliminary studies in connection therewith as required by the Financiers and/or for proper implementation of the Project;
- (vi) entered into the Provincial Support Agreement, the Direct Agreement, the EFU Agreement and the Subordinate Financing Agreement with *inter alios* the Concessionaire and satisfied all Conditions Precedent thereunder (if any);
- (vii) granted all the Approvals required to be granted by PKHA for achieving Financial Close, within six (6) Months of the Effective Date;
- (viii) granted all the Approvals required to be granted by PKHA to commence the Works for the duration of the Construction Period, within six (6) Months of the Effective Date;
- (ix) obtained, free from any Encumbrance, the Concession Area and, if required, the Additional Land, for the commencement of the Works, within three (3) Months of the Effective Date;
- (x) procured that the relevant Public Utilities obstructing the undertaking of the Works have been or shall be removed, relocated, diverted and reinstated, in such manner and within such time period as specified in Sections 9.2.1 and 9.2.2;
- (xi) resolved, settled and satisfactorily concluded all controversies, disputes, claims, suits, objections or restraints whatsoever by the public or any Person, if any, over or in relation to, the Concession Area, the Additional Land, if required, or in relation to the implementation of the Project by the Concessionaire to such extent that the same do not impinge on the Concessionaire's rights and obligations pursuant to the terms of this Agreement, within three (3) Months of the Effective Date; and
- (vi) entered into the IE Contract and the IA Contract.

6.2.2 Each Party shall provide reasonable cooperation as may be required to assist the other Party to satisfy the Conditions Precedent for which such Party is responsible and shall promptly inform the other Party in writing when any Condition Precedent has been satisfied.

6.3 NON-FULFILLMENT OF THE CONDITIONS PRECEDENT

6.3.1 Each Party shall satisfy its respective Conditions Precedent within the relevant time period specified in Section 6.2.1; provided, that each Party may, upon the written request of the other Party, extend the time period for fulfilment of one or more unfulfilled Condition Precedent for such further time period as may be mutually agreed upon by the Parties in writing. Each Party agrees, acknowledges and recognizes that (a) because of the size, scope and long term nature of the Project, it is more likely that the Project may be significantly undermined by events and occurrences outside the control of either Party.



or the Concessionaire, and, therefore, delays in fulfilment of one or more Condition Precedent by a Party may be attributable to extraneous events as opposed to the default or negligence of the Party unable to satisfy the relevant Conditions Precedent within the stipulated time period, (b) it is not in the best interest of either Party to mechanically Terminate this Agreement without considering the factors causing delay in fulfilment of the relevant Conditions Precedent by the other Party, and (c) mechanical Termination of this Agreement and re-tendering of the Project is likely to cause delay in provision of a vital infrastructure facility to the public and unwarranted loss to the public exchequer. Accordingly, in considering the request of a Party for extension of the time period for fulfilment of one or more unfulfilled Condition Precedent pursuant to this Section, the other Party shall act in good faith, be under a positive obligation to assess and take into account the causes of delay and shall not unreasonably withhold, condition or delay its consent to extend the time period for satisfaction of the relevant unfulfilled Conditions Precedent rather than Terminate this Agreement.

- 6.3.2 Each Party may, upon the written request of the other Party, waive one or more Conditions Precedent required to be fulfilled by the other Party pursuant to Section 6.2.1, to the extent permitted by the Applicable Laws; provided, that:
- (a) the exercise of the rights and performance of the obligations of the Concessionaire pursuant to the terms of this Agreement is not hindered or impeded; and
 - (b) except as otherwise stated in this Agreement, no substantial risk pertaining to the Project is transferred to PKHA, either directly or indirectly.
- 6.3.3 Upon the fulfilment or waiver, or the partial fulfilment and partial waiver, as the case may be, of the Conditions Precedent specified in Section 6.2.1, the Independent Engineer and the Independent Auditor shall jointly issue a certificate (the "**Conditions Precedent Certificate**") confirming that (a) all of the Conditions Precedent specified in Section 6.2.1 have been fulfilled, or (b) if any Conditions Precedent is/are waived, the Conditions Precedent have been partially fulfilled and partially waived.
- 6.3.4 The Parties hereby jointly undertake to procure that the Independent Engineer and the Independent Auditor issue the Conditions Precedent Certificate within three (3) Days of the date on which the Independent Engineer and the Independent Auditor are satisfied, acting reasonably, that:
- (a) each of the Concessionaire's Conditions Precedent stand satisfied (and/or waived or deferred by PKHA); and
 - (b) each of PKHA's Conditions Precedent stand satisfied (and/or waived or deferred by the Concessionaire).
- 6.3.5 If all the Conditions Precedent have not been fulfilled or waived, or partially fulfilled and partially waived, as the case may be, within the relevant time period specified in Section 6.2.1, the Parties may (depending on the circumstances then prevailing) agree on an extension of such period and any additional condition or amendment to this Agreement as may be required.

For the avoidance of doubt, waiver by either Party of any Condition Precedent pursuant to Section 6.3.2 and issuance of the Conditions Precedent Certificate in such event shall



by no means be construed as discharging the other Party from the obligation of fulfilling such Condition Precedent, unless otherwise agreed in writing by the waiving Party (in consultation with the Financiers, if necessary, in the event the waiving Party is the Concessionaire). The responsibility of a Party to fulfill such Condition Precedent shall subsist but may be deferred by the waiving Party to a later date in the circumstances as the waiving Party shall deem fit; provided, that such deferment may be granted by the waiving Party subject to the fulfilment by the other Party of any additional conditions which the waiving Party may deem fit to impose.

6.3.7 If the Concessionaire fails to fulfill a Condition Precedent and the time period for fulfilment of such Condition Precedent has not been extended pursuant to Section 6.3.1 or that Condition Precedent has not been waived by PKHA pursuant to Section 6.3.2, PKHA shall be entitled to declare a Concessionaire Event of Default, Terminate this Agreement pursuant to Section 21 [Termination] and forfeit the Financial Close Bond.

6.3.8 If PKHA fails to fulfill a Condition Precedent and the time period for fulfilment of such Condition Precedent has not been extended pursuant to Section 6.3.1 or that Condition Precedent has not been waived by the Concessionaire pursuant to Section 6.3.2, the Concessionaire shall be entitled to declare an PKHA Event of Default, Terminate this Agreement pursuant to Section 21 [Termination] and PKHA shall immediately and in any event by the Termination Date return the Financial Close Bond to the Concessionaire. In the event that PKHA does not return the Financial Close Bond as above, the Financial Close Bond shall be deemed to have been cancelled.

6.3.9 All costs and expenses in connection with any Condition Precedent expressed to be fulfilled and/or complied on part of PKHA or the Concessionaire shall be borne and paid by the respective Party accordingly and where any Condition Precedent is to be fulfilled jointly by PKHA and the Concessionaire, each Party shall meet such part of the costs and expenses which relate to the carrying out of its obligations under this Agreement.

6.4 DELAY IN ACHIEVEMENT OF FINANCIAL CLOSE AND WORKS COMMENCEMENT DATE

6.4.1 Subject to the terms of this Agreement, in the event achievement of Financial Close and/or commencement of the Works is delayed due to the failure of PKHA to fulfil any of its obligations relating to the Financial Close Period, the Construction Period shall stand extended by the Delay Duration and PKHA shall be liable to compensate the Concessionaire for any Incremental and Consequential Costs arising from such failure; provided, that for the purpose of calculation, determination and payment of such Incremental and Consequential Costs Sections 3.2.2 to 3.2.7 shall apply *mutatis mutandis*.

6.4.2 Subject to the terms of this Agreement, in the event achievement of Financial Close and/or commencement of the Works is delayed due to a Concessionaire Event of Default, PKHA shall be entitled to declare a Concessionaire Event of Default, Terminate this Agreement pursuant to Section 21 [Termination] and forfeit the Financial Close Bond.

6.5 DATES AND DURATION

6.5.1 This Agreement shall come into force on the Effective Date to the extent of the rights and obligations of the Parties which relate to the Financial Close Period, as expressly stated in this Agreement; provided, that this Agreement shall come into effect on the



- of the rights and obligations of the Parties in relation to the period commencing from the Take-Over Date to the Expiry Date, on the Take-Over Date.
- 6.5.2 The Concession Period shall be the period commencing from the Effective Date and ending on the Expiry Date (or the Termination Date, if earlier), and shall comprise of (a) the Financial Close Period, (b) the period commencing on the Appointed Date and concluding on the Works Commencement Date, (c) the Construction Period, which shall commence on the Works Commencement Date and conclude on the Project Completion Date, and (d) the Operations Period, which shall commence on the Expressway Section Service Commencement Date and conclude on the Expiry Date (or the Termination Date, if earlier).
- 6.5.3 PKHA shall fund the Initial PKHA Funding Amount in the Class B Equity Subscription Account on the Effective Date.
- 6.5.4 PKHA shall disburse the Subordinate Financing in the Subordinate Financing Account on the Effective Date.
- 6.5.5 PKHA shall establish and deliver to the Concessionaire the Balance PKHA Funding Amount Financial Instrument on the Effective Date.
- 6.5.6 PKHA shall hand over to the Concessionaire Vacant Possession of the Partial Concession Area, free of all Encumbrances and together with the Ancillary Rights, on the Effective Date for execution of the Preliminary Works by the Concessionaire.
- 6.5.7 The Concessionaire shall commence the Preliminary Works at the Partial Concession Area on the Preliminary Works Commencement Date and complete the same by the Preliminary Works Scheduled Completion Date.
- 6.5.8 PKHA shall give the Concessionaire access and the necessary rights to the Concession Area (other than the Partial Concession Area) within seven (7) Days of the Effective Date, to enable the Concessionaire to, *inter alia*, conduct technical and financial studies and other feasibility studies on the Project, soil investigation of the Concession Area and other preliminary studies in connection therewith as required by the Financiers and/or for proper implementation of the Project. In this regard, PKHA shall coordinate with the Concessionaire and use its best endeavours to facilitate the procurement of all necessary information, data, drawings and records whatsoever from the Public Sector Entities required by the Concessionaire for the Works on a date no later than the Works Commencement Date.
- 6.5.9 PKHA shall procure, free from any Encumbrance, the Concession Area and, if required, the Additional Land within three (3) Months of the Effective Date.
- 6.5.10 The Concessionaire shall expeditiously commence the Detailed Design of the Works upon the execution of this Agreement, and submit for the Approval of PKHA (which Approval shall not be unreasonably withheld, conditioned or delayed), all components of the Detailed Design no later than five (5) Months from the Effective Date.
- 6.5.11 PKHA shall remove or procure to be removed, relocated, diverted or reinstated the Public Utilities necessary for the undertaking of the Works within six (6) Months of the Effective Date, in the manner specified in Section 9.2.1 and 9.2.2.



- 6.5.12 The Concessionaire shall achieve Financial Close within the Financial Close Period.
- 6.5.13 The Concessionaire shall issue the Financial Close Achievement Notice upon achieving Financial Close.
- 6.5.14 The Independent Auditor shall issue the Financial Close Achievement Certificate within three (3) Days of receipt of the Financial Close Achievement Notice.
- 6.5.15 The Concessionaire shall, with the facilitation of PKHA, procure the supply of Public Utilities and ancillary services to the Concession Area required by the Concessionaire for the Works by the Works Commencement Date.
- 6.5.16 PKHA shall hand-over to the Concessionaire the Vacant Possession of the Concession Area (other than the Partial Concession Area) and the Additional Land, if required, together with the Ancillary Rights on the Take-Over Date.
- 6.5.17 PKHA shall fund the Balance PKHA Funding Amount in the Class B Equity Subscription Account on the Balance PKHA Funding Amount Funding Date.
- 6.5.18 Subject to the terms of this Agreement, the Concessionaire shall commence the Works (other than the Preliminary Works) on the Works Commencement Date and shall complete the same on or before the Project Completion Date.
- 6.5.19 The Concessionaire shall commence Toll collection operations at the relevant Toll Plazas in respect of the Expressway Section, and any subsequent Section added to the Expressway Section, on the basis of the Toll Structure set out in Part I of SCHEDULE B [TOLL STRUCTURE], from the Expressway Section Service Commencement Date and the Day immediately following the Section Completion Date in respect of each subsequent Section, respectively, and continue such collections until the Project Completion Date (or the Termination Date, if earlier).
- 6.5.20 The Concessionaire shall undertake Toll collection operations at the relevant Toll Plazas in respect of the Expressway, on the basis of the Toll Structure set out in Part II of SCHEDULE B [TOLL STRUCTURE], from the Service Commencement Date and continue such collections until the Expiry Date (or the Termination Date, if earlier).
- 6.5.21 The Concessionaire shall commence collecting the Revenues from the Concessionaire's exercise of its Development Rights including Revenues from the Ancillary Facilities and/or other facilities on the date the Ancillary Facilities and/or the other facilities provided by the Concessionaire as part of the Project, or any of them, become operational and/or the Commercial Activities Agreements come into force and effect, and, unless otherwise provided herein, continue such collection until the Expiry Date (or the Termination Date, if earlier).
- 6.5.22 Subject to the terms of this Agreement, the Concessionaire shall commence routine and major maintenance of the Project Assets, or part thereof, as applicable, on the Expressway Section Service Commencement Date and continue the same until the Expiry Date (or the Termination Date, if earlier) which routine and periodic maintenance shall be undertaken at such times and in such manner as stipulated in the O&M Manual.



7. GRANT OF CONCESSION

7.1 GRANT OF CONCESSION

7.1.1 Pursuant to the enabling provisions of the PPP Act and the NWFP Ordinance, PKHA hereby grants unto the Concessionaire, subject to the terms and conditions of this Agreement, a concession in accordance with Section 7.3 [*Scope of Concession*] to undertake the Project (the "Concession").

7.2 CONCESSION PERIOD

7.2.1 PKHA hereby grants to the Concessionaire the exclusive right, licence and authority to enjoy the rights, privileges, concessions and perform the obligations set out in this Agreement for a period of, unless extended otherwise in accordance with the terms of this Agreement, twenty five (25) years commencing from the Effective Date and ending on the Expiry Date (or the Termination Date, if earlier) (the "Concession Period").

7.3 SCOPE OF CONCESSION

7.3.1 Subject to and in accordance with the terms of this Agreement, PKHA hereby grants to the Concessionaire the Concession set forth herein, including, the exclusive right, licence and authority during the subsistence of this Agreement to implement the Project Deliverables as stated in Section 2.1.1 above.

7.4 ACCEPTANCE OF THE GRANT OF CONCESSION

7.4.1 Subject to the terms of this Agreement, the Concessionaire hereby accepts the grant of the Concession.

7.4.2 The Concessionaire shall exercise and enjoy all rights, powers, benefits, privileges, authorizations and entitlements under the Concession and perform its obligations, including undertaking the Works and the Services set forth in this Agreement.

7.5 EXCLUSIVITY AND DEVELOPMENT RIGHTS

7.5.1 During the Concession Period, PKHA undertakes and guarantees that the Concessionaire shall have the exclusive right to undertake the Project, and that no other Person shall have the right to enter, block or otherwise impede the domain of the Concessionaire inconsistent with this Agreement.

7.5.2 PKHA hereby confirms that, should PKHA or any Public Sector Entity decide to establish a Competing Route, the Concessionaire shall be entitled to such relief as specified in Section 15.3.

7.5.3 PKHA hereby confirms that during the Concession Period, the Concessionaire shall have the exclusive Development Rights for the Concession Area. The Concessionaire may undertake the Development Rights on its own or enter into Commercial Activities Agreements with third parties for this purpose; provided, that:

- (a) the Concessionaire shall, from time to time, notify PKHA in advance, in details of the proposed commercial activities, and seek its Approval for the same.



Approval shall not be unreasonably withheld, conditioned or delayed; provided, that PKHA shall not withhold its Approval if the proposed commercial activities do not infringe any Applicable Laws, statute (including, without limitation, the NWFP Ordinance), judgment, order, decree, regulation or rule of any Court or Public Sector Entity; provided, further, that no such notification requirement or approval shall be required in respect of the facilities to be established by the Concessionaire at the Expressway Service Areas in accordance with the terms of this Agreement;

- (b) exercise of the Development Rights is in conformity with, and does not contravene, the appropriate highway safety standards approved by PKHA or any other applicable standards, the Construction Performance Standards, Good Industry Practice, the terms of this Agreement and the Applicable Laws of Pakistan;
- (c) the term of any Commercial Activities Agreement in relation to the Development Rights shall not extend beyond the Expiry Date; provided, that where this Agreement is Terminated, PKHA shall step in and succeed to the interests of the Concessionaire under the Commercial Activities Agreements with effect from the Termination Date; provided, however, that any sums claimed by the Concessionaire as being due and owing under the Commercial Activities Agreements or accruing on account of any act, omission, or event prior to the Termination Date shall always constitute debt between the Concessionaire and the relevant third party and PKHA shall in no way or manner be entitled to such sums. The Concessionaire shall ensure that the Commercial Activities Agreements entered into pursuant hereto contain terms necessary to give effect to the terms of this Section 7.5.3(c);
- (d) the Concessionaire shall be entitled to charge under the Commercial Activities Agreement a fee/tariff as agreed upon by the Concessionaire with the relevant private sector utility provider(s), and/or in accordance with Applicable Laws, as applicable;
- (e) the Concessionaire shall not exercise its Development Rights on the Concession Area reserved for provision of Service Road in such manner that impedes future connectivity of the Service Road in accordance with Section 12.13 [*Interchanges and New Toll Plazas and Connectivity of Service Road*] of this Agreement;
- (f) on the Transfer Date ownership rights in permanent works established in relation to Development Rights shall transfer to PKHA and all agreements entered into by the Concessionaire with regard to such Development Rights shall be assigned to PKHA on the Transfer Date in terms of Section 7.5.3(c) above.

7.5.4 Except as otherwise expressly provided herein, nothing in this Agreement shall be construed or interpreted as limiting, restricting, diminishing or prejudicing in any way the right of the Concessionaire to claim any benefit provided under the Applicable Laws whether in effect now or in the future.

7.5.5 The Concessionaire may inform PKHA from time to time of any difficulties encountered in the activities it is to perform under this Agreement. If any such difficulties create a significant possibility that the Concessionaire shall be prevented or materially impaired in meeting its obligations hereunder, then upon the request of the Concessionaire,



shall take or cause to be taken such actions as are reasonable, appropriate and permissible under the Applicable Laws to remove or mitigate such difficulties.

7.6 SOLE PURPOSE OF THE CONCESSIONAIRE

7.6.1 The Concessionaire has been set up as a special purpose vehicle for the sole purpose of implementing the Project, and the Concessionaire shall not, except with the prior Approval of PKHA, be or become directly or indirectly engaged, concerned or interested in any business other than as envisaged in this Agreement.



8. PROJECT IMPLEMENTATION PROGRAMME AND DESIGN

8.1 PROJECT IMPLEMENTATION PROGRAMME AND KEY TARGET DATES

8.1.1 PROJECT IMPLEMENTATION PROGRAMME

The Concessionaire shall, immediately after the Effective Date, submit to PKHA and the Independent Engineer, a programme setting out the timetable in accordance with which the Concessionaire shall carry out the Works, including, surveys, investigations, designing, construction, Commissioning, periodic conduct of Tests and carrying out of related, incidental or ancillary works (the "Project Implementation Programme").

8.1.2 KEY TARGET DATES

- (a) Subject to the terms of this Agreement, while preparing the Project Implementation Programme, the Concessionaire shall have due regard to the following key target dates:
- (i) **FINANCIAL CLOSE:** The Concessionaire shall achieve Financial Close within six (6) Months from the Effective Date. In the event Financial Close cannot be achieved by the Concessionaire within six (6) Months from the Effective Date, the Parties may (depending on the circumstances then prevailing) agree on an extension of such period, provided such extension shall be no less than three (3) Months, and any additional condition or amendment to this Agreement, as may be required;
 - (ii) **DEVELOPMENT AND DESIGNING:** The Concessionaire shall expeditiously commence the Detailed Design of the Works upon the execution of this Agreement, and submit for the Approval of PKHA (which Approval shall not be unreasonably withheld, conditioned or delayed) all components of the Detailed Design no later than five (5) Months from the Effective Date;
 - (iii) **CONSTRUCTION PERIOD:** Subject to the terms of this Agreement, the Concessionaire shall commence the Works on the Works Commencement Date and Substantially Complete the same within twenty four (24) Months; provided, that the Concessionaire shall commence the Preliminary Works at the Partial Concession Area on the Preliminary Works Commencement Date and complete the same by the Preliminary Works Scheduled Completion Date; provided, that the Works in respect of seventy percent (70%) of the Main Carriageway shall be completed by the Concessionaire by December 31, 2017; provided, further, that the entire Main Carriageway shall be completed by the Concessionaire within eighteen (18) Months from the Works Commencement Date.
 - (iv) **OPERATIONS PERIOD:** Subject to the terms of this Agreement, the Operations Period shall commence on the Expressway Section Service Commencement Date and conclude on the Expiry Date (or the Termination Date, if earlier); provided, that the Concessionaire shall be entitled to commence collecting the Tolls (A) in respect of the



Expressway Section, and any subsequent Section added to the Expressway Section, at the relevant Toll Plazas from the Expressway Section Service Commencement Date and the Day immediately following the Section Completion Date of each succeeding Section, respectively, based on the Toll Structure set out in Part I of **SCHEDULE B [TOLL STRUCTURE]** and continue such collection until Project Completion Date, and (B) in respect of the Expressway at the Toll Plazas on the Service Commencement Date based on the Toll Structure set out in of Part II of **SCHEDULE B [TOLL STRUCTURE]**, and continue such collection until the Expiry Date (or the Termination Date, if earlier);

- (v) **COMMENCEMENT OF ROUTINE AND PERIODIC MAINTENANCE:** Subject to the terms of this Agreement, the Concessionaire shall commence routine and periodic maintenance of the Project Assets, or part thereof, on the Expressway Section Service Commencement Date and continue the same until the Expiry Date (or the Termination Date, if earlier), in accordance with the O&M Manual.

8.2 DESIGN

8.2.1 PRELIMINARY DESIGN APPROVALS

- (a) The Concessionaire shall submit for the review of PKHA the Preliminary Design of the Works within two (2) Months of the Effective Date.
- (b) The Concessionaire shall submit one (1) copy of the Preliminary Design to the Independent Engineer and four (4) copies thereof to PKHA within two (2) Months from the Effective Date. The Independent Engineer shall review the Preliminary Design and submit detailed comments to PKHA within one (1) Week of receipt of the Preliminary Design from the Concessionaire. PKHA may seek clarification from the Concessionaire on the Preliminary Design within two (2) Weeks of receipt of the initial submission by the Concessionaire and the Concessionaire shall supply those clarifications to PKHA within two (2) Weeks of receipt of the clarification request from PKHA.

8.2.2 DETAILED DESIGN APPROVALS

- (a) The Concessionaire shall expeditiously commence the Detailed Design of the Works upon the execution of this Agreement. The Detailed Design shall be in accordance with the Construction Performance Standards and the relevant Applicable Laws, and shall meet functional adequacy, structural integrity and prescribed safety and security requirements; provided, that subject to the other requirements of this Section 8.2.2(a), wherever possible, the Detailed Design shall not cause acquisition of any Additional Land to be undertaken by PKHA.
- (b) The Concessionaire may submit the Detailed Design for components of the Works in batches in such manner and at such times as provided in **SCHEDULE AD [DETAILED DESIGN MODULES]**; provided, however, that all components of the Detailed Design are submitted for the Approval of PKHA, no later than five (5) Months from the Effective Date. With each batch of the Detailed Design submitted under this Section, the Concessionaire shall also submit the requirement of removal, relocation and/or diversion of the Public Utilities.



services ancillary thereto required for undertaking the Works in accordance with the particular batch of the Detailed Design submitted by the Concessionaire.

- (c) The Concessionaire shall submit one (1) copy of each batch of the Detailed Design, to the Independent Engineer and four (4) copies thereof to PKHA as and when provided in **SCHEDULE AD [DETAILED DESIGN MODULES]**. The Independent Engineer shall review each batch of the Detailed Design and submit its comments to the PKHA within one (1) Week of receipt of the relevant batch of the Detailed Design from the Concessionaire. PKHA shall taking into account, *inter alia*, the comments of the Independent Engineer, inform the Concessionaire in writing of its Approval or rejection, partial Approval or partial rejection (along with comments) of each batch of the Detailed Design within four (4) Weeks from the date of submission. If the Concessionaire has not received the written Approval or written objections from PKHA on each such batch of the Detailed Design within four (4) Weeks after the date of submission, that particular batch of the Detailed Design shall be deemed Approved by PKHA.
- (d) If PKHA informs the Concessionaire in writing of its objection to or partial rejection of any batch of the Detailed Design within the period provided in Section 8.2.2(c), the Concessionaire shall, after making any appropriate changes based on the comments of PKHA, re-submit the said batch of the Detailed Design (or the relevant parts thereof, as the case may be) to PKHA for Approval within two (2) Weeks of receiving such objections or partial rejection. If the Concessionaire has not received written Approval or any written objection from PKHA on the re-submitted batch of the Detailed Design (or the relevant parts thereof, as the case may be) within two (2) Weeks after the date of receipt by PKHA of the said re-submission, the said re-submitted batch of the Detailed Design shall be deemed Approved by PKHA.
- (e) Once all the batches of the Detailed Design have been Approved in terms of this Section 8.2.2, the complete Detailed Design shall be deemed Approved by PKHA and no further Approvals shall be required therefor.
- (f) Notwithstanding the actual or deemed Approval of the Detailed Design as aforesaid, PKHA shall endorse four (4) sets of the Approved Detailed Design. Three (3) sets of such Approved Detailed Design shall be retained by PKHA and the other set shall be returned to the Concessionaire.
- (g) By submitting the Detailed Design to PKHA, the Concessionaire shall be deemed to represent that it has determined and verified that the design and engineering, including, field construction criteria related thereto, conform to the prescribed standards and specifications, are in accordance with the Construction Performance Standards, and shall meet the functional adequacy, structural integrity and safety requirements.
- (h) The Concessionaire shall be solely responsible for the adequacy of the Detailed Design, and shall not be relieved or absolved in any manner whatsoever from any of its obligations hereunder notwithstanding any review, comment or observation made by PKHA or the absence of the same from PKHA in approving the Detailed Design. Approval of the Detailed Design shall not be construed as



warranty by PKHA of the safety, durability, reliability or viability of the Approved Detailed Design.

- (i) The Concessionaire shall be responsible for delays in submitting the Detailed Design and/or caused by the inadequacy thereof, and shall not be entitled to seek any relief in that regard from PKHA.
- (j) Subject to the terms of this Agreement, in the event acquisition of any Additional Land is necessary for the implementation of the Approved Detailed Design, PKHA shall make available such Additional Land as soon as reasonably practicable (but in any event prior to the date on which the relevant section of the Works are required to be undertaken on such Additional Land), at its own efforts and at no cost or expense to the Concessionaire, free from any Encumbrance. For the avoidance of doubt, any Additional Land made available by PKHA under this Section 8 [Project Implementation Programme and Design] shall form part of the Concession Area.

8.2.3 VARIATIONS TO THE APPROVED DETAILED DESIGN BY THE CONCESSIONAIRE

- (a) The Concessionaire shall not make any Variations to the Approved Detailed Design without the prior Approval of PKHA.
- (b) The Concessionaire may propose Variations to the Approved Detailed Design to improve the design or to reduce the costs of the construction or to make the construction of a particular aspect of the Works more practical or to improve the safety and security of the Works or for such other purpose as is deemed appropriate by the Concessionaire (subject to the Applicable Laws). Any proposed Variation to the Approved Detailed Design shall be in accordance with the terms and conditions of this Agreement and shall not result in the reduction in the capacity, quality or safety of the Project.
- (c) Should PKHA inform the Concessionaire in writing of its rejection or partial rejection of any deviation proposed by the Concessionaire from the Approved Detailed Design, the Concessionaire may proceed with the Approved Detailed Design; provided, however, that the Concessionaire shall not be responsible for any adverse consequences which may arise from the inherent defects of the Approved Detailed Design which were sought to be rectified by the Variation proposed by the Concessionaire which has been wholly or partially rejected by PKHA.
- (d) The Concessionaire shall bear the cost of preparation of detailed technical drawings pursuant to any Variation to the Approved Detailed Design or for any additional construction cost which may result from such amendment proposed by the Concessionaire.
- (e) The Variation to the Approved Detailed Design by the Concessionaire shall, wherever possible, not cause acquisition of any Additional Land to be undertaken by PKHA. In the event acquisition of any Additional Land is necessary for the implementation of any Variation to the Approved Detailed Design proposed by the Concessionaire, PKHA shall arrange to acquire and deliver to the Concessionaire such Additional Land and remove or cause to be removed any Encumbrance therefrom, at the cost or expense of the Concessionaire.



that where such Variation proposed by the Concessionaire is necessary to meet the prescribed safety and security requirements of the Expressway, PKHA shall bear all the cost or expenses associated with the acquisition of such Additional Land. The Concessionaire shall not be obliged to undertake those portions of the Works affected by the Approved Variation to the Approved Detailed Design until such time that the Vacant Possession of the Additional Land has been handed over free of any Encumbrance to the Concessionaire.

8.2.4 **VARIATION REQUESTS BY PKHA**

- (a) PKHA may request a Variation to the Approved Detailed Design, by issuing a Variation Notice to the Concessionaire through the Independent Engineer, setting out in detail the changes required to the Approved Detailed Design.
- (b) The Concessionaire shall within four (4) Weeks of receipt of the Variation Notice, provide to the Independent Engineer such information as is necessary and reasonable together with preliminary documentation and detail including where necessary, in support of the following:
 - (i) the impact (if any) which the Variation proposed in the Variation Notice to the Approved Detailed Design is likely to have on the Works or the construction requirements for the Works;
 - (ii) the options for implementing the proposed Variation and the effect, if any, each such option would have on the costs and time thereof;
 - (iii) the estimate of the Incremental and Consequential Costs, including, Incremental and Consequential Costs for the additional Works, which would be incurred for implementing the proposed Variation;
 - (iv) the assessment of the time (in number of Days) which is required to make the proposed Variation, and the time implication on the schedule for completion of the Works; and
 - (v) the revised duration of the Construction Period and the extension of the Concession Period, if required by the Concessionaire.
- (c) The Independent Engineer shall review the aforesaid information and documents submitted by the Concessionaire, and consult with the Concessionaire and PKHA, and based on the preferred option:
 - (i) settle the rates, approve the quantities and certify the Incremental and Consequential Costs which shall be payable by PKHA to the Concessionaire;
 - (ii) if the Works are delayed as a consequence of the Variation to the Approved Detailed Design, certify the revised duration of the Construction Period and the extension of the Concession Period and the further Incremental and Consequential Costs which shall be payable by PKHA to the Concessionaire to compensate the Concessionaire for any estimated loss, cost or expense incurred as a consequence of the Variation.



- (iii) forward to PKHA for its consideration a statement incorporating the certified Incremental and Consequential Costs, and the time within which the Variation to the Approved Detailed Design shall be carried out by the Concessionaire; and
- (iv) forward to the Concessionaire a copy of the statement for the Concessionaire's records.
- (d) PKHA may, within a period of thirty (30) Days from the date of such statement, issue a written confirmation that the Variation proposed by the relevant Variation Notice to the Approved Detailed Design is to be carried out by the Concessionaire, whereupon the Concessionaire shall proceed with the implementation of such changes to the Approved Detailed Design, and PKHA shall make payment of the certified Incremental and Consequential Costs in accordance with the pre-agreed schedule of progress billings, and in any event within seven (7) Days of the relevant invoice from the Concessionaire.
- (e) Subject to the terms of this Agreement, where any Additional Land is necessary for purposes of implementing the Variation requested by PKHA to the Approved Detailed Design, PKHA shall make available such Additional Land as soon as reasonably practicable (but in any event prior to the date on which the relevant section of the Works are required to be undertaken on such Additional Land), at its own efforts and at no cost or expense to the Concessionaire, free from any Encumbrance. For the avoidance of doubt, any Additional Land made available by PKHA under this Section 8 [*Project Implementation Programme and Design*] shall form part of the Concession Area.
- (f) If the Concessionaire does not receive the written confirmation of PKHA within a period of thirty (30) Days from the Independent Engineer's statement, the Variation Notice issued by PKHA under Section 8.2.4(a) shall be deemed to be void, and PKHA shall reimburse the Concessionaire, within seven (7) Days of the relevant invoice from the Concessionaire, the costs and expenses certified by the Independent Engineer as having been incurred by the Concessionaire in preparing and submitting the drawings, documents, estimates and other information in compliance with the Variation Notice.



9. PUBLIC UTILITIES

9.1 NOT USED

9.2 REMOVAL, RELOCATION AND DIVERSION OF PUBLIC UTILITIES

- 9.2.1 PKHA shall at its own effort, cost and expense, procure the removal, relocation or diversion of the Public Utilities and services ancillary thereto, located within the Concession Area, necessary for undertaking the Works relevant to a particular batch of the Detailed Design, as submitted by the Concessionaire pursuant to Section 8.2.2(b), to such locations as required by the Concessionaire as specified in the relevant batch of the Detailed Design. Such removal, relocation or diversion shall be undertaken by PKHA no later than three (3) Months of submission of the relevant batch of the Detailed Design to PKHA in accordance with Section 8.2.2(b); provided, that PKHA shall remove or procure to be removed, relocated, diverted or reinstated the Public Utilities identified by the Concessionaire in the final batch of the Detailed Design no later than six (6) Months of the Effective Date.
- 9.2.2 PKHA shall also at its own effort, cost and expense procure the removal, relocation or diversion of any Public Utilities and services ancillary thereto which are not apparent either from the records of the relevant Public Sector Entities or a physical inspection of the Concession Area, and therefore not identified by the Concessionaire in the relevant batches of the Detailed Design but the removal of which Public Utilities is necessitated during the undertaking of Works by the Concessionaire.
- 9.2.3 The Concessionaire shall use its best endeavours (but shall not be under an obligation) to assist PKHA in arranging and achieving the timely completion of any necessary removal, relocation or diversion of the Public Utilities and services ancillary thereto necessary for undertaking the Works. Any costs and expenses associated with such assistance shall be fully reimbursed at actual by PKHA to the Concessionaire forthwith, and in any event, within seven (7) Days of a written request by the Concessionaire.
- 9.2.4 The Concessionaire shall use its best endeavours to undertake the Detailed Design in a manner that any further removal, relocation or diversion of the Public Utilities and services ancillary thereto, apart from that undertaken by PKHA in terms of Section 9.2.1, is not required for the undertaking the Works; provided, that PKHA shall remain responsible for the removal, relocation or diversion of Public Utilities in terms of Section 9.2.2.
- 9.2.5 The Concessionaire shall at its own effort, cost and expense, procure the further removal, relocation or diversion of any Public Utilities already removed, relocated or diverted by PKHA in terms of Section 9.2.1, if required.

9.3 DELAYED COMPLETION

- 9.3.1 If as a result of any delay in carrying out the works relating to the removal, relocation, diversion or reinstatement of the affected Public Utilities, such delay being attributable to the acts and/or omissions of PKHA, including delay, negligence or failure on the part of PKHA in carrying out its obligations under this Section 9 [Public Utilities] and more generally in carrying out its obligations under the terms of this Agreement, the Works are impeded or the final completion of the Works is otherwise delayed, the Concessionaire shall



shall be entitled to claim compensation in accordance with Section 9.4 in addition to an extension of time for the Delay Duration.

9.4 INCREMENTAL AND CONSEQUENTIAL COSTS FOR DELAYED COMPLETION RELATING TO RELOCATION ETC. OF PUBLIC UTILITIES

- 9.4.1 If the delay, in terms of Section 9.3, in carrying out the removal, relocation, diversion or reinstatement of Public Utilities described in Section 9.2.1 and 9.2.2, impedes the Works or delays the final completion of the Works, PKHA shall compensate the Concessionaire in accordance with this Section 9.4.
- 9.4.2 The Concessionaire shall duly notify PKHA the financial impact of any delayed completion of the works in relation to the Public Utilities described in Section 9.2.1 and 9.2.2, and the Incremental and Consequential Costs payable by PKHA as a result.
- 9.4.3 The Incremental and Consequential Costs shall be calculated for the Delay Duration, to provide full recovery of, *inter alia*, one or more of the following and without duplication:
- (a) any increase in the projected Estimated Project Cost;
 - (b) all costs of mobilization/demobilization, insurance premium (pro-rated for the Delay Duration), loss/deterioration of materials, wages, administrative/management expenses for the Delay Duration, all of the foregoing on actual basis;
 - (c) cost of construction financing (including any increase thereof), computed based on the Financing amount already drawn, at a rate per annum payable by the Concessionaire to the Financiers pursuant to the Financing Agreements for the Delay Duration;
 - (d) penalty charges;
 - (e) mark-up;
 - (f) any additional capital expenditure and/or the additional operating cost and/or additional taxes and/or any or all of the above, as the case may be; and/or
 - (g) lost Revenues.
- 9.4.4 The Concessionaire shall, upon making the notification referred to in Section 9.4.2, provide to the Independent Engineer (with a copy to PKHA) particulars of the components of the Incremental and Consequential Costs to enable the Independent Engineer to review and verify the same, and issue a certificate in this respect to the Concessionaire and PKHA within fifteen (15) Days of the notification by the Concessionaire.
- 9.4.5 The certificate under Section 9.4.4 shall also provide an estimate of the duration by which the Concession Period may be extended to compensate the Concessionaire for the certified Incremental and Consequential Costs.



- 9.4.6 The Concessionaire shall request PKHA within a reasonable period of time of a certificate given under Section 9.4.4 to make payment of the Incremental and Consequential Costs as certified by the Independent Engineer pursuant to Section 9.4.4 within fourteen (14) Days of the certificate given under that Section.
- 9.4.7 In the event PKHA fails, or is otherwise unable, to pay the Incremental and Consequential Costs, then the Concessionaire shall be entitled to recover compensation in accordance with Sections 29.20 and/or 29.21.
- 9.4.8 In the event PKHA fails, or is otherwise unable, to pay the Incremental and Consequential Costs, and the Concessionaire does not elect to exercise the rights stipulated in Section 9.4.7 or despite exercise of such rights, the Concessionaire is not adequately compensated, then, at any time thereafter, at the Concessionaire's option (a) the Parties shall negotiate in good faith with a view to agreeing upon an extension to the Concession Period or such other modification of this Agreement as shall adequately compensate the Concessionaire, or (b) if the Concessionaire deems that a Material Adverse Effect has occurred, the Concessionaire shall be entitled to declare an PKHA Event of Default in accordance with Section 21.1 whereupon the applicable sub-Sections of Section 21 [Termination] shall apply.

9.5 PUBLIC UTILITIES REQUIRED FOR THE WORKS

- 9.5.1 The Concessionaire shall procure the supply of the Public Utilities and ancillary services to the Concession Area as required for the Works and other purposes under this Agreement and PKHA shall, to the fullest extent, facilitate the Concessionaire to procure the said supply. All costs and expenses incurred in respect thereof shall be borne and paid by the Concessionaire. The Concessionaire, if required, shall expeditiously comply with all legal requirements necessary for such applications to the concerned Public Utilities service providers.

9.6 WORKS UNDERTAKEN BY PUBLIC UTILITIES

- 9.6.1 To the extent that a Public Utilities service provider must seek approval from PKHA to carry out works at or in the Concession Area, PKHA shall not grant any such approval, whether conditional or otherwise, until it has obtained the prior written consent of the Concessionaire subject to the Concessionaire's reasonable requirements as to any restrictions or conditions to be imposed on the timings and execution of the works by the Public Utilities service provider. PKHA shall take such reasonable requirements into consideration, including, where applicable, the imposition of restrictions or conditions when granting any approval to the Public Utilities service provider.
- 9.6.2 Subject to Section 9.6.1, and all such reasonable conditions or requirements (including any conditions as to indemnity against loss, damage, costs or expenses suffered or incurred by the Concessionaire as a result of granting access), the Concessionaire shall at all times during the Construction Period permit the authorized personnel of all Public Utilities service provider to have access to the Concession Area for the purpose of:
- (a) routine maintenance of any Public Utilities already located within the Concession Area;
 - (b) strengthening, replacing or upgrading of any Public Utilities already located within the Concession Area;



- (c) reinstating any foundations, structures, building, pavements, cabling and the like which may be disturbed or affected by reason of such works undertaken by a Public Utilities service provider; or
- (d) any other work, including, the installation of any new additional services of a Public Utilities service provider within the Concession Area;

Provided, however, that such works do not hamper or delay the execution of the Works or the provision of the Services by the Concessionaire, save and except for emergencies on account of major disruption to any Public Utilities.



10. FINANCES FOR THE PROJECT

10.1 CONCESSIONAIRE TO OBTAIN FINANCES FOR THE PROJECT

10.1.1 GENERAL

Save for PKHA's obligation to (a) fund (i) the Initial PKHA Funding Amount, (ii) the Balance PKHA Funding Amount, and (iii) the Subordinate Financing, and (b) provide the Concessionaire the Balance PKHA Funding Amount Financial Instrument, in each case, in accordance with the terms of this Agreement, the Concessionaire shall be solely responsible for obtaining the Financing, the Sponsor Funding Amount and/or any other funding component of the Total Project Cost, necessary to undertake the Project in accordance with the terms of this Agreement. Further, the Sponsor shall fund the Equity for Class A Shares in respect of the Project in accordance with the terms of the EFU Agreement.

10.1.2 FUNDING OF EQUITY

- (a) PKHA hereby undertakes to fund from time to time PKHA Funding Amount in accordance with the terms of the EFU Agreement.
- (b) The Concessionaire hereby undertakes to procure funding by the Sponsor from time to time of the Sponsor Funding Amount through subscription in cash in Pak Rupees for Class A Shares by the Sponsor in accordance with the EFU Agreement.
- (c) All Base Funding Amounts shall be funded and utilized from time to time in accordance with the EFU Agreement.

10.1.3 CLASS A SHARES & CLASS B SHARES

- (a) Upon funding of the PKHA Funding Amount (or any part thereof) by PKHA from time to time in accordance with the EFU Agreement (if applicable), PKHA shall be issued Class B Shares by the Concessionaire in accordance with the Applicable Laws in the name of "PAKHTUNKHWA HIGHWAYS AUTHORITY".
- (b) Irrespective of the mode of funding by PKHA pursuant to the EFU Agreement, PKHA shall have the right (to be exercised in its sole discretion) to nominate one (1) non-voting director on the board of directors of the Concessionaire at its discretion.
- (c) Upon funding of the Sponsor Funding Amount (or any part thereof) by the Sponsor from time to time in accordance with the EFU Agreement, the Sponsor shall be issued Class A Shares by the Concessionaire in accordance with the Applicable Laws. The obligation to fund the Sponsor Funding Amount shall be independent of the shareholding of the Sponsor in the Concessionaire.



- (d) PKHA shall not be entitled to any dividends in respect of Class B Shares.
- (e) The Concessionaire shall not offer for subscription the Class B shares to any Person other than PKHA to the extent required by the EFU Agreement.

10.2 FINANCIAL CLOSE BOND

- 10.2.1 Within one (1) Month of the Effective Date, the Concessionaire shall submit the Financial Close Bond to PKHA with a face amount equal to the face amount of the Bid Security. The Concessionaire shall keep the Financial Close Bond valid till such time that it is replaced by the Construction Performance Bond.
- 10.2.2 The Financial Close Bond shall secure the Concessionaire's obligation to achieve Financial Close in accordance with the terms of this Agreement. If the Concessionaire fails to achieve Financial Close in accordance with the terms of this Agreement, PKHA shall be entitled to declare a Concessionaire Event of Default, Terminate this Agreement and forfeit the Financial Close Bond. If, however, the Concessionaire is unable to achieve Financial Close due to PKHA's failure to fulfill a Condition Precedent within the prescribed time period, the Concessionaire shall be entitled to declare an PKHA Event of Default, Terminate this Agreement and PKHA shall immediately and in any event within seven (7) Days of the date of the Termination Notice return the Financial Close Bond to the Concessionaire. In the event that PKHA does not return the Financial Close Bond as above, the Financial Close Bond shall be deemed to have been cancelled.
- 10.2.3 The Financial Close Bond may be in the form of (a) cash, (b) a bank draft confirmed by a scheduled commercial bank, or (c) an unconditional, irrevocable and without recourse letter of credit from a scheduled commercial bank.
- 10.2.4 The Concessionaire shall be entitled to assign all its rights, title and interests under the Financial Close Bond to the Financiers as security for the Financing raised pursuant to the Financing Agreements.

10.3 FINANCIAL MODEL AND FINANCING TERM SHEET

- 10.3.1 Prior to Financial Close, the Concessionaire shall deliver to PKHA for information and record a schedule or a copy of the term sheet reflecting the proposed material terms of the Financing Agreements. The Concessionaire shall execute the Financing Agreements consistent with the aforesaid term sheet.

10.4 PERIOD TO ACHIEVE FINANCIAL CLOSE

- 10.4.1 Subject to the terms of this Agreement, the Concessionaire shall achieve Financial Close within six (6) Months from the Effective Date (the "**Financial Close Period**").
- 10.4.2 If despite the procurement of the requisite Approvals and Consents and the fulfilment of the other Conditions Precedent, the Concessionaire is unable to achieve Financial Close within the time period prescribed in Section 10.4.1 above, the period may be further extended for three (3) Months or such other period as may be mutually agreed upon by the Parties.



10.4.3 Subject to the terms of this Agreement, if despite procurement of the requisite Approvals and Consents and the fulfilment of the other Conditions Precedent, the Concessionaire is unable to achieve Financial Close within the time period prescribed and any extension thereof pursuant to Section 10.4.2 or the other applicable terms of this Agreement, PKHA shall be entitled to declare a Concessionaire Event of Default pursuant to Section 21.2, whereupon Section 10.2.2 and the applicable sub-Sections of Section 21 [Termination] shall apply.

10.5 FINANCING AGREEMENTS

10.5.1 The Concessionaire shall provide a copy of the executed Financing Agreements to PKHA before Financial Close and upon receipt of the same from the Financiers. Subject to the terms of this Agreement, the service of the Financing Agreements upon PKHA shall constitute express notice to PKHA of the rights, interest, title, recourse and remedies of the Financiers, including, such security interests of the Financiers as are specified in the Financing Agreements and the step-in rights of the Financiers upon the occurrence of an event of default under the Financing Agreements. To this end, PKHA hereby undertakes to sign and/or endorse the Direct Agreement as required by the Concessionaire and/or the Financiers; provided, that PKHA shall not be subjected to any financial repercussions in relation to the Direct Agreement or the Financing Agreements, save as otherwise expressly stated in this Agreement and/or the PKHA Agreements. A certificate to this effect shall be included by the Concessionaire in the Financial Close Achievement Notice.

10.5.2 Notwithstanding anything to the contrary contained herein, the Concessionaire shall not make any addition, replacement or amendments to any of the Financing Agreements without the prior written consent of PKHA if such addition, replacement or amendment has, or may have, the effect of imposing or increasing any financial liability or obligation on PKHA.

10.6 FINANCIAL CLOSE ACHIEVEMENT NOTICE AND FINANCIAL CLOSE ACHIEVEMENT CERTIFICATE

10.6.1 Upon the achievement of Financial Close, the Concessionaire shall issue a financial close achievement notice (the "**Financial Close Achievement Notice**") confirming that Financial Close has been achieved and this Financial Close Achievement Notice shall include a notice from the Financiers confirming the same.

10.6.2 Within three (3) days of receipt of the Financial Close Achievement Notice, the Independent Auditor shall certify (a) achievement of Financial Close, and (b) the date of achievement of Financial Close (the "**Financial Close Achievement Certificate**").



11. TOLLING DURING CONSTRUCTION

11.1 TOLL COLLECTION OPERATIONS AT THE TOLL PLAZAS

- 11.1.1 During the Construction Period, the Concessionaire shall be authorized to collect, demand, levy and charge the Tolls at the relevant Toll Plazas with effect from the Expressway Section Service Commencement Date, in accordance with **SCHEDULE B [TOLL STRUCTURE]** and shall continue such collections until the Project Completion Date.
- 11.1.2 For smooth implementation of the Toll Structure pursuant to Section 11.1.1, PKHA shall, upon being notified, at least one (1) Month in advance, by the Concessionaire of the scheduled dates of imposition of such Toll Structure, not later than two (2) weeks prior to such dates, issue the Toll Notification.
- 11.1.3 PKHA shall provide all the Approvals and facilitate the procurement of all the Consents whatsoever conferring on the Concessionaire the full authority to collect the Tolls based on the Toll Structure pursuant to Section 11.1.1.

11.2 CONTRACTORS

- 11.2.1 The Concessionaire may undertake the Tolling operation by itself or through a toll operator, which Person shall be the Sponsor, an Affiliate or, if otherwise, an Approved Contractor.
- 11.2.2 The Concessionaire shall conduct at-site training for its employees who shall be undertaking the Toll collection operations at the Toll Plazas. The Concessionaire shall complete all such at-site training by the Expressway Section Service Commencement Date.
- 11.2.3 Notwithstanding the appointment of any Person as the toll operator pursuant to Section 11.2.1, the Concessionaire shall continue to account to PKHA for the obligations to be completed under this Section 11 [*Tolling During Construction*].

11.3 BREACH

- 11.3.1 The Concessionaire shall not be considered in breach of its obligations under this Section 11 [*Construction Tolling*] if the Concessionaire fails to fulfil any obligation hereunder on account of a Permitted Event.

11.4 UTILIZATION OF THE TOLL REVENUE DURING THE CONSTRUCTION PERIOD

- 11.4.1 Save and except as otherwise specified in this Agreement, the Concessionaire shall utilize the Toll proceeds collected from the Toll Plazas from the Expressway Section Service Commencement Date until the Project Completion Date exclusively for undertaking the Project.



12. CONSTRUCTION PERIOD

12.1 COMMENCEMENT OF THE WORKS

12.1.1 Subject to the Conditions Precedent, the Concessionaire shall, before the commencement of the Works on the Works Commencement Date.

- (a) provide its plan for safety and accident prevention;
- (b) procure that the appointed Independent Engineer is responsible for all necessary exchange of information required pursuant to this Agreement;
- (c) provide and maintain a reasonably furnished site office for the Independent Engineer at the Concession Area;
- (d) provide to the Independent Engineer, the Concessionaire's proposed construction programme and completion schedule, which shall form the basis for monitoring the progress of the Works, as well as the schedule for opening of a Section, the Expressway Section or the Expressway to traffic, as the case may be; and
- (e) furnish to PKHA the Construction Performance Bond, in the form and content as provided in **SCHEDULE G [FORM OF CONSTRUCTION PERFORMANCE BOND]**.

12.1.2 Upon achieving Financial Close, the Concessionaire shall notify PKHA and the Independent Engineer of the Works Commencement Date, which date shall be no later than thirty (30) Days from the Appointed Date.

12.1.3 Subject to the terms of this Agreement, the Concessionaire shall only be required to commence the Works after satisfaction and/or waiver of the Conditions Precedent.

12.2 CONSTRUCTION PERFORMANCE BOND

12.2.1 The Concessionaire shall provide to PKHA, on or before the Works Commencement Date, the Construction Performance Bond with a face value equivalent to five percent (5%) of the Construction Costs as projected in the Financial Model, which shall answer for and guarantee the completion of the Works during the Construction Period. The Construction Performance Bond shall be in the form and content set forth in **SCHEDULE G [FORM OF CONSTRUCTION PERFORMANCE BOND]**. The Financial Close Bond shall be returned to the Concessionaire simultaneously with the provision of the Construction Performance Bond. In the event that PKHA refuses to so return the Financial Close Bond, the Concessionaire shall not be obliged to submit the Construction Performance Bond and, in doing so, shall not be considered to be in breach of this Agreement.

12.2.2 The Construction Performance Bond may be in the form of (a) cash, (b) a bank draft confirmed by a scheduled commercial bank, (c) an unconditional, irrevocable and without recourse letter of credit from a scheduled commercial bank, or (d) an insurance bond issued by a reputed insurance company with at least a double A (AA) rating.



12.3 VALIDITY OF CONSTRUCTION PERFORMANCE BOND

- 12.3.1 The Construction Performance Bond shall remain valid for the whole duration of the Construction Period.
- 12.3.2 PKHA shall, upon completion of each twenty five percent (25%) of the value of the Works, as certified by the Independent Engineer, release the Construction Performance Bond to the extent of twenty five percent (25%).
- 12.3.3 The Concessionaire shall be entitled to assign all its rights, title and interests under the Construction Performance Bond or the construction bond(s) issued by its Construction Contractor(s), as the case may be, to the Financiers as security for the Financing under the Financing Agreements.
- 12.3.4 In case of Termination of this Agreement during the Construction Period due to a Concessionaire Event of Default and provided that the Concessionaire Event of Default was not triggered due to Force Majeure Event or due to causes attributable to PKHA or a Public Sector Entity, PKHA shall be entitled to encash the Construction Performance Bond.
- 12.3.5 PKHA hereby agrees to return the Construction Performance Bond for cancellation within seven (7) Days of (a) its receipt of the Commissioning Notice in respect of the Expressway, or (b) the occurrence of a Termination not occasioned by a Concessionaire Event of Default. In the event that PKHA does not return the Construction Performance Bond as above, the Construction Performance Bond shall be deemed to have been cancelled. PKHA agrees to reimburse the Concessionaire for all costs and expenses at actual that the Concessionaire incurs on account of any non-return or delayed return for cancellation of the Construction Performance Bond, in accordance with the terms of this Agreement.

12.4 PRINCIPLES GOVERNING THE CONSTRUCTION PERIOD

- 12.4.1 The Concessionaire shall perform and complete the Works in accordance with:
- (a) **SCHEDULE P** [DESCRIPTION OF THE PROJECT AND SCOPE OF WORK];
 - (b) the Construction Performance Standards and Good Industry Practice;
 - (c) unless otherwise stated in this Agreement, the Proposal;
 - (d) the scope of this Agreement;
 - (e) the Approved Detailed Design;
 - (f) the Project Implementation Programme;
 - (g) the Project Completion Schedule; and
 - (h) the terms and conditions of this Agreement.



12.4.2 Without prejudice to Section 12.4.1, if, at any time during the Concession Period, any of the Works or any part thereof carried out by or on behalf of Concessionaire does not fully satisfy the Construction Performance Standards and/or any other term or condition of this Agreement, the Concessionaire shall, at its own cost and expense, rectify the Works or the part(s) thereof so that:

- (a) the Works or the part(s) in question thereof shall comply with and satisfy in full the Construction Performance Standards and/or the other terms and conditions of this Agreement; and
- (b) the Works the part(s) in question thereof shall be able to meet the structural, mechanical, electrical and other performance standards set out in the Construction Performance Standards.

12.5 GENERAL CONSTRUCTION OBLIGATIONS

12.5.1 The Concessionaire is responsible for all construction means, methods and techniques used to undertake the Works and must provide everything (including labour, plant, equipment and materials) necessary for implementing the construction and commissioning of the Project Assets pursuant to the terms of this Agreement.

12.5.2 The Concessionaire shall, in a timely and professional manner and in accordance with the terms of this Agreement:

- (a) design, develop and construct the Works diligently, expeditiously and in a thorough and workmanlike manner in accordance with Good Industry Practice;
- (b) save as otherwise expressly stated in this Agreement, ensure that no works other than the Works under this Agreement are constructed on the Concession Area by the Concessionaire or by any Person for whom the Concessionaire is responsible at law;
- (c) protect the Works;
- (d) in respect of plant, equipment and materials incorporated in the Works, use plant, equipment and materials that:
 - (i) are of a kind that are consistent with the Construction Performance Standards; and
 - (ii) are new, or otherwise in good working condition, of good quality and appropriate quantity in accordance with the Applicable Laws Good Industry Practice.

12.5.3 To the extent required by the Concessionaire and intimated to PKHA, PKHA shall facilitate the Concessionaire in obtaining assistance from law enforcement personnel for provision of security at the Concession Area and for purposes of securing the Concession Area to prevent access onto the Concession Area of any Persons not entitled to be at the Concession Area in the opinion of the Concessionaire, acting reasonably, so as to ensure smooth and uninterrupted construction of the Works during the Construction Period.



12.6 CONSTRUCTION INITIATION

12.6.1 The Concessionaire shall, within one (1) Month of the Effective Date:

- (a) submit to PKHA and the Independent Engineer:
 - (i) the Project Implementation Programme;
 - (ii) the Project Completion Schedule;
 - (iii) its construction methodology; and
 - (iv) its quality assurance procedures.
- (b) undertake, do and perform all such acts, deeds and things as may be necessary or required before commencement of construction of the Works in accordance with this Agreement and the Applicable Laws; and
- (c) make its own arrangements for quarrying of materials needed for undertaking the Works in accordance with the Applicable Laws.

12.7 REVISION OF PROJECT IMPLEMENTATION PROGRAMME

12.7.1 The Project Implementation Programme shall set out the timetable in accordance with which the Concessionaire shall carry out the Works, including, surveys, investigations, designing, construction, Commissioning, periodic conduct of Tests and carrying out of related, incidental or ancillary works.

12.7.2 Subject to the terms of this Agreement, where the Concessionaire is of the opinion that the Project Implementation Programme needs revision, the Concessionaire shall submit a revised Project Implementation Programme to the Independent Engineer (with a copy to PKHA), who shall either (a) within fourteen (14) Days of submission by the Concessionaire approve the same, or (b) within (7) Days of submission by the Concessionaire object to the revised Project Implementation Programme and the Concessionaire shall satisfy the objections raised by the Independent Engineer within such reasonable time period as specified by the Independent Engineer of such objection being raised by the Independent Engineer and resubmit the revised Project Implementation Programme; provided that the Construction Period shall not be extended solely due to the revised Project Implementation Programme.

12.7.3 Where the Independent Engineer is of the opinion, acting reasonably, that the Project Implementation Programme does not comply with Good Industry Practice or is not sufficiently detailed, the Concessionaire shall, within ten (10) Business Days of being so required by the Independent Engineer, submit a revised Project Implementation Programme.

12.7.4 Subject to the terms of this Agreement, should it reasonably appear to the Independent Engineer, or the Concessionaire, at any time that the actual or likely progress of the Works does not or shall not conform with the Project Implementation Programme in any material respect, then, within ten (10) Business Days of being so required by the Independent Engineer or (if earlier) becoming aware of the same, the Concessionaire



- (a) submit to the Independent Engineer a report identifying the reasons for such non-conformity; and
- (b) simultaneously submit to the Independent Engineer, a revised Project Implementation Programme which shall provide for the Works to be pursued diligently in such manner so as to achieve completion of the Works as soon as practicable and provide for the Works to be commenced and pursued diligently in accordance with the terms of this Agreement.

12.8 PROVISION OF SITE OFFICES, HUMAN RESOURCE AND RELATED FACILITIES

12.8.1 The Concessionaire shall, at its own cost and expense and without recourse to PKHA, provide, as it deems necessary:

- (a) site offices along with all the necessary human resource and office equipment;
- (b) all the tools, equipment, earth-moving machinery, compactors, excavators, road-rollers and other machinery and equipment necessary for undertaking the Works; and
- (c) the requisite skilled and unskilled labour.

12.8.2 The Concessionaire shall, at its own cost and expense, ensure provision of the necessary building materials so as to achieve completion of the Works within twenty-four (24) Months of the Works Commencement Date in accordance with the Project Completion Schedule.

12.8.3 The Concessionaire shall ensure that all the building materials are of proper quality and of required quantity as per the standards and specifications of the Pakistan Engineering Council, to the extent the same are in harmony with the Construction Performance Standards and the other standards and specifications specified in or pursuant to this Agreement.

12.9 HANDING OVER OF CONCESSION AREA

12.9.1 PKHA shall deliver and hand-over the Vacant Possession of the Concession Area and the Additional Land, if required, to the Concessionaire, within such time period as specified in this Agreement, free from all Encumbrances and occupations, and without the Concessionaire being required to make any payment to PKHA on account of any costs, compensations, expenses and charges for the acquisition and use thereof for the duration of the Concession Period.

12.10 PROTECTION OF CONCESSION AREA FROM ENCROACHMENTS

12.10.1 From the Take-Over Date till the Expiry Date (or the Termination Date, if earlier), the Concessionaire shall protect the Concession Area, the Additional Land, and the Project Assets, from any and all occupations, encroachments and Encumbrances and shall not place or create nor permit any Contractor or other Person claiming through or under the Concessionaire to place or create any Encumbrance or security interest over all or any part of the Project Assets, the Concession Area, the Additional Land, and/or the Project

