



**ISLAMIC REPUBLIC
OF
AFGHANISTAN
MINISTRY OF JUSTICE**

**OFFICIAL
GAZETTE**

Public Private Partnership (PPP) Law

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CHAPTER ONE
GENERAL PROVISIONS

Basis

Article 1:

This Act has been enacted pursuant to the provisions set forth in clause (2) Articles 9 and 10 of the Constitution of the Islamic Republic of Afghanistan.

Objectives

Article 2:

The objectives of this law are as below:

1. Regulating issues relevant to Public-Private Partnership on the basis of the principles of transparency, open competition, and cost-effectiveness;
2. Identifying the opportunities of joint investment of Public-Private sectors;
3. Providing an opportunity of utilizing efficiently the public estates and assets, capacities, expertise and technology in the private sector;

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4. Encouraging private investment for carrying out the Public-Private Partnership projects;
 5. Ensuring availability of funds for infrastructural projects and provision of public services;
 6. Facilitating efficient and swift economic and social development and ensuring public interests.

Definitions

Article 3:

The following terms shall have the following meanings in this law:

- 1- Public-Private Partnership [(PPP)]:** a partnership between an Entity and a Private Party for the purpose of infrastructure development and public services provision, funding, and development of them, in a manner that responsibilities , risks, profit and loss are shared by the Entity and the Private Party on an equitable basis, the Private Party performs the functions of the Entity and utilizes its assets/resources for a particular period of time;
- 2- Project:** are activities implemented for the purpose of providing infrastructure and offering public services by Public Private Partnership;

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- 3- **Public-Private Partnership Contract:** is a written agreement between an Entity and a Private Party highlighting the conditions and specification of the Project and obligations of the parties thereto;
 - 4- **Value for Money:** comparison of the net profit accruing from implementing a project through public sector *vis-à-vis* its implementation through Public-Private Partnership considering qualitative and quantitative advantage and selection, whatever course best serves interests of the government;
 - 5- **Feasibility Study:** a preliminary study to be undertaken by an Entity or a Private Party for realization of project goals;
 - 6- **Viability Gap Fund:** Funds that the Ministry of Finance delivers, in the form of grant or financial assistance for filling funding gaps of a project sustainability and protect interests of the Private Party in case it is realized that the project, without such assistance, cannot be completed;
 - 7- **Project Development Fund:** a fund established in the light of the provisions of this law by the Ministry of Finance for the purpose of conducting feasibility study, recruiting of experts and other financial and economic analysis of the project;

8- Unsolicited Proposal: a proposal relating to a Public-Private Partnership Project that is not submitted in response to a request or solicitation issued by an Entity;

9- *Idaara* (Entity): Ministries, General Directorates, Independent Commissions, Municipalities, State owned enterprises, State owned companies and semi-government companies in which share of the State ownership exceeds twenty-five percent (25%).

Scope of Application

Article 4:

1- This Law shall apply to entities involved in financing projects through Public-Private Partnership;

2- The Ministry of Finance shall prepare separate procedure for Projects processing where the anticipated Investment Value is below a minimum amount;

The minimum amount referred to above shall be fixed by the High Economic Council at the recommendation of the Minister of Finance;

3- Where the rules and regulations of international Organizations and donor agencies are in conflict with the provisions of this law, the government may approve the rules and regulations of such organizations for a Public-Private Partnership project; provided

that the approval is prompted by interests and wellbeing of the public.

Supporting the Public-Private Partnership

Article 5:

The government shall be obliged to support, encourage and ensure the **impunity** of investment of private sectors in the Public-Private Partnership Projects.

CHAPTER TWO

LIABILITIES OF THE ENTITIES

Central Public-Private Partnership Authority

Article 6:

- 1- A Central Public-Private Partnership Authority is working within the Ministry of Finance for the purpose of regulating policies related to Public-Private Partnership, analysis and assessment, providing technical support to entities, processing and developing Public-Private Partnership and other in related activities;
- 2- The Central Public-Private Partnership Authority is hereinafter referred to as Central Partnership Authority.

Powers and Functions of the Central Partnership Authority

Article 7:

The Central Partnership Authority shall have the following powers and functions:

- 1- Providing technical advice to the entities, High Economic Council, and other relevant parties pursuant to provisions of this law, the Regulation, and the Public Private Partnership Procedure.
- 2- Cooperation with other sectorial entities in developing and preparing policies for encouragement, attracting and support of bidders/interested parties in Public-Private Partnership;
- 3- Registering, analyzing and reviewing concepts of entities and unsolicited proposals of the private party, and ensuring their compliance with the National and Sectorial Development Plans; National priorities social, economic and environmental impacts; and forwarding the required proposals to the High Economic Council for approval, modification or rejection of the same;
- 4- Presenting the findings of feasibility study to the High Economic Council in accordance with the provisions of the Regulation and Public Private Partnership Procedure;
- 5- Presenting Public-Private Partnership Contract to the National Procurement Authority, following its comprehensive review and

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- analysis, along with all the necessary/supporting documents for approval;
- 6- Ensuring project implementation in light of the provision of this law, the Regulation and the Partnership Contract;
 - 7- Reviewing applications on the ground of government support to the project and providing advice whenever deemed necessary to the Minister of Finance;
 - 8- Preparing procedures, guidelines, issuing circulars and updating them whenever deemed necessary;
 - 9- Liaising with the relevant Entities to identify, design, develop, appraise, procure and implement projects;
 - 10- Managing the project development fund and reviewing applications and providing consultation to respective authority on the method of utilizing the Project Development Fund;
 - 11- Formulating a policy for and facilitating the use of information technology in respect of the Partnership projects activities, including, establishing database for registration and facilitating procurement, and dissemination of this Law, the Regulations, PPP Procedure, and circulars related to the Public-Private Partnership Projects;

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- 12- Evaluating the capacity and professional skills of the Entities and/or the PPP Units in Partnership Projects;
 - 13- Consolidating annual reports received from Entities and/or the PPP Units and presenting the same to the relevant authority for further improvement;
 - 14- Supervising the process of procurement for Public-Private Partnership to ensure that the rules of procurement are followed in accordance with the provisions of this law, the Regulation, and PPP procedure for Public-Private Partnership Projects;
 - 15- Performing such other functions conferred on it by a competent authority.

Establishment of Public-Private Partnership Unit

Article 8:

- 1- The entities may establish the Regulations, PPP Procedure, and Guidelines of Public-Private Partnership Unit with prior approval of the Central Partnership Authority for the purpose of regulating and implementing of the obligations set forth in the law in an enhanced manner;

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- 2- Notwithstanding, the Public-Private Partnership Unit may not conclude Partnership Contracts for itself or the entity it represents;
 - 3- The mode of operation, powers and functions of Public-Private Partnership Units shall be determined by the relevant Regulation.

Establishment of Project Advisory Committee

Article 9:

- 1- To advise the relevant entity in relation to evaluation of the Feasibility Study for a Project, preparation of bid documents, Partnership Contract and supervising a project, a Project Advisory Committee shall be established in relevant entities with the following membership:
 - 2- Representative of the Entity concerned as Chairperson
 - a. Representative of the Ministry of Economy as Member
 - b. Representative of the Central Partnership Authority Member
 - c. Representative of the Afghanistan Chamber of Commerce and Industries (ACCI) as Member
 - d. Representative of other Entities nominated by the Minister of Finance
 - 3- The mode of operation of the Committee mentioned in Clause (1) shall be determined by relevant Regulation.

High Economic Council

Article 10:

- 1- The Ministry of Finance shall, after evaluation, forward the concept of a project developed by an Entity and/or the unsolicited proposal along with the feasibility study of the same to the High Economic Council;
- 2- The High Economic Council may approve, reject, or refer the concept presented to it back to the Ministry of Finance for improvement or modification, as the case may be;

In the event of approval of feasibility study of a project by the High Economic Council, the Ministry of Finance shall refer the matter to the Ministers Cabinet of the Islamic Republic of Afghanistan for approval.

National Procurement Commission

Article 11:

- 1- The National Procurement Commission may approve, reject, or refer the Partnership Contract to the Ministry of Finance for re-evaluation;
- 2- The pecuniary jurisdiction of the Awarding Authority (*aamir-i-ita*) in relation to the Public-Private Partnership Contracts at the Center as well as Provinces shall be determined by the National

Procurement Commission at the proposal of the Ministry of Finance;

- 3- Partnership Contracts shall be approved by the Awarding Authority having pecuniary jurisdiction;
- 4- In case a Public-Private Partnership Agreement exceeds the pecuniary jurisdiction of the Awarding Authority, he shall, following its approval, forward the Contract to the National Procurement Commission for the approval.

CHAPTER THREE

PRINCIPLES OF PUBLIC-PRIVATE PARTNERSHIP

The Principles of Public-Private Partnership

Article 12:

Public-Private Partnership shall be operated based on rule of law, justice [and fairness], transparency, and open competition, as follows:

- 1- The entire performances of Public-Private Partnership is regulated by this law and other legislative documents;
- 2- Equal and fair treatment of all of the bidders in Public-Private Partnership Projects;

3- Access to information for all the stakeholders for Public-Private Partnership in every phase of the process;

4- No discrimination and limitation in all phases of the bidding.

Ensuring Public Interest

Article 13:

The Public-Private Partnership shall operate based on Partnership Contract considering public interest, value for money, risk sharing and protection of the environment.

Risks Resulted from Public-Private Partnership

Article 14:

The risks resulted from implementation of a Public-Private Partnership Project, assessment, control and its management shall be determined by virtue of one side of the Public-Private Partnership Contract.

Guaranteeing Rights of the Private Party

Article 15:

Guarantee of non-intervention in the Public-Private Partnership, protection of assets and the right of ownership of the Private Party along with all the relevant issues shall be regulated in the relevant regulation.

CHAPTER FOUR

**DESIGN AND IMPLEMENTATION OF THE PUBLIC-
PRIVATE PARTNERSHIP**

Areas of Public-Private Partnership

Article 16:

Unless otherwise prohibited by the law, the Government may conclude investment contracts in Public-Private Partnership projects involving Power/Energy generation, Communications, Telecommunication, Construction, Culture, Medical/Health, Agriculture and Irrigation, Education and Higher Education, Environment and other areas.

Models of Public-Private Partnership

Article 17:

- (1) The Project shall be implemented using one of the following models:
- a. Build-Operate-Transfer (“BoT”);
 - b. Renovate-Operate-Transfer (“ROT”);
 - c. Build-Transfer (“BT”);
 - d. Build-Own-Operate (“BOO”);
 - e. Build-Lease-Transfer (“BLT”);
 - f. Design-Build-Finance-Operate (“DBFO”);

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- g. Operating Concession (“OC”);
 - h. Lease Contracts (“LC”);
 - i. Management Contracts (“MC”);
 - j. Contract-Add-and-Operate (“CAP”).

(2) Models other than those specified in Clause (1) or variants of those models specified therein may be adopted depending on the nature and requirements of the specific Public-Private Partnership Project could be proposed to the government by the Directorate of Public-Private Partnership, if deemed necessary, and in case of approval of any such model, the same shall be added to the PPP Procedure.

(3) The requirements and methods of utilizing the models referred to above in Clause (1) shall be regulated in the PPP Procedure.

Methods of Procurement of a Public-Private Partnership

Article 18:

- 1- Following approval of concept of a project and its feasibility study by the Cabinet of the Islamic Republic of Afghanistan an Entity is obliged to administer a Project of Public-Private Partnership on any of the following three methods:
- a. Open Bidding;
 - b. Competitive Dialogue;
 - c. Direct Procurement.

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- 2- The Entity may commence single stage tender process for inviting tender documents from Private Parties eligible to participate in the process;
 - 3- The Entity may nevertheless opt for a two stage tender process in case it apprehends that, on technical grounds, it is improbable to describe the characteristics of the project in the request for technical proposals;
 - 4- The Entity shall conclude the contract of Partnership Project with the preferred bidder in light of the provisions of this Law and the relevant Regulation;
 - 5- The Central Partnership Authority, if it deems necessary, may propose to the High Economic Council modes of procurement in addition to those prescribed in Clause 1 of this article;
 - 6- The manner of operation and requirements of utilizing the modes prescribed in Clause 1 of this Article along with procurement securities and matters related to Partnership procurement shall be regulated in relevant regulation;
 - 7- Public-Private Partnership shall be administered on the basis of open bidding. Nonetheless, in cases where open bidding is not feasible, the Entity, in consultation with the Central Partnership Authority, might choose any of the modes referred to in Clause 1 of this Article in accordance with the Regulation and relevant

Operating Procedures spelling out the reasons for the choice so made.

Unsolicited Proposal

Article 19:

- 1- An Private Party may submit an unsolicited proposal for implementing a Project to the relevant Entity or the Central Partnership Authority;
- 2- Matters pertinent to unsolicited proposals by Private Parties are regulated in the Regulation and PPP Procedure.

Public-Private Partnership Project Cycle

Article 20:

- 1- The stages of a Public-Private Partnership Project are as follow:
 - a. Identifying a project for Public-Private Partnership which encompasses a variety of activities commencing at design of a project and ending by approval of the feasibility study of the same;
 - b. Selecting the Private Party which begins at preparation of the draft bidding documents and ends at the concluding of the Public-Private Partnership Contract;

c. Implementation of the Public-Private Partnership Contract and honoring the commitments agreed upon by the Parties to the Contract.

2- All the matters pertinent to the stages enlisted in the Clause 1 above are regulated by the Public-Private Partnership Regulation.

Viability Gap Fund

Article 21:

1. The Ministry of Finance, on the recommendation of the Central Partnership Authority, may constitute a fund to be called the Viability Gap Fund with initial funds to be specified;
2. Moneys in the Viability Gap Fund shall be used, after due diligence, to extend viability gap finance to projects which, in the opinion of the Ministry of Finance and approved by the High Economic Council, are economically and socially viable, but which may not be implemented in the absence of financial support from the Government;
3. The Viability Gap Fund will be administered by the Central Partnership Authority, who shall, for efficient utilization of the funds available therein, enact a separate Procedure.

Project Development Fund

Article 22:

- 1- The Ministry of Finance, on the recommendation of the Central Partnership Authority, may constitute a fund to be called the Project Development Fund with initial funds to be specified keeping in view the financial capability of the government;
- 2- The funds available at the Project Development Fund shall only be used to provide financial support for conducting studies and research, appointment of experts and consultants, preparing feasibility studies, capacity building and other purposes as may be prescribed in the Procedures of the Project Development Fund;
- 3- The Project Development Fund shall be administered and managed by the Central Partnership Authority in accordance with Procedure for administration of the Project Development Fund;
- 4- To efficiently regulate and administer the funds at the Project Development Fund, the Central Partnership Authority shall enact a separate Procedure.

**Supervision and Evaluation of Public-Private Partnership
Projects**

Article 23:

- 1- A Private Party is obliged report on the progress of the Project and a financial report of the same to the Ministry of Finance;
- 2- The relevant Entity and the Ministry of Finance shall supervise [and evaluate] all matters related to the Public-Private Partnership Projects;
- 3- The mode [and extent] of supervision and evaluation shall be regulated by a Regulation.

Dispute Resolution

Article 24:

Disputes arising between Entity and Private Party shall be settled in accordance with Public-Private Partnership Contract.

CHAPTER FIVE

FINAL PROVISIONS

Enacting Regulations and Procedures

Article 25:

The Ministry of Finance, for enhanced implementation of this law, may propose regulations and enact and approve Procedures.

Entry into Force

Article 26:

This Law shall enter into force when signed and shall be published in the Official Gazette thereupon nullifying all rules and regulations repugnant to it.