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SINDH ORDINANCE NO.I OF 2009

THE SINDH PUBLIC PRIVATE PARTNERSHIP ORDINANCE, 2009.

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SINDH ORDINANCE NO.I OF 2009

THE SINDH PUBLIC PRIVATE PARTNERSHIP ORDINANCE, 2009.

[15th September, 2009]

An Ordinance to provide for a comprehensive legal framework for participation of private entities in the social and economic development of the Province of Sindh.

Preamble.

WHEREAS it is expedient to provide for a comprehensive legal framework for participation of private entities in the social and economic development of the Province of Sindh.

AND WHEREAS the Provincial Assembly is not in session and the Governor of Sindh is satisfied that circumstances exist which render it necessary to take immediate actions;

NOW THEREFORE, in exercise of the powers conferred by clause (1) of Article 128 of the Constitution of the Islamic Republic of Pakistan, the Governor of Sindh is pleased to make and promulgate the following Ordinance: -

CHAPTER I
PRELIMINARY

Short title, extent and commence-ment.

1. (1) This Ordinance may be called the Sindh Public-Private Partnership Ordinance, 2009.

(2) It extends to the whole of the Province of Sindh.

(3) It shall come into force at once.

Definitions.

2. In this Act unless there is anything repugnant in the Subject or context -

(a) "Agency" means a department, attached department, body corporate, autonomous body of the Government, local government, or any organization or corporation owned or controlled by the Government or local government;

(b) "bid" means a bid tendered by a person who is eligible under the Act to submit a proposal to undertake a project;

(c) "Board" means the Public-Private Partnership Policy Board established under section 4;

(d) "change of control" means any assignment, sale, financing, grant of security interest, transfer of

interest or other transaction of any type or description, including by or through voting securities, asset transfer, contract, merger, acquisition, succession, dissolution, liquidation or otherwise, that results directly or indirectly in a change in possession of the power to direct or control, or cause the direction or control of the management of the affected company or a significant aspect of its business;

(e) "concession" means an exclusive contractual right granted to a Private Party allowing the latter, through a Public-Private Partnership Company, to receive compensation in the form of subsidies, user charges, government payments or a combination thereof, for a defined period of time sufficient to allow the Public-Private Partnership Company to repay its debts and receive a reasonable return on its invested capital in exchange for undertaking to construct, operate and maintain a public service facility using public property in accordance with performance standards established by the Government or Agency and set forth in the Concession Contract under this Act, Concession shall also include various contractual structures described in Schedule I;

(f) "concession contract" means an agreement entered into between the Government or Agency competent to grant such rights and a Public Private Partnership Company;

(g) "consortium" means a joint venture of persons, controlled by private investors or atleast majority thereof controlled by private investors, created for the purpose of forming a Public-Private Partnership Company and entering into a Public Private Partnership Agreement;

(h) "construction" includes building a new, refurbishment, reconstruction, rehabilitation, renovation, improvement, expansion, addition, alteration and related activities;

(i) "departmental Public-Private Partnership Node" means the cell established within an Agency which is authorized to identify Public-Private Partnership Projects within their administrative department and carry out the initial screening and

due diligence.

(j) "Director General" means the head of the Public-Private Partnership Unit appointed by the Government;

(k) "Government" means the Government of Sindh;

(l) "investment" includes preliminary and pre-operation capital expenditures made or incurred on project planning, equipment acquisition in any form, construction, administration, operation and maintenance of a project;

(m) "Lender" means a financial institution, bank, fund, official Agency or indenture trustee providing funding to a Public-Private Partnership Project;

(n) "local government" means a local government as defined in the Sindh Local Government Ordinance, 2001 (XXVII of 2001);

(o) "Management Contracts" means a contractual arrangement whereby the Government or Agency or local authority entrusts the operation and management of a public service facility to a Public-Private Partnership Company for a period specified in the agreement on payment of specific consideration.

(p) "Ordinance" means the Sindh Public-Private Partnership Ordinance, 2009;

(q) "Person" includes a company, an entity, a firm, an association or body of individuals and entities, whether incorporated or not and whether local or foreign or combined;

(r) "prescribed" means prescribed by rules or regulations made under this Ordinance;

(s) "private party" means a company within the meaning of the Companies Ordinance 1984 or a statutory corporation or a foreign company incorporated in a foreign country as a company or a non- profit Non-Governmental Organization.

(t) "Public-Private Partnership Company" means the Private Party authorized to enter into a Public-

Private Partnership Agreement with the Government or Agency.

(u) "Public-Private Partnership" or "Public-Private Partnership Agreement" means a commercial contractual arrangement related to a Public Service Infrastructure Project or other public facility, including but not limited to Concessions, Management Contracts, Public-Private Service Contracts or other commercial relationships between a public Agency and a Public-Private Partnership Company for the provision of public services and/or public works by the Public-Private Partnership Company where:

i. a substantial portion of the Risks related to the project have been transferred to the Public-Private Partnership Company for the contract term; and

ii. the Public-Private Partnership Company receives compensation from the Government or Agency, or receives charges or fees paid by users or customers of the services, or some combination of the foregoing;

(v) "Public-Private Partnership Project" means a project to be executed with varying levels of participation by a Public-Private Partnership Company under a mutually agreed Public-Private Partnership Agreement;

(w) "Public-Private Partnership Service Contracts" means any outsourcing contract by a public agency to any Private Party, of any significant service or activity normally carried out by government where -

(i) the term of the contract shall not exceed three years in length; and

(j) the contract is expected to yield substantial measurable savings and, or improved service to the public;

(x) "Public property" means any movable or immovable assets or rights which are in the public

domain pursuant to law or contract;

(y) "Public Service Infrastructure Project" means any project normally managed, owned, regulated and controlled by the Government or Agency, including but not limited to roads, schools, hospitals, clinics, eco-tourism and environmental activities or facilities, prisons, water and sanitation facilities, solid waste disposal and transportation or any other facility providing public services using Public Property;

(z) "Project Development Facility" means a pool of funds including contributions from donor international agencies, which are available to pay for consulting services required for the preparation and execution of Public-Private Partnership Projects.

(aa) "Risk" means any event or circumstance affecting the project which can adversely affect performance and costs of any of the contractual obligations related thereto including design, construction, financing, operation and/or maintenance;

(bb) "Sindh Public Procurement Rules" means the Sindh Public Procurement Rules, as may be framed by the Government from time to time;

(cc) "Sponsor" means the member of the private investor Consortium who directs and controls the management of the bidding Consortium and, or the Public-Private Partnership Company, even if it does not possess the majority of its voting shares;

(dd) "Viability Gap Funding" means the funds from the Government which are made available to the Public-Private Partnership Company to cover revenue shortfalls through grants, subsidies or guarantees.

(ee) "Unit" means the Public-Private Partnership Unit established under section 6;

(ff) "User fee" means a levy, unitary charge, annuity, shadow toll or fee whether paid by the Government or the public, which may be

charged by a Public-Private Partnership Company under a Public Private Partnership Agreement.

Private sector participation.

3. (1) Notwithstanding anything to the contrary in the laws in force, the Government, its Agencies and local governments will be authorized to seek participation from the private sector in appropriate projects subject to the provisions of this Ordinance.

(2) Subject to the provisions of this Act and the procedures outlined in Chapters III and IV hereto, the Government and its Agencies shall be fully empowered to enter into agreements and arrangements with Private Parties 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 social and economic development projects.

(3) The Government and its Agencies may enter into the Public-Private Partnership Agreement to vest Public Properties in Public-Private Partnership Companies for development and other appropriate exploitation. The Government may transfer title in Public Properties to the Public-Private Partnership Companies on appropriate terms and conditions as the Government may deem fit.

(4) The Government shall be competent to pay any fees for services performed by Public Private Partnership Companies under duly authorized Public-Private Partnership Agreements including but not restricted to User Fees, subsidies, revenue shortfall guarantees and may appropriate monies for such purposes.

CHAPTER II
ORGANIZATIONAL FRAMEWORK

Policy Board.

4. (1) There shall be a Public-Private Partnership Policy Board in the Province to formulate Public-Private Partnership policy based on strategic goals and ensure its implementation in the Province.

(2) The Board shall consist of -

(i) Chief Minister	**Chairman**
(ii) Chief Secretary	**Vice Chairman**
(iii) A Minister to be nominated by the	**Member**

Chief Minister.

(iv) A Member Provincial Assembly to be nominated by the Chief Minister	**Member**
(v) Additional Chief Secretary (Dev:), Planning and Development Department	**Member**
(vi) Secretary Finance	**Member**
(vii) Secretary of the concerned Department	**Member**
(viii) Director General Public-Private Partnership Unit	**Member/ Secretary**
(ix) Five members from Business Community to be nominated by the Chief Minister	**Members**
(x) Sectoral Specialist to be nominated by the Chief Minister	**Member**

(3) The Board shall frame and approve Public-Private Partnership policies and accord final approval to all the projects selected for implementation under the Public-Private Partnership modality.

(4) The members of Business Community shall be appointed for a period of one year and shall be eligible for reappointment.

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

(6) The decisions of the Board shall be taken by the majority of its members present. In case of a tie, the presiding member shall cast the deciding vote.

(7) All orders, determinations, and decisions of the Board shall be rendered in writing and signed by the Director General or any of the Directors on his behalf subject to approval of Chairman or Vice Chairman, as the case may be.

5. The functions of the Board shall be as follows:- **Functions of the Board.**

(a) To approve Public-Private Partnership policies, guidelines and Rules based on the strategic

development objectives of the Government and the recommendations of the Unit;

(b) to approve guidelines for developing and framing fundamental elements of the Public-Private Partnership Agreements for the Public-Private Partnership Projects, based on the recommendations of the Unit;

(c) to authorize for preparation of the portfolio of the Public-Private Partnership Projects;

(d) to prioritize projects for implementation;

(e) to identify inter-sector linkages;

(f) to frame and suggest rules under this Ordinance for sustained development of Public Private Partnership Projects in the Province;

(g) to approve Public-Private Partnership Projects for carrying out feasibility studies, and other technical studies related to Public-Private Partnership issues;

(h) to develop guidelines and policies for managing Public Private Partnerships in the social sectors with not for profit Private Parties.

(i) Granting final approval for execution of the Public-Private Partnership Projects;

(j) to authorize Public-Private Partnership Agreements, and execution of the approved projects;

(k) to approve Concession Contracts or other Public Private Partnership Agreements to be signed by the concerned agency along with funding requirements of the project out of Viability Gap Fund, provided that until the Viability Gap Fund Rules are formalized, the Viability Gap Fund may be used with the permission of the Government;

(l) to approve funding for new Public Private Partnership Projects through the Project Development Facility funds; and

(m) to take all other steps necessary to give effect to

the provisions of this Ordinance.

(2) The Board shall frame and publish a clear and comprehensive Public-Private Partnership policy outlining criteria for selection of projects and giving general principles for selection of Concessionaires. The policy shall work as the basis for allowing private sector participation in the government projects.

(3) The Board may delegate some of its functions, except final approval of the Public-Private Partnership Agreements, to Public-Private Partnership Nodes or Agencies. The Public-Private Partnership Nodes and Agencies shall act within the scope of the authority delegated to them by the Board.

Public-Private Partnership Unit.

6. (1) There shall be established a Public-Private Partnership Unit in the Finance Department, Government of Sindh headed by a Director General. It shall consist of officers, consultants, advisors and other officials as may be determined by the Government from time to time.

(2) The Unit shall assist the Board in formulating and implementing Public-Private Partnership policy. It shall act as the secretariat of the Board as well as the central advisory, processing and monitoring unit for Public-Private Partnership projects within the Province.

(3) To achieve the objectives in subsection (2), the Unit shall perform the following functions:

(a) to propose to the Board, the rules, procedures, guidelines and model documents for Public-Private Partnership projects based on international best practices;

(b) to work for the promotion of Public-Private Partnership initiatives and seek private partners, investors and service providers from within the country and abroad;

(c) to develop technical and human resources to support Public-Private Partnership initiatives at the Agencies;

(d) to coordinate with the Agencies for the preparation of feasibility studies for Public-Private Partnership Projects;

(e) to coordinate applications for Project Development Facility funding and technical assistance using outside consultants and advisors in

accordance with the Project Development Facility Policy Guidelines;

(f) to assist the Agencies in identifying and developing model projects and public sector comparators for realistic comparison, for use when deciding whether to fund a project with public funds or through a Public-Private Partnership arrangement;

(g) to process applications for the Viability Gap Fund for eligible projects and present such applications to the Board for approval;

(h) to prepare an ongoing portfolio of Public-Private Partnership Projects and prioritize them with the Board's approval;

(i) to oversee project implementation and issue semi-annual review and annual consolidated reports on the Public-Private Partnership Projects in the Province; and

(j) to perform any other functions and duties which that may be assigned to it by the Board.

(4) The Unit may procure for consideration or for free, technical and professional assistance and advice which it deems necessary from other governmental authorities, multilateral agencies, professional bodies and private firms. The Unit may also provide technical assistance and advisory services to the persons and entities in the Province and elsewhere for consideration or for free, as it deems appropriate.

Departmental Public-Private Partnership Nodes.

7. (1) The administrative head of each Agency which seeks to implement a project on a Public-Private Partnership basis, shall form a Public-Private Partnership cell consisting of officers from within the Agency or other Agencies, including at least one representative from the Finance Department, and independent technical and legal experts if deemed appropriate to develop the project.

(2) The Departmental Public-Private Partnership Node shall identify the social and economic development projects within the department's areas of activity and thoroughly evaluate them through feasibility analyses, economic and environmental impact studies, by itself or using resources within or outside of the Government, .

(3) The Departmental Public-Private Partnership Node shall refer projects, it wishes to be eligible for procurement and financing as Public-Private Partnership

Projects to the Unit for initial clearance. The Unit shall assist in the preparation of feasibility analysis to identify the advantages to be derived under a Public-Private Partnership scheme.

(4) The Departmental Public-Private Partnership Node shall prioritize the eligible Public-Private Partnership Projects within the Agency.

(5) After the approval by the Board, the Departmental Public-Private Partnership Node shall, in consultation with the Unit and other relevant provincial authorities, issue the pre-qualification notices, requests for proposals and other necessary information to the interested private parties.

(6) The Departmental Public-Private Partnership Node, with the assistance of the Unit if so requested, shall evaluate the bids, conduct discussions with the bidders to clarify the Request for Proposals, and, based on the bidding criteria, formulate a recommendation to be sent to the Unit for award of the project to the best evaluated bidder.

Project Implementation Unit.

8. (1) For each Concession Contract awarded to a Public Private Partnership Company, there shall be a Project Implementation Unit, to oversee day to day implementation, particularly during the construction period, of the project in terms of the Public-Private Partnership Agreement and the laws in force.

(2) The Project Implementation Unit shall be established by the administrative head of the Agency consisting of it's officers. The administrative head may appoint outside officers, professionals and consultants to serve on the Project Implementation Unit if so required.

(3) The Project Implementation Unit shall also liaise between the Government and the Public-Private Partnership Company for effective project implementation.

(4) The Departmental Public-Private Partnership Node shall be responsible to the administrative head of the Agency and shall provide it and the Unit with periodic progress reports.

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CHAPTER III
PROJECT DELIVERY PROCESS

Public-Private Partnership arrangements.

9. Subject to obtaining all required approvals and completing the necessary due diligence and appraisal of the project and the prospective Public-Private Partnership Company, an Agency may -

(a) enter into a Public-Private Partnership Agreement with the Public Private Partnership Company, through its administrative secretary or officer with equivalent rank and status, for the performance of any of the various tasks related to design and construction;

(b) arrange or provide for a payment to the Public Private Partnership Company in accordance with the terms and conditions of the Public-Private Partnership Agreement;

(c) enter into an agreement with any entity for funding or guaranteeing a Public-Private Partnership Project;

(d) transfer, through the Administrative Secretary, an interest in a Public-Private Partnership Project to a Private Party or subject to the approval of the Government, to a nominee of the Private Party by transfer, assignment, conveyance, lease, license or otherwise;

(e) enter into an arrangement with any other Agency, the Government Department or a body, board or entity owned or controlled by the Government for a Public-Private Partnership Project; and

(f) assume or transfer an interest in a Public Private Partnership Company or a nominee of the Public Private Partnership Company by transfer, assignment, conveyance, sale, grant or surrender, subject to the Public-Private Partnership Agreement.

Project identification and preparation.

10. (1) The Agency shall identify and prepare Public-Private Partnership Projects based on need analysis, its master plans or other planning documents.

(2) The preparation of the projects shall consist of a

feasibility study, initial environmental examination, environmental impact assessment, if required, Risk analysis, analysis of the need for Government support, stakeholder consultations, determination of the appropriate Public-Private Partnership modality, and preparation of bid documents including a draft Public-Private Partnership Agreement.

(3) The Agency shall prioritize the Public-Private Partnership Projects within its sector and, or geographical area using criteria such as supply and demand gaps, social and economic benefits, financial attractiveness, risks and uncertainties involved, and readiness for implementation.

(4) The Agency shall submit each approved Public-Private Partnership proposal through the Unit to the Board.

Project prioritization and approval.

11. (1) The Unit shall exercise quality control by reviewing the soundness and completeness of the project proposals.

(2) Projects shall be prioritized by the Unit across sectors and the Province, taking into account provincial development objectives, and submitted to the Board for approval.

(3) The approved projects shall be included in a priority list of the province and widely publicized by the Unit.

Approval of government support.

12. (1) Requests for Government support described in Section 15 of the Ordinance shall be an integral part of the project proposals submitted by the Government Agencies.

(2) The Unit shall review and analyze the Risks in all Public-Private Partnership proposals for their budget implications including any contingent liabilities.

(3) Based on this review and analysis, the Unit shall make a recommendation to the Board for approval, rejection or reconsideration of the Public-Private Partnership proposal.

(4) After approval of the Board, the Unit shall make necessary arrangements for including such support in the budget of the Province.

Consideration by the Board.

13. (1) Taking into account the recommendations of the Unit, the Board shall consider the proposal submitted by an Agency and may approve the proposal with or without modification, reject it or return it to the Agency for reconsideration, Provided that this consideration would subject to time limits and Unit shall have to carry out initial

due diligence within fifteen days and inform Agency about its opinion.

(2) If a proposal is returned for reconsideration, the Agency shall take suitable action on the Board's decision and may resubmit the proposal for Board approval.

Selection of the Public Private Partnership Company.

14. (1) After the approval of the project proposal by the Board, the Agency shall select the winning bidder for the project through open competitive bidding.

(2) The Agency shall not enter into direct negotiations with any Private Party without open competitive bidding. However, negotiations may take place during the bid evaluation process subject to principles of integrity, transparency and equal opportunity.

Change of Control and Transfer Restrictions.

15. (1) If a consortium is the pre-qualified person, the party in the consortium identified as the Sponsor shall not at any time prior to the award of the bid voluntarily or involuntarily cause, permit or suffer any change of control or transfer its controlling interest to a third party. After the bid award and up to the commencement of operations of the facility, the Sponsor shall not -

(a) voluntarily or involuntarily cause, permit or suffer any Change of Control; or

(b) transfer its interests in the Public-Private Partnership Company, unless it obtains the prior approval of the Agency, or is able to be replaced by an entity at least as technically and financially qualified to meet its project obligations.

(2) Any member of the Consortium, other than the Sponsor, may withdraw or transfer all or part of its interests in the Public-Private Partnership Company prior to award of the contract or during the term of the contract, provided that: (i) the remaining members of the Consortium are legally, technically and financially capable of successfully carrying out the implementation and operation of the project and (ii) an acceptable substitute with equal or better qualifications is replacing such withdrawing member. Transfers of interests between members of Consortium are permitted subject to the prior approval of the Agency.

(3) The Consortium shall notify the Agency of all changes in the shareholding of the consortium prior to the

award of the bid. Changes in shareholding of the Consortium prior to bid award may be approved by the Agency provided the changes are carried out in conformity with the terms and conditions of the bidding and do not jeopardize the bidder's prequalification; and

(4) If the Consortium fails to comply with the requirement of section 14 of the Ordinance, the Consortium shall cease to be pre-qualified.

16. Government support approved by the Board for a project shall be indicated in the bid documents. Such support may include any of the following: **Government support**.

(a) Administrative support to the Public Private Partnership Company consistent with the Public-Private Partnership Company's responsibilities under the Public-Private Partnership Agreement in obtaining licenses and clearances from the Government, a public sector organization or an Agency, for the purposes of the project on such terms and conditions as may be prescribed; provision of utility connections for power, gas and water at project site; acquisition of land or rights of way necessary for the project, rehabilitation and resettlement of displaced persons directly required to execute the project; and any other administrative responsibility;

(b) Asset-based support such as leasing land and, or infrastructure facilities owned by the Government or an Agency to the Public Private Partnership Company. The need for this type of support shall be determined on a case-by-case basis;

(c) Direct financial assistance through Viability Gap Funding. This type of support shall be offered only for projects which are economically and socially viable;

(d) Government compensation payments including but not limited to discriminatory changes in law as specified in the Public-Private Partnership Agreement, minimum revenue guarantees, government defaults, retained latent defects, construction

related compensations attributable to government actions or delays, indemnities for non-compete commitments, or early termination compensation formula;

(e) Any other reasonable support which may include equity or debt based financing or bridge financing, required by the project which is inconsistent with the feasibility analysis. This should include an appraisal of the costs and anticipated benefits of the Public-Private Partnership; and

(f) All of the Government support for the project shall be clearly identified in the bidding documents and included in the applicable Public-Private Partnership Agreement.

Unsolicited proposals.

17. A Private Party may propose a project to an Agency on its own initiative, and will be subject to the procurement procedures as may be prescribed.

Preparation and negotiation of Public-Private Partnership Agreement.

18. (1) The draft Public-Private Partnership Agreement shall form a part of bid documents.

(2) The draft Public-Private Partnership Agreement shall clearly define the legal relationship between the Agency and the selected Private Party, as well as their respective rights and responsibilities, including the specific government support for the project.

(3) The draft Public-Private Partnership Agreement shall include but not be limited to the following provisions, as applicable:

(a) Type of project;

(b) Term of the Public-Private Partnership Agreement;

(c) Scope of work and services to be provided under the project;

(d) Main technical specifications and performance standards;

(e) Environmental and safety requirements;

(f) Implementation milestones and completion date of the project;

(g) Cost recovery scheme through user levies, including a mechanism for periodical adjustment;

(h) Performance bonds for construction works and operation;

(i) Minimum insurance coverage;

(j) Acceptance tests and procedures;

(k) Rights and obligations of the parties to the Public-Private Partnership Agreement, including risk sharing;

(l) Penalties and liquidated damages provisions for delays;

(m) Type and amount of Government support;

(n) Hand back requirements at the end of the term of the Public-Private Partnership Agreement, if any;

(o) Warranty period and procedures after the transfer;

(p) Requirements and procedure for variations of the Public-Private Partnership Agreement;

(q) Grounds for and effects of termination of the Public-Private Partnership Agreement, including *force majeure*;

(r) Compensation formula for early termination scenarios;

(s) Procedures and venue for dispute resolution;

(t) Financial reporting by the Private Party; and

(u) Supervision mechanism of the Agency.

(4) The Agency shall not enter into a Public-Private

Partnership Agreement unless the procedure specified in this Ordinance has been followed.

(5) Contract negotiations for the conclusion of a Public-Private Partnership Agreement shall be completed between the Agency and the Private Party within six months after the bid award. Financial close for the project shall be achieved no later than twelve months after execution of the Public-Private Partnership Agreement. Any delay in reaching financial close beyond such period shall be reported to the Board, with an explanation for the delay so that the Board can determine if the project is capable of being financed under the proposed Public-Private Partnership modality or whether other alternatives including traditional procurement should be considered.

Project implementation and operation.

19. (1) Before signing the Public-Private Partnership Agreement with the Agency, the winning Consortium shall establish, without changing its shareholding, a Public-Private Partnership Company for implementation and operation of the project.

(2) For major construction works, Public-Private Partnership Company shall prepare a detailed engineering design and implementation plan in accordance with the main technical specifications prescribed in the Public-Private Partnership Agreement and submit to the Agency for approval prior to the start of construction.

(3) The Public-Private Partnership Company shall carry out any construction project in accordance with the performance standards and specifications prescribed in the approved engineering design.

(4) The Agency shall be responsible for monitoring and supervising the project during its implementation and operation to ensure its conformity with the plans, specifications, performance standards and tariffs in the Public-Private Partnership Agreement. The Agency shall submit quarterly reports on the project to the Unit.

Chapter IV
Public-Private Partnership Service Contracts

Public-Private Partnership Service Contracts:-

20. Public-Private Partnership Service Contracts qualify for treatment under Public-Private Partnership procurement and selection procedures because of the significant advantages they offer to the public agencies and their expected

budgetary impact. To encourage the use of these contracts and ensure consistency with the principles of Public-Private Partnership procurement, all Public-Private Partnership Service Contracting shall undergo the same screening and evaluation procedures as Public Service Infrastructure Projects,. The Unit, in conjunction with the Agencies, shall assist in the development of standardized contracts for Public-Private Partnership Service providers and shall participate in the evaluation of the Public-Private Partnership Service Contracts. All Public-Private Partnership Service Contracts, as defined in the Ordinance, must be approved by the Board.

CHAPTER V
PROCUREMENT

Public procurement laws to apply.

21. (1) The procurement process shall be governed under this Ordinance

(2) The Agency shall ensure that the procurement statutes have been followed in letter and spirit from the pre-qualification stage through selection and contract signing. In all instances, the procedures shall be transparent with full disclosure of the procedures and results of the bidding.

(3) In view of the special characteristics of procurement for Public-Private Partnership Projects, the Board shall review the Rules which apply to Public-Private Partnerships and its procedures periodically in consultation with the Unit and seek any changes which are needed for successful operation of the Public-Private Partnership program.

(4) On completion of the Concessionaire's selection process, the Board shall certify that in its opinion, the selection of the Concessionaire has been made in compliance with the procurement statutes.

Award through open bidding.

22. Public competitive bidding shall be applied for the award of all Public-Private Partnership Projects strictly in accordance with the provisions of the Ordinance.

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CHAPTER VI
PROJECT IMPLEMENTATION AND OPERATION

Public-Private Partnership Company.

23. All long term Public Private Partnerships shall be implemented through a Public-Private Partnership Company.

Performance guarantee.

24. (1) The Agency shall procure appropriate performance guarantee from the Public-Private Partnership Company that it shall perform its contractual obligations in accordance with the terms of the contract. This guarantee amount may be released in part or in full on meeting the appropriate performance milestones.

(2) The performance guarantee shall be set forth in the bidding documents.

(3) The duration of any Concession Contract shall not exceed thirty years which may be further extended by mutual agreement not exceeding to ten years.

Vesting the Rights under the Concession Contract.

25. (1) Subject to the provisions of this Ordinance and the Concession Contract, the Agency with the approval of Government may vest the public property and rights related thereto in the Public-Private Partnership Company.

(2) The Public-Private Partnership Company may use the rights arising from the Concession Contract to raise financing for the project in order to carry out its obligations under the relevant contract.

(3) Subject to the Concession Contract, on completion of the vestment term and expiry of the term of the agreement, all the rights in the vested public property together with the project built thereupon shall revert to the Government.

Operation and maintenance of the project.

26. The Public-Private Partnership Company in a Concession Contract shall be responsible for operation and maintenance of the Public Sector Infrastructure Project for the concession period and shall be authorized to pay and contract with third party companies to carry out its operation and maintenance responsibilities under the Concession.

CHAPTER VII
FINANCE

Financing.

27. (1) Financing of a Public-Private Partnership Public Service Infrastructure Project may be in such amounts and upon such terms and conditions as may be determined by the parties to the Concession Contract and Public-Private Partnership Agreement. Without limiting the generality of the foregoing, the private entity and the responsible Agency may propose to utilize any or all revenues which may be available to them by law -

(a) issue debt, equity, or other securities or obligations;

(b) enter into leases, concessions, and grant and loan agreements;

(c) access any designated funds;

(d) borrow or accept grants from any source; and

(e) secure any financing with a pledge of, security interest in, or lien on, any or all of its property, including all of its property interests in the public service infrastructure facility.

(2) The senior secured lenders of the Public-Private Partnership project company in a concession contract shall be entitled to enter into an agreement with the Government pursuant to which, in the event of default of the Public-Private Partnership Company, they or their duly appointed representative will have the right, but not the obligation, to step in and replace the Public-Private Partnership Company or one of its contractors to cure the default and avoid termination of the Concession Contract. Such agreement will be negotiated and signed at or before financial closing.

Viability gap fund.

28. The Government may establish a viability gap fund to support Public-Private Partnership projects and finance the gap between project revenues and the fair return on investment for the Public-Private Partnership projects.

User fee.

29. (1) The Government may impose and revise, through a notification in the official gazette, single or multiple user fees for different uses of the Public-Private Partnership projects by different classes of the users.

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

(3) The Government may entrust the Public-Private Partnership Company with collection of user fees.

(4) The Government may provide a mechanism for user fee revision for a project in the Public-Private Partnership Agreement or in Rules issued by the Government with sector responsibility. If the Government unilaterally orders an adjustment in the user fee which adversely affects the revenues of the Public-Private Partnership Company and its ability to repay its loans and earn a reasonable return on its investment, then the Government shall compensate the Public-Private Partnership Company either through a direct payment for lost revenues or any other mechanism for fairly adjusting the revenues. The method or methods to be applied shall be set forth in the Public-Private Partnership Agreement.

Reports and audits.

30. The Agency shall include appropriate reporting and audit requirements in the Public-Private Partnership Agreement, taking into consideration the nature of the project, its business structure, the source of financing and the financial commitments of the Government to the project company. To the extent required, the Agency may retain outside consultants and auditors to perform periodic reviews of the project company's accounts which may include the same reports submitted by the project company to its lenders.

CHAPTER VIII
Other Issues

Power to prescribe standards.

31. The Government may -

(a) prescribe and enforce performance standards for a Public-Private Partnership Project, including standards of performance for a Public Private Partnership Company with regard to different aspects of the services to be rendered to the users and the Government;

(b) prescribe quality standards, including standards for the materials, equipment, processes and resources used, or persons employed, during all stages of the project to ensure sustainable delivery of services and adherence to the prescribed quality standards;

(c) link entitlement to the Viability Gap Fund, subsidy, annuity and other compensation and benefits with meeting certain performance standards as it may deem fit;

(d) issue and enforce accounting guidelines for proper accounting of the projects; and

(e) prescribe any other standard for regulating the Public-Private Partnership projects.

Indemnity.

32. (1) The Public-Private Partnership Company or its sub-contractor shall, subject to subsection (2), be responsible for, and shall release and indemnify the Agency, its employees, agents and contractors on demand from and against all liability for -

(a) death or personal injury;

(b) loss of or damage to property, including property belonging to the Government or Agency or for which it is responsible;

(c) breach of statutory duty; and

(d) actions, claims, demands, costs, charges and expenses , including legal expenses on an indemnity basis;

which may arise out of, or in consequence of, the design, construction, operation or maintenance of the assets; the performance or non-performance by the Public-Private Partnership Company or its sub-contractor of its obligations under the Public-Private Partnership Agreement; or the presence on the Government's property of the contractor, a subcontractor, or their employees or agents.

(2) The Public-Private Partnership Company or its sub-contractors shall not be responsible or be obliged to indemnify the Board for -

(a) any of the matter referred to in paragraphs (1) (a) to (d) above which arises as a direct result of the Public-Private Partnership Company or its sub-contractor acting on the instruction of the Agency;

(b) any injury, loss, damage, cost and expense caused by the negligence or wilful default of the Agency, its employees, agents or contractors, or

a breach by the Agency of its obligations under the Public-Private Partnership Agreement, or

(c) any claims made under section 24 of the Ordinance in respect of Government property.

(3) An indemnity by either party under any provision of the Public-Private Partnership Agreement shall not limit any indemnity by that party under any other provision of the Public-Private Partnership Agreement.

Dispute resolution.

33. (1) If a dispute arises out of or relates to the Public-Private Partnership Agreement, 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 Board, before resorting to arbitration. Thereafter, any unresolved controversy or claim arising out of or relating to the Public-Private Partnership Agreement, or breach thereof, shall be settled by arbitration in the city of Karachi or any other place within Pakistan agreed to by the parties specified in the Public-Private Partnership Agreement. Judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

(2) Disputes shall be decided in accordance with the law in force in Pakistan.

Termination of the Public-Private Partnership Agreement.

34. The Public-Private Partnership Agreement may be terminated in the following cases:

(a) **End of the term of the Concession Contract** Upon completion of the term of the agreement, Public-Private Partnership Company will hand over the property to the Government, free and clear of all encumbrances and in satisfactory condition as determined by the Government following an inspection. The procedures for hand over and indemnities if any shall be set forth in the applicable Public-Private Partnership agreement.

(b) **Unilateral termination of the Concession Contract** by the Government acting in the public interest, in which case the Government shall compensate the Public-Private Partnership Company for any

investments made in the project, including any debts incurred and a return on the investment, or any amount which fairly compensates the Public-Private Partnership Company for its lost revenues;

(c) **Concession Contract Default by the Agency** of its obligations and expiration of any cure period, causing the private party to rescind the Public-Private Partnership Agreement, in which case the Agency will compensate the Public Private Partnership Company for any investments made in the project, including any debts incurred and a return on the investment, or any amount that fairly compensates the Public-Private Partnership Company for its lost revenues; or

(d) **Concession Contract Default by the Public-Private Partnership Company** (1) following expiration of the cure period and failure of the project company to remedy the default or the secured lenders to exercise their step-in rights. In such case, the Government may: (i) invite the lenders to step-in and replace the project company and rectify the default under an extended cure period; or (ii) auction the remaining value of the Concession to a third party, or (iii) apply any other remedy that fairly compensates the Public-Private Partnership Company and its lenders, if any, in accordance with international best practices.

(2) **Public Private Partnership Company** would not be compensated in such case, where the Public Private Partnership Company defaults due to its own inefficiency and it causes loss to the Government and the lenders which far exceeds its own investment.

(e) **The occurrence of a *force majeure* event** shall be decided in accordance with the contents of relevant Concession Agreement.

Immunity to acts done in good faith.

35. No suit, claim or other legal proceedings by a private party or by any person shall lie against the Board, the Unit, an Agency or an officer of the Board, the Unit, and other

government officers or consultants, in respect of anything done or intended to be done in good faith and in accordance with this Ordinance and other laws in force.

Power to make rules.

36. For systemic and transparent enforcement of this Ordinance and towards meeting its objectives the Government may, by notification in the official gazette, make rules for carrying out the purposes of this Ordinance.

Power to frame regulations and guidelines.

37. Subject to this Ordinance and the rules made hereunder, the Board may approve regulations, procedures and guidelines to make operations under this Ordinance, efficient, transparent and effective.

SCHEDULE I
(See section 2(e)

The following types of Concession Contracts for Public Service Infrastructure with their variations in terms of risk allocations are often found in Public Private Partnership arrangements and may be used by the Government or Agency or local authority. These listed classifications are indicative in nature, and the Government or Agency or local authority shall be entitled to use whatever contractual arrangements, consistent with the broad definition of concession, best suits the specific Public-Private Partnership Project.

Build-Operate-and-Transfer means a contractual arrangement whereby the Private Party undertakes the construction, including financing, of a given infrastructure facility, and the operation maintenance thereof. The Private Party operates the facility over a fixed term during which he is allowed to charge a User Fee not exceeding those proposed in the bid or as otherwise incorporated in the contract to enable recovery of its investment in the project.

Build-Lease-Transfer means a contractual arrangement whereby the Private Party undertakes to finance and construct a Public Service Infrastructure Project and upon its completion hands it back to the Government, Agency or local authority under a lease agreement for a fixed period. The lease payments are structured to reimburse the Private Party for its investment and repay the loans.

Build-Own-Operate-Transfer means a contractual arrangement whereby the Private Party is authorized to finance, construct, maintain and operate the Public Service Infrastructure Project and whereby such project is to vest in the Private Party for a

specified time. During the operation period, the Private Party is permitted to charge user fees specified in the Concession Contract to recover the investments made in the project.

Design-Build-Finance-Operate means a contractual arrangement whereby the Private party undertakes to design and build and maintain and operate the Public Service Infrastructure Project and whereby the project is vested in the Private Party for a specified time. The main difference between the Design-Build-Finance-Operate and the above structures relates to the level of risk assumed by the Design-Build-Finance-Operate operator for design risks during construction.