

The words "Terminate", "Terminated" and other grammatical variations of the word "Termination" shall be construed accordingly;

1.1.224 "Termination Date"

the effective date of early Termination of this Agreement, in accordance with its terms, which shall only be achieved subject to payment of the Termination Payment;

1.1.225 "Termination Notice"

the written communication issued in accordance with the terms of this Agreement by one Party to the other Party, terminating this Agreement;

1.1.226 "Termination Payment"

the Pre-FC Termination Payment and the Post-FC Termination Payment; provided, that for purposes of determining Termination Payment to be made under this Agreement, the capital cost of the Project shall at all times be reckoned as an amount not exceeding the Estimated Project Cost and the liability of PKHA to make such Termination Payment relating to Financing, Shareholder Loans, Equity Compensation, Due and Payable Costs or any other component of the Termination Payment shall be determined as if such capital cost was restricted to the Estimated Project Cost; provided, that for the purposes of determining Termination Payments to be made under this Agreement, the capital cost of the Project shall at all times be reckoned as an amount not exceeding the Estimated Project Cost and the liability of PKHA to make such Termination Payments relating to Financing, Shareholder Loans, Equity Compensation, Due and Payable Costs or any other component of the Termination Payment shall be determined as if such capital cost was restricted to the Estimated Project Cost;

1.1.227 "Termination Payment Certificate"

shall have the meaning attributed thereto in Section 21.6.3;

1.1.228 "Tests"

the tests to be conducted by the Concessionaire in accordance with the terms of this Agreement to ensure that the Works conform with the Construction Performance Standards and Good Industry Practice. The words "Test", "Testing", "Tested" and other grammatical variations of the word "Tests" shall be construed accordingly;

1.1.229 "Toll"

the fees to be levied by the Concessionaire at the Toll Plazas to vehicular traffic set forth in SCHEDULE B [TOLL STRUCTURE]. The words "Toll", "Tolling", "Tolled" and other grammatical variations of the word "Tolls" shall be construed accordingly;

1.1.230 "Toll Notification"

the notification for implementation of the Toll Structure to the public, through the official gazette of the GoKPK, and/or newspapers of general circulation, to be made or issued by PKHA at such time and in such manner as stated in this Agreement;



1.1.231 "Toll Operator"

the Contractor, if any, with whom the Concessionaire has entered or shall enter into an agreement for purposes of the Concessionaire's operations for collection and handling of the Tolls under this Agreement;

1.1.232 "Toll Plazas"

the toll plazas to be established by the Concessionaire at each of the Interchanges, all more particularly described in **SCHEDULE O [TOLL PLAZAS]**, and any other toll plazas created, or caused to be created, by PKHA after the Effective Date in accordance with the terms of this Agreement for the collection of the Tolls and/or management of Tolling operations and the related management of the Expressway;

1.1.233 "Toll Revenue"

all revenue derived by the Concessionaire from the Project from collection of the Tolls;

1.1.234 "Toll Structure"

the Toll rates and structure set out in **SCHEDULE B [TOLL STRUCTURE]** which shall be levied by the Concessionaire at the Toll Plazas;

1.1.235 "Total Project Cost"

the actual cost of the Project upon completion of the Project, as certified by the Independent Auditor; provided, that the same shall not include (unless otherwise agreed with PKHA) the Incremental and Consequential Costs;

1.1.236 "Transfer Bond"

the bond to be submitted by the Concessionaire pursuant to Section 22.2, in the form and content as provided in **SCHEDULE Z [FORM OF TRANSFER BOND]**;

1.1.237 "Transfer Date"

the Day immediately following the Expiry Date or the Termination Date, as applicable;

1.1.238 "Uninsurable"

in relation to a risk, either that:

- (a) insurance is no longer available from reputable insurers in the worldwide insurance market; or
- (b) even if insurance is available from reputable insurers in the worldwide insurance market, the insurance premium payable for insuring that risk has increased to such a level that the risk is no longer being insured against in the Pakistani insurance market;



1.1.239 "Utilized"

shall have the meaning attributed thereto in the EFU Agreement;

1.1.240 "Vacant Possession"

in relation to any part of the Concession Area, means the right to and delivery of exclusive possession thereof, free from any Encumbrance, and the grant of all Ancillary Rights and other rights appurtenant thereto so that the Concessionaire enjoys complete, uninterrupted and quiet possession of the Concession Area subject to the terms of this Agreement, in each case, to implement the Project in accordance with the terms of this Agreement;

1.1.241 "Variation"

a variation in the design, quality or quantity of the Works and may include amendments, additions, substitutions or alterations in the Approved Detailed Design;

1.1.242 "Variation Notice"

the notice issued by PKHA to the Concessionaire through the Independent Engineer pursuant to Section 8.2.4 requesting it to make a Variation to the Approved Detailed Design;

1.1.243 "Week"

a week according to the Gregorian calendar;

1.1.244 "Weigh Fines"

finest, penalties and charges from users of the Expressway (or any part thereof) pursuant to the Applicable Laws for (without limitation) weight limit violations;

1.1.245 "Works"

all works at the Concession Area undertaken or required to be undertaken by the Concessionaire during the Construction Period pursuant to the terms of this Agreement and in accordance with the Approved Detailed Design, as more particularly described in SCHEDULE P [DESCRIPTION OF THE PROJECT AND SCOPE OF WORK];

1.1.246 "Works Commencement Date"

subject to the terms of this Agreement, the date for the commencement of the Works falling no later than thirty (30) Days from the Appointed Date;

1.1.247 "Year"

a year according to the Gregorian calendar.



1.2 INTERPRETATION

1.2.1 In this Agreement, unless the context otherwise requires:

- (a) any reference to a statutory provision shall include such provision as is from time to time modified, re-enacted or consolidated so far as such modification, re-enactment or consolidation applies or is capable of applying to any transactions entered into hereunder, unless otherwise specified;
- (b) references to the Applicable Laws shall include all federal, provincial and local Applicable Laws and all orders, rules, regulations, bye-laws, ordinances, statutory notifications or orders, executive orders, decrees, judicial decisions, notifications or other similar lawful directives made pursuant thereto issued by any executive, administrative, legislative or judicial authority or any one or more of them having the force of law in Pakistan, as may be amended from time to time;
- (c) in the event of any conflict between the Applicable Laws (including the PPP Act) and this Agreement, the former shall prevail;
- (d) the words importing singular shall include plural and vice versa, and words denoting Persons shall include partnerships, firms, companies, corporations, joint ventures, trusts, associations, organizations or other entities (whether or not having a separate legal personality);
- (e) the headings are for convenience of reference only and shall not be used in, and shall not affect, the construction or interpretation of this Agreement;
- (f) any phrase introduced by the terms "including", "include", "in particular" or any similar expression shall be construed as illustrative and shall not limit the sense of the words preceding those terms;
- (g) where PKHA is required to "facilitate" or "provide facilitation" to the Concessionaire in fulfilling the Concessionaire's obligations (or any of them) pursuant to the terms of this Agreement, PKHA shall do so without assuming any binding obligation in relation to such obligation of the Concessionaire;
- (h) references to "construction", where the context so permits, include investigation, design, engineering, procurement, delivery, transportation, installation, processing, fabrication, Tests, Commissioning and other activities incidental to construction;
- (i) any reference to any period of time shall mean a reference to that according to Pakistan Standard Time;
- (j) any reference to "Day" shall mean a reference to a calendar day in Pakistan (and reference to "Days" shall be construed accordingly);
- (k) if an act prescribed under this Agreement to be done by a Party on or by a given Day is done after 5.30 p.m. on that Day, it is to be taken to be done on the following Business Day;



- (l) unless otherwise stated, any reference to any period commencing "from" a specified Day or date and "till" or "until" a specified Day or date, shall include both such Days or dates;
- (m) whenever there shall appear any reference to a time within which an act should be done or agreement reached or consent given, such reference shall be deemed to be read as including the expression, "or any other period agreed between the Parties from time to time";
- (n) if any provision in Section 1 [*Definitions and Interpretation*] is a substantive provision conferring rights or imposing obligations on any Party, effect shall be given to it as if it were a substantive provision in the body of this Agreement;
- (o) the rule of construction, if any, that a contract should be interpreted against the party responsible for the drafting and preparation thereof, shall not apply;
- (p) the Schedules to this Agreement form an integral part of this Agreement and shall be in full force and effect as though they were expressly set out in the body of this Agreement;
- (q) reference to Recitals, Sections, and Schedules in this Agreement shall, except where the context otherwise requires, be deemed to be references to Recitals and Sections of and Schedules to this Agreement;
- (r) any reference at any time to any agreement, deed, instrument, licence or document of any description shall be construed as reference to that agreement, deed, instrument, licence or document as amended, varied, supplemented, modified or suspended at the time of such reference, unless otherwise specified;
- (s) any agreement, consent, approval, authorization, notice, communication, information or report required under or pursuant to this Agreement from or by any Party or the Independent Engineer, the Independent Auditor and/or the Independent Consultant shall be valid and effectual only if it is in writing under the hands of duly authorized representative of such Party or the Independent Engineer, the Independent Auditor and/or the Independent Consultant, as the case may be, in this behalf and not otherwise;
- (t) in carrying out its obligations and duties under this Agreement, each Party shall be obliged to act in good faith.

1.3 LANGUAGE

- 1.3.1 The language of this Agreement shall be English. Except where specifically provided in this Agreement or otherwise required by the Applicable Laws, all correspondence, communication, drawings, design data, test reports, certificates, specifications, information and other written matter in respect of the Project shall be entirely in English. Instructions and notices to the public and the staff shall be available in English and Urdu, if reasonably required by PKHA. To the extent that any written matter in respect of the Project is in any other language, it shall be accompanied by a duly certified translation in English. In the event of a conflict between the English text and the text in any other language, the English text shall prevail.



1.4 PRIORITY OF DOCUMENTS

- 1.4.1 This Agreement shall be read, interpreted and construed as one coherent document and in case of any conflict or inconsistency between the Sections of this Agreement, the Section(s) relevant to the issue under consideration shall prevail. In case of conflict between one or more Sections of this Agreement and the terms expressed or implied in a Schedule, the former shall prevail.
- 1.4.2 Any agreement, deed, licence or other document incorporated in this Agreement by reference and forming an integral part of this Agreement shall be read together harmoniously, and unless otherwise expressly provided in this Agreement, the order of priority of this Agreement and such agreements, deeds, licences or other documents shall, in the event of conflict, be as follows:
- (a) this Agreement; and
 - (b) all other agreements, deeds, licences and other documents forming part hereof;
- i.e. this Agreement shall prevail over the agreements, deeds, licenses and other documents at (b) above.
- 1.4.3 Subject to Sections 1.4.1 and 1.4.2, in the event of ambiguities or discrepancies appearing in this Agreement, the following rules shall apply:
- (a) between two or more Sections of this Agreement, the provisions of the specific Section(s), relevant to the issue under consideration shall prevail over those in the other Section(s);
 - (b) between the Sections of this Agreement and the Schedules, the Sections shall prevail unless the issue in question/matter is specifically provided for in the Schedule and only referred to in the Sections;
 - (c) between any two Schedules, the Schedule relevant to the issue shall prevail;
 - (d) between the written description on the Approved Detailed Design and the Construction Performance Standards, the latter shall prevail;
 - (e) between the written description on the O&M Manual and the O&M Requirements, the latter shall prevail;
 - (f) between the dimension scaled from the Design and its specific written dimension, the latter shall prevail;
 - (g) between the dimension scaled from the O&M Manual and its specific written dimension, the latter shall prevail; and
 - (h) between any value written in numerals and that in words, the latter shall prevail.



2. **PROJECT DELIVERABLES, PROJECT IMPLEMENTATION STRUCTURE AND PROJECT RISKS**

2.1 **PROJECT DELIVERABLES**

2.1.1 Pursuant to the terms of this Agreement, the Project Deliverables shall mean and include the activities and services required to be undertaken by the Concessionaire to undertake the Project, as more particularly described in **SCHEDULE P [DESCRIPTION OF THE PROJECT AND SCOPE OF WORK]**.

2.1.2 The Concessionaire shall procure the performance of the Project Deliverables in accordance with the terms of this Agreement. Subject to and in accordance with the terms of this Agreement, the Concessionaire shall exercise its rights and perform its obligations in furtherance of the Project Deliverables at its own cost and risk and without recourse to PKHA, save as otherwise expressly provided in this Agreement.

2.1.3 Subject to the terms of this Agreement, the Concessionaire shall, at its own cost and risk, be responsible for ensuring that the Project Deliverables are delivered:

- (a) in accordance with the terms of this Agreement;
- (b) in accordance with Good Industry Practice;
- (c) in a manner that is not likely to cause death, injury to health or damage to property or the environment;
- (d) in a manner that is consistent with PKHA discharging its statutory functions and duties under the Applicable Laws, particularly, the NWFP Ordinance; and
- (e) in compliance with the Applicable Laws the Consents.

2.2 **PROJECT IMPLEMENTATION STRUCTURE**

2.2.1 Subject to the terms of this Agreement, the implementation of the Project is premised on the following implementation structure:

- (a) PKHA shall fund the Initial PKHA Funding Amount in the Class B Equity Subscription Account, at such time and in such manner as stated in this Agreement;
- (b) PKHA shall disburse the Subordinate Financing to the Subordinate Financing Account, at such time and in such manner as stated in this Agreement;
- (c) PKHA shall establish and deliver to the Concessionaire the Balance PKHA Funding Amount Financial Instrument, at such time and in such manner as stated in this Agreement;
- (d) PKHA shall hand over to the Concessionaire Vacant Possession of the Partial Concession Area, free of all Encumbrances and together with the Ancillary Rights for execution of the Preliminary Works by the Concessionaire at such time and in such manner as stated in this Agreement;



1.1.77 "Equity"

means the share capital of the Concessionaire, represented in PKR, subscribed to by any of the Concessionaire's shareholders for meeting the equity component of the Total Project Cost and it shall consist of two classes of shares i.e. Class A Shares and Class B Shares; provided, that Equity shall also include funding made available by the Sponsor for the Development Cost; provided, however, that for purposes of computing Termination Payment under this Agreement, Equity shall be reckoned as an amount that is actually invested in respect of the Project up to the Required Termination Payment Date pursuant to the terms of this Agreement as determined by the Independent Engineer and the Independent Auditor jointly as part of their certification of the Termination Payment;

1.1.78 "Equity Compensation"

the amount which, when taken together with all amounts already paid in respect of Equity of Class A Shares (by way of dividends and other distributions) and taking into account the actual timing of all such payments, provides the Shareholders (other than PKHA) with the Target Equity IRR;

1.1.79 "Estimated Project Cost"

the estimated cost of the Project of Rupees Thirty Four Billion One Hundred Sixty Five Million One Hundred Forty Seven Thousand Four Hundred and Forty Four only (PKR 34,165,147,444/-), as specified in the Financial Model;

1.1.80 "Event of Default"

either a Concessionaire Event of Default or an PKHA Event of Default, or both, as the context may admit or require;

1.1.81 "Exempted Vehicles"

vehicles, or a class of vehicles, exempted from the payment of the Tolls, as enumerated in SCHEDULE B [TOLL STRUCTURE];

1.1.82 "Expert"

a member of the Panel of Experts nominated to consider a Dispute under Section 24.2.1;

1.1.83 "Expert Reference Notice"

the notice pursuant to Section 24.2.2 issued by a disputing Party referring a Dispute for Fast-Track Dispute Resolution;

1.1.84 "Expiry Date"

the date of expiry of the Concession Period which shall be the twenty fifth (25th) anniversary date of the Effective Date;



1.1.85 "Expressway"

the 4-lane controlled access expressway starting from Kernel Sher Khan Interchange and terminating at Chakdara Interchange established on the Project Completion Date, as more particularly described in **SCHEDULE P** [DESCRIPTION OF THE PROJECT AND SCOPE OF WORK];

1.1.86 "Expressway Section"

the first (1st) continuous stretch of the Expressway from between two (2) consecutive Interchanges formed by completed Sections as confirmed by the Section Completion Certificate issued by the Independent Engineer pursuant to Section 13.3.1;

1.1.87 "Expressway Section Completion Date"

the date on which the Section Completion Certificate, proving the completion of the Expressway Section, is issued in accordance with Section 13.3.1;

1.1.88 "Expressway Section Service Commencement Date"

the date of commencement of the Services in respect of the Expressway Section, in accordance with Section 13.3.1, which shall be the Day immediately following the Expressway Section Completion Date;

1.1.89 "Expressway Service Areas"

the service areas at the Concession Area to be developed by the Concessionaire as a part of the Works in accordance with the Approved Detailed Design;

1.1.90 "Expressway Service Areas Revenue"

all income derived by the Concessionaire from the Expressway Service Areas;

1.1.91 "Facilities"

the Administrative Office, the Toll Plazas and any other buildings, facilities and structures together with all the necessary equipment, fittings and fixtures established by the Concessionaire to exercise its rights and perform its obligations under this Agreement, as more particularly described in **SCHEDULE P** [DESCRIPTION OF THE PROJECT AND SCOPE OF WORK];

1.1.92 "Fast-Track Dispute Resolution"

shall have the meaning attributed thereto in Section 24.2;

1.1.93 "Financial Close"

when the Financing Agreements have been executed, become effective and all the conditions precedent for disbursement specified therein have been met by the Concessionaire and/or waived enabling it to have immediate access to funding by the Financiers;



1.1.94 "Financial Close Achievement Notice"

shall have the meaning attributed thereto in Section 10.6.1;

1.1.95 "Financial Close Achievement Certificate"

shall have the meaning attributed thereto in Section 10.6.2;

1.1.96 "Financial Close Bond"

the bond to be submitted by the Concessionaire pursuant to Section 10.2.1, in the form and content as provided in **SCHEDULE I** [FORM OF FINANCIAL CLOSE BOND];

1.1.97 "Financial Close Period"

the period from the Effective Date until the Appointed Date during which, *inter alia*, the Concessionaire is required to achieve Financial Close;

1.1.98 "Financial Model"

the financial model set out in **SCHEDULE J** [FINANCIAL MODEL];

1.1.99 "Financiers"

all Persons, banks, financial institutions and other finance-providers for the time being, providing, raising or making available, directly or indirectly, finance or refinance (and, for the avoidance of doubt, finance and refinance shall not include amounts subscribed for ordinary share capital by the Shareholders) for the Project through the Financing Agreements, and shall include their respective successors-in-title and assigns, and the term "Financiers" also includes a consortium of Financiers, if any;

1.1.100 "Financier Cost"

the fees, expenses and other charges (if any) paid to the Financiers from the Effective Date up to the Appointed Date pursuant to the terms of the Financing Agreements;

1.1.101 "Financing"

the financing provided by the Financiers to the Concessionaire pursuant to and in accordance with the Financing Agreements;

1.1.102 "Financing Agreements"

the agreements between the Concessionaire and the Financiers for funding the Financing component of the Estimated Project Cost;

1.1.103 "Financing Agreements Default Funding Amounts"

any funding by the Concessionaire and/or the Sponsor of any Financing Payments under the Financing Agreements between the Required Termination Payment Date and the Termination Date;



1.1.104 "Financing Due"

the aggregate of the following sums expressed in Rupees outstanding and payable to the Financiers up to the Required Termination Payment Date pursuant to the Financing Agreements:

- (a) the principal amount of the Financing provided and disbursed by the Financiers under the Financing Agreements for financing the Project;
- (b) the interest or mark-up (or any other term connoting the return paid to the Financiers on Financing) accruing on the aforesaid principal amount; and
- (c) breakage costs, breakage premium, penal interest or charges payable under the Financing Agreements to the Financiers;

provided, that the term "Financing Due" shall exclude item (c) in the event this Agreement is Terminated due to a Non-Political Event or a Concessionaire Event of Default;

1.1.105 "Financing Payment"

any payments whatsoever payable or paid to the Financiers under the Financing Agreements;

1.1.106 "Financing Termination Date"

means the first date on which the Financiers certify that:

- (a) the Financiers have ceased to be under any commitment, obligation or liability under or in respect of the Financing Agreements;
- (b) all outstanding amounts under the Financing Agreements have been reduced to zero and all of the obligations owing to the Financiers under or pursuant to the terms of the Financing Agreements have been indefeasibly paid or repaid or satisfied in full and the Concessionaire has indefeasibly discharged all of its obligations and liabilities under the Financing Agreements; and
- (c) the Concessionaire has no further obligations or liabilities to make payments to any of the Financiers under or pursuant to the terms of the Financing Agreements;

1.1.107 "Fine Collection"

collection of Weigh Fines and the Police Fines (to the extent permissible under the Applicable Laws);

1.1.108 "Force Majeure Event"

shall have the meaning attributed thereto in Section 17.1;

1.1.109 "Force Majeure Period"



the period commencing from the date of occurrence of a Force Majeure Event and ending on (a) the date on which the Affected Party, acting in accordance with Good Industry Practice, resumes or should have resumed such of its obligations the performance whereof was excused in terms of Section 17.4, or (b) the Termination Date, as the case may be;

1.1.110 "GoKPK"

the government of Khyber Pakhtunkhwa, its respective departments or any other authorities, agencies and instrumentalities functioning under the direction or control of the GoKPK;

1.1.111 "GoP"

the Government of Pakistan, its respective departments or any other authorities, agencies and instrumentalities functioning under the direction or control of the Government of Pakistan;

1.1.112 "Good Industry Practice"

applying in relation to the manner in which the Works are performed and the Services rendered, the standards, practices, methods and procedures conforming to the Applicable Laws, and exercising that degree of skill, care, diligence, prudence and foresight that would reasonably and ordinarily be expected from a skilled and experienced Person engaged in a similar type of undertaking under similar circumstances;

1.1.113 "Handback Certificate"

the certificate to be issued by the Independent Consultant in the form attached hereto as SCHEDULE K [FORM OF HANDBACK CERTIFICATE], certifying that the Project Assets, that exist as on the Transfer Date, comply with the Handback Requirements in accordance with SCHEDULE L [HANDBACK REQUIREMENTS];

1.1.114 "Handback Requirements"

the requirements that the Project Assets, that exist as on the Transfer Date, must comply with on the Transfer Date (or such other date as agreed upon by the Parties in writing), as set out in SCHEDULE L [HANDBACK REQUIREMENTS];

1.1.115 "IA Contract"

shall have the meaning attributed thereto in Section 5.6.1;

1.1.116 "IE Contract"

shall have the meaning attributed thereto in Section 5.3.1;



- (e) the Concessionaire shall commence the Preliminary Works at the Partial Concession Area and complete the same, at such times and in such manner as stated in this Agreement;
- (f) PKHA shall give the Concessionaire access and the necessary rights to the Concession Area (other than the Partial Concession Area) to enable the Concessionaire to, *inter alia*, conduct technical and financial studies and other feasibility studies on the Project, soil investigation of the Concession Area and other preliminary studies in connection therewith as required by the Financiers and/or for proper implementation of the Project, at such time and in such manner as stated in this Agreement;
- (g) immediately after grant of access to the Concessionaire of the Concession Area (other than the Partial Concession Area), the Concessionaire shall conduct studies as described in Section 2.2.1(f) above. In this regard, PKHA shall coordinate with the Concessionaire and use its best endeavours to facilitate the procurement of all necessary information, data, drawings and records whatsoever from the Public Sector Entities required by the Concessionaire for the Works on a date no later than the Works Commencement Date;
- (h) PKHA shall, at its own efforts, cost and expense, if not already procured, procure, free from any Encumbrance the Concession Area (other than the Partial Concession Area) and the Additional Land, if required, at such times and in such manner as stated in this Agreement;
- (i) the Concessionaire shall expeditiously commence the Detailed Design of the Works upon the execution of this Agreement, submit for the Approval of PKHA (which Approval shall not be unreasonably withheld, conditioned or delayed) all components of the Detailed Design, at such time and in such manner as stated in this Agreement;
- (j) PKHA shall, at its own efforts and costs, remove or procure to be removed, relocated, diverted or reinstated the Public Utilities necessary for undertaking the Works, at such time and in such manner as stated in this Agreement;
- (k) the Concessionaire shall achieve Financial Close, at such time and in such manner as stated in this Agreement;
- (l) the Concessionaire shall issue the Financial Close Achievement Notice, at such time and in such manner as stated in this Agreement;
- (m) the Independent Auditor shall issue the Financial Close Achievement Certificate, at such time and in such manner as stated in this Agreement;
- (n) the Concessionaire shall, with the facilitation of PKHA, procure the supply of Public Utilities and ancillary services to the Concession Area required by the Concessionaire for the Works, at such time and in such manner as stated in this Agreement;
- (o) PKHA shall hand-over to the Concessionaire the Vacant Possession of the Concession Area (other than the Partial Concession Area) and the RC



Additional Land, if any, free from any Encumbrance, together with the Ancillary Rights, at such time and in such manner as stated in this Agreement;

- (p) PKHA shall fund the Balance PKHA Funding Amount in the Class B Equity Subscription Account, at such time and in such manner as stated in this Agreement;
- (q) subject to the grant and maintenance with full effect of all the Approvals and the Consents to the Concessionaire for the commencement of the Works (including the Approvals for the Detailed Design), the Concessionaire shall commence construction of the Works (other than the Preliminary Works) and complete the same, at such times and in such manner as stated in this Agreement;
- (r) the Concessionaire shall commence collecting the Tolls at the relevant Toll Plazas in respect of the Expressway Section, and any subsequent Section added to the Expressway Section, in each case, based on the Toll Structure set out in Part I of **SCHEDULE B [TOLL STRUCTURE]**, at such time and in such manner as stated in this Agreement;
- (s) the Concessionaire shall collect the Tolls at the Toll Plazas in respect of the Expressway, based on the Toll Structure set out in Part II of **SCHEDULE B [TOLL STRUCTURE]**, at such time and in such manner as stated in this Agreement;
- (t) the Concessionaire shall commence collecting the Revenues from the Project, including (without limitation), from (i) the Concessionaire's exercise of its Development Rights; and (ii) the Ancillary Facilities and/or the other facilities provided by the Concessionaire as part of the Project, at such time and in such manner as stated in this Agreement;
- (u) the Concessionaire shall retain ownership rights over the Project Assets during the Concession Period and maintain and operate the Project Assets, or part thereof, as applicable, from the Expressway Section Service Commencement Date for the duration of the Concession Period and hold the Concession for the duration of the Concession Period;
- (v) in the event of Termination, PKHA shall pay the Termination Payment to the Concessionaire and/or the Concessionaire shall pay the Non-Utilized PKHA Amount to PKHA, as applicable, at such time and in such manner as stated in this Agreement; and
- (w) the Concessionaire shall transfer the ownership rights to the Project Assets to PKHA, stop collecting the Toll Revenue, cease to maintain and operate the Project Assets and the Project Assets and otherwise cease to provide the Services, at such time and in such manner as stated in this Agreement.

2.3 PROJECT RISKS

- 2.3.1 Unless otherwise provided in this Agreement, the Concessionaire shall be solely responsible to bear all the risks originating directly or indirectly from the Project; provided, that PKHA shall use its best endeavors to facilitate the Concessionaire to mitigate the effects of the aforesaid risks.



3. CONCESSION AREA, ADDITIONAL LAND AND ANCILLARY RIGHTS

3.1 CONVEYANCE OF CONCESSION AREA, ADDITIONAL LANDS AND GRANT OF ANCILLARY RIGHTS

- 3.1.1 Subject to the terms of this Agreement, PKHA hereby grants to the Concessionaire for the Financial Close Period, the right of access to the Concession Area, for carrying out such surveys, investigations and soil tests, as the Concessionaire may deem necessary at its own cost, expense and risk.
- 3.1.2 PKHA shall, at its own efforts, cost and expense, on the Effective Date, hand-over to the Concessionaire, the Vacant Possession of the Partial Concession Area, free from any Encumbrance and together with the Ancillary Rights, for the purpose of implementing the Preliminary Works. Further, within a period of three (3) Months from the Effective Date, PKHA shall, at its own efforts, cost and expense, if not already procured, procure, free from any Encumbrance, and on the Take-Over Date, hand-over to the Concessionaire, the Vacant Possession of the Concession Area (other than the Partial Concession Area) and the Additional Land, if required, free from any Encumbrance and together with the Ancillary Rights, for the purpose of implementing the Project.
- 3.1.3 Within a period of two (2) Weeks from the Effective Date, the Concessionaire shall propose in writing to PKHA the locations of the Expressway Service Areas; provided, that in proposing such locations the Concessionaire shall use its best endeavours to ensure that any Additional Land shall not be required to be procured for such purpose; provided, further, that to the extent that such Additional Land is required PKHA shall provide the Concessionaire with such Additional Land at its own effort, cost and expense within six (6) Months of the Effective Date.
- 3.1.4 Where the Applicable Laws require the entry of any lease or the issuance of any easement or licence for the grant of Vacant Possession rights in respect of the Concession Area, PKHA shall expeditiously, at its own efforts, cost and expense (including the payment of any related registration fees and stamp duties), enter into, grant, issue or convey such lease, easement or licence to enable the Concessionaire to undertake the Works at the Concession Area and the Additional Land, and to effectively enable the Concessionaire to retain ownership rights to the Works and the Project Assets until the Transfer Date.
- 3.1.5 Upon the Vacant Possession of the Concession Area and the Additional Land, if required, being handed over and the Ancillary Rights being granted, the Concessionaire shall have the irrevocable right to enter upon, occupy and use the Concession Area, the Additional Land, as shall be required for the carrying out of the relevant part of the Works and the irrevocable right to exploit the Ancillary Rights, the Development Rights and undertake the Works on the Concession Area and Additional Land as may be necessary or appropriate to implement the Project in accordance with the terms of this Agreement.
- 3.1.6 If the Vacant Possession of any part of the Concession Area or the Additional Land, if required, has not been made available and the Ancillary Rights have not been granted to the Concessionaire within the time period specified in this Agreement, the Concessionaire may (without thereby adversely affecting its rights under this Agreement) enter into those parts of the Concession Area and the Additional Land, as have been made available, and exploit such of the Ancillary Rights and Development



2.3.2 PKHA shall bear the following risks in respect of the Project: (a) Change in Law; (b) Compensation Event; (c) Relief Event; and (d) Permitted Events; provided, that the Concessionaire shall use its best endeavors to facilitate PKHA to mitigate the effects of the aforesaid risks.



have been granted, and may at its sole discretion commence the relevant part of the Works; provided, that exercise of any rights conferred by this Section shall not operate nor be construed as a waiver of any obligation on the part of PKHA nor as a waiver of any right that the Concessionaire may have or acquire under this Agreement.

- 3.1.7 If PKHA is unable to comply with its obligation to deliver the Vacant Possession of the Concession Area and/or the Additional Land, if required, and grant the Ancillary Rights, within the time period specified in this Agreement, PKHA shall as soon as reasonably practicable notify the Concessionaire in writing. On receipt of such notification from PKHA, the Concessionaire may (but shall not be obliged to) agree with PKHA an extension of time to fulfill its obligations; provided, that PKHA agrees to the revised programme of activities, the revised Works Commencement Date, and the revised duration of the Construction Period and the extension of the Concession Period as required by the Concessionaire and determined by the Independent Engineer in accordance with the terms of this Agreement.
- 3.1.8 If the Concessionaire incurs any Incremental and Consequential Costs occasioned by the delayed delivery of the Vacant Possession of the Concession Area (or any part thereof) and/or the Additional Land or delayed grant of the Ancillary Rights, the Independent Engineer shall ascertain the Incremental and Consequential Costs in accordance with Section 3.2 [*Incremental and Consequential Costs for Delay*], and PKHA shall pay to the Concessionaire such Incremental and Consequential Costs.

3.2 INCREMENTAL AND CONSEQUENTIAL COSTS FOR DELAY

- 3.2.1 The Concessionaire shall notify PKHA the financial impact of any delayed delivery of the Concession Area, the Additional Land or the delayed grant of the Ancillary Rights, and the Incremental and Consequential Costs payable by PKHA as a result calculated in accordance with Section 3.2.2.
- 3.2.2 The Incremental and Consequential Costs shall be calculated for the Delay Duration, to provide full recovery, *inter alia*, of one or more of the following as relevant and without duplication:
- (a) any increase in the Estimated Project Cost;
 - (b) all costs of mobilization/demobilization, insurance premium (pro-rated for the Delay Duration), loss/deterioration of materials, wages, administrative/management expenses for the Delay Duration, all of the foregoing on actual basis;
 - (c) cost of construction financing (including any increase thereof), computed based on the Financing amount already drawn, at a rate per annum payable by the Concessionaire to the Financiers pursuant to the Financing Agreements for the Delay Duration;
 - (d) penalty charges;
 - (e) mark-up;
 - (f) any additional capital expenditure and/or the additional operating cost and/or additional taxes and/or any or all of the above, as the case may be; and



3.4 RIGHTS TO USE

3.4.1 PKHA shall ensure that all necessary access to and from the Concession Area and the Additional Land, if required, is made available to the Concessionaire, its employees, agents, representatives, any other authorized Persons, the Contractors and subcontractors, free from all Encumbrances, and the Concessionaire and any such employees, agents, representatives, authorized Persons, Contractors and subcontractors shall have the exclusive right to occupy and use the Concession Area and the Additional Land as shall be required for the exercise of the Concessionaire's rights and discharge of its obligations during the Concession Period and for this purpose the Concessionaire may regulate the entry and use of the Concession Area by third parties in the manner as the Concessionaire shall deem fit.

3.4.2 The Concessionaire shall use the Concession Area, the Additional Land and the Ancillary Rights for any purpose, as it deems necessary, which is incidental or necessary to the implementation of the Project.

3.5 PEACEFUL POSSESSION

3.5.1 Subject to the terms of this Agreement, on and from the Effective Date, PKHA hereby warrants that:

- (a) the Concession Area and the Additional Land, if required, together with the Ancillary Rights have been or shall be acquired by PKHA through the due process of law, shall belong to and vest in PKHA and PKHA has or shall have full powers to hold, dispose of and deal with the same consistent, *inter alia*, with the terms of this Agreement, and that the Concessionaire, subject to the terms of this Agreement, shall, in respect of the Concession Area, the Additional Land and the Ancillary Rights, have no liability regarding any compensation payment on account of rehabilitation or resettlement of any Persons affected thereby, or otherwise;
- (b) the Concession Area and the Additional Land do not or shall not comprise of any area on which PKHA does not have legal authority to authorize the construction of the Works or the Project Assets;
- (c) all requisite statutory, regulatory and other approvals and authorizations for the Project required to be procured by PKHA pursuant to the terms of this Agreement, if any, have been obtained and are maintained with full effect;
- (d) all requisite statutory, regulatory and other Approvals for the Project required to be given by PKHA pursuant to the terms of this Agreement have, are or shall be given, as the case may be, and maintained with full effect;
- (e) subject to the terms of this Agreement, the Concessionaire shall, to the extent that it complies with the terms and conditions of this Agreement, enjoy the Vacant Possession of the Concession Area and the Additional Land, if required, and the Ancillary Rights, and in the event the Concessionaire is obstructed by any Person claiming any right, title or interest in or over, the Concession Area and the Additional Land or the Ancillary Rights or any part thereof or in the event of any enforcement action including any attachment, distraint, appointment of receiver or manager or liquidator being initiated by any Person claiming to be



any interest in or charge on the Concession Area, the Additional Land or the Ancillary Rights or any part thereof, PKHA shall, if called upon by the Concessionaire, defend such claims and proceedings and also keep the Concessionaire fully indemnified and harmless against any consequential loss or damages which the Concessionaire or any Contractor may suffer, on account of any such right, title, interest or charge;

- (f) in furtherance of Section 3.5.1(e), if exercise of the Concessionaire's rights and/or performance of its obligations has been disrupted by the obstruction of such Person claiming any right, title or interest in or over the Concession Area, the Additional Land, if required, and the Ancillary Rights or any part thereof or as a result of any enforcement action as stated in that Section initiated by such Person, then the Concessionaire shall notify PKHA the financial impact of such disruption and the Incremental and Consequential Costs caused thereby. PKHA agrees to provide the Concessionaire compensation for such Incremental and Consequential Costs which are calculated in accordance with Section 3.2.2 above for the Delay Duration; and
- (g) PKHA agrees to provide the Concessionaire compensation for such Incremental and Consequential Costs, which are caused by the delay of the entire Project Implementation Programme. PKHA agrees to the revision of the Financial Model, if necessary in the opinion of the Concessionaire, the program of activities, the Construction Period and/or the Concession Period and provide the Concessionaire compensation calculated in accordance with Section 3.2 based on the Delay Duration and for this purpose Sections 3.2.2 to 3.2.7 shall apply *mutatis mutandis*; and the Concessionaire shall make the necessary notification to PKHA and provide the components of the Incremental and Consequential Costs to the Independent Engineer for verification and issuance of the relevant certificate in accordance with Sections 3.2.3 and 3.2.4 and to enable exercise of the right under Section 3.2.5.

3.6 COSTS AND EXPENSES

- 3.6.1 Subject to the terms of this Agreement, PKHA shall bear and pay all costs, expenses and charges incurred or levied in making available the Concession Area and the Additional Land, if required, and grant the Ancillary Rights and the Development Rights, to the Concessionaire, including, costs of rehabilitation or resettlement of any Person (legally or illegally) occupying the Concession Area, or the Additional Land or enjoying the Ancillary Rights or Development Rights, or any part thereof and any legal cost arising from legal actions taken by the landowners and/or any Person claiming any right, title or interest over the Concession Area, the Additional Land or the Ancillary Rights or the Development Rights in relation to the acquisition thereof and shall fully indemnify the Concessionaire and hold the Concessionaire harmless in such respect.

3.7 AFFIRMATIONS

- 3.7.1 Subject to the terms of this Agreement, on and from the Effective Date, the Concessionaire confirms that it (a) has made a complete and careful examination and an independent evaluation of the Concession Area and information provided by PKHA, (b) accepts the risk of inadequacy, mistake or error in or relating to any of the information provided by PKHA, and (c) has determined to its satisfaction the nature and extent of



risks and hazards as are likely to arise or it may face in the performance of its obligations under this Agreement.

3.7.2 Subject to the terms of this Agreement, on and from the Effective Date, PKHA undertakes not to give possession of the Concession Area and, the Additional Land to any other Person and no Person shall have the right to enter or establish an access to the Concession Area and the Additional Land except with the prior approval of the Concessionaire, or otherwise impede or hinder the Concessionaire in the performance of its obligations, and the exercise of its rights, under this Agreement.

3.7.3 Upon taking the Vacant Possession of the Concession Area and the Additional Land, the Concessionaire undertakes that the Concessionaire shall utilize the same only for the purposes provided in this Agreement, and the Concessionaire shall not create nor allow any third party to create any Encumbrance nor restrict the utility thereof in any other manner save and except as permitted in this Agreement.

3.8 HANDBACK OF CONCESSION AREA TO PKHA

3.8.1 With effect from the Transfer Date, the Concessionaire's Vacant Possession of the Concession Area and its unencumbered interest therein, shall stand transferred to PKHA in accordance with the provisions of Sections 21.5.4 [*Transfers to PKHA on Termination*] and 21.5.5 [*Transfers to PKHA on Expiry*].



4. REPRESENTATIONS, WARRANTIES, OBLIGATIONS AND COVENANTS OF THE PARTIES

4.1 REPRESENTATIONS AND WARRANTIES OF THE CONCESSIONAIRE

4.1.1 The Concessionaire represents and warrants to PKHA that:

- (a) the execution of this Agreement is duly authorized;
- (b) this Agreement is being signed and executed by a representative of the Concessionaire who has been duly authorized and empowered by the Concessionaire to sign and execute the Agreement on its behalf;
- (c) all the Project Documents have been duly executed under proper authority and are in full force and effect as at the Effective Date, save for those Project Documents identified in **SCHEDULE U** [*LIST OF PROJECT DOCUMENTS*] that shall be executed after the Effective Date;
- (d) the execution and performance of any of the Project Documents does not and shall not contravene any provision of the memorandum and articles of association of the Concessionaire as at the Effective Date, or any statute, judgement, order, decree, regulation, rule, award or decision of any Court, Public Sector Entity or arbitrator of competent jurisdiction that is binding on the Concessionaire as at the Effective Date;
- (e) the Concessionaire shall seek all Approvals and procure all Consents in terms of this Agreement;
- (f) there are no actions, suits, proceedings or investigations pending or to the Concessionaire's knowledge threatened against it at law or in equity before any Court, tribunal or before any judicial, quasi-judicial or other authority, the outcome of which may constitute a Concessionaire Event of Default or which individually or in the aggregate or any combination may result in Material Adverse Effect;
- (g) the Concessionaire is not subject to any obligation, non-compliance with which is likely to have a Material Adverse Effect on its ability to conduct the Project Deliverables;
- (h) no steps have been taken by the Concessionaire nor have any legal proceedings been started or threatened for the dissolution or winding-up of the Concessionaire or for the appointment of a receiver, liquidator, judicial manager or similar officer in respect of all or any part of the business or assets of the Concessionaire, the outcome of which may constitute a Concessionaire Event of Default, and it has no knowledge of any violation or default with respect to any order, writ, injunction or any decree of any Court or any legally binding order of any Public Sector Entity which may result in a Concessionaire Event of Default;
- (i) all information disclosed by or on behalf of the Concessionaire to PKHA at any time up to the Effective Date, and, in particular, during the bid process preceding the award of this Agreement to the Concessionaire, is true, complete and accurate in all material respects and the Concessionaire is not aware



material facts or circumstances not disclosed to PKHA which would, if disclosed, be likely to have an adverse effect on PKHA's decision (acting reasonably) to award this Agreement to the Concessionaire;

- (j) the copies of the executed Project Documents, if any, which have been delivered to PKHA, are true and complete copies of such Project Documents and there are no other documents replacing or relating to any such Project Documents, which would materially affect the performance of the Project Documents; and
- (k) as at the Effective Date:
 - (i) the Concessionaire has an authorized and issued share capital as set out in **SCHEDULE AA [CORPORATE DETAILS OF THE CONCESSIONAIRE]** and all shares in the issued share capital of the Concessionaire are fully paid up;
 - (ii) all shares in the issued share capital of the Concessionaire are legally and beneficially owned as represented in **SCHEDULE AA [CORPORATE DETAILS OF THE CONCESSIONAIRE]**;
 - (iii) save as provided in the Financing Agreements or the Shareholders' Agreement, as the case may be, no Person has the right (whether actual or contingent) to call for the issue of any share or loan capital in the Concessionaire whether pursuant to any option or otherwise including on realization of security; and
 - (iv) save as provided in the Financing Agreements or the Shareholders' Agreement, as the case may be, there is no Encumbrance over or affecting any of the Equity or the Shareholder Loans and there is no agreement or commitment to grant or create any such Encumbrance;
- (l) it has ready access to the Sponsor Funding Amount, and subject to achievement of Financial Close, it has the financial standing and capacity to undertake the Project in accordance with the terms of this Agreement;
- (m) this Agreement constitutes its legal, valid and binding obligation, enforceable against it in accordance with the terms hereof;
- (n) it is subject to the Applicable Laws;
- (o) it has complied with the Applicable Laws in all material respects and has not been subject to any fines, penalties, injunctive relief or any other civil or criminal liabilities which in the aggregate have or may have a Material Adverse Effect on its ability to perform its obligations under this Agreement;
- (p) it shall at no time undertake or permit any Change in Control except in accordance with the provisions of Section 4.6 and that the Sponsor together with its Affiliates hold not less than fifty percent (50%) plus one (1) share of its issued and paid up share capital as on the Effective Date;
- (q) the Sponsor is duly organized and validly existing and has agreed to and unconditionally accepted the terms and conditions set forth in this Agreement.



- (r) subject to the terms of this Agreement, all its rights and interests in the Project shall pass to and vest in PKHA on the Transfer Date, free and clear of all Encumbrances, without the need for any further act or deed on its part or that of PKHA, unless otherwise expressly specified by this Agreement and the Applicable Laws, in which case all such acts shall be done immediately and without any cavil or demur;
- (s) no bribe or unlawful payment or illegal gratification has been or shall be paid in cash or kind by or on behalf of the Concessionaire to any Person to procure the Concession; and
- (t) no representation or warranty by the Concessionaire contained herein or in any other document furnished by the Concessionaire to PKHA contains or shall contain any untrue statement of material fact or omits or shall omit a material fact necessary to make such representation or warranty not misleading. Notwithstanding any independent verification, study, review, search or observation having been carried out or made by PKHA to any such statements, data or information contained in the Concessionaire's representation and warranties as aforesaid, the Concessionaire shall not by virtue of the aforesaid be discharged from any of its representations or warranties made hereunder, in whole or in part.

4.2 REPRESENTATIONS AND WARRANTIES OF PKHA

4.2.1 PKHA represents and warrants to the Concessionaire that:

- (a) it is duly established under the NWFP Ordinance;
- (b) it has full power and authority under the NWFP Ordinance to execute, deliver and perform its obligations under this Agreement and to carry out the transactions contemplated herein and that it has taken all actions necessary to execute this Agreement, exercise its rights and perform its obligations pursuant to the terms of this Agreement;
- (c) this Agreement is being signed and executed by a representative of the PKHA who has been duly authorized and empowered by PKHA to sign and execute the Agreement on its behalf;
- (d) it has taken all necessary actions under the Applicable Laws to authorize the execution, delivery and performance of this Agreement, and to perform its obligations herein contained;
- (e) the execution, delivery and performance of this Agreement is in compliance with all the Applicable Laws;
- (f) this Agreement has the approval of the competent authority of PKHA as per the PPP Act and the execution, delivery and performance of its obligations under this Agreement by PKHA does not infringe any Applicable Laws, statute (including, without limitation, the PPP Act), judgment, order, decree, regulation or rule of any Court, Public Sector Entity or arbitrator of competent jurisdiction applicable or relating to it or its assets;



- (g) this Agreement constitutes a legal, valid and binding obligation of PKHA enforceable against it in accordance with the terms hereof;
- (h) all information provided by it in the RFP and the other bidding documents in connection with the Project is, to the best of its knowledge and belief, true and accurate in all material respects;
- (i) it has good and valid right and title to the Concession Area and the Additional Land (or shall procure such right and title within the time period specified in this Agreement), and has the power and authority to convey the Vacant Possession thereof to the Concessionaire in accordance with the terms of this Agreement (or shall have such power and authority upon procurement of good and valid right and title to the Concession Area within the time period specified in this Agreement);
- (j) save and except as provided by the Applicable Laws this Agreement, it shall not at any time during the Concession Period, interfere with the Concessionaire's peaceful Vacant Possession of the Concession Area and the Additional Land and exercise of the rights and discharge of the obligations of the Concessionaire in accordance with the terms of this Agreement;
- (k) it has all necessary authority and power to complete the Project and in respect of all other matters which are the subject of this Agreement and has the right to delegate and has delegated such of those powers to the Concessionaire as may be required, to uphold the terms of this Agreement;
- (l) no suits or investigations or other legal proceedings are pending or threatened in respect of the Concession Area, or the Project, at law or in equity, before any Court or before any other judicial, quasi-judicial or other authority, or any arbitrator, the outcome of which may constitute an PKHA Event of Default, and it has no knowledge of any violation or default with respect to any order, writ, injunction or any decree of any Court or any legally binding order of any Public Sector Entity or arbitration which may result in an PKHA Event of Default, including, the withdrawal or revocation of its powers under NWFP Ordinance;
- (m) PKHA is subject to the Applicable Laws with respect to this Agreement and PKHA hereby expressly and irrevocably waives any right of sovereign immunity which PKHA may now have or may acquire in the future to the extent permitted by the Applicable Laws;
- (n) the Concession Area and the Additional Land, if required, shall be free of any Encumbrance whatsoever and any financial, legal or other restraint or obligation;
- (o) the Project is under the jurisdiction of PKHA to the extent provided by the Applicable Laws;
- (p) no event has occurred which constitutes, or which with the giving of notice and/or the lapse of time and/or relevant determination would constitute an PKHA Event of Default under this Agreement or any agreement or instrument by which PKHA or any of its assets are bound or affected; and



- (q) no representation or warranty by PKHA contained herein furnished by PKHA to the Concessionaire contains or shall contain any untrue statement of material fact or omits or shall omit a material fact necessary to make such representation or warranty not misleading. Notwithstanding any independent verification, study, review, search or observation having been carried out or made by the Concessionaire to any such statements, data or information contained in PKHA's representation and warranties as aforesaid, PKHA shall not by virtue of the aforesaid be discharged from any of its representations or warranties made hereunder, in whole or in part.

4.3 COVENANTS TO ACHIEVE FINANCIAL CLOSE

4.3.1 The Parties covenant as follows:

- (a) From the date hereof up to the Appointed Date, PKHA shall, subject to this Agreement, facilitate and assist the Concessionaire to enable the Concessionaire to achieve Financial Close by the Appointed Date;
- (b) From the Effective Date to the Appointed Date, the Concessionaire shall use all reasonable efforts (i) to take, or cause to be taken, all actions necessary to comply promptly with all legal requirements which may be imposed on the Concessionaire to consummate Financial Close as promptly as practicable; and (ii) to obtain (and cooperate with the other Party to obtain) any Consent of any Public Sector Entity or any approval of a public or private third party which is required to be obtained or made by the Concessionaire in connection with the consummation of Financial Close. Each Party shall promptly cooperate with and promptly furnish information to the other in connection with any such efforts by, or requirement imposed upon, the Concessionaire in connection with its obligation to achieve Financial Close;
- (c) If any Public Sector Entity of competent jurisdiction issues a preliminary or permanent injunction or temporary restraining order or other order before the Appointed Date which would prohibit or materially restrict or hinder achievement of Financial Close, the Party or Parties, against whom such preliminary or permanent injunction or temporary restraining order or other order is issued shall use all reasonable efforts to have such injunction, decree or order dissolved or otherwise eliminated as promptly as possible and, in any event, prior to the Appointed Date. Any and all costs in accordance with this sub-Section (c) shall be borne by the Party in respect of which such injunction, restraining order or other order has been entered; provided, that if an injunction, restraining order or other order has been entered into against a Party because of the act or omission of the other Party, the other Party shall bear all of the aforesaid costs. In the event such injunction, restraining order or other order has been entered against both the Parties, the Parties shall bear the aforesaid costs equally; provided, further, that if the injunction, restraining order or other order has been entered into against both the Parties because of the act or omission of any one Party, the said Party shall bear all of the aforesaid costs; and
- (d) From the date hereof up to the Appointed Date, the Parties shall cooperate with each other to ensure the orderly transition of control, custody, operation, management, maintenance and rehabilitation of the Project Assets on the Take-Over Date.



4.4 OBLIGATIONS AND COVENANTS OF THE CONCESSIONAIRE

4.4.1 The Concessionaire covenants that it shall:

- (a) develop, design, engineer, finance, construct, Test, Commission, manage, operate, maintain, insure and, on the Transfer Date, transfer the Project Assets, under a BOT arrangement, and during the Concession Period, collect, receive and earn the Revenues, all in accordance with the terms of this Agreement;
- (b) obtain all Consents required by the Applicable Laws to enable it to undertake its obligations under this Agreement in conformity with the Applicable Laws and be in compliance thereof at all times during the Concession Period after obtaining the same;
- (c) procure and maintain in full force and effect, appropriate proprietary rights, licenses, agreements and permissions for materials, methods, processes and systems used in or incorporated into the Project;
- (d) undertake the implementation of the Works in accordance with the Construction Performance Standards and the Approved Detailed Design;
- (e) make its own arrangements for construction materials and observe and fulfil the environmental and other requirements under the Applicable Laws the Consents;
- (f) appoint, supervise, monitor and control, the activities of the Contractors under their respective contracts;
- (g) staff the Project with such professional managerial, technical, construction, operations and maintenance personnel as deemed fit by the Concessionaire;
- (h) equip the Project with such facilities and equipment as stated in this Agreement, and upgrade the said facilities and equipment as may be deemed fit by the Concessionaire from time to time;
- (i) be responsible for quality, soundness, durability, safety and the overall standard of the Works, notwithstanding the appointment by it of Contractors to undertake the Works;
- (j) ensure that, subject to the terms of this Agreement, the Expressway Section, the Expressway, or any part of the foregoing, is open to traffic throughout the relevant phases of the Concession Period;
- (k) undertake the Fine Collection in accordance with the Applicable Laws;
- (l) afford access to the Expressway Section, the Expressway, or any part of the foregoing, as applicable, to the Exempted Vehicles;
- (m) enable the Independent Engineer to inspect the Works to ensure that the Works comply with the Construction Performance Standards and the Approved Detailed Design;



- (n) operate, manage and maintain the Project Assets in accordance with the terms of this Agreement, the O&M Requirements set out in **SCHEDULE R [O&M REQUIREMENTS]** and the O&M Manual during the Operations Period;
- (o) inspect the Works to ensure that they are being carried out in accordance with the Construction Performance Standards and, in consultation with the Independent Engineer, carry out the Tests and Commission the Expressway Section, any Section subsequently added to the Expressway Section and the Expressway;
- (p) cooperate with law enforcement agencies with a view to maintaining law and order at the Concession Area;
- (q) provide all necessary assistance to the PKHA Representative, the Independent Engineer, the Independent Auditor and the Independent Consultant, as may be reasonably required, in the performance of their respective duties and services;
- (r) for the Construction Period, provide at the earliest, the PKHA Representative with a fully equipped office measuring minimum ten thousand square feet (10,000 sq. ft.) covered area with all fittings and fixtures including furnishing at a location on the Concession Area, as per the Approved Detailed Design and transportation facilities as follows:
- (i) two (2) Nos. Double Cabins (4x4);
 - (ii) four (4) Nos. Toyota Corolla GLI (or equivalent);
 - (iii) two (2) Nos. single cabin Toyota Pickup;
 - (iv) eight (8) drivers;
 - (v) monthly fuel allowance of three hundred (300) litres per vehicle;
 - (vi) repair/maintenance facility of these vehicles;
- (s) The Concessionaire shall be responsible to provide the facilities specified in the preceding Section subsequent to achievement of Financial Close. Upon completion of the Concession Period, all of the aforesaid facilities then available shall be transferred to PKHA along with the other Project Assets at no cost to PKHA;
- (t) arrange training at an international institution of repute for four (4) officials of PKHA, as nominated by Managing Director, PKHA, in the field of PPP project structuring, development and implementation at a training level equivalent to or better than that provided by the Institute of Public-Private Partnerships, USA;
- (u) use reasonable endeavours to maintain harmony and good industrial relations amongst the personnel employed in connection with the performance of its obligations under this Agreement;
- (v) maintain its corporate existence and its rights to carry on its business.



- (w) subject to the terms of this Agreement, transfer to PKHA, on the Transfer Date, its ownership rights to the Project Assets free and clear of any Encumbrance and without any further act or deed, unless otherwise required by the Applicable Laws.

4.4.2 The Concessionaire shall not be considered to be in breach of its covenants under this Agreement nor shall it incur or suffer any liability if and to the extent performance of any of its obligations under this Agreement is affected by or on account of a Permitted Event.

4.5 OBLIGATIONS RELATING TO THE PROJECT AGREEMENTS

4.5.1 Notwithstanding anything to the contrary contained in this Agreement, it is expressly agreed that the Concessionaire shall, at all times during the Concession Period, be responsible and liable for all its obligations under this Agreement and shall not be absolved or relieved of such obligations by delegating the Project Deliverables or any part thereof to one or more Acceptable Contractors through the Project Agreements.

4.6 OBLIGATIONS RELATING TO CHANGE IN CONTROL

4.6.1 Save as otherwise provided in this Agreement, the Concessionaire shall procure that there is no Change in Control during the Concession Period without the prior written Approval of PKHA, which Approval shall not be unreasonably withheld, conditioned or delayed; provided, that in the event the Person desirous of acquiring the Sponsor Shares is a Permitted Investor, PKHA shall not withhold the Approval.

4.6.2 The Concessionaire shall procure that, subject to the Financiers' rights in respect of any security held by them (or by any (a) Agent, (b) security company, (c) trust, or (d) other entity, holding any security in respect of the Financing for the benefit of the Financiers) there is no sale, assignment, cession, transfer, exchange, renunciation or other disposal of the whole or any part of the Equity, which is likely to cause a Change in Control during the Concession Period without the prior written Approval of PKHA, which Approval shall not be unreasonably withheld, conditioned or delayed; provided, that in the event the Person desirous of acquiring the Sponsor Shares is a Permitted Investor, PKHA shall not withhold the Approval.

4.7 OBLIGATIONS AND COVENANTS OF PKHA

4.7.1 PKHA covenants that it shall:

- (a) not, and shall procure that no Public Sector Entity shall (i) in any way amend, modify or obstruct, *inter alia*, the design, construction, management, maintenance and/or operation of the Project Assets or any part thereof, save in accordance with this Agreement; and (ii) do any act or omit to do any act which would cause, or be likely to cause, damage to any part of the Project Assets or be otherwise inconsistent with the terms of this Agreement;
- (b) exercise its powers under the NWFP Ordinance in a manner that is consistent with this Agreement;
- (c) ensure the timely grant of all the Approvals required to be granted by PKHA and facilitate procurement of all the Consents required to be procured by the Concessionaire, pursuant to the terms of this Agreement;



- (d) ensure peaceful use of the Concession Area and, the Additional Land by the Concessionaire under and in accordance with the terms of this Agreement without any let or hindrance from PKHA, any Public Sector Entity or any other Person, whether or not claiming through or under them;
- (e) upon reasonable request by the Concessionaire, use its good offices to support the Concessionaire's performance of its obligations to undertake the Project;
- (f) provide all such assistance as the Concessionaire may reasonably request to support the Concessionaire in obtaining permissions and licenses which are required by the Concessionaire from time to time for the purpose of the Project;
- (g) prohibit ribbon development along the Concession Area and immediately, but not later than three months after the Effective Date, remove all unauthorized development/construction and encroachments between the Building Line and the ROW, to the extent required by the Applicable Laws;
- (h) subject to the terms of this Agreement, not establish a Competing Route;
- (i) assist and facilitate, to the fullest extent possible, the Concessionaire in obtaining access to all necessary Public Utilities, including, water, electricity and telecommunication facilities at rates and on terms no less favourable to the Concessionaire than those generally available to commercial customers receiving substantially equivalent facilities/utilities;
- (j) ensure that the Concessionaire is enabled to exercise necessary authority to regulate traffic on the Concession Area subject to and in accordance with the Applicable Laws;
- (k) assist and facilitate the Concessionaire, to the fullest extent possible, in obtaining assistance from law enforcement personnel for traffic regulation, patrolling and provision of security on the Concession Area and for purposes of this Agreement;
- (l) support applications for subordinated loans (other than the Subordinate Financing) made by the Concessionaire on terms and conditions mutually agreed between the Financiers and the Concessionaire, pursuant to this Agreement without PKHA incurring any liability or obligation. For the avoidance of ambiguity the subordinated loans envisaged under this Section shall not include the Financing and/or Shareholder Loans in respect of which PKHA shall have such liability as provided in this Agreement;
- (m) observe and comply with all its obligations set forth in this Agreement in a timely manner;
- (n) secure or obtain the Concession Area and, the Additional Land, and transfer Vacant Possession thereof to the Concessionaire;
- (o) ensure that the Concession Area and the Additional Land, if required, are made available to the Concessionaire, free from any Encumbrance; and



- (p) assist the Concessionaire to apply and/or procure all incentives and exemptions granted by any Public Sector Entity for the Project (including any Tax holidays and exemptions from withholding Tax).

4.8 OBLIGATION TO NOTIFY CHANGE

- 4.8.1 In the event that any of the representations, warranties or assurances made or given under Sections 4.1 and 4.2 ceases to be true or stands changed, the Party who has made such representation or given such warranty or assurance shall promptly notify the other Party of the same for its recourse.

4.9 RIGHTS OF THE CONCESSIONAIRE FOR IMPLEMENTING THE PROJECT

- 4.9.1 Subject to the terms of this Agreement, the Concessionaire shall have, *inter alia*, the following rights in respect of the Project:

- (a) call for tenders and award contracts for the Project, with or without tender; provided, that the chosen Contractors of the Concessionaire are Acceptable Contractors;
- (b) arrange for site preparation activities and the preparation of all design and engineering plans required for the Project, approve or reject equipment, facilities and other materials required for the Works;
- (c) appoint and remove consultants and professional advisers;
- (d) purchase materials, equipment and facilities;
- (e) appoint, organize and direct staff to implement, manage and supervise the Project;
- (f) enter into contracts for the supply of goods, works and services;
- (g) enter into the Project Agreements;
- (h) enter into Commercial Activities Agreements; and
- (i) do and perform such other acts and things as are necessary or desirable for the completion and successful operations of the Project in the opinion of the Concessionaire.

4.10 COMPLIANCE

- 4.10.1 The Concessionaire shall, *inter alia*, implement the Project in compliance with the Approved Detailed Design, the Construction Performance Standards and the O&M Requirements.

4.11 DISCLAIMER

- 4.11.1 The Concessionaire acknowledges that, prior to the execution of this Agreement, the Concessionaire has, after a complete and careful examination, made an independent evaluation of the traffic volumes, the Concession Area and all the information provided by PKHA and has determined, to its satisfaction, the nature and extent of such



difficulties, risks and hazards as are likely to arise or may be faced by the Concessionaire in the course of performance of its obligations in accordance with the terms of this Agreement.

4.11.2 The Concessionaire acknowledges and hereby accepts the risk of inadequacy, mistake or error in or relating to any of the matters set forth in Section 4.11.1 above and hereby confirms that PKHA shall not be liable for the same in any manner whatsoever, to the Concessionaire, the Sponsor or their Affiliates, except to the extent stated in this Agreement.

4.11.3 Subject to the Applicable Laws, the Parties agree that any mistake or error in or relating to any of the matters set forth in this Section shall not vitiate this Agreement, or render it voidable.

4.12 DISCLOSURE

4.12.1 In the event that any occurrence or circumstance comes to the attention of either Party that renders any of its representations or warranties enumerated in Sections 4.1 and 4.2 untrue or incorrect, such Party shall immediately notify the other Party of the same. Such notification shall not have the effect of remedying any breach of the representation or warranty that has been found to be untrue or incorrect nor shall it adversely affect or waive any right, remedy or obligation of either Party under this Agreement or under the Applicable Laws.

4.13 EXCLUSION OF IMPLIED WARRANTIES

4.13.1 This Agreement expressly excludes any warranty, condition or undertaking implied by law or by custom or otherwise arising out of any other agreement between the Parties or any representation made by either Party not contained in a binding legal agreement executed by the Parties.

4.14 SURVIVAL

4.14.1 The representations and warranties set out in Sections 4.1 [*Representations and Warranties of the Concessionaire*] and 4.2 [*Representations and Warranties of PKHA*] shall survive the signing and delivery of this Agreement until the payment of all monies due under this Agreement, as if repeated by reference to the then existing circumstances from time to time.



5. APPOINTMENTS

5.1 PKHA REPRESENTATIVE

5.1.1 PKHA shall, within thirty (30) Days of the Effective Date, appoint, at its own cost and expense, the PKHA Representative, and shall duly notify the same to the Concessionaire in writing.

5.1.2 The PKHA Representative shall, *inter alia*, undertake the following functions:

- (a) exercise and enforce the rights of PKHA pursuant to the terms of this Agreement;
- (b) co-ordinate and facilitate on the request of the Concessionaire, services to be provided by the Public Sector Entities, including, the Public Utilities, emergency services and necessary traffic police assistance during the Concession Period;
- (c) ensure that all the relevant Approvals are provided within the prescribed time period, and procurement of all the relevant Consents is facilitated, so that the same are procured within the prescribed time period;
- (d) monitor the progress of the Works and report to PKHA on its quality in accordance with the Approved Detailed Design, the Construction Performance Standards, Good Industry Practice, the terms of this Agreement and the Applicable Laws;
- (e) attend the joint inspection of the Works with respect to the Commissioning of the Expressway Section, any Section subsequently added to the Expressway Section or the Expressway and opening of the Expressway Section, any Section subsequently added to the Expressway Section or the Expressway to the public;
- (f) monitor and report to PKHA the Concessionaire's compliance with appropriate highway safety standards approved by PKHA or any other applicable standards;
- (g) monitor and report to PKHA the operation, management and maintenance of the Project Assets by the Concessionaire in accordance with the O&M Requirements, the O&M Manual and the terms of this Agreement;
- (h) facilitate the Concessionaire so that it complies with the terms of this Agreement;
- (i) seek and receive all information and documents from the Concessionaire pursuant to the terms of this Agreement;
- (j) clarify and resolve with the Concessionaire Representative, any difficulties and disputes arising pursuant to this Agreement and any complaints by or against third parties; and
- (k) take any and all steps and actions in discharge of PKHA's obligations under this Agreement to facilitate the smooth implementation of the Project.

5.1.3 If at any time during the Concession Period, the position of the PKHA Representative becomes vacant, PKHA shall carry out the functions which would otherwise



performed by the PKHA Representative until such time that a replacement is appointed; provided, that PKHA shall immediately appoint an alternative PKHA Representative in the event that the position of the PKHA Representative becomes vacant for any reason whatsoever.

- 5.1.4 Except as notified by PKHA to the Concessionaire in writing, the Concessionaire shall be entitled to treat any act of the PKHA Representative which is authorized by this Agreement as being expressly authorized by PKHA, and the Concessionaire shall not be required to determine whether an express authority has in fact been granted to the PKHA Representative in that regard.

5.2 CONCESSIONAIRE REPRESENTATIVE

- 5.2.1 The Concessionaire shall, within thirty (30) Days of the Effective Date, appoint, at its own cost and expense, an authorized representative, being a natural Person or a firm/company/body corporate, to be the Concessionaire Representative to liaise with the PKHA Representative on all matters pursuant to this Agreement and to ensure the efficient and safe execution, operation and maintenance of the Project on a Day-to-Day basis.

- 5.2.2 The Concessionaire Representative shall have full authority to act on behalf of the Concessionaire for all purposes of this Agreement. Except as notified by the Concessionaire to PKHA in writing, PKHA and the PKHA Representative shall be entitled to treat any act of the Concessionaire Representative in connection with this Agreement as being expressly authorized by the Concessionaire, and PKHA and the PKHA Representative shall not be required to determine whether any express authority has in fact been granted to the Concessionaire Representative in that regard.

- 5.2.3 If at any time during the Concession Period, the position of the Concessionaire Representative becomes vacant, the Concessionaire shall carry out the functions which would otherwise be performed by the Concessionaire Representative until such time that a replacement is appointed; provided, that the Concessionaire shall immediately appoint an alternative Concessionaire Representative in the event that the position of the Concessionaire Representative becomes vacant for any reason whatsoever.

5.3 INDEPENDENT ENGINEER

- 5.3.1 The Concessionaire shall, within seven (7) Days of the Effective Date, forward to PKHA a list of five (5) firms/companies/bodies corporate who are eligible and willing to act as the Independent Engineer and PKHA shall have the right in respect of these firms/companies/bodies corporate to seek presentations and such other information from them as it deems necessary. The list shall comprise of independent Persons of repute with substantial experience in projects similar to the Project. PKHA shall, within fourteen (14) Days of receipt of the said list, shortlist two (2) firms/companies/bodies corporate and communicate the same to the Concessionaire. The Concessionaire shall within seven (7) Days thereafter (a) select a shortlisted entity to be the Independent Engineer, (b) in consultation with PKHA, finalize the fees and other terms of appointment of the Independent Engineer, including the required qualifications and job experience of its key personnel, and (c) enter into a contract with *inter alia* the Financiers, the Independent Engineer and PKHA on the finalized fee and other terms of appointment (the "IE Contract").



5.3.8 The Parties agree to cooperate with each other generally in relation to all matters within the scope of or in connection with the functions of the Independent Engineer. All instructions and representations issued or made by either Party to the Independent Engineer shall be simultaneously copied to the other Party and each Party shall be entitled to attend all inspections performed by and meetings involving the Independent Engineer.

5.3.9 Subject to Section 24 [*Dispute Resolution Procedure*], the Parties agree to act in accordance with the advice, recommendations, opinions, decisions and determinations of the Independent Engineer, in so far as the same are in accordance with the terms of its appointment and this Agreement, and any advice, recommendations, and determinations of the Independent Engineer shall be conclusive as to the matters set out therein and be binding on the Parties.

5.3.10 The appointment of the Independent Engineer shall not in any way absolve the Concessionaire of its obligations pursuant to the terms of this Agreement.

5.4 PROJECT MANAGER

5.4.1 The Concessionaire shall appoint, from time to time, at its own cost and expense, one or more established consulting engineering firms to design and supervise the Works, and in particular to ensure that the Works are in accordance with the prescribed standards and specifications, including the Construction Performance Standards. The appointment of the consulting engineering firm shall not in any way absolve the Concessionaire of its design obligations pursuant to the terms of this Agreement. The duties and responsibilities of the Project Manager shall include:

- (a) advising the Concessionaire on all aspects of the Design, including, design criteria, the Detailed Design, terms of the EPC Contract or other form of contract and contract procedures;
- (b) monitoring the Works to ensure that they conform with the Construction Performance Standards and the Approved Detailed Design; and
- (c) ensuring that the Project is carried out within the relevant cost projections and otherwise in accordance with the terms of this Agreement.

5.5 O&M MANAGER

5.5.1 The Concessionaire shall appoint or nominate, at its own cost and expense, the O&M Manager.

5.5.2 The O&M Manager shall design a cost effective management procedure to ensure that the Project is operated and maintained effectively, in accordance with this Agreement and the Applicable Laws.

5.5.3 The O&M Manager shall, during the Operations Period, monitor the performance of the O&M Contractor, if any, and ensure that the O&M Contractor complies with the O&M Contract.



5.5.4 The appointment of the O&M Manager shall not in any way absolve the Concessionaire of its obligations with respect to the operation and maintenance of the Project in accordance with this Agreement.

5.6 INDEPENDENT AUDITOR

5.6.1 The Concessionaire shall, within seven (7) Days of the Effective Date, provide a list of five (5) reputable firms of chartered accountants from amongst the panel of auditors maintained by the State Bank of Pakistan and PKHA shall have the right in respect of these firms to seek presentations and such other information from them as it deems necessary. The list shall comprise of independent professional firms of repute with substantial experience in projects similar to the Project. PKHA shall, within fourteen (14) Days of receipt of the said list, shortlist two (2) of the firms and communicate the same to the Concessionaire. The Concessionaire shall within seven (7) Days thereafter (a) select a shortlisted entity to be the Independent Auditor, (b) in consultation with PKHA, finalize the fees and other terms of appointment of the Independent Auditor, including the required qualifications and job experience of its key personnel, and (c) enter into a contract with *inter alios* the Financiers, the Independent Auditor and PKHA on the finalized fee and other terms of appointment (the "IA Contract").

5.6.2 The Independent Auditor shall have such duties and responsibilities as set out in **SCHEDULE N [TORS OF THE INDEPENDENT AUDITOR]**.

5.6.3 The remuneration, cost and expenses of the Independent Auditor shall be shared by the Concessionaire and PKHA equally and shall be paid directly to the Independent Auditor by the Concessionaire and PKHA, the detailed process for which shall be set out in the IA Contract.

5.6.4 Subject to the mutual consent of the Parties (and upon and after Financial Close till the Financing Termination Date, the Financiers), the IA Contract shall be terminated in any of the following circumstances:

- (a) if PKHA or the Concessionaire (or, upon and after Financial Close till the Financing Termination Date, the Financiers) has reason to believe that the Independent Auditor has not discharged its duties in a fair, appropriate and diligent manner;
- (b) if, in accordance with the terms of its appointment, the Independent Auditor resigns or notifies its intention not to continue as the Independent Auditor;
- (c) if, the Concessionaire and PKHA (and, upon and after Financial Close till the Financing Termination Date, the Financiers) mutually agree to terminate the IA Contract; or
- (d) any other circumstance arises which in the opinion of either Party (or, upon and after Financial Close till the Financing Termination Date, the Financiers) warrants the termination of the IA Contract.

5.6.5 If the IA Contract is to be terminated pursuant to Section 5.6.4 upon or after the Financial Close till the Financing Termination Date, the Concessionaire shall, in consultation with the Financiers, forward to PKHA a list of five (5) reputable firms of chartered accountants from amongst the panel of auditors maintained by the



- of Pakistan. The list shall comprise of independent professional firms of repute with substantial experience in projects similar to the Project. PKHA shall, within seven (7) Days of receipt of the said list, shortlist two (2) firms and communicate the same to the Concessionaire within two (2) Days. The Concessionaire shall within seven (7) Days thereafter (a) select a shortlisted entity to be the Independent Auditor, (b) in consultation with PKHA and the Financiers, finalize the fees and other terms of appointment of the Independent Auditor, and (c) jointly with the Financiers, enter into the IA Contract with *inter alios* the Independent Auditor and PKHA on the finalized fee and other terms of appointment.
- 5.6.6 The Financiers shall remain a Party to the IA Contract till the Financing Termination Date. On the Financing Termination Date, the Financiers shall cease to become a party to the IA Contract, and shall undertake all actions and execute all instruments whatsoever required by the Parties to ensure that the Financiers cease to remain a party to the IA Contract.
- 5.6.7 The duration of the appointment of the Independent Auditor (or the replaced Independent Auditor, as the case may be) shall be until the Transfer Date, unless otherwise agreed in writing by the Parties. The term of the appointment of a chartered accountancy firm as the Independent Auditor shall be for a maximum period of three (3) years and such chartered accountant firm may serve for a maximum of two (2) consecutive terms.
- 5.6.8 The Parties agree to cooperate with each other generally in relation to all matters within the scope of or in connection with the functions of the Independent Auditor. All instructions and representations issued or made by either Party to the Independent Auditor shall be simultaneously copied to the other Party and each Party shall be entitled to attend all inspections performed by and meetings involving the Independent Auditor.
- 5.6.9 Subject to Section 24 [*Dispute Resolution Procedure*], the Parties agree to act in accordance with the advice, recommendations, opinions, decisions and determinations of the Independent Auditor, in so far as the same are in accordance with the terms of its appointment and this Agreement, any advice, recommendations, and determinations of the Independent Auditor shall be conclusive as to the matters set out therein and be binding on the Parties. All instructions and representations issued or made by either Party to the Independent Auditor shall be simultaneously copied to the other Party and each Party shall be entitled to attend all inspections performed by and meetings involving the Independent Auditor.

5.7 INDEPENDENT CONSULTANT

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



consultation with PKHA, finalize the fees and other terms of appointment of the Independent Consultant, including the required qualifications and job experience of its key personnel, and (c) jointly with the Financiers (if applicable) enter into the Independent Consultant contract with *inter alios* the Independent Consultant and PKHA on the finalized fee and other terms of appointment.

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



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

6.1 EFFECTIVENESS

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

6.2 CONDITIONS PRECEDENT FOR FINANCIAL CLOSE

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

(a) the Concessionaire has:

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

(b) PKHA has:

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



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

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

6.3 NON-FULFILLMENT OF THE CONDITIONS PRECEDENT

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



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

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

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



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

- 6.3.7 If the Concessionaire fails to fulfill a Condition Precedent and the time period for fulfilment of such Condition Precedent has not been extended pursuant to Section 6.3.1 or that Condition Precedent has not been waived by PKHA pursuant to Section 6.3.2, PKHA shall be entitled to declare a Concessionaire Event of Default, Terminate this Agreement pursuant to Section 21 [*Termination*] and forfeit the Financial Close Bond.
- 6.3.8 If PKHA fails to fulfill a Condition Precedent and the time period for fulfilment of such Condition Precedent has not been extended pursuant to Section 6.3.1 or that Condition Precedent has not been waived by the Concessionaire pursuant to Section 6.3.2, the Concessionaire shall be entitled to declare an PKHA Event of Default, Terminate this Agreement pursuant to Section 21 [*Termination*] and PKHA shall immediately and in any event by the Termination Date return the Financial Close Bond to the Concessionaire. In the event that PKHA does not return the Financial Close Bond as above, the Financial Close Bond shall be deemed to have been cancelled.
- 6.3.9 All costs and expenses in connection with any Condition Precedent expressed to be fulfilled and/or complied on part of PKHA or the Concessionaire shall be borne and paid by the respective Party accordingly and where any Condition Precedent is to be fulfilled jointly by PKHA and the Concessionaire, each Party shall meet such part of the costs and expenses which relate to the carrying out of its obligations under this Agreement.
- 6.4 **DELAY IN ACHIEVEMENT OF FINANCIAL CLOSE AND WORKS COMMENCEMENT DATE**
- 6.4.1 Subject to the terms of this Agreement, in the event achievement of Financial Close and/or commencement of the Works is delayed due to the failure of PKHA to fulfil any of its obligations relating to the Financial Close Period, the Construction Period shall stand extended by the Delay Duration and PKHA shall be liable to compensate the Concessionaire for any Incremental and Consequential Costs arising from such failure; provided, that for the purpose of calculation, determination and payment of such Incremental and Consequential Costs Sections 3.2.2 to 3.2.7 shall apply *mutatis mutandis*.
- 6.4.2 Subject to the terms of this Agreement, in the event achievement of Financial Close and/or commencement of the Works is delayed due to a Concessionaire Event of Default, PKHA shall be entitled to declare a Concessionaire Event of Default, Terminate this Agreement pursuant to Section 21 [*Termination*] and forfeit the Financial Close Bond.

6.5 **DATES AND DURATION**

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



of the rights and obligations of the Parties in relation to the period commencing from the Take-Over Date to the Expiry Date, on the Take-Over Date.

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



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



7. GRANT OF CONCESSION

7.1 GRANT OF CONCESSION

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

7.2 CONCESSION PERIOD

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

7.3 SCOPE OF CONCESSION

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

7.4 ACCEPTANCE OF THE GRANT OF CONCESSION

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

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

7.5 EXCLUSIVITY AND DEVELOPMENT RIGHTS

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

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

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

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



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

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

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

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



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

7.6 SOLE PURPOSE OF THE CONCESSIONAIRE

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



8. PROJECT IMPLEMENTATION PROGRAMME AND DESIGN

8.1 PROJECT IMPLEMENTATION PROGRAMME AND KEY TARGET DATES

8.1.1 PROJECT IMPLEMENTATION PROGRAMME

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

8.1.2 KEY TARGET DATES

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



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

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

8.2 DESIGN

8.2.1 PRELIMINARY DESIGN APPROVALS

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

8.2.2 DETAILED DESIGN APPROVALS

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



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

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



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

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

8.2.3 VARIATIONS TO THE APPROVED DETAILED DESIGN BY THE CONCESSIONAIRE

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

