



KHYBER PAKHTUNKHWA

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PROVINCIAL ASSEMBLY SECRETARIAT,
KHYBER PAKHTUNKHWA

NOTIFICATION

Dated Peshawar, the 7th April, 2014.

No. PA/Khyber Pakhtunkhwa/Bills/2014/11407.—The Khyber Pakhtunkhwa Public Private Partnership Bill, 2014 having been passed by the Provincial Assembly of Khyber Pakhtunkhwa on 21st March, 2014 and assented to by the Governor of the Khyber Pakhtunkhwa on 2nd April, 2014 is hereby published as an Act of the Provincial Legislature of the Khyber Pakhtunkhwa.

THE KHYBER PAKHTUNKHWA PUBLIC PRIVATE PARTNERSHIP ACT, 2014

(KHYBER PAKHTUNKHWA ACT NO. XX OF 2014)

(First published after having received the assent of the Governor of the Khyber Pakhtunkhwa in the Gazette of the Khyber Pakhtunkhwa, (Extraordinary), dated the 7th April, 2014).

**AN
ACT**

to provide for the participation of the private sector in the financing, construction, development, operation, or maintenance of infrastructure or development Projects or other related services of the Government through Concession Contracts in Public Private Partnership mode and the establishment of institutions to regulate, monitor and supervise the implementation of Public Private Partnership contracts.

WHEREAS it is expedient to establish a favorable legislative framework to promote and facilitate the implementation of privately financed infrastructure Projects in form of Public Private Partnership by enhancing transparency, fairness and long-term sustainability and removing undesirable restrictions on private sector participation in shape of partnership with public sector in infrastructure development and operation;

AND WHEREAS it is also deemed necessary to further develop the general principles of transparency, economy and fairness in the award of contracts in public-private partnership through the establishment of related institutions and specific procedures to award such contracts, and to regulate, monitor and supervise such Projects and to provide for the matters ancillary there to and connected therewith;

It is hereby enacted as follows:

CHAPTER I
PRELIMINARY

1. **Short title, extent and commencement.**---(1) This Act may be called the Khyber Pakhtunkhwa Public Private Partnership Act, 2014.

(2) It extends to the whole of the Province of the Khyber Pakhtunkhwa.

(3) It shall come into force at once.

2. **Definition.**--- In this Act, unless the context otherwise requires,

- (a) "Bidder" or "bidders" means a person, including groups of persons or company as defined in the Khyber Pakhtunkhwa Factory Act, 2013 (Khyber Pakhtunkhwa Act No. XVI of 2013) thereof, that participate in selection proceedings concerning an infrastructure Project or development programme;
- (b) "Committee" means the Public Private Partnership Committee established under section 3 of this Act;
- (c) "Contracting Authority" means a department, attached department, a body corporate, autonomous body of the Government, local government, or any organization or corporation owned or controlled by the Government or local government;
- (d) "Concessionaire" includes a private party or person that carries out an infrastructure Project under a Concession Contract entered into with a Contracting Authority;
- (e) "Concession Contract" means the mutually binding public-private partnership agreement or agreements between the Contracting Authority and the Concessionaire that set forth the terms and conditions for the implementation of an infrastructure Project in the form of Build Operate Transfer (BOT), Build Own Operate Transfer (BOOT), Design Build Finance Operate (DBFO) or any other variant of Public Private Partnership;
- (f) "development Project" means a program, activity or a scheme, meant to ensure, improve or consolidate service delivery in any social or development sector, whether or not reflected in the annual development program of the Province and shall include interventions such as research, modernization of processes, addressing lags in service delivery or improvements in the general standards of living in the sectors listed in the Schedule;

- (g) "feasibility study" means a study undertaken to explore the technical, financial, legal, social, environmental and **gender mainstreaming** feasibility of undertaking an infrastructure or development facility as a Public Private Partnership;
- (h) "Government" means the Government of the Khyber Pakhtunkhwa;
- (i) "Infrastructure facility" means physical facilities and systems that directly or indirectly provide services to the general public;
- (j) "Infrastructure Project" means the design, construction, development and operation of new infrastructure facilities or the rehabilitation, modernization, expansion, maintenance or operation of existing infrastructure facilities;
- (k) "Lender" means a financial institution, bank, or establishment providing financial support with or without security;
- (l) "Person" means a company, an entity, a firm, an association, a body of individuals, or a sole proprietor other than a Contracting Authority;
- (m) "PPP Node" means the Public Private Partnership
Node, established under section 7 of this Act;
- (n) "PPP Unit" means the Public Private Partnerships Unit established under section 5 of this Act;
- (o) "Project" includes the developmental Project or the infrastructure Project, as the case may be;
- (p) "Public Private Partnership" means an arrangement between a Contracting Authority and a Concessionaire under which the Concessionaire-
- (i) undertakes to perform a public function or provide a service on behalf of the Contracting Authority;
 - (ii) receives a benefit for performing a public function by way of-
 - (a) compensation from a public fund, if so permitted by the relevant law;
 - (b) charges or user fees collected by the Concessionaire from users or consumers of a service provided to them; or
 - (c) a combination of such compensation and such charges or fees; and
 - (iii) is generally liable for risks arising from the performance of the function in accordance with the terms of the Concession Contract;

- (q) "Public Procurement Rules" means the Khyber Pakhtunkhwa Public Procurement Rules, as may be framed by the Government from time to time, in accordance with the provisions of the Khyber Pakhtunkhwa Public Procurement Regulatory Authority Act, 2012;
- (r) "Regulatory Agency" means a public authority that is entrusted with the power to issue and enforce rules and regulations governing the infrastructure facility or the provision of the relevant services;
- (s) "Schedule" means Schedule appended to this Act;
- (t) "unsolicited proposal" means any proposal relating to the implementation of an infrastructure Project that is not submitted in response to a request or solicitation issued by the Contracting Authority within the context of a selection procedure;
- (u) "user fee" means the rate, toll, fee, or other charge imposed for the use of all or part of an infrastructure or development facility or service; and
- (v) "value for money" means that the undertaking of a public function of the Contracting Authority by a Concessionaire under a Public Private Partnership results in a net benefit accruing to that Contracting Authority defined in terms of cost, price, quality, quantity, timeliness or risk transfer.

**CHAPTER-II
INSTITUTIONAL ARRANGEMENTS**

3. Establishment of the Public Private Partnership Committee.---(1) As soon as may be after the commencement of this Act, the Government shall establish a Committee to be known as the Public Private Partnership Committee with a mandate to promote, facilitate, coordinate and oversee private investment in infrastructure or development Projects using the public-private partnership approach.

(2) The Committee shall comprise of -

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| (i) | Minister for Planning and Development
Department of the Khyber Pakhtunkhwa; | <i>Chairman</i> |
| (ii) | Minister for Finance Department of the
Khyber Pakhtunkhwa; | <i>Vice-Chairman</i> |
| (iii) | Minister for Energy and Power of the
Khyber Pakhtunkhwa; | <i>Member</i> |
| (iv) | Chief Secretary to Government; | <i>Member</i> |
| (v) | Additional Chief Secretary (Dev) to
Government; | <i>Member</i> |
| (vi) | Secretary Finance to Government; | <i>Member</i> |

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| (vii) | Secretary to Government, of the concerned Department; | <i>Member</i> |
| (viii) | five (5) members (one out of 5 members must be a woman) from the private sector to be nominated by the Chairman, from amongst academia, chambers of commerce and industry, financial institutions, community social organizations, consumers groups, foreign donors, multilateral agencies etc; | <i>Members</i> |
| (ix) | Secretary to Government, Planning and Development Department; and | <i>Member/
Secretary</i> |
| (x) | Secretary to Government, Law and Parliamentary Affairs Department. | <i>Member</i> |

(3) The Chairman of the Committee may co-opt such number of Sectoral Experts, as he may deem fit.

(4) The members mentioned at clause (viii) of sub-section (2) shall be nominated for a period of two years and shall be eligible for re-nomination for two terms only. They shall be selected after careful consideration of any actual or potential conflicts of interest. If any conflict of interest arises during the tenure of any member, such person shall be removed from the Committee and replaced with an eligible person by **the majority votes of the members of the Public Private Partnership Committee.**

(5) The meetings of the Committee shall be presided over by the Chairman and in his absence by the Vice-Chairman.

(6) The quorum of the Committee shall be nine members including Chairman.

(7) The decisions of the Committee shall be taken by the majority of its members present. In case of a tie, the presiding member shall have the casting vote.

(8) All orders, determinations, and decisions of the Committee shall be rendered in writing and signed by the Secretary of the Committee, subject to approval of Chairman or Vice Chairman, as the case may be.

4. Functions of the Committee.---(1) The functions of the Committee shall be to-

- (a) ensure that each draft Concession Contract is consistent with the provisions of this Act;
- (b) formulate policy guidelines on Public Private Partnerships;

- (c) ensure that all Projects are consistent with the provincial priorities specified in the relevant sector policy and strategies;
- (d) approve a Project proposal submitted to it by a Contracting Authority of any amount:
 - provided that no further approval shall be required from any other forum for the said project;
- (e) approve award of Concession Contracts and all other supplemental Public Private Partnership agreements;
- (f) authorize allocations from the Fund establish under this Act;
- (g) formulate or approve standards, guidelines and procedures for awarding Concession Contracts and standardized bid documents;
- (h) review the legal, institutional and regulatory framework of Public Private Partnerships;
- (i) approve additions to the organizational structure of the PPP Unit **by giving solid reasons for addition;**
- (j) oversee the monitoring and evaluation by contracting authorities, of a Public Private Partnership from the commencement to the post completion stage;
- (k) ensure approval of, and fiscal accountability in the management of, financial and any other form of support granted by Government in the implementation of Projects under this Act;
- (l) ensure the efficient implementation of any Concession Contract entered into by a Contracting Authority; and
- (m) perform such other functions as may be conferred on it under this Act or under any other law for the time being in force.

(2) The Committee shall have all the powers necessary for the proper discharge of its functions under this Act and without prejudice to the generality of the foregoing, shall have the power to-

- (a) oversee the implementation of policies formulated under clause (b) of sub-section(1) of section 4;
- (b) require any information from any party to a Project on any matter relating to a Public Private Partnership; and
- (c) take custody of a Concession Contract made under this Act and monitor compliance with the terms and conditions of the Concession Contract.

(3) The Committee with the prior approval of Provincial Development Working Party (PDWP) may authorize utilization of an amount from the fund established under the Khyber Pakhtunkhwa Hydrel Development Fund Ordinance, 2001(Ord. No. XXVI of 2001), for Energy and Power Development Projects.

(4) The Committee shall meet once in two months and may meet earlier if so required. The Secretary of the Committee may take approval of any decision through circulation from members of the Committee;

(5) The Committee may establish such sub-committees as it may consider necessary for the better performance of its functions and the exercise of its powers under this Act.

(6) The Committee may co-opt into the membership of a sub-committee established under sub-section (5), such persons whose knowledge and skills are found necessary for the performance of the functions of the sub-committee.

(7) The Committee may, by resolution either generally or in any particular case, delegate to any sub-committee or to any member, officer, employee or agent of the Committee, the exercise of any of the powers or the performance of any of the functions of the Committee under this Act or under any law.

5. Public Private Partnerships Unit.--- (1) There shall be established a Unit to be known as the Public Private Partnership Unit, under the chairmanship of the Secretary to Government Planning and Development Department, with permanent members not below the rank of Additional Secretary, nominated from the Finance Department and Law, Parliamentary Affairs and Human Rights Department and such other co-opted members as the Committee deems appropriate.

(2) Committee shall be at liberty to add other members in the composition of PPP Unit.

6. Functions of the PPP Unit.---(1) The functions of the PPP Unit shall be to-

- (a) serve as the secretariat and technical arm of the Committee; and
- (b) provide technical, financial and legal expertise to the Committee and any PPP Node established under this Act.

(2) In the performance of its functions under sub-section (1), the PPP Unit shall-

- (a) serve as a resource centre on matters relating to Public Private Partnerships;
- (b) conduct civic education to promote the awareness and understanding of the Public Private Partnerships process amongst stakeholders;
- (c) provide capacity building to, and advise contracting authorities or other parties involved in the planning, coordinating, undertaking or monitoring of Projects under this Act;
- (d) rate, compile and maintain an inventory of Public Private Partnership Projects that are highly rated and which are likely to attract private sector investment;

- (e) develop an open, transparent, efficient and equitable process based on principles of social justice, equity and maintenance of Ecological balance for ensured sustainability through holistic approach for managing the identification, screening, prioritization, development, procurement, implementation and monitoring of Projects, and ensure that the process is applied consistently to all Projects;
- (f) conduct research and gap analysis to ensure continuous performance improvement in the implementation of Public Private Partnerships;
- (g) collate, analyze and disseminate information including data on the liabilities of the Government in relation to a Project;
- (h) make recommendations on the approval or rejection of a Project, prior to submission to the Committee for approval;
- (i) assist contracting authorities, where it considers it necessary, to design, identify, select, prioritize, appraise, evaluate and negotiate infrastructure and development Projects;
- (j) maintain a record of all Project documentation;
- (k) review and assess requests for Government support in relation to a Project and advise the Committee on the support that should be accorded in relation to a Project;
- (l) assist the Committee in formulating guidelines and standard documentation required under this Act;
- (m) liaise and supervise the contracting authorities in their roles in the various stages of a Project cycle;
- (n) ensure that the tendering process relating to a Project conforms with this Act and to procurement best practices;
- (o) put in place measures to eliminate constraints limiting the realization of benefits expected from a Public Private Partnership;
- (p) monitor contingent liabilities and accounting and budgetary issues related to Public Private Partnerships with the relevant offices within the Department responsible for finance; and
- (q) carry out such other functions as may be conferred on it by the Committee from time to time under this Act.

(3) The PPP Unit shall prepare financial accounts and an inventory of any monies allocated to any fund under this Act, any financial support received by and any success fees received by it from a Concessionaire as the case may be, under this Act.

7. Establishment of a PPP Node.---(1) A Contracting Authority that intends to enter into a Public Private Partnership arrangement in form of a Concession Contract with a Concessionaire shall establish a Public Private Partnership Node.

(2) A PPP Node established under sub-section (1) shall be headed by the principal accounting officer of the Contracting Authority and shall consist of such other financial, technical, procurement and legal personnel as that authority shall, in consultation with the unit, consider necessary for the performance of its functions in relation to a Project under this Act.

(3) A PPP Node shall, on behalf of the Contracting Authority -

- (a) identify, screen and prioritize Projects based on guidelines issued by the Committee;
- (b) prepare and appraise each Concession Contract to ensure its legal, regulatory, social, economic and commercial viability;
- (c) ensure that the parties to a Concession Contract comply with the provisions of this Act;
- (d) undertake the tendering process in accordance with this Act;
- (e) monitor the implementation of a Concession Contract entered into with the contacting authority;
- (f) liaise with all key stakeholders during a Project cycle;
- (g) oversee the management of a infrastructure or development Project in accordance with the Concession Contract entered into by the Contracting Authority;
- (h) submit to the PPP unit, annual or such other period reports on Concession Contracts altered into by the Contracting Authority relating to a Project under this Act;
- (i) maintain a record of all documentation and Concession Contract entered into by the Contracting Authority relating to an infrastructure or development Project under this Act;
- (j) prepare Projects in accordance with guidelines and standard documents issued by the Committee under this Act;
- (k) ensure that the transfer of assets at the expiry or early termination of a Concession Contract is, consistent with the terms and conditions of the Concession Contract, where the Concession Contract involves a transfer of assets; and
- (l) carry out such other functions as may be assigned to it by the Contracting Authority.

(4) In performing its functions under sub-section (1), a PPP Node shall report to the PPP Unit and shall-

- (a) implement the recommendations and guidelines issued by the PPP Unit; and
- (b) submit such information as shall be required by the PPP Unit or the Committee.

CHAPTER III PRIVATE PARTICIPATION IN PUBLIC INFRASTRUCTURE

8. Private sector participation.---(1) Notwithstanding anything to the contrary in any other law for the time being in force, Government, its contracting authorities and local bodies will be authorized to seek participation from the private sector in appropriate Projects, subject to the provisions of this Act.

(2) Subject to the provisions and the procedures outlined in this Act, Government and its contracting authorities shall be fully empowered to enter into Concession Contract and arrangements with Concessionaires under mutually agreed terms and conditions in one or several Project planning and management functions such as designing, financing, building, constructing, owning, operating and maintaining different infrastructure Projects or development programs.

(3) Government and its contracting authorities with the approval of the Committee may enter Concession Contract to vest public property in Concessionaire for development and other appropriate purposes. The relevant contracting authorities may transfer title in Public Properties to Concessionaire on appropriate terms and conditions as the Committee may deem fit.

(4) Government and its contracting authorities subject to the general or special approval of the Committee, shall be competent to pay any fees for services performed by private parties under duly authorized Concession Contracts including but not restricted to user fees, subsidies, revenue shortfall guarantees and may appropriate monies for such purposes.

9. Applicability.---(1) Subject to the provisions contained hereinafter and the overall control of the Committee, Concession Contracts in nature of Public Private Partnership may be entered into by the relevant contracting authorities only in respect of the sectors listed in Schedule.

(2) Government may, by notification, amend Schedule and apply the provisions of this Act to an infrastructure development Project or of any sector, not enumerated in the Schedule.

10. Basis for Public Private Partnership.---(1) The Committee, with the assistance of the PPP Unit, shall devise sector specific methodologies, establishing the general criterion for selection of infrastructure Projects for Concessionaire contracts.

(2) Each of such sector specific methodologies shall require a preliminary needs assessment, conducted by the relevant Contracting Authority, which shall among other things, states the economic, financial, legal and administrative grounds of the decision to launch an award procedure for such a Concession Contract.

(3) This assessment shall include a comparative analysis of the various options, particularly in terms of best value for money, sharing of risks and performance, as well as sustainable development issues, if in response to an unforeseeable situation, this assessment may be succinct.

(4) Concessions Contracts may only be signed in situations where the preliminary needs assessment conclusively shows that:

- (a) given the degree of complexity of the infrastructure Project, the Contracting Authority is not objectively in a position to define unaided and in advance the technical means to meet its needs or to make the financial or legal arrangements for the Project; or
- (b) the infrastructure Project is a matter of urgency, involving making up for a delay, detrimental to the general interest, affecting the completion of public facilities or the performance of a public service mission, irrespective of the causes of the delay, or responding to an unforeseeable situation; or
- (c) given the Project characteristics, the requirements of the public service for which the Contracting Authority is responsible, or the inadequacies and difficulties observed in carrying out comparable Projects, resorting to such a contract presents a more favorable balance of advantages versus disadvantages compared to other kinds of public procurement contracts. The criterion of deferred payment shall not alone constitute an advantage.

11. Project identification and preparation.---(1) Subject to the provisions of section 10 of this Act, any Contracting Authority may identify and prepare any infrastructure or development Project for its implementation through Public Private Partnership and shall submit an advance report to this effect, to the Committee.

(2) The Contracting Authority, with the assistance of its relevant PPP Node, shall identify and conceptualize potential Projects from its master plans and other planning documents.

(3) The Contracting Authority shall prioritize the Projects within its sector or geographical area, using criteria such as supply and demand gaps, social and economic benefits, **focusing on Gender equity**, financial attractiveness, risks and uncertainties involved, and readiness for implementation **having Gender equity and sustainability as cross cutting themes.**

(4) Preparation of a high-priority Project shall consist of a feasibility study, initial environmental examination or environmental impact assessment, risk analysis, analysis of the need for Government support, stakeholder consultations, determination of the PPP Node, and preparation of bid documents including a draft PPP Concession Contract.

(5) The Contracting Authority shall submit a viable Project proposal through the PPP Unit to the Committee.

12. Project prioritization and approval.---(1) The PPP Unit shall exercise quality control by reviewing the viability of a Project proposal and its completeness in terms of documentation.

(2) The PPP Unit shall prioritize the Projects across sectors and the Province that pass the criteria, by taking into account provincial development objectives, and submit them to the Committee for approval.

(3) The PPP Unit shall include approved Projects in a priority list of the Province and widely publicize them.

13. Approval of Government support. - (1) When a proposal for Public Private Partnership has been finalized, the Contracting Authority shall, submit the proposal to the PPP Unit under intimation to the Committee. The proposal amongst other particulars shall include any requests for Government support which are integral to the Project proposal.

(2) The PPP Unit, shall review the justification and eligibility of the infrastructure or the development Project for public-private partnership, and analyze the fiscal impact of the related direct and contingent liabilities.

(3) The PPP Unit shall, on the basis of review and analysis, make a recommendation to the Committee for approval, rejection or reconsideration of the requested Government support.

(4) If approved by the Committee, the Finance Department shall make the necessary arrangements for including such support in the annual budget of the Province.

14. Consideration by the Committee. - (1) The Committee shall, by taking into account the recommendations of the PPP Unit, consider a Project proposal submitted by a Contracting Authority and may approve the proposal with or without modification, reject it or return it to the Contracting Authority for reconsideration.

(2) In case a Project proposal is returned for reconsideration, the Contracting Authority shall take suitable action on the decision taken by the Committee and may resubmit the proposal for approval by the Committee.

CHAPTER - IV SELECTION OF THE CONCESSIONAIRE

15. Rules governing the selection proceedings.---Subject to overall supervision and control of the Committee, once a Project is approved in terms of preceding Chapter, the selection of the Concessionaire shall be conducted in accordance with section 26 to 47 of this Act and, for matters not provided herein, in accordance with the Khyber Pakhtunkhwa Public Procurement Rules.

16. Purpose and procedure of pre-selection.---(1) The Contracting Authority, with the approval of the Committee, shall engage in pre-selection proceedings with a view to identifying bidders that are suitably qualified to implement the envisaged infrastructure Project.

(2) The invitation to participate in the pre-selection proceedings shall be published in accordance with the Khyber Pakhtunkhwa Public Procurement Rules.

(3) To the extent not already required by the Khyber Pakhtunkhwa Public Procurement Rules, the invitation to participate in the pre-selection proceedings shall include at least the following:

- (a) a description of the infrastructure facility or development program;
- (b) an indication of other essential elements of the Project, such as the services to be delivered by the Concessionaire, the financial arrangements envisaged by the Contracting Authority, for example, whether the Project will be entirely financed by user fees or tariffs or whether public funds such as direct payments, loans or guarantees may be provided to the Concessionaire;

- (c) where already known, a summary of the main required terms of the Concession Contract to be entered into;
- (d) the manner and place for the submission of applications for pre-selection and the deadline for the submission, expressed as a specific date and time, allowing sufficient time for bidders to prepare and submit their applications;
- (e) the manner and place for solicitation of the pre-selection documents; and
- (f) the share of debt equity to be specified in publication.

(4) To the extent not already required by the Khyber Pakhtunkhwa Public Procurement Rules, the pre-selection documents shall include at least the following information:

- (a) the pre-selection criteria in accordance with section 17 of this Act;
- (b) whether the Contracting Authority intends to waive the limitations on the participation of consortia set forth in section 18 of this Act;
- (c) whether the Contracting Authority intends to request only a limited number of pre-selected bidders to submit proposals upon completion of the pre-selection proceedings in accordance with sub-section (2) of section 19 of this Act, and, if applicable, the manner in which this selection will be carried out; and
- (d) whether the Contracting Authority intends to require the successful bidder to establish an independent legal entity established and incorporated under the Company laws of Pakistan in accordance with section 30 of this Act.

(5) For matters not provided for in this section, the pre-selection proceedings shall be conducted in accordance with the Khyber Pakhtunkhwa Public Procurement Rules.

17. Pre-selection criteria.—In order to qualify for the selection proceedings, interested bidders must meet objectively justifiable criteria that the Contracting Authority in light of recommendations of the PPP Unit considers appropriate in the particular proceedings, as stated in the pre-selection documents. These criteria shall include at least the following:

- (a) adequate professional and technical qualifications, human resources, equipment and other physical facilities as necessary to carry out all the phases of the Project, including design, construction, operation and maintenance;
- (b) sufficient ability to manage the financial aspects of the Project and capability to sustain its financing requirements; and
- (c) appropriate managerial and organizational capability, reliability and experience, including previous experience in operating similar infrastructure facilities.

18. Participation of consortia.—(1) The contracting authority, when first inviting the participation of bidders in the selection proceedings, shall allow them to form bidding consortia. The information required from members of bidding consortia to demonstrate their qualifications in accordance with section 17 of this Act, shall relate to the consortium as a whole as well as to its individual participants.

(2) Unless otherwise authorized by the Committee and stated in the pre-selection documents, each member of a consortium may participate, either directly or indirectly, in only one consortium, at the same time. A violation of this rule shall cause the disqualification of the consortium and of the individual members.

(3) When considering the qualifications of bidding consortia, the Contracting Authority shall consider the capabilities of each of the consortium members and assess whether the combined qualifications of the consortium members are adequate to meet the needs of all phases of the Project.

19. Decision on pre-selection.—(1) The Contracting Authority shall make a decision with respect to the qualifications of each bidder that has submitted an application for pre-selection. In reaching that decision, the Contracting Authority shall apply only the criteria that are set forth in the pre-selection documents. All pre-selected bidders shall thereafter be invited by the Contracting Authority to submit proposals in accordance with sections 20 to 27 of this Act.

(2) Notwithstanding anything contained in sub-section (1), the contracting authority may, provided that it has made an appropriate statement in the pre-selection documents to that effect, reserve the right to request proposals upon completion of the pre-selection proceedings only from a short-listed bidders that best meet the pre-selection criteria; **provided that there are at least 3 short listed bidders.** For this purpose, the Contracting Authority shall rate the bidders that meet the pre-selection criteria on the basis of the criteria applied to assess their qualifications and draw up the list of bidders that will be invited to submit proposals upon completion of the pre-selection proceedings. In drawing up the list, the Contracting Authority shall apply only the manner of rating for short-listing that is set forth in the pre-selection documents.

20. Single-stage and two-stage procedures for requesting proposals.—(1) The contracting authority shall provide a set of the request for proposals and related documents issued in accordance with section 21 of this Act, to each pre-selected bidder that pays the price, if any, charged for those documents.

(2) Notwithstanding the above, the Contracting Authority may use a two-stage procedure to request proposals from pre-selected bidders when the Contracting Authority does not deem it to be feasible to describe in the request for proposals the characteristics of the Project such as Project specifications, performance indicators, financial arrangements or contractual terms in a manner sufficiently detailed and precise to permit final proposals to be formulated.

(3) Where a two-stage procedure is used, the following provisions shall apply:

- (a) the initial request for proposals shall call upon the bidders to submit, in the first stage of the procedure, initial proposals relating to Project specifications, performance indicators, financing requirements or other characteristics of the Project as well as to the main contractual terms proposed by the Contracting Authority;

- (b) the Contracting Authority may convene meetings and hold discussions with any of the bidders to clarify questions concerning the initial request for proposals or the initial proposals and accompanying documents submitted by the bidders. The Contracting Authority shall prepare minutes of any such meeting or discussion containing the questions raised and the clarifications provided by the Contracting Authority;
- (c) following examination of the proposals received, the Contracting Authority may review and, as appropriate, revise the initial request for proposals by deleting or modifying any aspect of the initial Project specifications, performance indicators, financing requirements or other characteristics of the Project, including the main contractual terms, and any criterion for evaluating and comparing proposals and for ascertaining the successful bidder, as set forth in the

initial request for proposals, as well as by adding characteristics or criteria to it. The Contracting Authority shall indicate in the record of the selection proceedings to be kept pursuant to section 36 of this Act, the justification for any revision to the request for proposals. Any such deletion, modification or addition shall be communicated in the invitation to submit final proposals; and
- (d) in the second stage of the proceedings, the Contracting Authority shall invite the bidders to submit final proposals with respect to a single set of Project specifications, performance indicators or contractual terms in accordance with section 21 to 27 of this Act.

21. Content of the request for proposals.— To the extent not already required by the Khyber Pakhtunkhwa Public Procurement Rules, the request for proposals shall include at least the following information:

- (a) general information as may be required by the bidders in order to prepare and submit their proposals;
- (b) Project specifications and performance indicators, as appropriate, including the contracting authority's requirements regarding safety and security standards and environmental protection;
- (c) the contractual terms proposed by the Contracting Authority, including an indication of which terms are deemed to be non-negotiable; and
- (d) the criteria for evaluating proposals and the thresholds, if any, set by the Contracting Authority in consultation with PPP Unit for identifying non-responsive proposals; the relative weight to be accorded to each evaluation criterion and the manner in which the criteria and thresholds are to be applied in the evaluation and rejection of proposals.

22. Bid securities.—(1) The request for proposals shall set forth the requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of the required bid security.

(2) A bidder shall not forfeit any bid security that it may have been required to provide, other than in cases of:

- (a) withdrawal or modification of a proposal after the deadline for submission of proposals and, if so stipulated in the request for proposals, before that deadline;
- (b) failure to enter into final negotiations with the Contracting Authority pursuant to sub-section (1) of section 27 of this Act;
- (c) failure to submit its best and final offer within the time limit prescribed by the Contracting Authority pursuant to sub-section (2) of section 27 of this Act;
- (d) failure to sign the Concession Contract, if required by the Contracting Authority to do so, after the proposal has been accepted; and
- (e) failure to provide required security for the fulfillment of the Concession Contract after the proposal has been accepted or to comply with any other condition prior to signing the Concession Contract specified in the request for proposals.

23. Clarifications and modifications.— The Contracting Authority may, whether on its own initiative or as a result of a request for clarification by a bidder, review and, as appropriate, revise any element of the request for proposals as set forth in section 21 of this Act. The Contracting Authority shall indicate in the record of the selection proceedings to be kept pursuant to section 36 of this Act, the justification for any revision to the request for proposals. Any such deletion, modification or addition shall be communicated to the bidders in the same manner as the request for proposals at a reasonable time prior to the deadline for submission of proposals.

24. Evaluation criteria.— (1) In addition to Public Private Partnership policy and criteria laid down by the Committee, the evaluation and comparison of the technical proposals, while generally insuring value for money, shall include at least the following:

- (a) technical soundness;
- (b) compliance with environmental standards;
- (c) operational feasibility; and
- (d) quality of services and measures to ensure their continuity.

(2) The criteria for the evaluation and comparison of the financial and commercial proposals shall include, as appropriate:

- (a) the present value of the proposed tolls, unit prices and other charges over the Concession period;
- (b) the present value of the proposed direct payments by the Contracting Authority, if any;

- (c) the costs for design and construction activities, annual operation and maintenance costs, present value of capital costs and operating and maintenance costs;
- (d) the extent of financial support, if any, expected from a Regulatory Agency;
- (e) the soundness of the proposed financial arrangements;
- (f) the extent of acceptance of the negotiable contractual terms proposed by the Contracting Authority in the request for proposals; and
- (g) the social and economic development potential offered by the proposals.

25. Comparison and evaluation of proposals.— (1) The Contracting Authority shall compare and evaluate each proposal in accordance with the evaluation criteria, the relative weight accorded to each such criterion and the evaluation process set forth in the request for proposals.

(2) For the purposes of sub-section (1), the Contracting Authority in consultation with PPP Unit, may establish thresholds or qualifying score with respect to quality, technical, financial and commercial aspects. Proposals that fail to achieve the thresholds shall be regarded as non-responsive and rejected from the selection procedure.

26. Further demonstration of fulfillment of qualification criteria.— The Contracting Authority may require any bidder that has been pre-selected to demonstrate again its qualifications in accordance with the same criteria used for pre-selection. The Contracting Authority shall disqualify any bidder that fails to demonstrate again its qualifications if requested to do so.

27. Final negotiations.—(1) The Contracting Authority shall rank all responsive proposals on the basis of the evaluation criteria and invite for final negotiation of the Concession Contract the bidder that has attained the best rating. Final negotiations shall not concern those contractual terms, if any that were stated as non-negotiable in the final request for proposals.

(2) If it becomes apparent to the Contracting Authority that the negotiations with the invited bidder will not result in a Concession Contract, the Contracting Authority shall inform the bidder of its intention to terminate the negotiations and give the bidder reasonable time to formulate its best and final offer. If the Contracting Authority does not find that proposal acceptable, it shall terminate the negotiations with the bidder concerned. The Contracting Authority shall then invite for negotiations the other bidders in the order of their ranking until it arrives at a Concession Contract or rejects all remaining proposals. The Contracting Authority shall not resume negotiations with a bidder with which negotiations have been terminated pursuant to this sub-section.

CHAPTER - V NEGOTIATION OF CONCESSION CONTRACTS WITHOUT COMPETITIVE PROCEDURES

28. Circumstances authorizing award without competitive procedures.— Subject to approval by the Committee, the Contracting Authority is authorized to negotiate a Concession Contract without using the procedure set forth in sections 16 to 27 of this Act, in the following cases:

- (a) when there is an urgent need for ensuring continuity in the provision of the service and engaging in the procedures set forth in sections 16 to 27 of this Act, would be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the Contracting Authority nor the result of dilatory conduct on its part;
- (b) where the Project is of short duration and the anticipated initial investment value does not exceed the amount of rupees five hundred (500) millions;
- (c) where the Project involves matters relating to public peace and security or has to address disasters, calamities and other emergencies of like nature;
- (d) where there is only one source capable of providing the required service, such as when the provision of the service requires the use of intellectual property, trade secrets or other exclusive rights owned or possessed by a certain person or persons;
- (e) in cases of unsolicited proposals falling under section 33 of this Act;
- (f) when an invitation to the pre-selection proceedings or a request for proposals has been issued but no applications or proposals were submitted or all proposals failed to meet the evaluation criteria set forth in the request for proposals and if, in the judgment of the Contracting Authority, issuing a new invitation to the pre-selection proceedings and a new request for proposals would be unlikely to result in a Project award within a required time frame; and
- (g) in other cases where the Committee authorizes such an exception for compelling reasons of public interest.

29. Procedures for negotiation of a Concession Contract.— Where a Concession Contract is negotiated without using the procedures set forth in sections 16 to 27 of this Act, the Contracting Authority shall-

- (a) except for Concession Contracts negotiated pursuant to clause (c) of section 28 of this Act, cause a notice of its intention to commence negotiations in respect of a Concession Contract to be published in accordance with the Khyber Pakhtunkhwa Public Procurement Rules;
- (b) engage in negotiations with as many persons as the Contracting Authority, with help of the PPP Unit, judges capable of carrying out the Project as circumstances permit; and
- (c) establish evaluation criteria against which proposals shall be evaluated and ranked.

CHAPTER - VI UNSOLICITED PROPOSALS

30. Admissibility of unsolicited proposals.—As an exception to sections 16 to 27 of this Act, the Contracting Authority is authorized to consider unsolicited proposals pursuant to the procedures set forth in sections 31 to 33 of this Act, provided that such proposals do not relate to a Project for which selection procedures have been initiated or announced.

31. Procedures for determining the admissibility of unsolicited proposals.— (1) Following receipt and preliminary examination of an unsolicited proposal, the Contracting Authority shall promptly inform the proponent or investor whether or not the Project is considered to be potentially in the public interest.

(2) If the Project is considered to be potentially in the public interest under sub-section (1), the contracting authority shall invite the proponent to submit as much information on the proposed Project as is feasible at this stage to enable the Contracting Authority to make a proper evaluation of the proponent's qualifications and the technical and economic feasibility of the Project and to determine whether the Project is likely to be successfully implemented in the manner proposed in terms acceptable to the Contracting Authority. For this purpose, the proponent shall submit a technical and economic feasibility study, an environmental impact study and satisfactory information regarding the concept or technology contemplated in the proposal.

(3) In considering an unsolicited proposal, the Contracting Authority shall respect the intellectual property, trade secrets or other exclusive rights contained in, arising from or referred to in the proposal. Therefore, the Contracting Authority shall not make use of information provided by or on behalf of the proponent in connection with its unsolicited proposal other than for the evaluation of that proposal, except with the consent of the proponent. Except as otherwise agreed by the parties, the Contracting Authority shall, if the proposal is rejected, return to the proponent the original and any copies of documents that the proponent submitted and prepared throughout the procedure.

32. Unsolicited proposals that do not involve intellectual property, trade secrets or other exclusive rights.— (1) Except in the circumstances set forth in section 28 of this Act, the Contracting Authority shall, if it decides to implement the Project, initiate a selection procedure in accordance with sections 16 to 27 of this Act, if the Contracting Authority considers that-

- (a) the envisaged output of the Project can be achieved without the use of intellectual property, trade secrets or other exclusive rights owned or possessed by the proponent; and
- (b) the proposed concept or technology is not truly unique or new.

(2) The proponent shall be invited to participate in the selection proceedings initiated by the Contracting Authority pursuant to sub-section(1) and may be given an incentive or a similar benefit in a manner described by the Contracting Authority in the request for proposals in consideration for the development and submission of the proposal.

33. Unsolicited proposals involving intellectual property, trade secrets or other exclusive rights.— (1) If the Contracting Authority determines that the conditions of clauses (a) and (b) of sub-section (1) of section 32 of this Act, are not met, it shall not be required to carry out a selection procedure pursuant to model provisions contain in sections 6 to 17 of this Act. However, the Contracting Authority may still seek to obtain elements of comparison for the unsolicited proposal in accordance with the provisions set out in sub-section (2) to (4) of this section.

(2) Where the Contracting Authority intends to obtain elements of comparison for the unsolicited proposal, the Contracting Authority shall publish a description of the essential output elements of the proposal with an invitation for other interested parties to submit proposals within 30 days.

(3) If no proposals in response to an invitation issued pursuant to sub-section (2) are received within 30 days, the Contracting Authority may engage in negotiations with the original proponent.

(4) If the Contracting Authority receives proposals in response to an invitation issued pursuant to sub-section (2), the Contracting Authority shall invite the proponents to negotiations in accordance with the provisions set forth in section 29 of this Act. In the event that the Contracting Authority receives a sufficiently large number of proposals, which appear prima facie to meet its needs, the Contracting Authority shall request the submission of proposals pursuant to sections 20 to 27 of this Act, subject to any incentive or other benefit that may be given to the person who submitted the unsolicited proposal in accordance with sub-section (2) of section 32 of this Act.

CHAPTER - VII MISCELLANEOUS PROVISIONS

34. Confidentiality.— The Contracting Authority shall treat proposals in such a manner as to avoid the disclosure of their content to competing bidders. Any discussions, communications and negotiations between the Contracting Authority and a bidder pursuant to sub-section (3) of section 20 and sections 27, 28, 29 or sub-section (3) and (4) of section 33 of this Act, shall be confidential. Unless required by law or by a court order or permitted by the request for proposals, no party to the negotiations shall disclose to any other person any technical, price or other information in relation to discussions, communications and negotiations pursuant to the aforementioned provisions without the consent of the other party.

35. Notice of contract award.— Except for Concession Contracts awarded pursuant to clause (c) of section 28 of this Act, the Contracting Authority shall cause a notice of the contract award to be published in official Gazette. The notice shall identify the Concessionaire and include a summary of the essential terms of the Concession Contract.

36. Record of selection and award proceedings.— The Contracting Authority shall keep an appropriate record of information pertaining to the selection and award proceedings in accordance with the Khyber Pakhtunkhwa Public Procurement Rules and the Khyber Pakhtunkhwa Right to Information Ordinance, 2013.

37. Review procedures.— (1) A bidder that claims to have suffered, or that may suffer, loss or injury due to a breach of a duty imposed on the Contracting Authority may seek review of the Contracting Authority's acts or failures to act through a Review Petition filed within fifteen days of such grievance before the PPP Unit.

(2) The PPP Unit, shall within thirty day of the receipt of Review Petition, convene a hearing, affording an opportunity of being heard both to the bidder and the Contracting Authority, record statements, receive evidence and other relevant material, and decide the matter accordingly.

(3) Subject to a further right of appeal under sub-section (4), the decision of the PPP Unit shall be binding on the parties.

(4) Any party, aggrieved of the decision of PPP Unit, may institute an appeal to the Committee within fifteen days of the date of decision aggrieved of. The Committee may, in its next meeting to be held after receipt of the Appeal, pass a final order on the matter of complaint of the bidder.

CHAPTER - VIII
CONTENTS AND IMPLEMENTATION
OF THE CONCESSION CONTRACT

38. **Contents and implementation of the Concession Contract.**—The Concession Contract shall provide for such matters as the parties deem appropriate, such as:

- (a) the nature and scope of works to be performed and services to be provided by the Concessionaire;
- (b) the conditions for provision of those services and the extent of exclusivity, if any, of the Concessionaire's rights under the Concession Contract;
- (c) the assistance that the Contracting Authority may provide to the Concessionaire in obtaining licenses and permits to the extent necessary for the implementation of the infrastructure Project;
- (d) any requirements relating to the establishment and minimum capital of a legal entity incorporated in accordance with section 40 of this Act;
- (e) the ownership of assets related to the Project and the obligations of the parties, as appropriate, concerning the acquisition of the Project site and any necessary easements, in accordance with sections 41 to 43;
- (f) the remuneration of the Concessionaire, whether consisting of tariffs or user fee of the facility or the provision of services the methods and formulas for the establishment or adjustment of any such tariffs or fees and payments, if any, that may be made by the Contracting Authority or other Regulatory Agency;
- (g) procedures for the review and approval of engineering designs, construction plans and specifications by the Contracting Authority, and the procedures for testing and final inspection, approval and acceptance of the infrastructure facility;
- (h) the extent of the Concessionaire's obligations to ensure, as appropriate, the modification of the service so as to meet the actual demand for the service, its continuity and its provision under essentially the same conditions for all users;
- (i) the Contracting Authority's or other Regulatory Agency's right to monitor the works to be performed and services to be provided by the Concessionaire and the conditions and extent to which the Contracting Authority or a Regulatory Agency may order variations in respect of the works and conditions of service or take such other reasonable actions as they may find appropriate to ensure that the infrastructure facility is properly operated and the services are provided in accordance with the applicable legal and contractual requirements;
- (j) the extent of the Concessionaire's obligation to provide the Contracting Authority or a Regulatory Agency, as appropriate, with reports and other information on its operations;

- (k) mechanisms to deal with additional costs and other consequences that might result from any order issued by the Contracting Authority or another Regulatory Agency in connection with clauses (h) and (i) above, including any compensation to which the Concessionaire might be entitled;
- (l) any rights of the Contracting Authority to review and approve major contracts to be entered into by the Concessionaire, in particular with the Concessionaire's own shareholders or other affiliated persons;
- (m) guarantees of performance to be provided and insurance policies to be maintained by the Concessionaire in connection with the implementation of the infrastructure Project;
- (n) remedies available in the event of default of either party;
- (o) the extent to which either party may be exempt from liability for failure or delay in complying with any obligation under the Concession Contract owing to circumstances beyond its reasonable control;
- (p) the duration of the Concession Contract and the rights and obligations of the parties upon its expiry or termination;
- (q) the manner for calculating compensation pursuant to section 57 of this Act;
- (r) the governing law and the mechanisms for the settlement of disputes that may arise between the Contracting Authority and the Concessionaire; and
- (s) the rights and obligations of the parties with respect to confidential information in terms of section 34 of this Act.

39. Governing laws.—The Public Private Partnership Concession Contracts shall be governed by the laws of Pakistan and by such laws, as are applicable in the Province of the Khyber Pakhtunkhwa, unless otherwise provided in the Concession Contract.

40. Organization of the Concessionaire.— The Contracting Authority may require that the successful bidder to establish a legal entity incorporated under the company laws of Pakistan, provided that a statement to that effect was made in the pre-selection documents or in the request for proposals, as appropriate. Any requirement relating to the minimum capital of such a legal entity and the procedures for obtaining the approval of the Contracting Authority to its statute and by-laws and significant changes therein shall be set forth in the Concession Contract consistent with the terms of the request for proposals.

41. Ownership of assets.— Without affecting the right Contracting Authority to own the infrastructure at the end of the Concession in case of termination or otherwise, the Concession Contract shall specify, as appropriate, which assets are or shall be public property and which assets are or shall be the private property of the Concessionaire. The Concession Contract shall in particular identify the assets belong to the following categories:

- (a) assets, if any, that the Concessionaire is required to return or transfer to the Contracting Authority or to another entity indicated by the Contracting Authority in accordance with the terms of the Concession Contract;
- (b) assets, if any, that the Contracting Authority, at its option, may purchase from the Concessionaire; and
- (c) assets, if any, that the Concessionaire may retain or dispose of upon expiry or termination of the Concession Contract.

42. Acquisition of rights related to the Project site.—(1) The Contracting Authority or other Regulatory Agency under the terms of the law and the Concession Contract shall make available to the Concessionaire or, as appropriate, shall assist the Concessionaire in obtaining such rights related to the Project site, including title thereto, as may be necessary for the implementation of the Project.

(2) Any compulsory acquisition of land that may be required for the implementation of the Project shall be carried out in accordance with the Land Acquisition Act, 1894(Act No. 1 of 1894).

43. Easements.—(1) The Contracting Authority or any another Regulatory Agency, on the request of the Contracting Authority, under the terms of the law and the Concession Contract shall make available to the Concessionaire or, as appropriate, shall assist the Concessionaire to enjoy the right to enter upon, transit through or do work or fix installations upon property of third parties, as appropriate and required for the implementation of the Project.

(2) Notwithstanding anything contained in the Easements Act, 1882 (Act No. V of 1882), any other easements and licenses that may be required for the implementation of the Project shall be deemed to have been created in favor of the Concessionaire from the date of Concession Contract.

44. Financial arrangements.—(1) The Concessionaire shall have the right to charge, receive or collect tariffs or user fees for the use of the facility or its services in accordance with the Concession Contract, which shall provide for methods and formulas for the establishment and adjustment of those tariffs or fees in accordance with the rules established by the competent Regulatory Agency.

(2) The Contracting Authority shall have the power to make direct payments to the Concessionaire as a substitute for, or in addition to, tariffs or fees for the use of the facility or its services.

45. Security interests.—(1) Subject to any restriction that may be contained in the Concession Contract, the Concessionaire has the right to create security interests over any of its assets, rights or interests, including those relating to the infrastructure Project, as required to secure any financing needed for the Project, including, in particular, the following:

- (a) security over movable or immovable property owned by the Concessionaire or its interests in Project assets; and
- (b) a pledge of the proceeds of, and receivables owed to the Concessionaire for, the use of the facility or the services it provides.

(2) The shareholders of the Concessionaire shall have the right to pledge or create any other security interest in their shares in the Concessionaire.

(3) No security under sub-section (1) may be created over public property or other property, assets or rights needed for the provision of a public service, where the creation of such security is prohibited by any law.

46. Assignment of the Concession Contract.—Except as otherwise provided in section 45 of this Act, the rights and obligations of the Concessionaire under the Concession Contract may not be assigned to third parties without the consent of the Contracting Authority or Government as the case may be. The Concession Contract shall set forth the conditions under which the Contracting Authority shall give its consent to an assignment of the rights and obligations of the Concessionaire under the Concession Contract, including the acceptance by the new Concessionaire of all obligations there-under and evidence of the new Concessionaire's technical and financial capability as necessary for providing the service.

47. Transfer of controlling interest in Concessionaire.— Except as otherwise provided in the Concession Contract, a controlling interest in the Concessionaire may not be transferred to third parties without the consent of the Contracting Authority. The Concession Contract shall set forth the conditions under which consent of the Contracting Authority shall be given.

48. Operation of infrastructure.—(1) The Concession Contract shall set forth, as appropriate, the extent of the Concessionaire's obligations to ensure:

- (a) the modification of the service so as to meet the demand for the service;
- (b) the continuity of the service;
- (c) the provision of the service under essentially the same conditions for all users; and
- (d) the non-discriminatory access, as appropriate, of other service providers to any public infrastructure network operated by the Concessionaire.

(2) The Concessionaire shall have the right to issue and enforce procedures governing the use of the facility, subject to the approval of the Contracting Authority and the appropriate Regulatory Agency.

49. Compensation for specific changes in legislation.—The Concession Contract shall set forth the extent to which the Concessionaire is entitled to compensation in the event that the cost of the Concessionaire's performance of the Concession Contract has substantially increased or that the value that the Concessionaire receives for such performance has substantially diminished, as compared with the costs and the value of performance originally foreseen, as a result of changes in legislation or regulations specifically applicable to the infrastructure facility or the services it provides.

50. Revision of the Concession Contract.—(1) Without prejudice to section 49 of this Act, the Concession Contract shall further set forth the extent to which the Concessionaire is entitled to a revision of the Concession Contract with a view to providing compensation in the event that the cost of the Concessionaire's performance of the Concession contract has substantially increased or that the value that the Concessionaire receives for such performance has substantially diminished, as compared with the costs and the value of performance originally foreseen, as a result of:

- (a) changes in economic or financial conditions; or
- (b) changes in legislation or regulations not specifically applicable to the infrastructure facility or the services it provides:

Provided that the economic, financial, legislative or regulatory changes:

- (a) occur after the conclusion of the contract;
- (b) are beyond the control of the Concessionaire; and
- (c) are of such a nature that the Concessionaire could not reasonably be expected to have taken them into account at the time the Concession Contract was negotiated or to have avoided or overcome their consequences.

(2) The Concession Contract shall establish procedures for revising the terms of the Concession Contract following the occurrence of any such changes.

51. Takeover of an infrastructure Project by the Contracting Authority.— Notwithstanding anything contained in the Concession Contract to the contrary, the Contracting Authority shall have the right to temporarily take over the operation of the facility for the purpose of ensuring the effective and uninterrupted delivery of the service in the event of serious failure by the Concessionaire to perform its obligations and to rectify the breach within a reasonable period of time after having been given notice by the Contracting Authority to do so.

52. Substitution of the Concessionaire.— The Contracting Authority may agree with the entities extending financing for an infrastructure Project and the Concessionaire to provide for the substitution of the Concessionaire by a new entity or person appointed to perform under the existing Concession contract upon serious breach by the Concessionaire or other events that could otherwise justify the termination of the Concession Contract or other similar circumstances.

CHAPTER - IX DURATION, EXTENSION AND TERMINATION OF THE CONCESSION CONTRACT

53. Duration and extension of the Concession Contract.— The duration of the Concession Contract shall not be more than 30 years, unless a different duration is set forth in the Concession Contract for each project, subject to approval of the Committee. The Contracting Authority shall not agree to extend its duration except as a result of the following circumstances:

- (a) delay in completion or interruption of operation due to circumstances beyond the reasonable control of either party;
- (b) Project suspension brought about by acts of the Contracting Authority or other public authorities;
- (c) increase in costs arising from requirements of the Contracting Authority not originally foreseen in the Concession Contract, if the Concessionaire would not be able to recover such costs without such extension; or

- (d) any other reasons, justifying such extension, so approved by the Committee.

54. Termination of the Concession Contract by the Contracting Authority.—The Contracting Authority may terminate the Concession Contract:

- (a) in the event that it can no longer be reasonably expected that the Concessionaire will be able or willing to perform its obligations, owing to insolvency, serious breach or otherwise; without limiting the generality of the foregoing, circumstances may include:
- (i) serious failure to provide services in accordance with the statutory and contractual standards of quality, including disregard of price control measures;
 - (ii) non-excusable suspension or interruption of the provision of the service without prior consent from the Contracting Authority;
 - (iii) serious failure by the Concessionaire to maintain the facility, its equipment and appurtenances in accordance with the agreed standards of quality or non-excusable delay in carrying out maintenance works in accordance with the agreed plans, schedules and timetables; and
 - (iv) failure to comply with sanctions imposed by the Contracting Authority or the Regulatory Agency, as appropriate, for infringements of the Concessionaire's duties; and
- (b) for compelling reasons of public interest, subject to payment of compensation to the Concessionaire, the terms of the compensation to be as agreed in the Concession Contract.

55. Termination of the Concession Contract by the Concessionaire.— (1) The Concessionaire may not terminate the Concession Contract except under the following circumstances:

- (a) in the event of serious breach by the Contracting Authority or other Regulatory Agency of its obligations in connection with the Concession Contract;
- (b) if the conditions for a revision of the Concession contract under sub-section (1) of section 50 of this Act, are met, but the parties have failed to agree on a revision of the Concession Contract; or
- (c) if the cost of the Concessionaire's performance of the Concession Contract has substantially increased or the value that the Concessionaire receives for such performance has substantially diminished as a result of acts or omissions of the Contracting Authority or other public authorities, for instance, pursuant to clauses (h) and (i) of section 38 of this Act, and the parties have failed to agree on a revision of the Concession Contract.

(2) Before invoking termination under sub-section (1), the Concessionaire shall approach the PPP Unit in review proceedings, as envisaged under section 37 of this Act.

56. **Termination of the Concession Contract by either party.**— Either party shall have the right to terminate the Concession Contract in the event that the performance of its obligations is rendered impossible by circumstances beyond either party's reasonable control. The parties shall also have the right to terminate the Concession Contract by mutual consent.

57. **Compensation upon termination of the Concession Contract.**— The Concession Contract shall stipulate how compensation due to either party is calculated in the event of termination of the Concession Contract, providing, where appropriate, for compensation for the fair value of works performed under the Concession Contract, costs incurred or losses sustained by either party.

58. **Wind-up and transfer measures.**—(1) Upon completion of the duration of Concession Contract, the infrastructure Project shall vest free of all encumbrances, in the Contracting Authority.

(2) Without prejudice to the foregoing, the Concession Contract shall provide, as appropriate, for:

- (a) mechanisms and procedures for the transfer of assets to the Contracting Authority;
- (b) the compensation to which the Concessionaire may be entitled in respect of assets transferred during the currency of the Concession, to the Contracting Authority or to a new Concessionaire or purchased by the Contracting Authority;
- (c) the transfer of technology required for the operation of the facility;
- (d) the training of the Contracting Authority's personnel or of a successor Concessionaire in the operation and maintenance of the facility; and
- (e) the provision, by the Concessionaire, of continuing support services and resources, including the supply of spare parts, if required, for a reasonable period after the transfer of the facility to the Contracting Authority or to a successor Concessionaire.

CHAPTER - X SETTLEMENT OF DISPUTES

59. **Disputes between the Contracting Authority and the Concessionaire.**—(1) If a dispute arises out of or relates to the Concession Contract, or the breach thereof, and if that dispute cannot be settled through direct discussions, the parties shall first endeavor to settle the dispute in an amicable manner by mediation administered by an independent and impartial person appointed by the Committee, before resorting to arbitration. Thereafter, any unresolved controversy or claim arising out of or relating to the Concession Contract, or breach thereof, shall be settled by arbitration in the city of Peshawar or any other place in Pakistan or as agreed to by the parties specified in the Concession Contract. Judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

(2) Notwithstanding anything contained in section 39 of this Act, the applicable law for determination of disputes shall be decided by the terms of the Concession Contract, in so far as it is not in repugnance to the laws of Pakistan.

60. **Disputes involving customers or users of the infrastructure facility.**— Subject to overall control and supervision of the Committee and the concerned Regulatory Agency, where the Concessionaire provides services to the public or operates infrastructure facilities accessible to the public, the Contracting Authority may require the Concessionaire to establish simplified and efficient mechanisms for handling claims submitted by its customers or users of the infrastructure facility.

61. **Other disputes.**—(1) The Concessionaire and its shareholders shall be free to choose the appropriate mechanisms for settling disputes among themselves.

(2) The Concessionaire shall be free to agree on the appropriate mechanisms for settling disputes between itself and its lenders, contractors, suppliers and other business partners.

CHAPTER - XI INCIDENTAL PROVISION

62. **Viability Gap Fund.**—The Government may establish a Viability Gap Fund to support Public-Private Partnership Projects and finance the gap between Project revenues constrained by affordability considerations and revenues needed to generate a fair return on investment for the Public- Private Partnership Projects.

63. **User fee.**—(1) Government may impose and revise, through a notification in the official Gazette, single or multiple user fees for different uses of the infrastructure Projects undertaken in public-private partnership mode by different classes of the users.

(2) Government may exempt, through notification in the official Gazette, certain classes of users from payment of the user fees.

(3) Government may entrust the Concessionaire with collection of user fees.

(4) Government shall set the user fees at levels that ensure the financial viability of the Project and fully cover the operations and maintenance expenses, plus a fair return to the Concessionaire. Notwithstanding the foregoing, if the Government elects to maintain the user fees at levels below that would ensure financial viability as described herein, then it shall compensate the Concessionaire for the difference through the Viability Gap Fund.

64. **Reports and audits.**—The Contracting Authority shall include appropriate reporting and audit requirements in the Concession Contracts, taking into consideration the nature of the Project, its business structure, the source of financing and the financial commitments of Government to the Concessionaire. To the extent required, the Contracting Authority may retain outside consultants and auditors to perform periodic reviews of the Concessionaire's accounts which may include the same reports submitted by the Concessionaire to its lenders.

65. **Public disclosure.**—(1) Subject to the confidentiality provision contained in section 34 of this Act, a Concession Contract or any other ancillary or additional agreement shall be a public document.

(2) The Contracting Authority shall make arrangements for inspection or copying a Concession Contract or any other ancillary or additional agreement subject to the payment of the prescribed fee.

(3) Any person may, subject to the payment of prescribed fee and any other reasonable restriction, inspect or obtain copies of a Concession Contract or any other ancillary or additional agreement.

66. Prescribing and enforcing standards. – Government, in consultation with the Committee may–

- (a) prescribe and enforce performance standards for a Project including standards of performance of the Concessionaire in regard to the services to be rendered by it to the consumers;
- (b) prescribe quality standards including standards of materials, equipments and other resources or processes relevant to infrastructure Projects including planning criteria, construction practices and standards of such facilities, operating standards and maintenance schedules for regulating the working of the Concessionaire to ensure efficiency and adherence to the prescribed quality standards;
- (c) prescribe the mode of output-based contracting, performance-based payment systems and output-based procurement procedures;
- (d) establish a uniform system of accounts to be followed by the Concessionaires;
- (e) take steps to promote effective competition and efficiency in Projects using the Public Private Partnership approach;
- (f) prescribe the mode of conducting public hearing and consultation with stakeholders; and
- (g) prescribe any other standard for regulating the infrastructure development through Public Private Partnership.

67. Indemnity by the Concessionaire.–The Concessionaire shall indemnify Government and the relevant Contracting Authority against any defect in design, construction, maintenance or operation of the Project and undertake to reimburse all costs, charges, expenses, losses and damages suffered by Government, Contracting Authority or an end user due to any such defect.

68. Recovery of costs, dues and fees.–(1) Regulatory Agency may recover a sum due from the Concessionaire, as ascertained through the dispute resolution under this Act, as if the same is recoverable as arrears of land revenue under the West Pakistan Land Revenue Act, 1967 (West Pakistan Act No. XVII of 1967).

(2) Regulatory Agency shall designate an officer as collector to exercise the powers of collector under the West Pakistan Land-Revenue Act 1967 (West Pakistan Act No. XVII of 1967).

69. Protection of action taken in good faith.– No suit, claim or other legal proceedings shall lie against the Committee or the PPP Unit, a Contracting authority or a representative of the Committee or the Contracting Authority in respect of anything done or intended to be done in good faith under this Act or the rules or regulations made thereunder.

70. **Overriding effect**---The provisions of this Act shall have effect notwithstanding anything contained in any other law for the time being in force.

71. **Power to make rules.** - Government may, make rules for carrying out the purposes of this Act.

72. **Power to frame regulations and guidelines.** - Subject to this Act and the rules made hereunder, the Committee may approve regulations, procedures and guidelines to make operations under this Act, efficient, transparent and effective.

SCHEDULE
[SEE SECTION 9]
INFRASTRUCTURE AND DEVELOPMENT SECTORS

- (1) Power generation facilities.
- (2) Education facilities.
- (3) Health facilities.
- (4) Housing.
- (5) Industrial estates.
- (6) Information technology.
- (7) Land reclamation.
- (8) Canals or dams.
- (9) Roads (provincial highways, district roads, bridges or bypasses).
- (10) Sewerage or drainage.
- (11) Solid waste management.
- (12) Sports or recreational infrastructure, public gardens or parks.
- (13) Trade fairs, conventions, exhibitions or cultural centers.
- (14) Urban transport including mass transit or bus terminals.
- (15) Water supply or sanitation, treatment or distribution.
- (16) Wholesale markets, warehouses, slaughter houses or cold storages.
- (17) Up, middle and downstream Oil and Gas Projects.
- (18) Dimension stones and mineral, mining and value addition.
- (19) Power transmission and distribution facilities.
- (20) Training institutes and common facilitation and training centers.

BY ORDER OF MR. SPEAKER
PROVINCIAL ASSEMBLY OF KHYBER PAKHTUNKHWA

(AMANULLAH)
Secretary
Provincial Assembly of Khyber Pakhtunkhwa