

THE KHYBER PAKHTUNKHWA PUBLIC PRIVATE
PARTNERSHIP ACT, 2020
(KHYBER PAKHTUNKHWA ACT NO. XLII OF 2020)

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THE KHYBER PAKHTUNKHWA PUBLIC PRIVATE
PARTNERSHIP ACT, 2020
(KHYBER PAKHTUNKHWA ACT NO. XLII OF 2020)

(First published after having received the assent of the Governor of the Khyber Pakhtunkhwa in the Gazette of the Khyber Pakhtunkhwa, (Extraordinary), dated the 09th October, 2020).

AN
ACT

to provide for participation of private sector into public sector Projects through the Public Private Partnerships in the Province of Khyber Pakhtunkhwa.

WHEREAS it is expedient to provide for promotion of socio-economic, physical infrastructure and services development in the Province of the Khyber Pakhtunkhwa through encouragement and facilitation of private sector participation in public sector projects through the Public Private Partnerships and for matters connected therewith and ancillary thereto;

It is hereby enacted by the Provincial Assembly of the Khyber Pakhtunkhwa as follows:

CHAPTER-I
PRELIMINARY

1. Short title, extent and commencement.---(1) This Act may be called the Khyber Pakhtunkhwa Public Private Partnership Act, 2020.

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

(3) It shall come into force at once.

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

(a) "Committee" means the Public Private Partnership Committee established under section 3 of this Act;

(b) "compensation" means the payments based on availability and or performance and may include rate, toll, fee or other charges imposed for the use of all or part of an infrastructure or development facility or service, unitary charges and annuity payments;

(c) "Contracting Authority" means a department or an attached department thereof, a body corporate or an autonomous body of the Government,

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local government, or any organization or corporation owned or controlled by Government or a local government;

“feasibility study” means an in-depth study carried out in the public, private or public private partnership sector and includes, determination of technical, financial, economic, legal, social and environmental feasibility of the Project;

“Government” means the Government of the Khyber Pakhtunkhwa Province;

“guidelines” mean the guidelines issued under section 32 of this Act;

“lender” means a financial institution, bank, mutual funds, companies or any other regulated entities providing financial loans and capital;

“PPP Node” means the Public Private Partnership Node, established under section 7 of this Act;

“PPP Unit” means the Public Private Partnerships Unit established under section 5 of this Act;

“prescribed” means prescribed by rules or regulation made under this Act;

“Private Partner” means a selected Private Party that carries out a Project under a Public Private Partnership;

“Private Party” means a concessionaire, contractor, lessee, joint venture or any other body corporate under the applicable law;

“Project” means any new and existing project developed or implemented in the physical, infrastructure, socio-economic and services sectors in the Public Private Partnership;

“Project Agreement” means an agreement or a set of subsidiary agreements entered into by and between the Contracting Authority and the Private Partner with Project participants for the designing, building, engineering, procurement, financing, construction, management, operation and maintenance of the Project;

“Project Development Facility” means the Project Development Facility established under section 10 of this Act;

“Province” means the Province of the Khyber Pakhtunkhwa;

“Public Partner” means the Contracting Authority that has entered into

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Public Private Partnership;

“Public Procurement Rules” mean the Khyber Pakhtunkhwa Public Procurement of Goods, Works and Services Rules, 2014 framed under the Khyber Pakhtunkhwa Public Procurement Regulatory Authority Act, 2012 (Khyber Pakhtunkhwa Act No. XI of 2012);

“Public Private Partnership” means a contractual or institutional arrangement between the Public Partner and the Private Partner, for providing or using a public asset or service in which the Private Partner bears a significant risk and management responsibilities and receives compensation for it;

“Public Private Partnership Agreement” means the agreement between the Public Partner and the Private Partner that sets forth the terms and conditions for the development and implementation of a Project;

“regulations” mean the regulations made under section 31 of this Act;

“Risk Management Unit” means the Risk Management Unit established under section 9 of this Act;

“rules” mean the rules made under section 30 of this Act;

“Unsolicited proposal” means any proposal relating to a potential Project that has not been submitted in response to a request or solicitation issued by the Contracting Authority within the context of a selection procedure; and

“Viability Gap Fund” means the Viability Gap Fund established under section 22 of this Act.

CHAPTER-II

INSTITUTIONAL ARRANGEMENTS

3. Public Private Partnership Committee.---(1) There shall be a Committee to be known as the Public Private Partnership Committee, under the Chairmanship of Chief Minister, Khyber Pakhtunkhwa, with a mandate to promote, facilitate, coordinate, approve and oversee Public Private Partnership Projects.

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The Committee shall consist of such number of other members as may be

The Committee shall regulate its procedure in such a manner as may be

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

authority for grant of approvals and award of Projects, submitted to it by a Contracting Authority through the PPP Unit.

(2) The Committee shall oversee, monitor and evaluate the Projects and review the legal, institutional and regulatory framework of the Public Private Partnerships.

(3) Without prejudice to the generality of the foregoing functions, the Committee shall-

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formulate and approve policy guidelines on Public Private Partnerships;

formulate and approve standards, guidelines and procedures for Public Private Partnerships;

approve a Project of any value submitted to it by a Contracting Authority;

approve the grant of termination payment;

authorize the signing of Public Private Partnership Agreement and any and all Project Agreements; and

perform such other functions as may be conferred on it under this Act, the rules made thereunder and any other law for the time being in force.

(4) 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, it shall have the power to-

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authorize allocations from any funds established under this Act;

authorize utilization of an amount from the fund established under the Khyber Pakhtunkhwa Hydel Development Fund Ordinance, 2001(Ord. No. XXVI of 2001) or any other funds established by Government; and

create sub-committees and delegate any of its function to them.

(5) The processing and approvals of Projects by the Committee under this Act and the rules made thereunder shall be exclusive, full and final and such Projects

shall not be required to obtain any further approvals from Government and shall not be processed in the like manner of public sector projects under the public sector development programs.

5. PPP Unit.---(1) There shall be a Public Private Partnership Unit, under the Chairmanship of the Secretary to Government Planning and Development Department.

(2) The PPP Unit shall consist of such number of other members as may be prescribed.

6. Functions of the PPP Unit.---(1) The PPP Unit shall serve as the Secretariat and technical arm of the Committee, serve as a resource center on matters relating to Public Private Partnerships and provide technical, financial, economic and or legal expertise to the Committee and liaise with any PPP Node and the Risk Management Unit established under this Act.

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

(a) assist the Committee in formulating guidelines, Project criteria and standard documentation required for a Project under this Act;

(b) assist a Contracting Authority in identification, selection, designing, prioritization, appraisal and evaluation of the Projects;

(c) submission of quarterly reviews to the Committee about progress reports submitted by PPP Nodes and or Contracting Authority regarding progress of on-going Projects and identification of new potential projects;

(d) liaise and supervise with the Contracting Authorities in their roles in the various stages of a Project cycle and provide capacity building to, and advise the Contracting Authorities or other parties involved in the planning, reviewing, coordinating, undertaking or monitoring of Projects under this Act;

(e) make recommendations for the approval, rejection or award of a Project to the Committee;

(f) make recommendations for the approval of the Public Private Partnership Agreement to the Committee;

(g) implement the recommendations and guidelines issued by the Committee;

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procurement of professional assistance and advice which it deems necessary from other Government authorities, multilateral agencies, professional bodies and private firms;

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; and

carry out such other functions as may be conferred on it by the Committee from time to time under this Act and the rules made thereunder.

7. PPP Node.---(1) There shall be a Public Private Partnership Node within each Contracting Authority, under the Chairmanship of the Principal Accounting Officer of the concerned Contracting Authority.

(2) The PPP Node shall be notified by the Contracting Authority from time to time in consultation with PPP Unit and shall consist of such number of members as may be specified in the notification.

(3) A PPP Node shall-

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prepare Public Private Partnership strategy in consultation with the PPP Unit;

identify, screen and prioritize Projects;

prepare Projects including proposals, conduct or review of feasibility studies in accordance with the guidelines and

standard documents issued by the Committee;

undertake the selection process in accordance with this Act and the rules made thereunder;

enforce the Public Private Partnership Agreement;

negotiate the Public Private Partnership Agreements and Project Agreements;

hire transaction advisors;

monitor the implementation of a Public Private Partnership Agreement;

carry out such other functions as may be conferred on it by the Committee from time to time under this Act and the rules made thereunder;

G) conduct research and gap analysis to ensure performance improvement in the implementation of Public Private Partnership;

(k) prepare and appraise the social, economic, environmental and commercial viability of the Project; and

(1) submit quarterly progress report to the PPP Unit on the progress of on-going Projects and identification of new potential Projects.

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

(a) implement the recommendations and guidelines issued by the PPP Unit or the Committee; and

(b) submit all such information as is required by the Committee or the PPP Unit.

8. Project Implementation Unit.---(1)The administrative head of the concerned Contracting Authority may establish a Project Implementation Unit which may consist of government officers, experts, professionals and consultants.

(2) The Project Implementation Unit shall administer the Public Private Partnership Agreement during the construction and operation stages of the Project.

(3) The procedure for appointment of officers, professionals and consultants shall be such as may be prescribed.

9. Risk Management Unit.---(1) Government shall, by notification in the official Gazette, establish a Risk Management Unit in the Finance Department. The Secretary to Government Finance Department shall be the head of Risk Management Unit.

(2) The head of Risk Management Unit shall be the permanent member of the Committee.

(3) The representatives of the concerned Contracting Authority not below the rank of an Additional Secretary shall also be a member of the Risk Management Unit for the project of such Contracting Authority.

(4) The Risk Management Unit shall-

(a) develop risk assessment and management guidelines for approval by the Committee;

(b) provide support and advice to the Committee and the PPP Unit with regards to affordability, fiscal risk assessment and management at all key stages in Projects;

(c) examine request for Government support and proposed risk sharing; and

(d) perform such other functions as may be prescribed in the rules or as the Committee may assign.

10. Project Development Facility.---(1)Government may establish a Project Development Facility which shall consist of such resources that are available through contributions from Federal and Provincial Governments, Government Agencies, local or foreign development partners.

(2) The Project Development Facility shall be administered and managed by the PPP Unit with the object and functions of providing financial support for conducting studies and research, appointment of consultants and experts, preparation of the feasibility studies of the Projects and capacity building and other such purposes as may be prescribed in rules or guidelines.

CHAPTER-II

PUBLIC PRIVATE PARTNERSHIP

11. Basis for Public Private Partnership.---(1) The PPP Nodes shall, in consultation with the PPP Unit, devise sector-specific Public Private Partnership strategies and establish general criteria for selection of Projects developed under the Public Private Partnership mode in accordance with the rules, regulations and guidelines.

(2) Sector strategies shall be derived from a preliminary needs assessment conducted by the relevant Contracting Authority for developing Projects under the Public Private Partnership mode.

(3) The preliminary needs assessment shall include a comparative analysis of the various options particularly in terms of best value for money, sharing of risks and performances as well as sustainability.

12. Private sector participation.---(1)Notwithstanding anything to the contrary contained in any other law for the time being in force, Government and the Contracting Authorities shall be authorized to seek participation from the private sector in appropriate Projects, subject to the provisions of this Act and the rules.

(2) Subject to the provisions of this Act and the rules the Contracting Authorities shall have the power to-

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enter into Public Private Partnership Agreements and Project Agreements with a Private Partner in one or several Project functions such as designing, financing, building, engineering, constructing, owning, managing, operating and maintaining Projects;

vest the public property, for the term of the Project, in the Public Private Partnership for financing of the Project in accordance with the terms therein. Such public property shall revert and transfer to Government upon the expiry or termination of the Public Private Partnership Agreement;

recommend to the Committee through Risk Management Unit and the PPP Unit any compensation, incentives, exemptions, concessions and guarantees to Public Private Partnership;

determine user fees, annuities, subsidies, revenue shortfall guarantees, profits, return on equity, dividends, repayment of equity, repayment of Project debt;

decide the grant of termination payments to the Private Partner subject to the provisions of the Public Private Partnership Agreement, after approval from the Committee, for the defaults of the Government entities, for the defaults of Private Partner and for force majeure events which may include value of the assets, incurred costs, repayment of debt, repayment of equity, opportunity costs, reasonable profits foregone in relation to the Project;

finance a Public Private Partnership Project in such amounts and upon such terms and conditions as may be determined under the Public Private Partnership Agreement and such financing may be secured against the revenues and assets of the Project; and

enter into an international commercial arbitration with mutually agreed venue under the Public Private Partnership Agreement for the resolution of disputes in case of foreign equity investments and foreign loans.

CHAPTER-IV PROCEDURE FOR PROJECT PROCESSING

13. Procedure for Project processing.---(1) The Contracting Authority, with the assistance of its relevant PPP Node, shall process the Projects expeditiously by providing one window facility to the Private Sector.

(2) The Project shall be processed in such a manner and in accordance with such procedure and within such timelines as may be prescribed.

(3) The Committee may approve alternative or fast track procedures as may be prescribed for processing Projects in general or for prioritized sectors.

14. Evaluation and appraisal of Project.---The Project identified by a Contracting Authority or a Private Party, as the case may be, to be executed in Public Private Partnership mode shall be evaluated and appraised in such a manner as may be prescribed in rules, regulations and the guidelines issued by the Committee from time to time.

15. Approval of Project proposal.---The Project proposal shall be placed before the Committee for approval and after approval of the Committee, the concerned Contracting Authority shall commence the Project development activities and selection of Private Partner under this Act, the rules, regulations and guidelines.

16. Approval of Project and signing of Public Private Partnership Agreement.---

(1) After completion of selection proceedings in the prescribed manner, the Project shall finally be placed before the Committee for approval and authorization to execute Public Private Partnership Agreement with the Private Partner.

(2) After approval of the Committee under sub-section (1), the Contracting Authority shall execute the Public Private Partnership Agreement and Project Agreements with the Private Partner.

17. Financial close and incidental matters.---(1) Subject to the Public Private Partnership, the Private Partner shall be responsible for the financial close of the Project, construction, refurbishment, and or, operation and management of the Project, whereas the Public Partner shall be responsible for the arrangement of all consents, approvals and authorizations.

(2) Government and or the Contracting Authority may permit the use, lease and transfer of its assets, resources, works and or, services for the term of Public Private Partnership Agreement in consideration of its role as a Public Partner.

(3) Public assets vested in the Public Private Partnership upon reversion to Government at the expiry or termination of the Public Private Partnership Agreement

shall be free and clear of liens, charges, mortgages, encumbrances and interests.

(4) The Projects shall be processed as per the rules and guidelines within defined timelines.

CHAPTER-V

SELECTION OF THE PRIVATE PARTNER

18. Selection proceedings.---(1) Notwithstanding, anything contained in the Public Procurement Rules, the selection of the Private Partner shall be exclusively conducted in accordance with the provisions of this Act and the rules made thereunder.

(2) Subject to this Act and rules made thereunder, the normal procedure for the selection of Private Partner shall be through the open competitive bidding.

(3) Government or the Contracting Authority may in some cases process the Project proposals through alternate processes for selection of Private Partner through restricted bidding, competitive negotiations, negotiated bidding, framework Agreements or through unsolicited proposals in the manner as may be prescribed.

19. Special exemption.---Notwithstanding anything contained in this Act, the rules made thereunder or in the Public Procurement Rules, the procedure for the selection of the Private Partner shall not apply to—

(a) Projects that are undertaken in Public Private Partnership mode but where the Private Party is an entity, agency, corporation, company, a consortium or other body or institution owned or controlled by the Federal Government or Government;

(b) Projects where the Private Party or a majority share holders in the Private Party is state owned enterprise, entity, agency, corporation or company, owned or controlled directly or indirectly by a foreign state; and

(c) Projects undertaken as a result of international obligations, commitments or arrangements of Government arising out of an international agreement or arrangement with a foreign state or states, or any international

multilateral financial institutions.

CHAPTER-VI

MODES OF FINANCING

20. Modes of financing Projects.---The Projects may be financed through the following modes, namely:

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

(b) enter into leases, concessions, grants, financing documents and loan agreements;

(c) access any designated funds;

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

(e) secure any financing with the pledge of security interests in, or lien on, any or all of its assets, including all of its assets interests in the Project including but not limited to asset financing and collateralization.

21. Agreement with lenders.---Government or the Contracting Authority may enter into a direct agreement with the secured lenders of the Private Partner pursuant to which all the rights, interests and title pertaining to the Project under the Public Private Partnership Agreement are assigned to the secured lenders and in the event of default of the Private Partner they or their duly appointed agents shall have the right to step in and replace the Private Partner or any of its contractors to cure the default and avoid termination of the Public Private Partnership Agreement and assume the rights and obligations of the Private Partner under the Public Private Partnership Agreement.

CHAPTER-VII INCIDENTAL PROVISIONS

22. Viability Gap Fund.---Government may establish a Viability Gap Fund in the prescribed manner to support Projects, that are-

(a) economically and socially viable, but not financially attractive being constrained by affordable user levies; and

(b) deficit in Project revenues, returns and or expenditures during construction and operation phases of the Projects are necessary to be financed.

23. Compliance with Environmental Standards.---The Private Partner shall make compliance with Environmental Standards as per National Environmental Quality Standards (NEQS) and Khyber Pakhtunkhwa Environmental Protection Act, 2014 as applicable.

24. Compensation.---(1) The Committee may formulate, prescribe, modify, review and revise compensation for Projects.

(2) The Committee may exempt, through notification in the official Gazette, certain classes of users from payment of any form of compensation.

(3) The Committee may entrust the Public Private Partnership with collection of any form of compensation.

(4) The Committee shall set the compensation amounts at levels that ensure the financial viability of the Project and fully cover the financing costs, development

costs, engineering, procurement and construction costs, management cost, operations and maintenance expenses, tax expenses, cost overruns plus a fair and equitable and reasonable return to the Public Private Partnership.

(5) Notwithstanding the foregoing, if the Committee elects to maintain the compensation at levels below that would ensure financial viability as described herein, then it shall compensate the Public Private Partnership for the difference through the Viability Gap Fund.

25. Reports and audits.---The Public Partner 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 Government, as the case may be.

26. Public disclosure.---(1) A Public Private Partnership Agreement or any other Project Agreement shall be a public document.

(2) The Public Partner shall make arrangements for inspection or copying a Public Private Partnership Agreement or any Project Agreement subject to the payment of the prescribed fee.

(3) Any person may, subject to the payment of prescribed fee and any other reasonable restrictions, inspect or obtain copies of a Public Private Partnership Agreement or any Project Agreement.

27. Recovery of costs, dues and fees.---(1)The Public Partner may recover a sum due from the Public Private Partnership, as ascertained through the dispute resolution under the Public Private Partnership Agreement, 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) The Public Partner 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).

28. Protection of actions taken in good faith.---No suit, petition, civil claim or damages, criminal charge or liability or other legal proceedings shall lie against or attach to the Committee, PPP Unit, PPP Node or a Contracting Authority in respect of anything done or intended to be done in good faith under this Act and the rules or regulations made thereunder.

29. Overriding effects.---Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall have an overriding and

exclusive effect in relation to the Projects under this Act.

30. Power to make rules.---Government may, by notification in the official Gazette,

make rules for carrying out the purposes of this Act.

31. Power to make regulations.---The Committee may, by notification in the official Gazette, make regulations for prescribing procedures under this Act.

32. Power to issue guidelines.---Subject to this Act, the Contracting Authority or PPP Unit may issue guidelines on all matters for which such guidelines, clarifications or advisories are expedient.

33. Transitional provision.---A Public Private Partnership Agreement signed with a Private Partner under the repealed Act, prior to the coming into force of this Act, shall be valid and shall be deemed to have entered between Public Partner and the Private Partner under this Act.

34. Repeal and savings.---(1) The Khyber Pakhtunkhwa Public Private Partnership Act, 2014 (Khyber Pakhtunkhwa Act No. IX of 2014) is hereby repealed.

(2) Notwithstanding the repeal of the Khyber Pakhtunkhwa Public Private Partnership Act, 2014 (Khyber Pakhtunkhwa Act No. IX of 2014), anything done or any action taken or purported to have been done or taken under the repealed Act shall, including office orders, Government notifications, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act.

(3) All debts, duties and obligations incurred or contracts entered into or rights, claims or assets acquired and all matters and things engaged to be done by, with or for the Committee, PPP Unit or the Contracting Authority shall be deemed to have been incurred, entered into, acquired or engaged to be done under this Act.

(4) All suits and other legal proceedings instituted by or against the Committee, PPP Unit or the Contracting Authority shall be deemed to be suits and proceedings under this Act and shall be preceded or otherwise dealt with accordingly.

(5) All the Projects commenced or undertaken under the repealed Act shall be deemed to have been validly commenced or undertaken under the provisions of this Act.

(6) A reference to the Committee, PPP Unit, PPP Node or the Contracting

Authority in any statutory instrument or document shall, unless the context otherwise requires, be read and construed as reference to this Act.