

Assets, or on any rights of the Concessionaire therein or under this Agreement, save and except as otherwise expressly provided in this Agreement.

12.11 SPECIAL/TEMPORARY RIGHT OF WAY

12.11.1 Save for PKHA's obligation to convey to the Concessionaire the Ancillary Rights in accordance with the terms of this Agreement, the Concessionaire shall bear all costs and charges for any special or temporary right of way required by it in connection with access to the Concession Area.

12.12 CONSTRUCTION OF THE PROJECT ASSETS

12.12.1 The Concessionaire may undertake the Works itself or by appointing one or more Construction Contractors possessing the requisite technical, financial and managerial expertise and capability, as it deems necessary; provided, however, that the Concessionaire shall remain solely responsible for the Works. The Concessionaire shall appoint, at its own cost and expense, only Acceptable Contractors to undertake the Works or portions of the Works. The contract price, cost, fee and expense payable to such Construction Contractor(s) shall be in accordance with the terms and conditions contained in the EPC Contract(s) entered into by the Concessionaire and such Construction Contractor(s). The Concessionaire shall ensure that provisions are incorporated in the relevant EPC Contract(s) with such Construction Contractor(s) for (a) the rectification of defects in the relevant portions of the Works during the agreed defects liability period/defects notification period, and for this purpose, may consult with PKHA on the quantum and period thereof, and (b) the payment of liquidated damages for delays in the completion of the relevant portions of the Works.

12.12.2 In awarding contracts in respect of the Project, the Concessionaire shall endeavour to (but not be obliged to) give preference to Pakistani contractors, consultants, suppliers of materials and service providers, the qualifications and capabilities whereof are, in the sole judgment of the Concessionaire, comparable with foreign contractors, consultants, suppliers of materials and service providers and the products and services whereof are comparable in quality, delivery time, costs, reliability and in respect of other significant terms to those offered by foreign counterparts, and meet or exceed the Construction Performance Standards.

12.12.3 The Concessionaire shall execute the Works in a proper workmanlike manner and shall use material, plant and equipment in accordance with the Construction Performance Standards.

12.12.4 The Concessionaire shall not commence or permit the commencement of the construction of the Works or any part of the Works until the Detailed Design is Approved or deemed Approved in accordance with the terms of this Agreement.

12.12.5 For the purpose of determining that the Works are being undertaken in accordance with the Construction Performance Standards, the Concessionaire shall, with due diligence, carry out all necessary Tests in accordance with the Construction Performance Standards and shall issue a certificate to the effect that the materials being used for the construction of the relevant portion of the Works are suitable and meet the required standard. The Concessionaire shall maintain proper records of such Tests and the remedial measures taken to cure the defects or deficiencies, if any, indicated by the Tests' results.



- 12.12.6 If after appropriate Tests, the Concessionaire determines that the relevant materials being used for carrying out the Works are not in accordance with the Construction Performance Standards, the Concessionaire shall ensure that those materials are promptly replaced with suitable materials in accordance with the Construction Performance Standards.
- 12.12.7 The Concessionaire shall provide, as part of the Works, one emergency telephone service as an aid to users of the Expressway, and fire and alarm services at the identified Toll Plazas and the Administrative Office or at such other location as may be deemed appropriate by the Concessionaire.
- 12.12.8 Not Used.
- 12.12.9 PKHA shall use its good offices to facilitate the reasonable requests of the Concessionaire in connection with the execution of the Works (including making arrangements with the traffic police to divert or control traffic).
- 12.12.10 During the Construction Period, the Concessionaire shall undertake the Works, and the organization and implementation of temporary traffic diversions and controls in such manner so as to ensure proper levels of safety for road users, the public in general and those engaged in undertaking the Works.
- 12.12.11 Subject to the terms of this Agreement, the Concessionaire shall complete the Works in a timely manner and in accordance with the Project Completion Schedule.
- 12.12.12 Upon the completion of the Works, the Concessionaire shall undertake to clear away and remove all construction plant, surplus materials, rubbish and temporary works of every description and shall ensure that the Concession Area is clean and in a condition satisfactory to PKHA for commencement of the Operations Period.

12.13 INTERCHANGES AND NEW TOLL PLAZAS AND CONNECTIVITY OF SERVICE ROAD

- 12.13.1 In the event (a) either Party wishes to establish an interchange connected to the Expressway and/or a New Toll Plaza (other than the Interchanges and the New Toll Plazas to be established as part of the Works) after the Effective Date or (b) provide or allow provision of connectivity or interconnection with the Service Road (each, a "Specific Activity"), the same shall be done in accordance with the procedure set out in this Section 12.13 [*Interchanges and New Toll Plazas and Connectivity of Service Road*].
- 12.13.2 In the event PKHA or the Concessionaire wishes to undertake a Specific Activity, PKHA or the Concessionaire shall intimate the Independent Engineer of the same (with a copy to the other Party), setting out in detail the reasons necessitating the Specific Activity. Such written intimation shall (a) include a representation that undertaking the Specific Activity does 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 (the "Compliance Representation"), and (b) be accompanied by a detailed design of the interchange and/or New Toll Plaza and/or connectivity or interconnection with the Service Road (as applicable) prepared, or caused to be prepared by PKHA or the Concessionaire, as applicable. The Concessionaire or PKHA, as applicable, shall ensure that such detailed design conforms to the Construction Performance Standards and the operational requirements of the



Concessionaire as prevalent in respect of the Toll Plazas or the Service Road (as applicable) already existing on the relevant date.

12.13.3 Subject to written certification by the Independent Engineer that the Compliance Representation is accurate, the Concessionaire shall within four (4) weeks of such certification, 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:

- (a) any proposed modification/rectification of the detailed design of the interchange and/or New Toll Plaza and/or connectivity or interconnection with the Service Road (as applicable) provided by a Party pursuant to Section 12.13.2, so as to ensure that the same complies with the Construction Performance Standards and the operational requirements of the Concessionaire as prevalent in respect of the Toll Plazas or the Service Road (as applicable) already existing on the relevant date;
- (b) the impact (if any) which undertaking the Specific Activity is likely to have on the Works or the construction requirements for the Works;
- (c) the options for undertaking the Specific Activity and the effect, if any, each such option would have on the costs and time thereof;
- (d) the estimate of the Incremental and Consequential Costs (which may include without duplication capital expenditure, operational expenditure, maintenance expenditure, additional taxes and/or projected loss of Revenue, as applicable), which would be incurred as a result of undertaking the Specific Activity;
- (e) the assessment of the time (in number of Days) which is required to undertaking the Specific Activity, and the time implication (if any) on the schedule for completion of the Works; and
- (f) in the event undertaking the Specific Activity is proposed by PKHA, the revised duration of the Construction Period and the extension of the Concession Period, if applicable and required by the Concessionaire.

12.13.4 In the event undertaking the Specific Activity is proposed by PKHA, the Independent Engineer shall review the aforesaid information and documents submitted by the Concessionaire, and consult with PKHA, and based on the preferred option:

- (a) certify the Incremental and Consequential Costs which shall be payable by PKHA to the Concessionaire;
- (b) if the Works are delayed as a consequence of undertaking the Specific Activity, 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 delay;



- (c) forward to the Concessionaire for its consideration a statement incorporating the certified Incremental and Consequential Costs, and the time within which the Specific Activity shall be carried out by the Concessionaire; and
- (d) forward to PKHA a copy of the statement for PKHA's records.

12.13.5 Upon receipt of the statement from the Independent Engineer pursuant to Section 12.13.4 or in the event undertaking the Specific Activity is proposed by the Concessionaire and the requirements of Section 12.13.3 have been satisfied, the Concessionaire shall proceed with undertaking the Specific Activity forthwith and complete the same within prescribed time period, and in the event undertaking the Specific Activity is proposed by PKHA, PKHA shall make payment of the certified Incremental and Consequential Costs in accordance with the pre-agreed schedule of progress billings.

12.13.6 Subject to the terms of this Agreement, where any Additional Land is necessary for purposes of undertaking the Specific Activity, PKHA shall make available Additional Land as soon as reasonably practicable (but in any event prior to the date on which 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 such Additional Land made available by PKHA under this Section 12.13 [*Interchanges and New Toll Plazas and Connectivity of Service Road*] shall form part of the Concession Area.

12.14 PRELIMINARY WORKS

12.14 Subject to handing over of Vacant Possession of the Partial Concession Area by PKHA to the Concessionaire, free of all Encumbrances and together with the Ancillary Rights, the Concessionaire shall commence the Preliminary Works and complete the same by the Preliminary Works Scheduled Completion Date. The Preliminary Works shall include, *inter alia*, undertaking the Detailed Design, clearance of the Partial Concession Area, mobilization of the Construction Contractor, establishment of the camp-sites, identification of quarry sites, stacking of materials, and construction of all such Works for which the Detailed Design has been approved in terms of this Agreement.

12.15 PROJECT COMPLETION

12.15.1 Unless PKHA grants, upon the prior written request of the Concessionaire, an extension to the Construction Period for verifiable and justifiable reasons suggesting and proving the inability of the Concessionaire to Substantially Complete the Works in relation to the Expressway in accordance with the Project Completion Schedule or if the Construction Period otherwise stands extended in accordance with the terms of this Agreement, the Concessionaire shall be bound to achieve Substantial Completion of the Expressway within twenty four (24) Months from the Works Commencement Date.

12.15.2 If Substantial Completion of the Works in respect of the Expressway, and entry into commercial operations of the Expressway is not achieved within a period of twenty four (24) Months from the Works Commencement Date for any reason other than those specified in Section 12.18.1, the Concessionaire shall pay to PKHA as Weekly liquidated damages for delay in the achievement of the Service Commencement Date, an amount calculated at the rate of point zero one percent (0.01%) of the projected Construction



Costs per Week or part thereof, up to a maximum of ninety five percent (95%) of the value of the Construction Performance Bond.

12.16 MONITORING AND INSPECTION OF CONSTRUCTION

- 12.16.1 The Independent Engineer shall have the right to monitor, acting reasonably and in a *bona fide* manner, all of the Concessionaire's plans and programmes for the implementation of the Works prior to the implementation of the same to ensure conformity with the terms of this Agreement and Good Industry Practice.
- 12.16.2 Subject to and to the extent provided in this Agreement, the Independent Engineer shall monitor the progress of the Works, in particular, the quality of the Works and adherence to the Construction Performance Standards.
- 12.16.3 Without interfering in the execution of the Works, the Independent Engineer shall regularly monitor the designing and progress of the construction of the Works in accordance with the terms of this Agreement.
- 12.16.4 Consequent to the monitoring and inspection of the Works by the Independent Engineer, if the Independent Engineer, acting reasonably, finds any defects or deficiencies in the Works or any part thereof, it shall intimate the Concessionaire through a written notice with a copy to PKHA specifying in reasonable detail the said defects or deficiencies, and requiring the Concessionaire to take remedial measures to cure the said defects or deficiencies. The Concessionaire shall undertake the necessary remedial measures within a reasonable time period specified by the Independent Engineer in accordance with Good Industry Practice.
- 12.16.5 Monitoring and inspection by the Independent Engineer of the Works shall not relieve or absolve the Concessionaire of its obligations and liabilities hereunder in any manner whatsoever.
- 12.16.6 The Concessionaire and all Persons claiming through or under it, whether the Contractors or otherwise, shall give such assistance as is reasonably required by the Independent Engineer for conducting any monitoring or inspection of the Works, including, providing access to such part of the Works and all relevant drawings or documents as may be required by the Independent Engineer for the purpose of monitoring and inspection of the Works or any part thereof.
- 12.16.7 During the Construction Period, the PKHA Representative shall (at the cost and expense of PKHA) have an independent right to monitor the progress of Works without interfering in the construction activities of the Concessionaire. The report of such monitoring may be communicated to the Independent Engineer and the Concessionaire for rectification or for provisions of comments, or both; provided, that findings of such report of the PKHA Representative shall be assessed by the Independent Engineer, and necessary remedial measures shall be taken in the light of the Independent Engineer's recommendations in accordance with the terms of this Agreement.

12.17 QUARTERLY PROGRESS REPORTS

- 12.17.1 From the Works Commencement Date, within seven (7) Days after the expiry of every three (3) Month period during the Construction Period, the Concessionaire shall furnish to the Independent Engineer, with a copy to PKHA, quarterly reports of the past quarter



regarding the progress of the Works in accordance with Good Industry Practice and shall promptly give such other relevant information as may be reasonably required by the Independent Engineer relating to the progress of the Works.

12.18 EXTENSION OF CONSTRUCTION PERIOD

12.18.1 Notwithstanding the other reliefs/remedies available to the Concessionaire pursuant to the terms of this Agreement, the Independent Engineer shall grant an extension of time for completion of the Works to the Concessionaire, after duly notifying PKHA, upon the occurrence of a Permitted Event.

12.18.2 As a result of Section 12.18.1, the Concessionaire shall be granted an extension to the Construction Period for the Delay Duration based on the certification of the Independent Engineer, which shall be binding on the Parties.



13. COMPLETION OF THE PROJECT

13.1 MECHANICS OF COMPLETION

- 13.1.1 The Independent Engineer shall periodically, on the expected date of completion of each Section of the Expressway (or if so requested by the Concessionaire), conduct all necessary inspections of the Works before the opening of the relevant Section of the Expressway to vehicular traffic.
- 13.1.2 Upon the completion of the Works in respect of the Administrative Office, the Concessionaire shall so notify the Independent Engineer (the "**Premises Completion Notice**"). Within three (3) Days of receipt of the Premises Completion Notice, the Independent Engineer shall undertake the inspection of the Works in respect of the Administrative Office, and if the Independent Engineer is satisfied that the Works in respect of the Administrative Office have been completed, it shall issue the Premises Completion Certificate within seven (7) Days of the inspection.
- 13.1.3 Upon completion of a Section of the Expressway, the Concessionaire shall so notify the Independent Engineer (the "**Section Completion Notice**"). Within seven (7) Days of receipt of a Section Completion Notice, the Independent Engineer shall undertake the inspection of the relevant Works with the Concessionaire, and record any defects therein and/or produce the Incomplete Works List in respect thereof. The Independent Engineer shall within fifteen (15) Days of the inspection, issue:
- (a) the Section Completion Certificate, if the Independent Engineer is satisfied that the Works relevant to the Section have been completed to meet the requirements of Substantial Completion, as applicable to the Section *mutatis mutandis*; and
 - (b) the Incomplete Works List (which shall include all identified defects in the relevant Works) relevant to the Section, if the Independent Engineer determines that the relevant Works have not been completed to meet the requirements of Substantial Completion, as applicable to the Section *mutatis mutandis*.
- 13.1.4 All Incomplete Works List items identified under Section 13.1.3(b) shall be completed by the Concessionaire within such time as may be determined by the Independent Engineer. Upon satisfactory completion by the Concessionaire of the items forming part of the Incomplete Works List, and the rectification of all identified defects in the relevant Works, the Concessionaire shall issue a new Section Completion Notice and the Independent Engineer shall issue a Section Completion Certificate in accordance with Section 13.1.3.
- 13.1.5 Upon the Substantial Completion of the Works in respect of the Expressway, the Concessionaire shall so notify the Independent Engineer (the "**Substantial Completion Notice**"). The Independent Engineer shall, jointly in the presence of, but without interference from, PKHA and the Concessionaire, undertake inspection of the Works, and record any defects in the Works and/or produce the Incomplete Works List; provided, that in the event either Party fails to attend the inspection on the date designated by the Concessionaire through a written notice served to PKHA at least seven (7) Days prior to the date of inspection, the Independent Engineer shall proceed with the inspection and its decision/certification under this Section 13.1.5 shall be final and binding on the Parties. The Independent Engineer shall within fifteen (15) Days of inspection, issue:



- (a) the Completion Certificate, if the Independent Engineer is satisfied that the Works have been completed;
- (b) the Substantial Completion Certificate together with the Incomplete Works List (which shall include all identified defects in the Works), if the Independent Engineer determines that although the Works have been Substantially Completed, certain Works or items forming part of the Works are not complete; or
- (c) the Incomplete Works List (which shall include all identified defects in the Works), if the Independent Engineer determines that the Works have not been Substantially Completed.

13.1.6 All Incomplete Works List items identified under Section 13.1.5 shall be completed by the Concessionaire within such time as may be determined by the Independent Engineer, acting reasonably. Upon satisfactory completion by the Concessionaire of the items forming part of the Incomplete Works List, and the rectification of all identified defects in the Works:

- (a) if no Substantial Completion Certificate has been issued, the Concessionaire shall issue a new Substantial Completion Notice to the Independent Engineer and PKHA in accordance with Section 13.1.5; or
- (b) if the Substantial Completion Certificate has been issued, the Independent Engineer shall within seven (7) Days of the request from the Concessionaire, carry out another inspection jointly with PKHA and the Concessionaire, and if the Independent Engineer is satisfied with the completion of the items forming part of the Incomplete Works List and/or rectification of all identified defects in the Works, the Independent Engineer shall issue the Completion Certificate within fifteen (15) Days of the inspection; provided, that the Concessionaire shall remain under an obligation to complete the remaining items forming part of the Incomplete Works List and/or rectification of all remaining defects in the Works, if any, at the earliest.

13.1.7 Any Dispute in relation to the issuance of the Premises Completion Certificate, the Section Completion Certificate, Substantial Completion Certificate, the Incomplete Works List or the Completion Certificate shall be referred for amicable settlement in accordance with Section 24.1. If any Dispute referred for amicable settlement remains unresolved for a period of fifteen (15) Days, the Dispute shall be referred to Fast-Track Dispute Resolution in accordance with Section 24.2.

13.1.8 In the event (a) the Independent Engineer does not issue the Premises Completion Certificate, the Section Completion Certificate, Substantial Completion Certificate, the Incomplete Works List and/or the Completion Certificate upon the request of the Concessionaire in terms of this Agreement, (b) such matter is Disputed between the Parties wherein PKHA takes the position that the Section Completion Certificate, Substantial Completion Certificate, the Incomplete Works List and/or the Completion Certificate was rightfully not issued by the Independent Engineer, and (c) it is determined in accordance with the Dispute Resolution Procedure that the Section Completion Certificate, the Substantial Completion Certificate and/or the Completion Certificate which is the subject matter of the Dispute should have been issued by the Independent Engineer, then PKHA



shall pay the Concessionaire the Incremental and Consequential Costs as a result of non-issuance of the Section Completion Certificate, Substantial Completion Certificate, the Incomplete Works List and/or the Completion Certificate, as applicable, within fifteen (15) Days of a certification of the same by the Independent Auditor. The Independent Auditor shall certify the Incremental and Consequential Costs within fifteen (15) Days of a written request by the Concessionaire.

- 13.1.9 In the event (a) the Independent Engineer issues the Premises Completion Certificate, the Section Completion Certificate, Substantial Completion Certificate, the Incomplete Works List and/or the Completion Certificate upon the request of the Concessionaire, (b) issuance of the same is Disputed between the Parties wherein PKHA takes the position that the Section Completion Certificate, Substantial Completion Certificate, the Incomplete Works List and/or the Completion Certificate was wrongfully issued by the Independent Engineer, (c) operation of the Section Completion Certificate, Substantial Completion Certificate, the Incomplete Works List and/or the Completion Certificate, as applicable, is suspended by a Dispute resolution forum, and (d) it is determined in accordance with the Dispute Resolution Procedure that the Section Completion Certificate, the Substantial Completion Certificate and/or the Completion Certificate which is the subject matter of the Dispute was rightfully issued by the Independent Engineer, then PKHA shall pay the Concessionaire the Incremental and Consequential Costs as a result of suspension of the Section Completion Certificate, Substantial Completion Certificate, the Incomplete Works List and/or the Completion Certificate, as applicable, within fifteen (15) Days of a certification of the same by the Independent Auditor. The Independent Auditor shall certify the Incremental and Consequential Costs within fifteen (15) Days of a written request by the Concessionaire.

13.2 REQUIREMENT OF TESTS

- 13.2.1 The Independent Engineer shall not issue the Section Completion Certificate, the Substantial Completion Certificate or the Completion Certificate, as the case may be, unless the Works are subjected to the Tests in accordance with Sections 12.12.5 and 12.12.6.

13.3 ENTRY INTO COMMERCIAL OPERATIONS

- 13.3.1 Upon issuance of a Section Completion Certificate, which by itself or in combination with other Section Completion Certificate(s) earlier issued, signifies and proves for the first (1st) time completion of an Expressway Section, such Expressway Section shall be deemed to be fit for usage by vehicular traffic, and the date of issue of such Section Completion Certificate shall be the Expressway Section Completion Date. The Concessionaire shall be entitled to commence commercial operations of such Expressway Section on the Day immediately following the Expressway Section Completion Date, which date shall be the Expressway Section Service Commencement Date.

- 13.3.2 Upon the issuance of any Section Completion Certificate, subsequent to that issued under Section 13.3.1, which by itself or in combination with any of the Section Completion Certificate(s) issued earlier, signifies and proves an addition to the existing Expressway Section, such addition shall be deemed to be fit for usage by vehicular traffic. The Concessionaire shall be entitled to commence commercial operations of such addition of the existing Expressway Section on the Day immediately following the Day of issuance of a Section Completion Certificate issued under this Section 13.3.2.



- 13.3.3 Subject to the terms of this Agreement, upon commencement of commercial operations of the Expressway Section, or the subsequent addition of a Section thereto, under Section 13.3.1 and Section 13.3.2, the Concessionaire shall be entitled to collect, levy and demand the Tolls at the relevant Toll Plazas from the vehicular traffic plying on the Expressway Section and any Section subsequently added to the Expressway Section, if any, in accordance with the Toll structure set out in Part I of **SCHEDULE B [TOLL STRUCTURE]**.
- 13.3.4 Upon issuance of the Substantial Completion Certificate or the Completion Certificate, as the case may be, the Project Assets shall be deemed to be complete and the date of issuance of the same shall be the Project Completion Date. The Concessionaire shall be entitled to commence commercial operations of the Expressway on the Day immediately following the Project Completion Date, which date shall be the Service Commencement Date.
- 13.3.5 Upon commencement of commercial operations of the Expressway and subject to the other requirements of this Agreement, if any, the Concessionaire shall be entitled to collect, levy and demand the Tolls at Toll Plazas from the vehicular traffic liable to pay the Tolls plying on the Expressway, in accordance with the Toll Structure set out in Part II of **SCHEDULE B [TOLL STRUCTURE]**.
- 13.3.6 To ensure uninterrupted commercial operations of the Expressway Section, Expressway, or any part thereof, as the case may be, the Concessionaire shall promptly remove from the Concession Area, or relevant part thereof, all surplus construction machinery, surplus materials, waste materials (including hazardous materials and waste water), rubbish and other debris (including, accident debris) and keep the Concession Area, or relevant part thereof, in a clean, tidy and orderly condition, in conformity with the Applicable Laws Good Industry Practice.
- 13.4 OPERATIONS BOND**
- 13.4.1 Subject to Section 12.3.2 and the return of the Construction Performance Bond, the Concessionaire shall, by the Service Commencement Date, submit to PKHA the Operations Bond with a face value of five percent (5%) the projected Toll Revenue for the relevant Operational Year in which the Service Commencement Date is achieved, as specified in the Financial Model. The Operations Bond shall remain in full force and effect for the relevant Operational Year.
- 13.4.2 Prior to expiry of the first (1st) Operations Bond furnished pursuant to Section 13.4.1, it shall be replaced by another such Operations Bond in an amount, computed as aforesaid (i.e. five percent (5%) of the projected Toll Revenue for the relevant Operational Year, as specified in the Financial Model), for the next Operational Year. Thereafter, the Operations Bond shall continue to be replaced at one (1) Operational Year intervals as aforesaid until the Expiry Date (or the Termination Date, if earlier).
- 13.4.3 The Operations Bond shall secure all the Concessionaire's obligations, liabilities, warranties, indemnities, representations, guarantees and responsibilities under this Agreement in relation to the operations and maintenance of the Project, or part thereof, and all other works and services to be provided by the Concessionaire under this Agreement during the Operations Period but only insofar as these relate to the period after the Project Completion Date, including the integrity and quality of the Project.



Concessionaire's and its Contractors' workmanship, the timely and continuous performance of the works and services during the Operations Period (after the Project Completion Date), the quality and quantity of the any equipment, materials, items and components supplied, the performance of the works and services during the Operations Period (after the Project Completion Date) by the Concessionaire and compliance of the same with the O&M Requirements, the O&M Manual and all other applicable standards set out in this Agreement and all other works and services to be provided by the Concessionaire during the Operations Period (after the Project Completion Date); provided, that furnishing of the Operations Bond shall not in any way absolve the Concessionaire of its obligations during the Operations Period.

13.4.4 The Operations 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.

13.4.5 Without prejudicing the rights of PKHA in or to the Operations Bond, the Concessionaire shall be entitled to assign all its rights, title and interests under the Operations Bond to the Financiers as security for the Financing under the Financing Agreements.



14. OPERATIONS AND MAINTENANCE

14.1 COMMISSIONING OF THE PROJECT

- 14.1.1 Upon the receipt of the Section Completion Certificate issued by the Independent Engineer in terms of Section 13.3.1, the Concessionaire Representative shall notify the PKHA Representative that the Expressway Section, in respect of which said Section Completion Certificate has been received, is ready to be commissioned.
- 14.1.2 Upon the receipt of the Section Completion Certificate issued by the Independent Engineer in terms of Section 13.3.2, the Concessionaire Representative shall notify the PKHA Representative that the Section being added to the Expressway Section, in respect of which said Section Completion Certificate has been received, is ready to be commissioned.
- 14.1.3 Upon the receipt of the Substantial Completion Certificate or the Completion Certificate, as the case may be, the Concessionaire Representative shall notify the PKHA Representative that the Expressway is ready to be commissioned.
- 14.1.4 The commissioning of the Expressway Section, the Expressway, or a part thereof, as the case may be, shall be carried out in accordance with the procedures set out in **SCHEDULE C [COMMISSIONING PROCEDURES]**, and otherwise in accordance with the Applicable Laws and Good Industry Practice.
- 14.1.5 All traffic signage shall be properly displayed at appropriate locations at the Concession Area for the safety and convenience of the users of the Expressway Section, the Expressway or part thereof, as the case may be.

14.2 OPERATIONS AND MAINTENANCE

- 14.2.1 From the Expressway Section Service Commencement Date until the Project Completion Date the Concessionaire shall simultaneously (a) undertake such Works as are necessary for the completion of the Project, and (b) undertake commercial operations of the Expressway Section, and any extension thereof, in accordance with the terms of this Agreement and to this extent there shall be an overlap between the Works and the Services.
- 14.2.2 From the Expressway Section Service Commencement Date, the Concessionaire shall commence commercial operations of the Expressway Section, and from the Service Commencement Date, of the Expressway, and provide the Services in accordance with the terms of this Agreement and the O&M Manual. The O&M Manual so submitted shall be appended to this Agreement as **SCHEDULE AF [O & M MANUAL]**.
- 14.2.3 The Concessionaire shall collect the Tolls (a) in respect of the Expressway Section and any Section added thereto, at the relevant Toll Plazas from the Expressway Section Service Commencement Date and the Day immediately following each succeeding Section Completion Date, 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 relevant Toll Plazas on the Service Commencement Date based on the Toll Structure set out in Part II of **SCHEDULE B**.



[TOLL STRUCTURE], and continue such collection until the Expiry Date (or the Termination Date, if earlier).

14.2.4 Without prejudice to Section 14.3.2, the Concessionaire shall at all times during the Operations Period procure that the Services are performed by appropriately qualified and trained personnel and in accordance with:

- (a) the terms of this Agreement;
- (b) the O&M Manual;
- (c) the Applicable Laws;
- (d) Good Industry Practice; and
- (e) unless otherwise stated in this Agreement, the Proposal.

14.2.5 The Concessionaire may undertake the operation and maintenance of the Project Assets either itself or through the O&M Contractor appointed in accordance with the terms and conditions set out in the O&M Contract. The Concessionaire shall appoint the O&M Manager for the purposes of monitoring the operation and maintenance of the Project Assets, including, the performance of the O&M Contractor.

14.2.6 The Concessionaire may undertake the Toll operations itself or through the Toll Operator, which entity may be an Affiliate of the Sponsor or, if otherwise, an Acceptable Contractor.

14.2.7 Notwithstanding the appointment of any Person pursuant to Section 14.3.6 as the O&M Manager, the O&M Contractor or the Toll Operator, the Concessionaire shall continue to account to PKHA for the obligations to be completed under Section 15 [Tolls, Revenues and Accounts].

14.3 PERSONNEL MANAGEMENT

14.3.1 Within one (1) Month of the Effective Date, the Concessionaire shall provide to PKHA a detailed organizational chart of the Concessionaire for the implementation by the Concessionaire of its obligations under this Section 14 [Operations and Maintenance]. The Concessionaire shall, upon establishing the Administrative Office, display the organizational chart in an appropriate place within the Administrative Office. The displayed organizational chart shall be updated from time to time, and shall indicate the names and functions of all key personnel of the Concessionaire (and its Toll Operator and/or O&M Contractor, as the case may be) in the execution of the Toll operations and maintenance of the Administrative Office and the Project Assets.

14.3.2 The Concessionaire shall recruit such additional personnel as may be required to man the Toll Plazas, to supervise the Toll operations, to manage the Toll operations and the surveillance system and for the upkeep and maintenance of the Administrative Office and the Project Assets. The Concessionaire shall comply with the Applicable Laws relating to employees, including, the payment of prescribed provident or other social benefit contributions.



14.3.3 The Concessionaire shall provide to PKHA a detailed list of the key personnel of the Concessionaire, and any change of such key personnel from time to time. The Concessionaire shall also provide to PKHA the updated list of contact details to enable PKHA to contact the key personnel in case of emergencies or as the need may arise.

14.3.4 The Concessionaire shall, in consultation with PKHA, design and develop a training program for its personnel comprising classroom course training and on-site training with the intent that after such training, the trained personnel shall have the requisite skills to undertake their respective functions and responsibilities when the Expressway Section, the Expressway, or any part thereof, as the case may be, is opened to vehicular traffic.

14.4 OPERATIONS AND MAINTENANCE OBLIGATIONS OF CONCESSIONAIRE

14.4.1 PKHA hereby gives the Concessionaire the exclusive right and authority to undertake the operation and maintenance of the Project Assets and, if required, modify, repair, refurbish or otherwise make improvements to the Project Assets during the Operations Period in accordance with **SCHEDULE R [O&M REQUIREMENTS]** and the O&M Manual.

14.4.2 The rights and obligations of the Concessionaire under Section 14.4.1 specifically include the following:

- (a) collecting and appropriating the Tolls based on the Toll Structure set out in **SCHEDULE B [TOLL STRUCTURE]**;
- (b) minimizing the disruption to traffic in the event of accidents or other incidents affecting the safety and use of the relevant parts of the Concession Area by providing a rapid and effective response mechanism and maintaining liaison procedures with emergency services;
- (c) undertaking routine maintenance including prompt repairs of potholes, cracks, concrete joints, drains, line markings, lighting and signage;
- (d) undertaking periodic maintenance such as resurfacing, repairs to structures, repairs and refurbishment of the Tolling system and hardware and other equipment;
- (e) carrying out periodic preventive maintenance to the Expressway Section, any Section added thereto and the Expressway, as the case may be, including the Tolling system;
- (f) preventing, with the assistance of PKHA and the concerned law enforcement agencies, the assistance whereof shall be procured by PKHA whenever required by the Concessionaire, unauthorized entry to and exit from the Concession Area and to fence both sides of the Concession Area in accordance with the Approved Detailed Design;
- (g) preventing, with the assistance of PKHA and the concerned law enforcement agencies, the assistance whereof shall be procured by PKHA whenever required by the Concessionaire, encroachments on the Concession Area;



- (h) carrying out interface and co-ordination activities with the Contractors and the O&M Contractor engaged by the Concessionaire and all operations connected therewith in accordance with this Agreement, the O&M Requirements and the Applicable Laws;
- (i) maintaining a public relations unit to interface with and attend to suggestions from users of the Expressway Section, the Expressway or any part thereof, as the case may be, the media, the Public Sector Entities, and other external agencies;
- (j) entering into Commercial Activities Agreements; and
- (k) performing such other services as mutually agreed to between the Parties from time to time for the satisfactory attainment of the objects of the Project.

14.5 O&M MANUAL

14.5.1 The Concessionaire shall prepare and provide to PKHA, at least ninety (90) days prior to the Expressway Section Service Commencement Date, three (3) hard-bound sets of the O&M Manual.

14.5.2 The O&M Manual shall specify detailed instructions as per manufacturer's requirements, and the steps and standard operating procedures that the Concessionaire shall take for operating the assets established, created, installed or deployed, carrying out the Toll operations, emergency services, routine maintenance, periodic maintenance and emergency maintenance, and the specifications and standards to be applied by the Concessionaire in undertaking the maintenance works. The Concessionaire shall ensure that the instructions, steps, standard operating procedures, specifications and standards are consistent with the Approved Detailed Design and the O&M Requirements.

14.6 MAINTENANCE

14.6.1 PREVENTIVE AND SCHEDULED MAINTENANCE PLAN

- (a) The O&M Manual, shall, *inter alia*, detail its proposed programme of preventive and other scheduled maintenance of the Project Assets (the "Preventive and Scheduled Maintenance Plan").
- (b) The Concessionaire shall perform maintenance of the Project Assets as identified in the Preventive and Scheduled Maintenance Plan, and, without limiting the Concessionaire's other obligations in respect of the performance of the Services, shall undertake all the maintenance work:
 - (i) in accordance with the Project Deliverables;
 - (ii) at the times scheduled for such maintenance work as specified in the O&M Manual;
 - (iii) in accordance with Good Industry Practice;
 - (iv) in a manner that allows the Project Assets to remain operational at all times; and



- (v) otherwise in accordance with the Preventive and Scheduled Maintenance Plan.

14.7 VISITS

- 14.7.1 During the Operations Period, PKHA shall have the right to visit the Concession Area and the Project Assets to observe the performance by the Concessionaire of its obligations on an annual basis and the Concessionaire shall make all reasonable arrangements for the same. The Independent Engineer shall accompany PKHA for such visit.
- 14.7.2 The Independent Engineer shall make a report of such visit stating in reasonable detail the observations, if any, in the Concessionaire's compliance with its obligations pursuant to this Agreement and/or the Project Assets with particular reference to the O&M Manual.
- 14.7.3 The Independent Engineer shall, within seven (7) Days of the visit, provide a copy of its observation report to the Concessionaire and PKHA.
- 14.7.4 The Concessionaire hereby undertakes that, within a reasonable time period, it shall take appropriate measures, if required pursuant to the said observation report, to improve the performance of its obligations, at its own cost and expense.
- 14.7.5 The visit or submission of the observation report by the Independent Engineer shall not relieve or absolve the Concessionaire of its obligations and liabilities hereunder in any manner whatsoever.
- 14.7.6 In addition to PKHA's right to visit Independent Engineer as stipulated in Sections 14.7.1 to 14.7.5 above, PKHA shall also have the right to visit the Concession Area, throughout the Concession Period, either itself or through an independent third party duly authorized by PKHA in writing; provided, that such visit shall not in any way fetter, impede or obstruct the Concessionaire's exercise of its rights and/or discharge of its obligations under this Agreement and that the Concessionaire will be given at least three (3) Business Days' notice; provided, further, that if the objective of the said visit is to measure the international roughness index (IRI) of the Expressway Section or the Expressway, as the case may be, such inspection shall not be carried out more than twice in any period of twelve (12) Months throughout the Concession Period.

14.8 ACCESS

- 14.8.1 Subject to the terms of this Agreement, the Concessionaire shall procure that the PKHA Representative has access to the Concession Area at all reasonable times during the Operations Period, solely in order to perform his functions under this Agreement.

14.9 SAFETY, VEHICLE BREAKDOWNS AND ACCIDENTS

- 14.9.1 Subject to the terms of this Agreement, the Concessionaire shall be responsible for accident prevention and safety of the Project. The Concessionaire shall ensure implementation of its accident prevention/safety policies and administration of the



Concessionaire's safety programme, including, accident prevention and safety procedures.

14.9.2 The Concessionaire shall, at all times during the Concession Period, ensure safe conditions for the users of the Expressway Section, the Expressway or any part thereof, and in the event of unsafe conditions, lane closures, diversions, vehicle breakdowns and accidents, it shall follow the relevant operating procedures in accordance with the Applicable Laws, the O&M Manual and Good Industry Practice, including, the setting-up of temporary traffic cones and warning signs, and removal of obstructions and debris without delay.

14.9.3 Subject to the terms of this Agreement, if, in the reasonable opinion of the Concessionaire, there exists an emergency which warrants de-commissioning and closure to traffic of the whole or any part of the Expressway Section, the Expressway or any part thereof, as the case may be, the Concessionaire shall be entitled to de-commission and close the whole or any part of the Expressway Section, the Expressway or any part thereof, as the case may be, to traffic for so long as such emergency and the consequences thereof warrant; provided, that such de-commissioning and particulars thereof shall be notified by the Concessionaire to PKHA without any delay, and the Concessionaire shall diligently carry out and abide by any reasonable directions that PKHA may give for dealing with such emergency pursuant to the NWFP Ordinance.

14.10 CATALOGUES CONCERNING SPARE PARTS FOR TOLLING AND SAFETY EQUIPMENT

14.10.1 The Concessionaire shall prepare an information catalogue or lists concerning necessary spare parts for the machinery and equipment employed in the Project in accordance with Good Industry Practice, the O&M Requirements and the Applicable Laws.

14.11 SUBMISSION OF OPERATION, MAINTENANCE AND REPAIR INSTRUCTIONS

14.11.1 The Concessionaire shall submit to the PKHA Representative the final drawings, pamphlets, manuals and the operating and maintenance instructions related to the prescribed machinery and equipment employed for the Project at the time of transfer of the Project to PKHA.

14.12 INVENTORY MANAGEMENT

14.12.1 The Concessionaire shall at all times keep an inventory of spare parts and other consumables for the machinery and equipment employed in accordance with Good Industry Practice and the O&M Manual.

14.13 REGULATIONS

14.13.1 The Concessionaire shall comply with all regulations, rules and orders made or issued under the Applicable Laws which are applicable generally to road networks such as the Expressway (to the extent of being brought to the notice of the Concessionaire and consented to by the Concessionaire).

14.13.2 PKHA shall ensure, and procure that the GoKPK and/or the relevant Public Sector Entities shall ensure, that at all times there are adequate law enforcement services for the operation of the Project and the protection and safety of the public and the Project Assets, and that the concerned law enforcement personnel shall follow proper practice in



enforcing the Applicable Laws, save for any fine or penalty in accordance with the Applicable Laws, shall not impose any other charges. PKHA, with the assistance of the GoKPK and/or the relevant Public Sector Entities, shall ensure that the law enforcement personnel shall not unlawfully hamper or hinder the Concessionaire in the performance of its obligations or the exercise of its rights pursuant to this Agreement or the users of the Expressway Section, the Expressway or any part thereof, as the case may be.

14.14 OPERATING PRACTICE

14.14.1 The Concessionaire shall have the right to weigh vehicles and inspect vehicles and their load in circumstances where there is a doubt about the vehicles' compliance with regulations, rules and/or orders applicable to the Project.

14.14.2 The Concessionaire shall be authorized to exercise similar authority as PKHA exercises in respect of overloading of vehicles where the gross vehicle weight or any axle load exceeds the limits specified in the Applicable Laws.

14.15 ALARM SYSTEM

14.15.1 Fire and emergency alarm systems shall be implemented and coordinated by the Concessionaire at adequate location(s) at the Concession Area.

14.16 SERVICES AND AIDS

14.16.1 The Concessionaire shall provide, at its own cost and expense, one emergency telephone service as an aid to users of the Expressway Section or the Expressway, as the case may be.

14.16.2 The Concessionaire shall provide breakdown/patrol services at reasonable costs to provide assistance to users of the Expressway Section, the Expressway or any part thereof, as the case may be, in distress or during emergency.

14.17 MANAGEMENT STRUCTURE

14.17.1 The Concessionaire shall design a cost effective management structure to ensure that the Project shall operate in a harmonious manner through the O&M Manager and the O&M Contractor.

14.18 COMMUNICATION

14.18.1 The Concessionaire shall establish a state-of-the-art system of communication between management, staff, clients and customers.

14.19 LABOUR

14.19.1 Employment of workers/labour/personnel for the Concessionaire shall be undertaken by the Concessionaire subject to such restrictions as may be imposed under the Applicable Laws.



14.20 CLEANLINESS

14.20.1 The Concessionaire shall, during the Operations Period, be responsible for the cleanliness and safe and reliable operation of the Expressway Section, the Expressway or any part thereof, as the case may be.

14.21 BARRIERS

14.21.1 PKHA shall procure that, during the Concession Period, no barriers are erected or placed by any Public Sector Entity on or at the Concession Area, except in accordance with the terms of this Agreement.

14.22 EXCUSE FROM PERFORMANCE OF OBLIGATIONS

14.22.1 The Concessionaire shall not be considered in breach of its obligation to provide the Services, if it is unable to provide the Services (or any part thereof) on account of a Permitted Event.

14.23 TEMPORARY TAKE-OVER OF OPERATIONS BY PKHA

14.23.1 PKHA may temporarily take-over the operations of the Project or any part thereof, as the case may be, upon the written request of Concessionaire (which written request shall not be required in case of (a) below) upon occurrence of any of the following events:

- (a) a temporary abandonment of the Concession Area by the Concessionaire by virtue of the withdrawal of all, or substantially all, personnel by the Concessionaire from the Concession Area, for at least ten (10) consecutive Days;
- (b) emergencies occasioned by the occurrence of a Force Majeure Event, which the Concessionaire is unable to cope with;
- (c) emergencies occasioned by political upheavals or disturbances;
- (d) emergencies created by acts or omissions constituting a criminal offence;
- (e) labour-related emergencies such as major labour strikes, lock-outs, pickets and stoppage of work; and
- (f) such other emergencies which may be best addressed by PKHA, the GoKPK and/or the relevant Public Sector Entities.

14.23.2 All Revenues collected by PKHA during the temporary take-over in terms of this Section 14.23 [*Temporary Take-Over of Operations by PKHA*] shall be duly deposited in the Concessionaire's designated revenue account on a Daily basis.

14.23.3 In making the request for the temporary take-over of the operations pursuant to Section 14.23.1, the Concessionaire shall identify the specific functions that are to be turned over to PKHA. PKHA shall return to the Concessionaire the identified functions turned over immediately upon receiving a notice from the Concessionaire upon the cessation of the emergency which occasioned the temporary take-over.



14.23.4 PKHA shall be liable for any loss or damage to any of the Project Assets (which is attributable to the negligence of PKHA during the period of temporary take-over) to the extent the same is not recoverable pursuant to the insurance policies procured and maintained in accordance with the terms of this Agreement.

14.23.5 For the duration of the temporary take-over by PKHA under this Section 14.23 [Temporary Take-Over of Operations by PKHA], PKHA shall be entitled to such reasonable compensation for the operation and maintenance expenses incurred by it for the duration of such temporary take-over, as certified by the Independent Engineer, on a monthly basis.



15. TOLLS, REVENUES AND ACCOUNTS

15.1 TOLLS AND REVENUES

15.1.1 Under the terms of this Agreement, the Concessionaire is entitled to levy, demand, collect and/or earn:

- (a) the Toll Revenue (i) in respect of the Expressway Section and any Section added thereto 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 (ii) in respect of the Expressway at the relevant Toll Plazas on the Service Commencement Date based on the Toll Structure set out in Part II of **SCHEDULE B [TOLL STRUCTURE]**, and continue such collection until the Expiry Date (or the Termination Date, if earlier);
- (b) the Expressway Service Areas Revenue commencing from the date such Expressway Service Areas and the Ancillary Facilities thereon are operational pursuant to the terms of this Agreement until the Expiry Date (or the Termination Date, if earlier);
- (c) the Other Revenues commencing from the date such Other Revenues start accruing to the Concessionaire pursuant to the terms of this Agreement until the Expiry Date (or the Termination Date, if earlier).

15.1.2 Not Used.

15.1.3 Not Used.

15.1.4 For smooth implementation of the Toll Structure set out in **SCHEDULE B [TOLL STRUCTURE]** pursuant to Section 15.1.1, PKHA shall upon being notified, at least one (1) Month in advance, by the Concessionaire/Independent Engineer of the scheduled date of imposition of a new Toll rate in accordance with **SCHEDULE B [TOLL STRUCTURE]**, not later than two (2) Weeks prior to such date issue the Toll Notification and procure all the Approvals and the Consents whatsoever (a) pertaining to the opening for vehicular traffic the Expressway Section, any Section added thereto or the Expressway, as the case may be, and (b) conferring on the Concessionaire the full authority to collect the Tolls, based on the Toll Structure set out in **SCHEDULE B [TOLL STRUCTURE]**.

15.1.5 If required under the Applicable Laws, PKHA shall do all acts and things to procure for the Concessionaire the necessary rights and authority to levy and collect the Tolls.

15.1.6 The Concessionaire shall bear all related costs incurred in performing the Toll collection operations, including, payroll expenses, supervision and monitoring costs, and costs incurred in cash counting and tallying, cash delivery and deposits.

15.1.7 The Tolls shall be periodically adjusted during the Operations Period in such manner and according to such procedures as set out in **SCHEDULE B [TOLL STRUCTURE]**.



15.1.8 Notwithstanding anything to the contrary contained in this Agreement, the Concessionaire:

- (a) shall not collect any Tolls from the Exempted Vehicles; provided, that any change to the Exempted Vehicles as they exist prior to the Effective Date shall, if such change has adverse revenue consequences for the Concessionaire, be deemed to be a Change in Law for the purposes of Section 20 [*Change in Law*]; and
- (b) may, in its sole discretion, levy Tolls at rates lower than those set out in or determined in accordance with **SCHEDULE B [TOLL STRUCTURE]** or offer and negotiate concession packages to or with such class or classes of users of the Expressway Section, Expressway or any part thereof, as the case may be, as may be determined by the Concessionaire in its discretion.

15.1.9 The Concessionaire shall conduct on-site training for its employees who shall be undertaking the Toll operations at the Toll Plazas. The Concessionaire shall complete all such on-site training at least forty five (45) Days prior to commencement of Toll collection operations.

15.2 UTILIZATION OF THE REVENUES DURING THE OPERATIONS PERIOD

15.2.1 Subject to the terms of the Financing Agreements, during the Operations Period, the Concessionaire shall use the Revenue for (without limitation) the costs necessary for the proper operation and maintenance of the Expressway, the Expressway Section or any part thereof, as the case may be (including reconstruction, resurfacing, restoration and rehabilitation of the Expressway in compliance with the requirements of this Agreement), for Financing Payments pursuant to the Financing Agreements until the Financing Termination Date, payment of dividends to the Shareholders, payments to PKHA under the Subordinate Financing Agreement and for such other purposes as specified in this Agreement and the Financing Agreements.

15.3 COMPETING ROUTES

15.3.1 PKHA undertakes and assures:

- (a) there is no Competing Route as of the Effective Date;
- (b) that as of the Effective Date, should PKHA or any Public Sector Entity decide to establish a Competing Route as described in Section 15.3.1(a), then PKHA shall undertake that the said Competing Route shall be tolled at toll rates at least equivalent to an amount 1.5 times higher than the prevailing Toll rates imposed at the Expressway Section, any Section added thereto or the Expressway, as the case may be;
- (c) that in the event PKHA is not agreeable to Section 15.3.1(b) above or is otherwise unable to comply with the same, then monetary compensation shall be payable by PKHA to the Concessionaire, within fifteen (15) Days of certification of the said amount of monetary compensation by the Independent Auditor. The Independent Auditor shall certify the amount due to the Concessionaire within



fifteen (15) Days of a written request by the Concessionaire. The monetary compensation shall be paid by PKHA on a quarterly basis. The monetary compensation for the Operational Year concerned or the relevant year of the Construction Period, as applicable, to be deposited in the compensation account of the Concessionaire and distributed in accordance with the terms of this Agreement, shall be in the sum calculated as the difference between (A) the aggregate projected Toll Revenue based on the Toll Structure set out in **SCHEDULE B [TOLL STRUCTURE]**, that would have been generated but for non-imposition of the toll rates in accordance with Section 15.3.1(b), against (B) the aggregate actual Toll Revenue collected, which difference shall be duly substantiated by the Concessionaire through a traffic and revenue study;

- (d) that in the event PKHA fails, or is otherwise unable, to pay the monetary compensation, then the Concessionaire shall be entitled to recover compensation in accordance with Sections 29.20 and/or 29.21;
- (e) that in the event PKHA is not agreeable to Section 15.3.1(b), or is otherwise unable to comply with the same, fails to pay the monetary compensation in accordance with Section 15.3.1(c), and the Concessionaire does not elect to exercise the rights stipulated in Section 15.3.1(d) or despite exercise of such rights, the Concessionaire is not adequately compensated, then, at any time thereafter, at the Concessionaire's option (i) 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 (ii) 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.

15.4 TAXES

15.4.1 Save as otherwise stated in this Agreement, each Party shall pay its own Taxes as and when due in accordance with the Applicable Laws.

15.5 REDUCTION IN TOLL RATES

15.5.1 If, at the request of PKHA and upon giving the Concessionaire two (2) Months prior notice in writing, the Concessionaire is required to reduce the Toll rates or otherwise not to implement the Toll escalation in the manner set out in **SCHEDULE B [TOLL STRUCTURE]**, then monetary compensation shall be payable by PKHA to the Concessionaire on account of such reduction, to be paid on a monthly basis if the Toll reduction or failure to implement Toll escalation occurs during the Construction Period and on a quarterly basis if the same occurs during the Operations Period but after the Project Completion Date, after being verified by the Independent Auditor, to pay such compensation. The Independent Auditor shall undertake such verification within five (5) Days of a written request by the Concessionaire. The monetary compensation shall be paid by PKHA on a quarterly basis. The monetary compensation for the Operational Year concerned or the relevant year of the Construction Period, as applicable, to be deposited in the compensation account of the Concessionaire and distributed in accordance with the terms of this Agreement, shall be in the sum calculated as the difference between (a) the aggregate projected Toll Revenue based on the Toll Structure set out in **SCHEDULE B [TOLL STRUCTURE]** that would have been generated but for the



reduction or non-escalation of Toll rates, against (b) the aggregate actual Toll Revenue collected based on the reduced or non-escalated Toll rates, which difference shall be duly substantiated by the Concessionaire through a traffic and revenue study.

15.5.2 In the event PKHA is not agreeable to Section 15.5.1 or is otherwise unable to comply with the same, then the Concessionaire shall be entitled to recover, or cause to be recovered, compensation in accordance with Sections 29.20 and/or 29.21.

15.5.3 In the event PKHA is not agreeable to Section 15.5.1 or is otherwise unable to comply with the same, and the Concessionaire does not elect to exercise the rights stipulated in Section 15.5.2 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.

15.6 RECORDS

15.6.1 The Concessionaire shall maintain, from the Expressway Section Service Commencement Date until the Expiry Date (or the Termination Date, if earlier), detailed and accurate records of its Toll collection operations and shall make copies of such records available to PKHA at no cost, upon being given a five (5) Business Days' notice by PKHA.

15.7 PROJECT ACCOUNTS

15.7.1 After the Effective Date up to the Day immediately preceding the Appointed Date, the Concessionaire shall maintain such bank accounts as it deems fit for undertaking costs and expenses in respect of the Project.

15.7.2 From the Appointed Date till the Financing Termination Date, the Concessionaire shall maintain such bank accounts, as set forth in the Financing Agreements (including the Class B Equity Subscription Account and the Subordinate Financing Account, both of which shall be operated through standing instructions set out in the relevant PKHA Agreements and the Financing Agreements).

15.7.3 After the Financing Termination Date till the Expiry Date (or the Termination Date, if earlier), the Concessionaire shall maintain the following bank accounts:

- (a) the project collection account/revenue account, wherein the Revenues shall be deposited;
- (b) an operating account for meeting the operations, management and maintenance expenses of the Concessionaire in relation to the Project under the terms of this Agreement;
- (c) a maintenance reserve account, wherein reserve funds for maintenance shall be deposited;



- (d) a compensation account, wherein any insurance proceeds and compensation amounts received by the Concessionaire from, *inter alia*, (i) PKHA under this Agreement, (ii) any other counter-party to a Project Agreement, shall be deposited; and
- (e) such other bank accounts, if any, as mutually agreed upon between the Parties.

15.8 ENCUMBRANCE OVER BANK ACCOUNTS

15.8.1 From the date of execution of the Financing Agreements till the Financing Termination Date, the Concessionaire may create an Encumbrance over its bank accounts as security for pre-payment and payment obligation to the Financiers.



16. INSURANCE

16.1 TAKAFUL OR INSURANCE DURING THE CONSTRUCTION PERIOD

16.1.1 The Concessionaire shall, at its own cost and expense, procure and maintain at all material times from takaful companies of appropriate rating or insurance companies of single A (A) rating, such takaful or insurance as is necessary, specified in SCHEDULE AF [INSURANCE COVER], including, the following:

- (a) a contractor's all risks policy for the full value of the Works to include cover for all goods, equipment, materials, plants and other items necessary for the Works including when they are in transit to the Concession Area;
- (b) comprehensive third party liability insurance, including, against injury or death to personnel or representatives or other natural Persons that may enter the Concession Area;
- (c) cover for any damage to the Works, in part or whole, caused by the Concessionaire's vehicles, tools, equipment or personnel;
- (d) workmen's compensation insurance as required under the Applicable Laws;
- (e) any other cover that may be necessary for the Works, including, against such Force Majeure Events that are insurable in accordance with the norms of the industry;
- (f) cash-in-transit insurance to cover movement of the Toll Revenue at the Toll Plazas (and the Administrative Office once completed), and the deposit thereof into the project collection account/revenue account.

16.1.2 The takaful or insurance cover referred to in Section 16.1.1 shall commence on or prior to the Works Commencement Date and shall continue until the Project Completion Date. The Concessionaire shall be named the loss payee, jointly with the Agent on behalf of the Financiers, in the policy of takaful or insurance.

16.2 TAKAFUL OR INSURANCE DURING THE OPERATIONS PERIOD

16.2.1 The Concessionaire shall, at its own cost and expense, procure and maintain takaful or insurance from takaful companies of appropriate rating or insurance companies of single A(A) rating, as necessary, specified in SCHEDULE AF [INSURANCE COVER], including, the following:

- (a) cover for any damage to the Project Assets, in part or whole, as shall be prudent to insure against having regard to the practice of the industry;
- (b) comprehensive third party liability insurance, including, against injury or death to personnel or representatives or other natural Persons for each incident (the number of the incidents to be unlimited);



- (c) workmen's compensation insurance as required under the Applicable Laws;
- (d) any other cover that may be necessary, including, against such Force Majeure Events that are insurable in accordance with the norms of the industry; and
- (e) cash-in-transit insurance to cover movement of the Toll Revenue at the Toll Plazas (and the Administrative Office once completed), and the deposit thereof into the project collection account/revenue account.

16.2.2 The takaful or insurance cover referred to in Section 16.2.1 shall commence on the Service Commencement Date and shall continue until the Expiry Date (or the Termination Date, if earlier). The Concessionaire shall be named the loss payee, jointly with the Agent on behalf of the Financiers so long as any Financing remains outstanding, in the policy of takaful or insurance, whereafter the Concessionaire shall be the sole loss payee.

16.3 GENERAL PROVISIONS

16.3.1 The Concessionaire shall, upon receipt of the duly executed policies of takaful or insurance, provide to PKHA with one (1) copy each of all such policies within fifteen (15) Days.

16.3.2 The Concessionaire shall be liable for any cost deficiency should any insurance proceeds be insufficient to cover the necessary repair and or restoration works, or the cost of replacement as the case may be; provided, however, that any excess of the said insurance proceeds shall inure to the exclusive benefit of the Concessionaire.

16.3.3 If any risk which has been insured becomes uninsurable due to the fact that the insurers have ceased to insure that risk, and the takaful or insurance cannot be maintained or reinstated in respect to such risk, the Concessionaire shall not be in a breach of its obligation regarding insurance under this Agreement.

16.3.4 Any takaful and or insured sums received and/or obtained by the Concessionaire from the takaful and/or insurance companies pursuant to the takaful and or insurance policy(ies), shall not absolve any Party of any obligations and/or liabilities that may have accrued under this Agreement or any other agreement entered into by the Concessionaire for the purpose of implementing the Project.

16.4 VALIDITY OF INSURANCE

16.4.1 The Concessionaire shall, from time to time, promptly pay all insurance premiums, keep the insurance policies in force and valid throughout relevant period and furnish one (1) copy each thereof to PKHA. Each insurance policy shall provide that the same shall not be cancelled or terminated unless ten (10) Days clear notice of cancellation is provided to PKHA in writing. If at any time, the Concessionaire fails to obtain or maintain in full force and effect any and all of the insurance required under this Agreement, PKHA may at its option obtain and maintain such insurance and all sums incurred by PKHA in relation thereto shall be reimbursed by the Concessionaire to PKHA within fourteen (14) Days from the receipt of claim in respect thereof made by PKHA (to the extent the same relates to the insurance during the Construction Period) or otherwise settle with the Concessionaire as deemed fit.



16.5 APPLICATION OF INSURANCE PROCEEDS

16.5.1 Subject to the terms of the Financing Agreements and unless otherwise provided herein, the proceeds of all insurance policies received shall be promptly applied by the Concessionaire towards repair, renovation, restoration or re-instatement of the Project Assets or any part thereof which may have been damaged or destroyed. The Concessionaire shall carry out such repair, renovation, restoration or re-instatement, to the fullest extent possible, and in such manner that the Project Assets, after such repair, renovation, restoration or re-instatement be as far as possible in the same condition as they were prior to such damage or destruction, normal wear and tear excepted.

16.6 UNINSURABLE RISKS

16.6.1 If a risk usually covered by the insurance stipulated in **SCHEDULE AF [INSURANCE COVER]** becomes Uninsurable, then the Concessionaire shall notify PKHA within ten (10) Days of the risk becoming Uninsurable.

16.6.2 If the Parties agree, or it is determined through Fast-Track Dispute Resolution in accordance with Section 24.2, that:

- (a) the risk is Uninsurable;
- (b) the risk being Uninsurable is not caused by the actions or omissions of the Concessionaire; and
- (c) other service providers carrying on businesses similar to the Project would cease to do so as a result of such Uninsurability;

then the Parties shall meet to discuss the means by which the risk should be managed (including by way of self-insurance by either Party).

16.6.3 The Concessionaire shall bear the onus of proving the circumstances in Sections 16.6.2 (a) to (c).

16.6.4 If the requirements of Sections 16.6.1 and 16.6.2 are met:

- (a) this Agreement shall continue in full force and effect; and
- (b) on the occurrence of the risk (but only if that risk has continued to be Uninsurable) PKHA shall, at the Concessionaire's option, either pay:
 - (i) to the Concessionaire an amount equal to the insurance proceeds that would have been payable had the risk continued to be insurable, in which event this Agreement shall continue in full force and effect; or
 - (ii) an amount equal to the amount set out in Section 21.6 and this Agreement shall Terminate as if due to a Force Majeure Event.



16.7 WAIVERS/EXEMPTIONS

- 16.7.1 All takaful/insurance covers taken under this Section 16 [*Insurance*] shall include a waiver of any right of subrogation of the insurers therein against, *inter alia*, the Concessionaire and its Contractors, employees, successors, permitted assigns, insurers and underwriters and of any right of the insurers of any set-off or counterclaim or any other deduction, whether by attachment or otherwise, in respect of any liability of any such Person insured under any such policy.
- 16.7.2 PKHA hereby releases and waives any and all rights of recovery against, *inter alia*, the Concessionaire and its Contractors, employees, successors, permitted assigns, insurers and underwriters, which PKHA may otherwise have or acquire in or from or in any way connected with any loss covered by policies of insurance (other than third party liability insurance policies) maintained or required to be maintained by the Concessionaire pursuant to this Agreement, or because of deductible clauses in or inadequacy of limits of any such takaful/insurance covers.
- 16.7.3 PKHA shall facilitate the exemptions as required under Section 166 of the Insurance Ordinance, 2000, if applicable.
- 16.7.4 Subject to Section 16.5, if the Financing repayment obligations remain outstanding, the Financiers and the Concessionaire shall be the joint beneficiaries of all takaful/insurance covers taken by the Concessionaire.

16.8 SUBORDINATION OF RIGHTS TO INSURANCE

- 16.8.1 PKHA acknowledges and agrees that the interest of PKHA, its officers and employees in and to the insurances maintained by the Concessionaire pursuant to this Agreement shall be subordinate to the interests in such insurances of the Financiers under the Financing Agreements.

16.9 SAVINGS

- 16.9.1 Neither failure to comply nor full compliance with this Section 16 [*Insurance*] shall relieve the Concessionaire of its liabilities and obligations under this Agreement, and in particular the Concessionaire's obligation to hold PKHA harmless in compliance with any indemnity provisions contained in this Agreement.



17. FORCE MAJEURE

17.1 INTERPRETATION

17.1.1 For purposes of this Agreement, a Force Majeure Event shall mean the occurrence in Pakistan of a Non-Political Event, a Political Event or an Indirect Political Event, as defined in Sections 17.1.2, 17.1.3 and 17.1.4, respectively (and includes the impact or consequence thereof), which is beyond the reasonable control of the Affected Party, and the occurrence whereof could not have been reasonably foreseen on the Effective Date by exercise of due diligence and which makes performance and discharge of the obligations of the Affected Party under this Agreement impossible or impractical.

17.1.2 A Non-Political Event shall mean one or more of the following acts or events which makes it impossible or impractical for the Concessionaire to perform any of its obligations:

- (a) major earthquake, unusual flood, inundation, landslide;
- (b) storm, tempest, hurricane, cyclone, lightening, thunder or other extreme atmospheric disturbances;
- (c) fire caused by reasons not attributable to the Concessionaire or PKHA or any of the representatives of the Concessionaire or PKHA; or
- (d) disruption in the procurement of raw materials for the Works.

17.1.3 A Political Event shall mean any event, including, the following, which makes it illegal, impossible or impractical for the Concessionaire to perform its obligations:

- (a) Change in Law;
- (b) an action of the GoP, GoKPK, PKHA or a Public Sector Entity having a Material Adverse Effect; or
- (c) an action of the GoP, GoKPK, PKHA or a Public Sector Entity of expropriation, nationalization or compulsory acquisition or take-over of the Project Assets or any part thereof (other than in accordance with Section 14.23) or of the Concessionaire's rights under this Agreement;

Provided, however, that a Change in Law for which no relief is provided under the terms of Section 20 [*Change in Law*] shall be deemed to be a Political Event.

17.1.4 An Indirect Political Event shall mean any of the following events which makes it impossible for the Concessionaire to perform any of its obligations:

- (a) ionizing radiation, serious epidemics, contamination by radioactivity from nuclear fuel, any nuclear waste or radioactive toxic explosion;
- (b) strikes, protests, boycotts, labour disruptions or any other industrial disturbance not arising on account of the acts or omissions of the Concessionaire.



- (c) war, hostilities (whether war be declared or not), acts of terrorism, rebellion, riots or ethnic violence, civil commotion, unrest, disruption civil war or armed conflicts or state of emergency; or
- (d) invasion, act of foreign enemy, conflict with weapons or military actions.

17.2 MITIGATION MEASURES

17.2.1 PKHA and the Concessionaire acknowledge their mutual interest to direct, to the extent possible, their decisions as a consequence of a Force Majeure Event towards the completion of the Works and the continued operation of the Project Assets, or any part thereof, for the full duration of the Concession Period in accordance with the terms of this Agreement, and shall to this end formulate damage mitigation measures in accordance with Section 17.3.2(c).

17.3 OBLIGATION TO NOTIFY

17.3.1 As soon as practicable and in any case within one (1) Month of the date of occurrence of a Force Majeure Event or the date of knowledge thereof, the Affected Party shall notify the other Party of the Force Majeure Event setting out, *inter alia*, the following in reasonable detail:

- (a) the nature and extent of the Force Majeure Event;
- (b) the estimated Force Majeure Period;
- (c) the nature of and the extent to which, performance of any of its obligations under this Agreement is affected by the Force Majeure Event;
- (d) the measures which the Affected Party has taken or proposes to take to alleviate or mitigate the impact of the Force Majeure Event and to resume performance of such of its obligations as are affected thereby; and
- (e) other relevant information concerning the Force Majeure Event and/or the rights and obligations of the Parties under this Agreement.

17.3.2 As soon as practicable and in any case within seven (7) Days of notification by the Affected Party in accordance with the preceding Section 17.3.1, the Parties shall meet, hold discussions in good faith and where necessary conduct physical inspection/survey of the Project in order to:

- (a) assess the impact of the underlying Force Majeure Event;
- (b) determine the likely duration of the Force Majeure Period; and
- (c) formulate damage mitigation measures and steps to be undertaken by the Parties for resumption of obligations the performance of which shall have been affected by the underlying Force Majeure Event.



17.3.3 The Affected Party shall, during the Force Majeure Period, provide to the other Party with regular (not less than Weekly) reports concerning the matters set out in the preceding Section 17.3.2 and also any information, details or documents which the other Party may reasonably require.

17.3.4 Notwithstanding the terms of this Section 17.3, the Concessionaire is entitled to issue a Termination Notice forthwith upon the occurrence of an event set out in Section 17.1.3(c), in which case the applicable provisions of Section 21 [Termination] shall apply.

17.4 PERFORMANCE OF OBLIGATIONS

17.4.1 If the Affected Party is rendered wholly or partially unable to perform any of its obligations under this Agreement because of a Force Majeure Event, it shall be excused from performance of such obligation to the extent it is unable to perform the same on account of such Force Majeure Event; provided, however, that:

- (a) the excuse from performance shall be of no greater scope and of no longer duration than is necessitated by the Force Majeure Event;
- (b) the timelines for performance by the Concessionaire of its relevant obligations to be performed under this Agreement, the Construction Period and/or the Concession Period, as applicable, shall be extended by the Force Majeure Period (as determined by the Independent Engineer in writing);
- (c) the Affected Party shall make all reasonable efforts to mitigate or limit damage, if any, caused or likely to be caused to the Project Assets as a result of the Force Majeure Event and to restore the Project Assets, in accordance with Good Industry Practice and its relative obligations under this Agreement;
- (d) the Affected Party shall take all remedial measures, including, duly prosecuting and exhausting all such remedies available to the Affected Party under the Applicable Laws;
- (e) when the Affected Party is able to resume performance of its obligations under this Agreement, it shall give to the other Party written notice to that effect and shall promptly resume performance of its obligations hereunder;
- (f) the Affected Party shall continue to perform such obligations which are not affected by the Force Majeure Event and which are capable of being performed in accordance with this Agreement.

17.5 ALLOCATION OF COSTS

17.5.1 Upon occurrence of a Force Majeure Event, the Incremental and Consequential Costs shall be allocated as follows:

- (a) upon occurrence of a Non-Political Event, all Incremental and Consequential Costs shall be on the account of the Concessionaire and PKHA shall not be liable or responsible for the same in any manner;



- (b) upon occurrence of an Indirect Political Event or a Political Event, PKHA shall fund and bear the Incremental and Consequential Costs within fifteen (15) Days of certification of the same by the Independent Engineer upon the Concessionaire's written request.

17.6 TERMINATION OCCASIONED BY FORCE MAJEURE

17.6.1 If a Force Majeure Event continues or is in the reasonable judgment of the Parties likely to continue beyond a period of six (6) Months, the Parties may mutually decide to Terminate this Agreement or continue this Agreement on mutually agreed revised terms (which may include revision of the Financial Model). If the Parties are unable to reach an agreement in this regard, either Party shall, after expiry of the said period of six (6) Months, be entitled to Terminate this Agreement.

17.6.2 If either Party, having become entitled to Terminate this Agreement pursuant to Section 17.6.1, so decides to Terminate this Agreement, it shall issue a Termination Notice setting out:

- (a) in sufficient detail the underlying Force Majeure Event;
- (b) the Termination Date which shall, other than in respect of an event specified in Section 17.3.4, be a date occurring not earlier than sixty (60) Days from the date of the Termination Notice;
- (c) the estimated Termination Payment, including, details of computation thereof; and
- (d) any other relevant information.



18. COMPENSATION EVENTS AND RELIEF EVENTS

18.1 COMPENSATION EVENTS

18.1.1 "Compensation Event" means and includes any of the following:

- (a) the delayed delivery of the Concession Area, the Additional Land, and/or the Ancillary Rights in accordance with Section 3.1 (but only if and so long as such breach or failure does not constitute an PKHA Event of Default pursuant to the terms of this Agreement whereupon the Concessionaire elects to Terminate this Agreement);
- (b) interference with peaceful possession of the Concession Area, the Additional Land, and/or the Ancillary Rights in accordance with Section 3.5;
- (c) a Variation to the Approved Detailed Design pursuant to Section 8.2.4;
- (d) the delayed completion of the Works due to delay in the removal, relocation, diversion or reinstatement of Public Utilities pursuant to Section 9.2;
- (e) occurrence of an event under Sections 13.1.8 or 13.1.9 which entitles the Concessionaire to relief in terms of Section 13.1.8 or 13.1.9;
- (f) failure or inability of PKHA to comply with Sections 15.3.1(a) or 15.3.1(b);
- (g) at the request of PKHA, reduction in the Toll rates or non-implementation of the Toll escalation in the manner set out in **SCHEDULE B [TOLL STRUCTURE]** by the Concessionaire pursuant to Section 15.5.1;
- (h) PKHA fails to facilitate the Concessionaire to adjust the Tolls as per the Toll escalation procedures set out in **SCHEDULE B [TOLL STRUCTURE]** or otherwise under the terms of this Agreement including in accordance with Sections 11.1.2, 15.1.4 and 29.21.2;
- (i) temporary take-over of the operations of the Expressway, or any part thereof, by PKHA in accordance with Section 14.23.1;
- (j) Change in Law pursuant to Section 20 [*Change in Law*]; and
- (k) any other event specifically stated in this Agreement in respect of which the Concessionaire is entitled to Incremental and Consequential Costs and/or an extension of time for the Delay Duration.

18.1.2 CONSEQUENCES OF A COMPENSATION EVENT

On the occurrence of a Compensation Event, the Concessionaire shall be entitled to exercise the rights under such Sections of this Agreement, as correspond to and are relevant to such Compensation Event.



18.2 RELIEF EVENTS

18.2.1 "**RELIEF EVENT**" means and includes any of the following events, which could not reasonably be expected to be avoided by the Concessionaire acting in accordance with Good Industry Practice:

- (a) any fire, explosion, tempest, adverse weather conditions, flood, ionizing radiation, earthquakes, riots and civil commotion, or pressure waves caused by devices travelling at supersonic speed, to the extent the same do not constitute a Force Majeure Event;
- (b) other than an PKHA Event of Default, any failure by PKHA or any Public Sector Entity to carry out works or provide services of a nature which have a direct bearing on performance by the Concessionaire of its obligations under this Agreement;
- (c) any accidental loss or damage to any of the Works and/or the Project Assets;
- (d) any off-site failure or shortage of power, fuel or transport;
- (e) any blockade or embargo which does not constitute a Force Majeure Event;
- (f) the discovery of any heritage objects or resources that could not reasonably have been discovered by proper due diligence as contemplated in Section 3.7.1;
- (g) any official or unofficial strike, lockout, go slow or other such labour disputes generally affecting the transport sector or a significant sector of it, unless any of the events listed in Sections 18.2.1 (a) to (g) inclusive arises (directly or indirectly) as a result of any negligence, wilful conduct or default of the Concessionaire or any Contractor.

18.2.2 CONSEQUENCES OF A RELIEF EVENT

- (a) If and to the extent that a Relief Event:
 - (i) causes a delay in the Service Commencement Date; and/or
 - (ii) has a Material Adverse Effect on the ability of the Concessionaire to perform any of its obligations under this Agreement,

then the Concessionaire shall be entitled to apply for relief from any rights of PKHA arising under Section 21 [Termination].

- (b) To obtain relief, the Concessionaire shall:
 - (i) as soon as practicable, and in any event within fifteen (15) Days after it becomes aware that the Relief Event has caused or is likely to cause delay and/or have a Material Adverse Effect on the ability of the Concessionaire to perform its obligations pursuant to the terms of this Agreement, give to the Independent Engineer a written notice of its claim for relief from its obligations under this Agreement, including full details



- of the nature of the Relief Event, the date of occurrence and its likely duration;
- (ii) within ten (10) Days of receipt by the Independent Engineer of the notice referred to in Section 18.2.2 (b)(i), give full details of the relief claimed; and
 - (iii) demonstrate to the reasonable satisfaction of the Independent Engineer, as the case may be, that:
 - (A) the Concessionaire and its Contractors could not have avoided such occurrence or consequences by steps which they might reasonably be expected to have taken;
 - (B) the Relief Event directly caused the delay to the Service Commencement Date or the need for relief from other obligations under this Agreement;
 - (C) the time lost and/or relief from the obligations under this Agreement claimed could not reasonably be expected to be mitigated or recovered by the Concessionaire acting in accordance with Good Industry Practice; and/or
 - (D) the Concessionaire is using reasonable endeavours to perform its obligations under this Agreement.
- (c) In the event that the Concessionaire has complied with its obligations under Section 18.2.2 (b), then:
- (i) the Service Commencement Date shall be postponed by the Delay Duration or such longer period of time as shall be reasonable, in the opinion of the Independent Engineer, as the case may be, for such a Relief Event, taking into account the likely effect of delay; and/or
 - (ii) PKHA shall not be entitled to exercise its rights to Terminate this Agreement under Section 21 [Termination].
- (d) The Concessionaire shall notify the Independent Engineer, with a copy to PKHA, if at any time it receives or becomes aware of any further information relating to the Relief Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading.
- (e) In the event of a Relief Event stipulated in Section 18.2.1 that continues for a period in excess of six (6) Months, the Parties shall meet in order to find a mutually satisfactory solution for dealing with such prolonged Relief Event.
- (f) If the Parties cannot agree on the extent of the relief required, or PKHA disagrees that a Relief Event has occurred or that the Concessionaire is entitled to any extension of the Service Commencement Date and/or other relief from its



obligations under this Agreement, the Parties shall resolve the matter through Fast-Track Dispute Resolution in accordance with Section 24.2



19. SUBSIDY, EQUITY, SUBORDINATE FINANCING AND RELATED MATTERS

19.1 SUBSIDY AND EQUITY FUNDING AND UTILIZATION

19.1.1 The Parties hereby acknowledge and agree that:

- (a) PKHA shall fund the PKHA Funding Amount in the Class B Equity Subscription Account in accordance with the terms of this Agreement and the EFU Agreement to fund the Estimated Project Cost;
- (b) PKHA shall fund the Initial PKHA Funding Amount in the Class B Equity Subscription Account on the Effective Date;
- (c) PKHA shall fund the Balance PKHA Funding Amount in the Class B Equity Subscription Account on the Balance PKHA Funding Amount Funding Date in accordance with the terms of the EFU Agreement;
- (d) the Sponsor shall fund the Equity in accordance with the terms of the EFU Agreement; and
- (e) the Initial PKHA Funding Amount, the Balance PKHA Funding Amount, the Subordinate Financing and the Equity shall, in each case, be Utilized by the Concessionaire in accordance with the terms of the EFU Agreement.

19.1.2 The PKHA Funding Amount and the Subordinate Financing (each, a "Specific Payment") shall be paid by PKHA:

- (a) free of any restriction or condition (except the restriction that the Specific Payment shall be used for the Project in terms of the Agreement, the PKHA Agreements and the Financing Agreements);
- (b) free and clear of and (except to the extent required by Applicable Law) without any deduction or withholding on account of any Tax; and
- (c) without deduction or withholding (except to the extent required by Applicable Law).

19.1.3 If (a) GoKPK and/or PKHA (or any other person) (the "Obligor") is required by Applicable Law to make any deduction or withholding on account of any Tax or other amount from any Specific Payment; or (b) the Obligor (or any Person on its behalf) is required by Applicable law to make any deduction or withholding from, or any payment on or calculated by reference to a Specific Payment:

- (a) the Obligor shall notify the Concessionaire of any such requirement or any change in any such requirement as soon as it becomes aware of it;
- (b) the Obligor shall pay any such Tax or other amount before the date on which penalties attach thereto, such payment to be made (if the liability is imposed on the Concessionaire and/or the Sponsor) on behalf of and in the name of that party; and



- (c) the Specific Payment payable by the Obligor in respect of which the relevant deduction, withholding or payment is required shall be increased to the extent necessary to ensure that, after the making of that deduction, withholding or payment, that party receives on the due date and retains (free from any liability in respect of any such deduction, withholding or payment) a net sum equal to what it would have received and so retained had no such deduction withholding or payment been required or made.

19.2 BALANCE PKHA FUNDING AMOUNT FINANCIAL INSTRUMENT

19.2.1 ISSUANCE

- (a) PKHA hereby agrees and undertakes to provide a standby letter of credit in the form and manner set out in Sections 19.2.1(b) to (d) (to be issued by the Balance PKHA Funding Amount Financial Instrument Issuing Bank) for the Balance PKHA Funding Amount (the "**Balance PKHA Funding Amount Financial Instrument**") and hereby agrees to maintain the same in accordance with the terms of this Agreement.
- (b) PKHA hereby agrees and undertakes that the Balance PKHA Funding Amount Financial Instrument shall be issued on its behalf. The Balance PKHA Funding Amount Financial Instrument issued on behalf of PKHA shall be fully secured by PKHA as a principal debtor and not as surety without any recourse to the Concessionaire, its assets or properties. All costs, expenses, fees and other charges of any nature associated with the issuance, maintenance and encashment of the Balance PKHA Funding Amount Financial Instrument shall be borne solely by PKHA.
- (c) The Balance PKHA Funding Amount Financial Instrument shall be issued in the form and substance acceptable to the Concessionaire and the Financiers and the Balance PKHA Funding Amount Financial Instrument Issuing Bank shall be acceptable to the Concessionaire and the Financiers.
- (d) The Balance PKHA Funding Amount Financial Instrument shall be unconditional, irrevocable, encashable in accordance with the terms thereof and shall be payable on first written demand without any prior notice, reference or recourse to PKHA or any other entity. PKHA hereby agrees to the terms of encashment of the Balance PKHA Funding Amount Financial Instrument issued on its behalf, as set out in this Section 19.2.2 [*Encashment*] and in the Balance PKHA Funding Amount Financial Instrument.

19.2.2 ENCASHMENT

- (a) Without prejudice to or in any way limiting any other provisions of this Agreement, the Balance PKHA Funding Amount Financial Instrument may be encashed in accordance with this Agreement in the following circumstances:
- (i) pursuant to Section 19.2.3(b);
 - (ii) pursuant to Section 19.2.3(c); and



(iii) pursuant to Section 19.2.4(a).

19.2.3 AMOUNT, VALIDITY PERIOD AND RELATED MATTERS

- (a) The Parties acknowledge and agree that PKHA shall issue the Balance PKHA Funding Amount Financial Instrument on the Effective Date.
- (b) The Parties acknowledge and agree that the Balance PKHA Funding Amount Financial Instrument shall be established and maintained and shall be valid, at the time of issuance, until the date falling six (6) months following the Balance PKHA Funding Amount Funding Date (the "**Balance PKHA Funding Amount Financial Instrument Expiry Date**"). In the event the Balance PKHA Funding Amount Financial Instrument expires prior to the Balance PKHA Funding Amount Financial Instrument Expiry Date, PKHA shall extend the validity of the Balance PKHA Funding Amount Financial Instrument, at least ninety (90) days prior to its expiry, so as to keep it valid and enforceable until the Balance PKHA Funding Amount Financial Instrument Expiry Date. In the event of failure by PKHA to extend the validity of the Balance PKHA Funding Amount Financial Instrument in accordance with this Section 19.2.3(b), the Concessionaire shall have the right, upon issuance of the first written demand to encash the Balance PKHA Funding Amount Financial Instrument to its full outstanding value. All proceeds from encashment of the Balance PKHA Funding Amount Financial Instrument pursuant to this Section 19.2.3(b) shall be credited to the Class B Equity Subscription Account and shall be Utilized in terms of the EFU Agreement.
- (c) In the event of failure by PKHA to fund the Balance PKHA Funding Amount in the Class B Equity Subscription Account by the Balance PKHA Funding Amount Funding Date in accordance with the terms of this Agreement and the EFU Agreement, the Concessionaire shall have the right, upon issuance of the first written demand to encash the Balance PKHA Funding Amount Financial Instrument to its full outstanding value. All proceeds from encashment of the Balance PKHA Funding Amount Financial Instrument pursuant to this Section 19.2.3 (c) shall be credited to the Class B Equity Subscription Account and shall be Utilized in terms of the EFU Agreement.

19.2.4 PAYMENT OF TERMINATION PAYMENT BY ENCASHMENT OF BALANCE PKHA FUNDING AMOUNT FINANCIAL INSTRUMENT

- (a) In the event of Termination of this Agreement and to the extent the Termination Payment (or any part thereof) remains due, payable and outstanding on the Required Termination Payment Date (the "**Outstanding Termination Payment**"), the Concessionaire shall be entitled to encash the Balance PKHA Funding Amount Financial Instrument in accordance with Section 21.6 [*Compensation on Termination*] below.

19.3 SUBORDINATE FINANCING

19.3.1 The Parties hereby acknowledge and agree that:

- (a) PKHA shall disburse the Subordinate Financing in the Subordinate Financing Account on the Effective Date to fund the Estimated Project Cost

