

9/5/16

[TO BE INTRODUCED IN THE NATIONAL ASSEMBLY]

**A
Bill**

to provide a regulatory and enabling environment for private participation in provision of public infrastructure and related services through fair and transparent procurement processes

WHEREAS it is expedient to establish a regulatory framework to execute Public Private Partnerships in Pakistan so as to promote domestic and foreign private investment in infrastructure to increase availability of public infrastructure, set up transparent and efficient institutional arrangements for PPPs and to promote private sector participation in the economic development among others through transparent and fair procurement process;

It is hereby enacted as follows:—

**CHAPTER I
Preliminary**

1. Short title, extent, application and commencement.—(1) This Act may be called the Public Private Partnership Authority Act, 2016.

(2) It extends to the whole of Pakistan.

(3) It shall come into force at once.

(4) It shall apply to all kinds of projects undertaken by an Implementing Agency under Public Private Partnership.

2. Definitions.—In this Act, unless there is anything repugnant in the subject or context—

- (a) “Agreement” means the written agreement between the Implementing Agency and the Private Party for implementation of the Project and any other agreement subsidiary or incidental to it;
- (b) “Authority” means Public Private Partnership Authority established under section 3 of this Act;
- (c) “Board” means the Board of the Public Private Partnership Authority constituted by the Federal Government in accordance with the section 7;
- (d) “Bid Documents” means request for proposal or pre-qualification, issued by the Implementing Agency under the provisions of this Act;
- (e) “Dispute” means any monetary claim or contractual dispute between the Private Party and the Implementing Agency under the Agreement;
- (f) “Implementing Agency” means any of the line ministries, attached departments, body corporate, autonomous body of the Federal Government or any organization or corporation owned or controlled by the Federal Government;

- (g) "Lender" means a financial institution that provides loan to the Private Party for the implementation of a Project;
- (h) "Person" includes an individual, a company, a statutory body corporate, an association of persons whether incorporated or not, a trust and a partnership;
- (i) "prescribed" means prescribed by the rules or regulations;
- (j) "Private Party" means a Person who is eligible to bid for a Public Private Partnership project with the Implementing Agency;
- (k) "Project" means an infrastructure project, provision of infrastructure related services or both, under the Public Private Partnerships;
- (l) "Project Proposal" means, the proposal received by the Implementing Agency from a Private Party for a Project;
- (m) "Project Support" means any or a mix of subsidy or guarantee or financial assistance, during any stage of the Project cycle;
- (n) "Public Private Partnership means a commercial transaction between an Implementing Agency and a Private Party in terms of which the Private Party,-
 - (i) performs an Implementing Agency's function on behalf of it;
 - (ii) assumes the use of public property for a Project; and
 - (iii) assumes substantial financial, technical and operational risks in connection with the performance of the Implementing Agency function or use of the public property; or
 - (iv) receives a benefit for performing the Implementing Agency function or from utilizing the public property, either by way of,-
 - (a) consideration to be paid by the Implementing Agency from its budget or revenue; or
 - (b) charges or fees to be collected by the Private Party from users or customers of a service provided to them; or
 - (c) a combination of such consideration and such charges or fees.
- (o) "Request for Proposals" means the publicly advertised tender inviting proposals for a Project prepared in accordance with the provisions of the Act;
- (p) "Users" means the users of a Project, whether upon payment of charges, fee or otherwise; and
- (q) "Viability Gap Fund" means the fund to be established by the Board to provide Project Support to an Implementing Agency for those Projects, for which a feasibility study has found to be economically or socially justified but are not financially viable because of lack of affordability.

CHAPTER II
Public Private Partnership Authority

3. Establishment of the Authority.—(1) As soon as it deem appropriate after the commencement of this Act, the Federal Government shall establish Public Private Partnership Authority for carrying out the purposes and objectives of this Act.

(2) The Authority shall be an independent body corporate having perpetual succession and common seal, subject to the provisions of this Act to acquire and hold property, both moveable and immovable, and shall by its name sue and be sued.

(3) The headquarters of the Authority shall be at Islamabad Pakistan and it may establish its offices at such other place or places as it may consider appropriate

4. Functions and powers of the Authority.—(1) Subject to the provisions of this Act, the Authority may take such measures and exercise such powers as may be necessary for promoting and helping the realization of the concept and methods of Public Private Partnership.

(2) Without prejudice to the generality of the powers conferred by sub-section (1) above, the Authority may,-

- (a) ensure that projects are consistent with national and sectoral strategies;
- (b) ensure value for money and budget affordability;
- (c) make assessment of fiscal risks;
- (d) advise and facilitate the Implementing Agency to identify, develop, structure and procure the Projects;
- (e) prescribe and receive fee and charges,;
- (f) standardize the contractual provisions and to develop the sector specific provisions of the model Public Private Partnership Agreements;
- (g) develop annuity, user-based and hybrid financial models for the Projects;
- (h) ensure that Pubic Private Partnership Agreement is consistent with the provisions of this Act; and
- (i) interact, collaborate and liaise with international agencies.

5. Appointment of officers and staff of the Authority.—(1) The Authority may appoint such officers, experts, advisers, consultants and members of staff as it may consider necessary for the efficient performance of its functions in the prescribed manner and on prescribed terms and conditions.

(2) The officers, members of the staff, advisers, consultants and experts and other persons appointed by the Authority shall not be civil servants within the meaning of the Civil Servants Act, 1973 (LXXI of 1973).

(3) The officers, advisers, consultants, employees and staff of the Authority when acting or purporting to act under any of the provisions of this Act or rules shall be deemed to be public servants within the meaning of section 21 of Pakistan Penal Code (Act XLV of 1860).

6. **Board of the Authority.**— (1) There shall be a Board of Directors of the Authority comprising the following members, namely:-

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|-------|---|-------------------------|
| (i) | Minister of Finance, Revenue and Economic Affairs | <i>Chairperson</i> |
| (ii) | Secretary, Finance Division | <i>Vice-Chairperson</i> |
| (iii) | Secretary, Planning and Development Division | <i>Member</i> |
| (iv) | Secretary Board of Investment | <i>Member</i> |
| (v) | Chief Executive Officer | <i>Member</i> |
| (vi) | two members from private sector to be nominated by the Federal Government | <i>Member</i> |

(3) The Chief Executive Officer shall also act as the Secretary of the Board.

(4) The members from the private sector shall be appointed by the Federal Government for a period of three years and shall be entitled to such terms and conditions as the Federal Government may prescribe.

(5) The Board shall meet at least once in a quarter. The Secretary of the Board may take approval of any decision through circulation from members of the Board, which shall be subsequently ratified in the first Board meeting occurring immediately after such decision.

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

(7) The quorum for a meeting of the Board shall be at least three members and decisions of the Board shall be made with majority of total membership of the Board. In case of a tie, the Chairperson or Vice-Chairperson, as the case may be, shall have a casting vote:

Provided that the Ministry of Finance shall have the power to reject any proposal approved by the Board in case the fiscal risks associated with the proposal are considered unacceptable.

(8) The Board may co-opt such members, as it deems appropriate, for rendering advice on case-to-case basis.

(9) The Board may, for carrying out its functions, constitute such committees, from time to time, as may be considered appropriate and delegate its powers as it may prescribe.

7. Chief Executive Officer.— (1) The Federal Government shall appoint a Chief Executive Officer to serve as a member of the Board and shall be responsible for the day to day administration of the Authority on such terms and conditions including his salary and privileges as the Federal Government may prescribe.

(2) The Chief Executive Officer shall be answerable to the Board for all administrative, financial and technical matters of the Board.

8. Functions and powers of the Board.—(1)The general directions and superintendence of the Authority and its affairs shall vest in the Board which may exercise all powers, perform all functions and do all acts which may be exercised, performed or done by the Authority

(2) Without prejudice to the generality of powers given in sub-section (1), the Board shall perform, *inter-alia*, which may include, the following namely:-

- (a) monitoring the implementation of Public Private Partnership agreements, both in terms of the financial situation and the construction of physical assets and service delivery;
- (b) approving relevant accounting policies and financial reporting standard and templates for contracting agencies;
- (c) renegotiating, if necessary, Public Private Partnership agreements or contracts;
- (d) approve rules for the purposes of this Act;
- (e) approve feasibility study, bid documents and proposal of a Project;
- (f) approve Public Private Partnership Agreement to be executed by the Implementing Agency;
- (g) review and strengthen the institutional and regulatory framework for the effective implementation and operation of the Public Private Partnerships of the Federal Government;
- (h) approve the yearly budget of the Authority; and
- (i) establish Viability Gap Fund and Risk Management Unit, to perform such functions as it may prescribe.

9. Disqualifications to become a member.—(1)The disqualifications of certain persons to become or hold office in any corporate entity under the provisions of the Companies Ordinance, 1984 shall, *ipso facto*, apply to the members of the Board in addition to the following disqualifications namely:-

- (a) gross misconduct;
- (b) involved in corruption or malpractices;
- (c) receives or is accused of receiving any illegal gratification from the Private Party; or

- (d) having any interest, either monetary or otherwise, directly or indirectly in any Private Party tendering for Public Private Partnership or involved in the process in any way.

10. Fund.—(1) There is hereby established a Fund, to be called the Public Private Partnership Authority Fund which shall vest in Authority and shall be utilized by the Authority to meet the charges in connection with its functions under this Act.

- (2) The Fund of the Authority shall comprise of the following namely:-
 - (a) such sums as the Federal Government may from time to time, allocate to it in the annual budget;
 - (b) grants from the Federal Government;
 - (c) donations and grants from the international donor agencies;
 - (c) income from the investments;
 - (d) fees; and
 - (e) any sources approved by the Federal Government.

(2) The management, operation and maintenance of the Fund and accounts of the Authority shall be done by the prescribed offices of the Authority in the prescribed manner.

(3) The accounts of the Authority shall be maintained in such forms as may be prescribed by the Board and consistent with the requirements of the applicable laws.

11. Viability Gap Fund.—(1) There shall be established a Viability Gap Fund which shall be managed, controlled and administered by the Authority in Prescribed manner.

(2) Viability Gap Fund shall be established by an amount specified by the Board within the Public Private Partnership Authority Fund.

(3) Viability Gap Fund will be utilized to provide support the projects deemed feasible, socially and economically but not financially viable because of lack of affordability. The Board shall consider a Project eligible for grant of subsidy or financial support from the Viability Gap Fund.

12. Accounts and audit.—(1) The Authority shall prepare its own budget in respect of each financial year and shall maintain complete and accurate books of accounts of their actual expenses in the prescribed manner.

(2) The accounts of the Authority shall be audited by a reputable firm of Chartered Accountants, within the meaning of the Chartered Accountants Ordinance, 1961 (X of 1961), appointed by the Board from a panel of chartered accountants proposed by the Authority on such terms and conditions as the Board may prescribe.

(3) The Auditor General of Pakistan may conduct audit of the Authority.

CHAPTER III

Functions of the Implementing Agency and Government Support

13. Responsibilities of an Implementing Agency.—(1) The responsibilities of the Implementing Agency in relation to the planning, development, procurement, implementation, execution and monitoring of a Project shall be such as may be prescribed.

(2) Without prejudice to the generality of sub-section (1), the Implementing Agency, *inter-alia*, shall for the purposes of this Act, –

- (a) identify, conceptualize, appraise and develop the Project;
- (b) undertake or cause to be undertaken a feasibility study;
- (c) develop and issue or cause to be developed and issued a request for proposal including draft of the Public Private Partnership Agreement;
- (d) procure a Project only through a competitive bidding process as prescribed; and
- (e) monitor and implement the Project in accordance with the Public Private Partnership Agreement.

(3) The Implementing Agency shall submit the Bid Documents and the Project Proposal for the approval of the Board.

(4) Once the Project Proposal is approved by the Board, the Implementing Agency shall procure the Project in accordance with the provisions of this Act.

14. Approval of Project Support.–(1) The Implementing Agency, requiring the Project Support to implement the Project, shall submit all the relevant documentation to the Board for consideration.

(2) The Board shall review the Project Proposal and evaluate the need and amount of Government Support requested and send its recommendations to the Federal Government for provision of Project Support.

CHAPTER IV **Legal and Contractual Frameworks**

15. Contents of Public Private Partnership Agreements.–(1) The contents of a Public Private Partnership Agreement shall be such as may be prescribed.

(2) Notwithstanding anything contained in sub-section (1), the Implementing Agency may follow their applicable laws on the following issues, namely:-

- (a) the scope of activities of the parties to the Agreement;
- (b) the duration of the Agreement;
- (c) the payment arrangements for the Private Party, including where applicable, the factors based on which and the manner in which user charges or tariffs may be revised;
- (d) the rights and obligations of the parties and the respective risks to be borne by each party;
- (e) the penalties for non-compliance with the provisions of the Public Private Partnership Agreement;
- (f) dispute resolution mechanisms;
- (g) exit clauses specifying procedure of early termination of the Public Private Partnership Agreement;
- (h) termination payments and compensations, if agreed and provided in the Public Private Partnership Agreement;
- (i) the debt-equity ratio;
- (j) the monitoring;

- (k) project insurances and treatment of insurance proceeds;
- (l) operation and maintenance requirements; and
- (m) reversion, transfer or handing back of the Project, wherever applicable, and all the associated assets to the Implementing Agency upon expiry or termination of the Public Private Partnership Agreement.

(3) Unless otherwise provided in the Public Private Partnership Agreement, every agreement shall be governed, construed and interpreted in accordance with the laws of Pakistan.

16. Contractual relationship.—(1) For the purposes of implementation of the Project, the Private Party shall, with or without the participation of the Implementing Agency, incorporate a company as special purpose vehicle to undertake the Project.

(2) Without prejudice to the generality of the foregoing provision and subject to the decision of the Board, the Implementing Agency and Private Party may, if the circumstances and nature of the Project permit, enter into any contractual relationship that is capable of providing value for money and affordability for the Implementing Agency and the Users of the Project.

17. Protection of interests.—Notwithstanding anything contained in any other law for the time being in force, and subject to compliance with the provisions of this Act and the rules made thereunder, an Implementing Agency may, in respect of a Project to which this Act applies:

- (a) transfer an interest, or part of an interest, of the Implementing Agency in any present or future assets comprised in the Project to the Private Party:

Provided; that title to the immovable property of an Implementing Agency shall not be transferred to the Private Party;

- (b) transfer to the Private Party the right to receive directly revenues or receivables of the Project during the subsistence of Public Private Partnership Agreement;
- (c) permit the Private Party to create security interests over or in respect of the present or future assets created by it, revenues, or receivables, comprised in or expected, in connection with the Project in favour of any Lender providing loans for the Project;
- (d) enter into agreements with Lenders to the Project; or
- (e) agree to pay compensation for early termination of the Public Private Partnership Agreement in the manner stated therein.

18. Settlement of Disputes.—(1) All disputes arising between the Implementing Agency and the Private Party shall be decided in accordance with the terms and conditions of the Public Private Partnership Agreement.

(2) Subject to the terms and conditions of the Public Private Partnership Agreement, neither the Implementing Agency nor the Private Party shall initiate any judicial or quasi-judicial proceedings unless the remedies provided in the Public Private Partnership Agreement have been fully exhausted:

Provided that, no dispute, as aforesaid, shall remain unsettled between the Implementing Agency and the Private Party beyond the period prescribed under the terms of the Public Private Partnership Agreement.

(3) Neither the Private Party nor its agents, its contractor or sub-contractors shall stop, impede, suspend, either in whole or in part, or cause the suspension of, or otherwise delay the provision of, the services to the Users on account of pendency of any Dispute under the Public Private Partnership Agreement.

CHAPTER V

Public Private Partnership Project Procurement

19. Negotiations of the Agreement.—(1) The Implementing Agency, after the Project Proposal has been approved by the Board, shall invite the successful Private Party bidder for negotiation of the Public Private Partnership Agreement.

(2) The Authority may nominate any of its officer or employee to be part of the negotiations.

(3) Subject to the final approval of the Board, the Implementing Agency shall execute the Public Private Partnership Agreement.

20. Negotiated procurement of Project.— The Implementing Agency may enter into a negotiated procurement of a Public Private Partnership Project, in case of the following circumstances namely:-

- (a) where the Project is being undertaken on the basis of any Federal Government's bilateral treaty or arrangement; or
- (b) in any other case where the Federal Government authorizes such an exception, for reasons to be recorded in writing, in the public interest.

21. Vesting of Project.— (1) Subject to the Public Private Partnership Agreement, the Project along with all the movable and immovable properties, project physical assets, licenses, goodwill, trademarks, patents, leases, licences, all rights including intellectual property rights and interests associated with the Project shall vest with the Private Party during the tenure of the Public Private Partnership Agreement:

Provided; however that the Private Party shall not create any lien, charge or encumbrance, in favour of the Lenders, over the immovable properties of the Implementing Agency as collateral, except with the prior approval of the Board.

Provided; further that after the expiry of the Public Private Partnership Agreement all the properties as aforesaid shall stand transferred, without any lien, charge or encumbrance, to the Implementing Agency in accordance with the provisions of the Public Private Partnership Agreement.

(2) Without prejudicing the interests of the Lenders, the Private Party shall not assign, transfer, sublet or part with its possession either in whole or in part, the Project or its related services to any of the third parties, except to the extent provided for in the Public Private Partnership Agreement.

CHAPTER VI
Miscellaneous Provisions

22. No compensation for risks not covered.—The Federal Government or the Implementing Agency shall not be held liable for any claim of the Private Party for a risk, which is not specified in the Public Private Partnership Agreement.

23. Compensation and recovery of costs, dues and fees.—Notwithstanding anything contained in Public Private Partnership Agreement or in any other law for the time being in force, the Federal Government or the Implementing Agency may recover a sum due from a Private Party as if the sum is recoverable as arrears of land revenue under the provisions of the West Pakistan Land Revenue Act, 1967 (W. P. Act No. XVII of 1967).

24. Transparency and public disclosure.—The Public Private Partnership Agreement shall be a public document. Any interested person, shall be entitled to obtain a copy of it in accordance with the applicable laws.

25. Power to make rules.—The Authority, may by notification in the official Gazette and with the approval of the board may make rules for carrying out its functions under this Act.

26. Indemnity.— Without prejudice to the obligations incurred by an Implementing Agency under a Public Private Partnership Agreement, no suit, prosecution or other legal proceedings shall lie against the Federal Government, the Board, the Authority or any its officers acting for and on its behalf in furtherance of the functions of the Authority or Board, as the case may be, which, is in good faith done, or, intended to be done, under this Act, or rules made thereunder.

27. Removal of difficulties.— If any difficulty arises in giving effect to any provision of this Act, the Federal Government, by notification in the official Gazette, may make such provisions as may appear it to be necessary for the purpose of removing such difficulty.

Statement of Objects and Reasons

In order to achieve a high growth trajectory Pakistan needs quick investments in development of infrastructure to bridge the gap in this critical area. Government alone cannot provide finances due to its own limitations therefore promotion of Private sector investment in this area is critical. The use of public private partnership (PPPs) is likely to become widespread in Pakistan, with an expected surge in PPP-financed projects in the near future. The federal government has so far been modest in utilizing the PPP model in infrastructure investments, but the situation is likely to change in the near future as the present government embarks on an ambitious program of large-scale investment projects. The Planning and Development Division has announced an overall development strategy ("Vision 2025), which promotes private sector-led growth as one of its pillars. In this context, the PPP model is expected to bring a range of economic benefits such as leveraging private sector participation in financing and management of infrastructure projects. However, in order to facilitate the expected surge in PPP-financed infrastructure projects, Pakistan needs to develop a robust framework to ensure sound practices in the evaluation, prioritization, and implementation of PPPs, and an improvement in the management of potential fiscal costs and risks associated with PPP projects.

2. Accordingly, with a view to promote PPP model, it is proposed to enact the Public Private Partnership Authority Bill, 2016 that provides a regulatory framework to execute Public Private Partnerships in Pakistan so as to promote domestic and foreign private investment in infrastructure, set up transparent and efficient institutional arrangements for PPPs, and promote private sector participation in the economic development, among others through transparent and fair procurement process and in particular:

- (a) ensuring that projects are consistent with national and sectoral strategies;
- (b) ensuring value for money and budget affordability;
- (c) assessment of fiscal risks;
- (d) advise and facilitate the Implementing Agency to identify, develop, structure and procure the Projects;
- (e) prescribe and receive fee and charges,;
- (f) ensure that Public Private Partnership Agreement is consistent with the provisions of this Bill;
- (g) interact, collaborate and liaise with international agencies;

3. The bill is designed to achieve the aforesaid purpose.

SENATOR MOHAMMAD ISHAQ DAR
Minister for Finance, Revenue, Economic Affairs,
Statistics and Privatization
Member-in-charge