THE PUBLIC-PRIVATE PARTNERSHIP ACT, 2009

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SCHEDULE

GOVERNMENT OF ZAMBIA

ACT

No. 14 of 2009

Date of Assent: 26th August, 2009

An Act to promote and facilitate the implementation of privately financed infrastructure projects and effective delivery of social services by enhancing transparency, fairness and long term sustainability and removing undesirable restrictions on private sector participation in the provision of social sector services and the development and operation of public infrastructure; establish a Public-Private Partnership Unit and provide for its functions; establish the Public-Private Partnership Council and provide for its functions; provide for public-private partnerships for the construction and operation of new infrastructure facilities and systems and the maintenance, rehabilitation, modernisation, expansion and operation of existing infrastructure facilities and systems and the provision of social sector services; develop general principles of transparency, economy and fairness in the award of contracts by public authorities through the establishment of specific procedures for the award of infrastructure projects and facilities and provision of social sector services and rules governing public-private inception, procurement, contracting and management of public-private partnerships; provide for the implementation of public-private partnership agreements between contracting authorities and concessionaires; and provide for matters connected with, or incidental to, the foregoing.

[28th August, 2009

ENACTED by the Parliament of Zambia. Enactment

PART I
PRELIMINARY

1. This Act may be cited as the Public-Private Partnership Act, 2009, and shall come into operation on such date as the Minister may, by statutory instrument, appoint. Short title and commencement

Application

2. This Act applies to infrastructure projects and facilities, and the provision of social sector services as may be prescribed by the Minister, implemented through the Public-Private Partnership Unit, but does not apply to the following infrastructure projects or infrastructure facilities:

(a) projects which are undertaken by any joint venture between any statutory body, Government Ministry or department, statutory body or local authority;

(b) projects between any statutory body and any Government Ministry or department;

(c) projects which may be taken over by any concessionaire or private sector entity on privatisation or dis-investment by any Government Ministry, department, statutory body, State corporation, local authority or agency; or

(d) projects which have been expressly excluded from the provisions of this Act or which are not prescribed by the Minister.

Interpretation

3. In this Act, unless the context otherwise requires—

"affordable" in relation to an agreement, means a contractual arrangement where a contracting authority is able to meet any financial commitment likely to be incurred under the agreement from its existing or future budgetary funds;

"agreement" means a public-private partnership agreement entered into in accordance with this Act which may incorporate any approvals, licences, permits and authorisations necessary for its implementation;

"asset" includes an existing asset of a relevant contracting authority or a new asset to be acquired for the purposes of entering into an agreement;

"bid" means a tender, an offer, a proposal or price quotation, given in response to an invitation to participate in an infrastructure facility or infrastructure project;

"bidder" means any person, including a group of persons, that participates in selection proceedings relating to a project;

"bidding documents" means the tender solicitation documents or other documents for solicitation of bids, on the basis of which bidders are to prepare their bids;

"bidding consortium" means a situation where a proposal for an infrastructure project or infrastructure facility is made by more than one person, and "bidding consortia" shall be construed accordingly;

"concessionaire" means a person from the private sector who undertakes an infrastructure project or infrastructure facility or the provision of any social sector services under a public-private partnership agreement, other than a contracting authority;

"contracting authority" means the public authority that has the power to enter into an agreement for the implementation of an infrastructure project or infrastructure facility or the provision of any social sector services under any law, and includes any Ministry, Government department, local authority or statutory body;

"contingent liability" includes Government's guarantee for loan and foreign currency transfer and step in function in the event of default by the relevant contracting authority;

"Council"means the Public-Private Partnership Council established under section *six;*

"generic risks" means any circumstances that have the potential to adversely affect the development of, or interests of the parties to, an infrastructure project or infrastructure facility or the provision of any social sector services or the interest of a contracting authority, in the nature of construction period risk, operation period risk, market and revenue risk, finance risk, legal risk and miscellaneous risk, as prescribed by the Minister;

"infrastructure facility" means any physical facility and systems that directly or indirectly provide services to the general public;

"infrastructure project" means the design, construction, development and operation of any new infrastructure facility or the rehabilitation, modernisation, expansion or operation of any existing infrastructure facility;

"local authority" has the meaning assigned to it under the Local Government Act; Cap. 281

"material default" means any failure of a concessionaire to perform any duty under a public-private agreement which affects or will affect the delivery of service to the public, and remains unsatisfied after a reasonable period of time and after the concessionaire has received written notice of the failure from the Unit;

"National Council for Construction" means the Council established under the National Council for Construction Act, 2003; Act No. 13 of 2003

"preferred bidder" means a bidder, including any bidding consortium, selected as a successful bidder during the competitive selection process;

"project" means an infrastructure project, an infrastructure facility, or the provision of any social sector service, as the case may be;

"public-private partnership" means investment through private sector participation in an infrastructure project or infrastructure facility;

"public-private partnership agreement" means a contractual arrangement between a contracting authority and a concessionaire, made in accordance with this Act, in which the concessionaire—

(a) undertakes to perform or undertake any infrastructure project or infrastructure facility as specified in the First Schedule or as prescribed;

(b) undertakes to provide or provides such social sector services as may be prescribed;

(c) assumes substantial financial, technical and operational risks in connection with the performance of the institutional function or use of State property; and

(d) receives consideration for performing a public function or utilising State property, either by way of —

(i) a fee from any revenue fund or a Ministry's budgetary funds;

(ii) user levies collected by the concessionaire from users or customers for a service provided by it; or

(iii) a combination of the consideration paid under sub-paragraphs (i) and (ii);

"regulatory agency" means a public authority that is entrusted with the power to issue and enforce the laws governing infrastructure development or the provision of services;

"Technical Committee" means the Public-Private Partnership Technical Committee established under section *ten;*

"Unit" means the Public-Private Partnership Unit established under section *four;*

"unsolicited proposal" means any proposal relating to the implementation of an infrastructure project or infrastructure facility that is not submitted in response to a request or solicitation issued by the Unit or a contracting authority within the context of a competitive selection procedure;

"user levy" means the right or authority granted to a concessionaire by the contracting authority to recover investment and a fair return on investment and includes

tolls, fees, tariffs, charges or other benefit whatsoever called;

"value for money" means the carrying out of the institutional function of a contracting authority or the use of State property by a concessionaire, in terms of an agreement, which results in a net benefit to the contracting authority or consumer, defined in terms of cost, price, quality, quantity, risk transfer or a combination thereof; and

"Zambia Development Agency" has the meaning assigned to it in the Zambia Development Agency Act, 2006. Act No. 11 of 2006

PART II

THE PUBLIC-PRIVATE PARTNERSHIP UNIT, COUNCIL AND TECHNICAL COMMITTEE

Establishment of Public-Private Partnership Unit

4. (1) There is hereby established the Public-Private Partnership Unit which shall be responsible for the implementation of the provisions of this Act.

(2) The Unit shall be a department in the Ministry responsible for finance and shall be under the control and supervision of the Minister responsible for finance.

(3) The expenses of the Unit shall be charged upon and issued out of the general revenues of the Republic.

Functions of Unit

5. (1) The functions of the Unit are to—

(a) promote the participation of the private sector in the financing, construction, maintenance and operation of any project irrespective of its cost;

(b) advise Government on administrative procedures in relation to project development and on all matters of policy relating to public-private partnerships;

(c) conceptualise, identify and categorise projects for purposes of this Act and prepare a project register as may be Prescribed;

(d) co-ordinate with contracting authorities in respect of any project;

(e) develop technical and best practice guidelines in relation to all aspects of public-private partnerships, standardised bidding documents and public-private partnership agreement provisions for purposes of this Act and as may be prescribed;

(f) receive and make an assessment of any proposed project submitted to it and give its recommendations to the contracting authority as to whether the project or facility-

(i) is affordable to a contracting authority;

(ii) provides value for money; and

(iii) presents optimum transfer of technical, operational and financial risks to the concessionaire;

(g) examine the request for proposals to ensure conformity with the approved feasibility study and as may be prescribed;

(h) monitor the competitive selection process and provide for review of the process if so required, under this Act;

(i) monitor progress of implementation of public-private partnerships;

(j) facilitate the internal and external auditing of projects and prepare a road map for project development;

(k) in liaison with the Zambia Development Agency, facilitate and market investment in public-private partnerships;

(l) identify inter-sectoral linkages and facilitate approvals from the Ministry responsible for finance required under this Act;

(m) approve terms of reference for consultancy assignments for a project and the consultant selection process for such assignment in liaison with the Technical Committee;

(n) determine financial support and approve the allocation of contingent liability for any project, as prescribed by the Minister;

(o) monitor issues pertaining to user levies and recommend to the Council, in liaison with the appropriate regulatory agency, mechanisms and procedures for setting, revising and collecting user levies and the settlement of disputes relating to user levies, notwithstanding any other law to the contrary;

(p) train, and provide advisory services to, project officers; and

(q) promote public-private partnership awareness and advocacy in Zambia.

(2) The Unit shall be responsible for ensuring the proper implementation, management, enforcement and monitoring of any agreement and the reporting by a concessionaire on an agreement.

(3) The Unit shall exercise and perform such other powers and functions as are conferred or imposed on it by, or under, this Act or any other written law.

Establishment of Public-Private Partnership Council

6. (1) There is hereby established the Public-Private Partnership Council.

(2) The provisions of the Second Schedule apply to the Council.

Functions of Council

7. (1) The functions of the Council are to—

(a) formulate policies relating to public-private partnerships for purposes of this Act;

(b) approve projects for purposes of this Act;

(c) approve the preliminary award of agreements under this Act;

(d) ensure competition, transparency, fairness and equity in the selection process under this Act;

(e) make recommendations to the contracting authority on generic risk sharing principles for any project and the grounds for entering into negotiations with a preferred bidder;

(f) give directions to any contracting authority, regulatory agency or concessionaire regarding the implementation of any project and the contracting authority, regulatory agency or concessionaire shall comply with the directive, subject to any other written law;

(g) set time limits for the clearance of any project and review the time limits periodically;

(h) resolve issues relating to the project approval process; and

(i) refer any bid received by it to an appropriate contracting authority for examination and evaluation;

(2) The Council shall approve or reject a project or award of an agreement before it within twenty one days of receiving a recommendation on it from the Technical Committee.

(3) The Council shall, in the performance of its functions under this Act, take into consideration the recommendation of the Technical Committee.

(4) In the discharge of its functions under this Act, the Council may—

(a) commission any study relevant to the determination of the award of any agreement;

(b) request any contracting authority, regulatory agency, concessionaire or any other body or person to furnish the Council with information, details, documents and particulars required in connection with or relating to any project;

(c) request any professional or technical assistance from any appropriate body or person in Zambia or elsewhere; and

(d) inspect, visit, review and monitor any project and its implementation, execution, operation and management.

(5) The Council may —

(a) request the chairperson, supervising officer or chief executive officer of a contracting authority to—

(i) produce any records or other document relating to a project; and

(ii) answer all relevant questions, on a project as requested by the Council; and

(b) examine any record or other document submitted under paragraph (a) and take copies or extracts from them.

(6) Any person to whom a request is made under subsection (5) who—

(a) fails to comply with the request; or

(b) refuses to answer or gives any false or misleading answer to any question lawfully put by the Council;

commits an offence and is liable upon conviction, to a fine not exceeding five hundred thousand penalty units or to imprisonment for a term not exceeding five years, or to both.

(7) Where the Council makes recommendations under paragraph (e) of subsection (1), any change in the terms of the agreement shall be submitted by the contracting authority to the Council for final approval before the signing of the agreement.

(8) The Council may delegate any of its functions to the Technical Committee.

Composition of Council

8. The Council shall consist of the following part-time members:

(a) the Minister responsible for finance, who shall be the Chairperson;

(b) four Ministers appointed by the President, one of whom shall be designated the Vice-Chairperson;

(c) not more than four other persons who shall be appointed by the President on such conditions as the President may determine.

Secretary to Council

9. (1) The Permanent Secretary in the Ministry responsible for finance shall be the Secretary to the Council.

(2) The Secretary shall be responsible for the day-to-day affairs of the Council under the general supervision of the Chairperson.

Constitution of Public-Private Partnership Technical Committee

10. (1) There is hereby constituted the Public-Private Partnership Technical Committee, which shall consist of the following part-time members appointed by the Minister:

(a) the Secretary to the Treasury, as Chairperson;

(b) a representative of the Attorney-General;

(c) the Permanent Secretary of the Ministry responsible for works and supply;

(d) the Permanent Secretary of the Ministry responsible for industry;

(e) the Permanent Secretary of the Ministry responsible for land;

(f) the Permanent Secretary of the Ministry responsible for local government;

(g) a representative of the Engineering Institution of Zambia;

(h) a representative of the National Council for Construction;

(i) a representative of the Environmental Council of Zambia;

(j) a representative of the Zambia Public Procurement Authority;

(k) a representative of the Economic Association of Zambia, nominated by that Association; and

(l) two persons appointed by the Minister.

(2) The Minister shall appoint the Vice-Chairperson from among the members.

(3) Subject to subsection (4), the members of the Technical Committee referred to in paragraphs (g) to (l) of subsection (1) shall hold office for a period of three years from the date of appointment and are eligible for appointment for a further term of three years.

(4) The office of a member becomes vacant—

(a) if the member is absent, without reasonable excuse, from three consecutive meetings of the Technical Committee of which the member has had notice;

(b) upon the member's death;

(c) if the member is adjudged bankrupt;

(d) if the member ceases to hold the office by virtue of which the member was appointed;

(e) if the member becomes mentally or physically incapable of performing the duties of a member;

(f) if the member is removed by the Minister;

(g) if the member is convicted of an offence involving dishonesty or fraud under this Act or any other law;

(h) upon the expiry of one month's notice of the member's intention to resign from office, given by the member to the Minister.

(5) A member may resign from office by giving one month's notice in writing to the Minister.

(6) Where a vacancy occurs in terms of subsection (4), the Minister shall appoint another person to replace the member who vacates office, but that person shall hold office for the remainder of the outgoing member's term.

(7) A member of the Technical Committee shall be paid such allowances as the Minister may determine.

Functions of Technical Committee

11. (1) The Technical Committee shall advise the Council and the Unit on all technical matters relating to public-private partnerships and projects under this Act.

(2) Notwithstanding the generality of subsection (1), the Technical Committee shall—

(a) recommend to the Council the award of agreements under this Act;

(b) evaluate and select projects for award for recommendation to the Council;

(c) recommend the approval of projects under this Act; and

(d) perform such other functions provided for under this Act, or as may be assigned by the Council.

Proceedings of Technical Committee

12. (1) Subject to the other provisions of this Act, the Technical Committee may regulate its own procedure.

(2) The Technical Committee shall meet for the transaction of business at least once in every three months at such places and at such times as the Chairperson may determine.

(3) Upon giving notice of not less than fourteen days, a meeting of the Technical Committee may be called by the Chairperson and shall be called if not less than five members so request in writing:

Provided that if the urgency of any particular matter does not permit the giving of such notice, a special meeting may be called upon giving a shorter notice.

(4) Six members shall form a quorum at any meeting of the Technical Committee.

(5) There shall preside at any meeting of the Technical Committee—

(a) the Chairperson;

(b) in the absence of the Chairperson, the Vice-Chairperson; and

(c) in the absence of both the Chairperson and the Vice-Chairperson, such member as the members present may elect from among themselves for purposes of the meeting.

(6) The determination of any matter before the Technical Committee shall be according to the votes of the majority of the members present and considering the matter.

(7) The Technical Committee may invite any person whose presence is in its opinion desirable to attend and to participate in the deliberations of a meeting of the Technical Committee but such person shall have no vote.

(8) The Technical Committee shall cause minutes to be kept of the proceedings of every meeting of the Technical Committee.

Disclosure of interest

13. (1) A person present at a meeting of the Technical Committee at which any matter is the subject of consideration and in which matter that person is directly or indirectly interested shall, as soon as is practicable after the commencement of the meeting, disclose the interest and shall not, unless the Technical Committee otherwise directs, take part in any consideration or discussion of or vote on, any question touching that matter.

(2) A disclosure of interest made under subsection (1) shall be noted in the minutes of the meeting at which it is made.

Director and other public officers

14. (1) There shall be a Director for the Unit who shall be a public officer appointed by the Public Service Commission.

(2) The Director shall, subject to the general or specific directions of the Council —

(a) be responsible for the administration of the Unit;

(b) be an ex-officio member of the Technical Committee; and

(c) exercise the functions conferred upon the Director by, or under, this Act.

(3) The Public Service Commission shall appoint such other officers as are necessary for purposes of this Act.

Conciliation, mediation and arbitration

15. Notwithstanding section *sixty four,* the Council may act as mediator, conciliator or arbiter with regard to any dispute, arising under this Act or an agreement, between a contracting authority and a concessionaire at the request of the parties.

Appointment of mediator or arbitrator

Act No. 19 of 2000

16. Notwithstanding section *fifteen,* the Council may appoint a suitable person to act as mediator or arbitrator for the settlement of disputes on its behalf, in accordance with this Act or the Arbitration Act, and any action or decision of a person so appointed shall be deemed to be an action or a decision of the Council.

PART III

Project Identification And Feasibility Study

Participation in project

17. Any person in the private sector may participate in the financing, construction, rehabilitation, maintenance, operation and management of any projects as enumerated in the First Schedule or as prescribed, notwithstanding any other law to the contrary.

Project identification and feasibility study

18. The Minister may, by statutory instrument, make regulations to provide for—

(a) the identification, evaluation, operation and management of projects under this Act;

(b) the undertaking of feasibility studies for purposes of this Act;

(c) the implementation and monitoring of projects under an agreement; and

(d) any other matter to ensure that agreements provide value for money and afford the optimum transfer of appropriate technical, operational or financial risk to concessionaires.

Approval by Council

19. (1) Subject to subsection (5), a contracting authority shall, after undertaking a feasibility study and in accordance with the advice of the Unit, submit a project proposal together with the proposed agreement to the Technical Committee for evaluation.

(2) The Technical Committee shall consider the project proposal and the proposed agreement submitted under subsection (1) and submit the feasibility study, the project proposal and the proposed agreement to the Council which shall—

(a) accept the project proposal and agreement with or without amendments, within the prescribed time;

(b) return the project proposal and agreement to the contracting authority for re-consideration and re submission for approval, within the prescribed time; or

(c) reject the project proposal and agreement, within the prescribed time.

(3) If at any time, after the Council has approved a feasibility study for a project, any assumption in the feasibility study is materially revised, including any assumption concerning affordability, value for money and substantial technical, operational and financial risk transfer, the contracting authority shall immediately

(a) provide the Technical Committee with details of the intended revision including a statement regarding the purpose and impact of the intended revision on the affordability, value for money and risk transfer evaluation contained in the feasibility study; and

(b) ensure that the Technical Committee is provided with a revised feasibility study for submission to the Council for consideration in accordance with subsection (2).

PART IV

Competitive Selection Process And Award Proceedings

Procurement procedure

20. (1) The procurement procedure relating to public private partnerships provided for under this Act shall be as follows:

(a) the procurement system shall be fair, equitable, transparent, competitive and cost effective;

(b) the procurement process shall be in accordance with

(i) this Act or the bidding documents; or

(ii) where this Act or the bidding documents do not specifically provide for a process, commission, omission, offence or penalty in relation to any aspect of the procurement process relating to public-private partnerships, the Public Procurement Act, 2008, shall apply; and

Act No. 12 of 2008

(c) take into account the Citizens Economic Empowerment Act, 2006, regarding preferential treatment for certain categories of citizens that have been disadvantaged or marginalised, as defined under that Act, in accessing and being awarded tenders for the procurement of goods and services.

Act No. 9 of 2006

Pre-selection proceedings

21. A contracting authority may engage in pre selection proceedings with a view to identifying bidders that are suitably qualified to implement the proposed project.

Request for expression of interest

22. (1) A contracting authority shall prepare a request for submission of expressions of interest, after the approval of the feasibility study.

(2) A contracting authority shall submit the request for submission of expressions of interest prepared by it to the Unit for written authorisation to advertise, invite, solicit or call for bids for the purposes of engaging in pre selection proceedings.

(3) A contracting authority shall not issue any bidding document for a public private partnership to any prospective bidder before obtaining the approval of the Unit.

(4) The invitation for submission of expressions of interest shall be published in accordance with regulations issued under it.

(5) The invitation to submit expressions of interest for participation in the pre selection proceedings shall include at least the following:

(a) a description of the infrastructure project or facility;

(b) an indication of other essential elements of the project, such as the—

(i) services to be delivered by the concessionaire; and

(ii) financial arrangements envisaged by the contracting authority;

(c) where already known, a summary of the main required terms of the agreement to be entered into;

(d) the manner and place for the submission of applications for pre-selection and the deadline for the submission, expressed as a specific date and time, allowing sufficient time for bidders to prepare and submit their expressions of interest;

(e) the manner and place for solicitation of the pre selection bidding documents; and

(f) an appropriate statement to the effect that the contracting authority reserves the right to request proposals upon completion of the pre selection proceedings only from a limited number of bidders that best meet the pre selection criteria.

(6) The pre-selection bidding documents shall include at least the following information:

(a) the pre-selection criteria in accordance with section *twenty-three;*

(b) whether the contracting authority intends to waive any limitation on the participation of consortia in accordance with section *twenty-four;*

(c) whether the contracting authority intends to request only a limited number of pre selected bidders to submit proposals upon completion of the pre selection proceedings and, if applicable, the manner in which this selection shall be carried out; and

(d) whether the contracting authority intends to require the preferred bidder to establish an independent legal entity under any other law in accordance with section *forty-one*.

Pre selection criteria

23. Any person who meets the criteria stated in the pre selection bidding documents shall qualify for the pre selection proceedings which criteria shall include the following:

(a) adequate professional and technical qualifications, human resources and equipment and other physical facilities as may be necessary to carry out all the phases of the project; and

(b) appropriate managerial and organisational capability, reliability and experience, including previous experience in operating similar infrastructure facilities.

Participation of consortia

24. (1) A contracting authority when requesting for submission of expressions of interest for the pre selection proceedings, may allow bidders to form bidding consortia and in such a case the bidding consortium shall demonstrate its qualifications, in accordance with section *twenty-three*, relating to the consortium as a whole as well as to its individual members.

(2) Unless otherwise authorised by a contracting authority in the pre selection bidding documents, each member of a consortium may participate, either directly or indirectly, in only one consortium at the same time.

(3) When considering the qualifications of bidding consortia, a contracting authority shall consider the capabilities of each of the consortium's members and assess whether the combined qualifications of the consortium's members are adequate to meet the needs of all phases of the project.

Approval of Unit

25. (1) A contracting authority shall evaluate the qualifications of each bidder that has submitted an expression of interest for pre selection, applying only the criteria that are set forth in the pre-selection bidding documents and this Act.

(2) All pre selected bidders shall, after the approval of the Unit, as specified in section *twenty-six*, be invited by the contracting authority to submit proposals in accordance with this Act.

Single stage and two stage procedures for requesting technical proposals

26. (1) After the evaluation of the pre selection bids, the contracting authority shall submit a report for approval to the Unit, demonstrating how the pre selection criteria specified under section *twenty-three* has been met.

(2) The report shall contain the following statements:

(a) that the bids explain the capacity of the concessionaires and their proposed mechanisms and procedures to effectively implement, manage, enforce, monitor and report on the proposed infrastructure project and facility; and

(b) that a satisfactory due diligence including a legal due diligence has been completed by the Unit and the selected concessionaires in relation to matters of their respective competence and capacity are qualified to enter into the public private partnership agreement.

Content of request for technical proposals

27. (1) A contracting authority shall provide a set of the request for technical proposals and related documents issued in accordance with section *twenty-eight* to each pre-selected bidder that pays the price, if any, charged for those bidding documents.

(2) Notwithstanding subsection (1), a contracting authority may use a two stage procedure to request for technical proposals from pre selected bidders when the contracting authority does not consider it to be feasible to describe the characteristics of the project in the request for technical proposals.

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

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

(b) the contracting authority may convene meetings and hold discussions with any of the bidders to clarify questions concerning the initial request for technical proposals or the initial technical proposals and accompanying documents submitted by the bidders which shall be recorded inminutes of the meeting or discussion; and

(c) following evaluation of the technical proposals received, the contracting authority may review and, as appropriate, revise the initial request for technical proposals by removing, modifying or adding to any aspect of the initial project specifications, performance indicators, financing requirements or other characteristics of the project,

including the main contractual terms and any criterion for evaluating technical proposals and ascertaining the preferred bidder, as set out in the initial request for technical proposals;the contracting authority shall indicate in the record of the selection proceedings, to be kept pursuant to section *thirty-nine*, the justification for any revision to the request for technical proposals and which shall be communicated in the invitation to submit final proposals; and at the second stage of the procedure, the contractingauthority, shall invite the bidders to submit final proposals with respect to a single set of project specifications, performance indicators or contractual terms in accordance with sections *twenty eight* through to section *thirty-four.*

Content of request for technical proposals Act No. 12 of 2008

28. To the extent not required by, or under, the Public Procurement Act, 2008, a request for technical proposals shall include the following:

(a) general information as may be required by the bidders in order to prepare and submit their proposals;

(b) project specifications and performance indicators, as appropriate, including the contracting authority's or Unit's requirements regarding safety and security standards and environmental protection;

(c) contractual terms proposed by the contracting authority or Unit including an indication of which terms are considered to be non negotiable; and

(d) criteria for evaluating technical proposals, and the thresholds, if any, set by the contracting authority for identifying non responsive proposals, the relative weight to be accorded to each evaluation criterion and the manner in which the criteria and thresholds are to be applied in the evaluation and rejection of proposals.

Bid securities

29. (1) A request for technical proposals shall set out the requirements with respect to the issue of, and the nature, form, amount and other principal terms and conditions of, the required bid security.

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

(a) withdrawal or modification of a technical proposal after the deadline for submission of proposals and, if so stipulated in the request for technical proposals, before that deadline;

(b) failure to enter into final negotiations with the contracting authority pursuant to subsection (1) of section *thirty-four;*

(c) failure to submit its best and final offer within the time limit prescribed by the contracting authority pursuant to subsection (2) of section *thirty-four;*

(d) failure to sign the agreement, if required by the contracting authority to do so, after the technical proposal has been accepted; or

(e) failure to provide the required security for the fulfillment of the agreement after the technical proposal has been accepted or to comply with any other condition prior to signing the agreement, as specified in the request for technical proposals.

Clarifications and modifications

30. (1) A contracting authority may, whether on its own initiative or as a result of a request for clarification by a bidder, review and, as appropriate, revise any element of the request for technical proposals as set out in section *twenty eight.*

(2) A contracting authority shall indicate in the record of the selection proceedings to be kept pursuant to section *thirty-nine* the justification for any revision to the request for technical proposals and which shall be communicated to the bidders, in the same manner as the request for technical proposals, at a reasonable time prior to the deadline for submission of technical proposals.

Evaluation criteria

31. (1) The criteria for evaluating technical proposals shall include the following:

(a) technical soundness;

(b) compliance with environmental standards under any law;

(c) operational feasibility;

(d) quality of services and measures to ensure their continuity; and

(e) any other prescribed criteria.

(2) The criteria for evaluating financial and commercial proposals shall include, as appropriate:

(a) the present value of proposed user levies, unit prices, and other charges over the agreement period;

(b) the present value of proposed direct payments by the contracting authority, if any;

(c) the costs for design and construction activities, annual operation and maintenance costs, present value of capital costs and operating and maintenance costs;

(d) the extent of financial support, if any, expected from a public authority in Zambia;

(e) the soundness of the proposed financial arrangements;

(f) the extent of acceptance of the negotiable contractual termsproposed by the contracting authority in the request for technical proposals;

(g) the social and economic development potential offered by the technical proposals; and

(h) any other prescribed criteria.

Evaluation of technical proposal

32. (1) A contracting authority shall evaluate each technical proposal in accordance with the evaluation criteria, the relative weight accorded to each such criterion and the evaluation process set out in the request for technical proposals.

(2) For the purposes of subsection (1), a contracting authority may establish thresholds with respect to quality, technical, financial and commercial aspects of the proposal.

(3) For the purposes of subsection (2), the lowest evaluated bid shall not necessarily be the lowest offered price.

Further demonstration of fulfillment of qualification criteria

33. (1) A contracting authority may require any bidder that has been pre selected to demonstrate again its qualifications in accordance with the same criteria used for pre selection.

(2) A contracting authority shall disqualify any bidder that fails to demonstrate again its qualifications if requested to do so.

Final negotiations

34. (1) A contracting authority shall rank all responsive technical proposals on the basis of the evaluation criteria and invite, for final negotiation of the agreement, the bidder that has attained the best rating, except that the final negotiations shall not include those contractual terms, if any, that were stated as non negotiable in the final request for technical proposals.

(2) A contracting authority shall, where it becomes apparent to the contracting authority that the negotiations with the bidder invited will not result in an agreement, inform the bidder of its intention to terminate the negotiations and give the bidder reasonable time to formulate its best and final offer.

(3) Where a bidder puts forward its best and final offer and the contracting authority does not find that offer acceptable, it shall terminate the negotiations with the bidder concerned.

(4) Where a contracting authority terminates negotiations under subsection (3), the contracting authority shall invite the other bidders fornegotiations, in the order of their ranking, until the parties conclude an agreement or the contracting party rejects all the remaining proposals.

(5) A contracting authority shall not resume negotiations with a bidder with whom negotiations have been terminated in accordance with this section.

Circumstances authorizing award without competitive procedures

35. A contracting authority may negotiate an agreement, subject to the approval of the Unit, without using the procedure set out in this Part in the following cases:

(a) when there is an urgent need for ensuring continuity in the provision of the service and engaging in the procedures set out in this Part would be impractical:

Provided that the circumstances giving rise to the urgency were neither foreseeable by the contracting authority nor the result of any dilatory conduct on its part;

(b) where the project is of short duration and the anticipated initial investment value does not exceed an amount prescribed;

(c) where the project involves national defense or national security;

(d) where there is only one source capable of providing the required service, such as, when the provision of the service requires the use of intellectual property, trade secrets or other exclusive rights owned or possessed by a certain person or persons;

(e) where an invitation to the pre selection proceedings or a request for technical proposals has been issued but no proposals were submitted or all proposals failed to meet the evaluation criteria set out in the request for proposals and if, in the opinion of the contracting authority, issuing a new invitation to the pre selection proceedings and a new request for technical proposals is not likely to result in an infrastructure project or facility award within the required time frame; or

(f) in any other case where the Unit authorises such an exception for compelling reasons of national or public interest.

Procedure for negotiation of agreement

36. Where an agreement is negotiated without using the procedures set out in this Part, a contracting authority shall —

(a) except for an agreement negotiated pursuant to sub paragraph (c) of section *thirty five*, cause a notice, of its intention to commence negotiations in respect of the agreement, to be published in the prescribed manner;

(b) engage in negotiations with as many persons as the contracting authority considers capable of carrying out the project, as circumstances permit; and

(c) establish evaluation criteria against which proposals shall be evaluated and ranked.

Confidentiality

37. (1) A contracting authority and the Unit shall treat proposals in such a manner as to avoid the disclosure of their content to competing bidders and any discussion, communication or negotiation between the contracting authority and a bidder shall be confidential.

(2) Unless required by law or by a court order or permitted by the request for proposals, a party to a negotiation shall not disclose, to any other person, any technical or financial matter or any other information in relation to any discussion, communication or negotiation submitted, received or done, as the case may be, under this Act, without the consent of the other party.

Notice of contract award

38. (1) Subject to subsection (3) and except for a contract awarded pursuant to paragraph (c) of section *thirty five*, a contracting authority shall cause a notice of the contract award to be published in the prescribed manner.

(2) A notice issued under subsection (2) shall identify the concessionaire and include a summary of the essential terms of the agreement.

(3) A contracting authority shall not award any project or sign any agreement unless the—

(a) award of the project has been approved by the Unit; and

(b) agreement relating to the project has been approved by the Council.

Record of selection and award proceedings

39. A contracting authority shall keep an appropriate record of information pertaining to the selection and award proceedings in the prescribed manner.

Review procedures

40. A bidder that claims to have suffered, or that may suffer, loss or injury due to a breach of a duty imposed on a contracting authority under this Act or any other written law, may seek review of the contracting authority's acts or failure to act.

Organisation of concessionaire

41. (1) A contracting authority may require that the preferred bidder establish a legal entity incorporated under the laws of Zambia.

(2) Where a preferred bidder establishes a legal entity in accordance with subsection (1), the bidder shall make a statement to that effect in the pre selection bidding documents or in the request for technical proposals, as appropriate.

(3) Any requirement relating to the minimum capital of a legal entity established under subsection (1) and the procedures for obtaining the approval of a contracting authority to the legal entity's Articles of Association or any significant changes in the Articles shall be set out in the agreement consistent with the terms of the request for proposals.

Unsolicited proposal

42. (1) A contracting authority may receive, consider, evaluate and accept an unsolicited proposal for a public private partnership if the proposal —

(a) is independently originated and developed by the proposer;

(b) shall be beneficial to the public;

(c) has been prepared without the supervision of the Unit or a contracting authority; and

(d) includes sufficient detail and information for a contracting authority to evaluate the proposal in an objective and timely manner.

(2) A contracting authority shall, within fourteen days after receiving an unsolicited proposal, undertake a preliminary evaluation of the unsolicited proposal to determine if the proposal complies with the requirements of subsection (1).

(3) A contracting authority or the Unit shall take appropriate action to protect confidential or proprietary information that a person provides as part of an unsolicited proposal.

(4) A contracting authority shall, where an unsolicited proposal does not comply with subsection (1), return the proposal without further action.

(5) A contracting authority may, if an unsolicited proposal complies with subsection (1), continue to evaluate the proposal in accordance with this section.

(6) A contracting authority shall, if an unsolicited proposal complies with subsection (1), advertise the unsolicited proposal for the purpose of receiving competitive proposals for the same project.

(7) An advertisement issued under subsection (6), shall outline the general nature and scope of the unsolicited proposal, including the location of the project, if appropriate and the work to be performed on or in connection with the project and shall specify an address to which a competing proposal may be submitted.

(8) An advertisement, issued under subsection (6), shall specify a reasonable time period by which competitors shall submit a competing proposal to the contracting authority.

(9) A contracting authority may charge, the original proposer or any competing proposer, a reasonable fee to cover its costs for processing, reviewing and evaluating an unsolicited proposal and any competing proposals, as the case may be.

(10) A contracting authority shall —

(a) determine if any competing proposal is comparable in nature and scope to the original unsolicited proposal;

(b) evaluate the original unsolicited proposal and any comparable competing proposal; and

*(c)*conduct any good faith discussions and, if necessary, any negotiations concerning each qualified proposal.

(11) A contracting authority shall evaluate an unsolicited proposal and any comparable competing proposal using the following criteria:

(a) novel methods, approaches or concepts demonstrated by the proposal;

(b) scientific, technical, or socio economic merits of the proposal;

(c) potential contribution of the proposal to the contracting authority's mission;

(d) capabilities, related experience, facilities, or techniques of the private entity or unique combinations of these qualities that are integral factors for achieving the proposal objectives;

(e) qualifications, capabilities, and experience of the proposed team leader or key personnel, who are critical to achieving the proposal objectives;

*(f)*how the proposal benefits the public; and

(g) any other factors appropriate to a particular proposal.

(12) After evaluating an unsolicited proposal and any competing proposals, a contracting authority may —

(a) accept the unsolicited proposal and reject any competing proposals;

(b) request the originator of the proposal to match any competing proposal or make a best and final offer and if the originator of the proposal does so, the project shall be awarded to the originator of the proposal;

(c) reject the unsolicited proposal and accept a comparable competing proposal if the contracting authority determines that the comparable competing proposal is the most advantageous to the Government;

(d) accept both the unsolicited proposal and a competing proposal if accepting both proposals is advantageous to the Government; or

(e) reject the unsolicited proposal and any competing proposal.

(13) Subsection (3) shall apply to any unsolicited proposal or competing proposal that has been rejected.

PART V

PUBLIC PRIVATE PARTNERSHIP AGREEMENTS

Contents and implementation of agreement

43. An agreement shall provide for such matters as the parties consider appropriate, but shall include:

(a) the nature and scope of works to be performed and services to be provided by the concessionaire;

(b) the conditions for provision of services and the extent of exclusivity, if any, of the concessionaire's rights under the agreement;

(c) the assistance that a contracting authority may provide to the concessionaire in obtaining licences and permits to the extent necessary for the implementation of the project;

(d) the return of assets, if any, to a contracting authority, at the termination or expiry of the agreement, in such manner as may be provided for in the agreement, as specified in section *forty five;*

(e) procedures for the review and approval of engineering designs, construction plans and specifications by the contracting authority and the procedures for testing and final inspection, approval and acceptance of the project;

(f) the Unit's, contracting authority's or other regulatory agency's right to monitor the works to be performed and services to be provided by the concessionaire and the conditions and extent to which the Unit, contracting authority or the regulatory agency may order variations in respect of the works and conditions of service or take such other reasonable actions as they may find appropriate to ensure that the project is properly operated and the services are provided in accordance with the applicable legal and contractual requirements;

(g) the extent of the concessionaire's obligation to provide the Unit, contracting authority or regulatory agency, as appropriate, with reports and other information on its operations;

(h) mechanisms to deal with additional costs and other consequences that might result from any order issued by the Unit, contracting authority or another public authority under this Act including any compensation to which the concessionaire might be entitled;

(i) any rights of the Unit or contracting authority to review and approve major contracts to be entered into by the concessionaire, in particular with the concessionaire's own shareholders or other affiliated persons;

(j) guarantees of performance to be provided and insurance policies to be maintained by the concessionaire in connection with the implementation of the project;

(k) remedies available in the event of default of either party;

(l) the extent to which either party may be exempt from liability for failure or delay to comply with any obligation under the agreement owing to circumstances beyond its reasonable control;

(m) the duration of the agreement and the rights and obligations of the parties upon its expiry or termination;

(n) the manner for calculating compensation under this Act as provided under section *sixty-one;*

(o) the governing law and the mechanisms for the settlement of disputes that may arise between the Unit or contracting authority and the concessionaire;

(p) the rights and obligations of the parties with respect to confidential information;

(q) the relevant financial terms;

(r) the sharing of generic risks between the contracting authority and the concessionaire;

(s) the payment to the concessionaire by way of compensation from a revenue fund or of user levies collected by the concessionaire for a service provided by it as provided under section *forty-eight;* and

(t) such other information as may be prescribed. Governing law.

Governing law

44. Every agreement shall be governed by and construed in accordance with the laws of Zambia unless otherwise provided in the agreement.

Ownership of assets

45. (1) An agreement shall specify, as appropriate, which assets are or shall be public property and which assets are or shall be the private property of the concessionaire.

(2) An agreement shall, in particular, identify which assets belong to the following categories:

(a) assets, if any, that the concessionaire is required to return or transfer to the contracting authority or to another entity indicated by the contracting authority in accordance with the terms of the agreement;

(b) assets, if any, that the contracting authority, at its option, may purchase from the concessionaire; and

(c) assets, if any, that the concessionaire may retain or dispose of upon expiry or termination of the agreement.

Acquisition of rights related to project site

46. (1) A contracting authority or other public authority, under the terms of any relevant law and an agreement, shall make available to the concessionaire or, as appropriate, shall assist the concessionaire in obtaining such rights related to the project site, including title thereto, as may be necessary for the implementation of the project .

(2) Any compulsory acquisition of land that may be required for the implementation of a project shall be carried out in accordance with the Land Acquisition Act.

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Easements

47. A contracting authority or other public authority, under the terms of any law and an agreement, shall make available to the concessionaire or, as appropriate, shall assist the concessionaire to enjoy the right to enter upon, transit through or do work or fix installations upon, property of third parties, as appropriate and required for the implementation of the project.

Financial arrangements

48. (1) A concessionaire shall have the right to charge, receive or collect user levies for the use of an infrastructure facility or its services in accordance with an agreement, which shall provide for methods and formulas for the establishment and adjustment of user levies in accordance with any rules established by the competent regulatory agency.

(2) A contracting authority may agree to make direct payments to the concessionaire as a substitute for, or in addition to, user levies for the use of the project or its services.

Security interest

49. (1) Subject to any restriction that may be contained in an agreement, a concessionaire shall have the right to create security interests over any of its assets, rights or interests, including those relating to the project, as shall be required to secure any financing needed for the project, including, in particular, the following:

(a) security over movable or immovable property owned by the concessionaire or its interests in project assets; and

(b) a pledge of the proceeds of, and receivables owed to the concessionaire for, the use of the project or the services it provides.

(2) The shareholders of a concessionaire's company shall have the right to pledge or create any other security interest in their shares in the company.

(3) No security under subsections (1) and (2) may be created over public property or other property, assets or rights needed for the provision of a public service, where the creation of such security is prohibited by the laws of Zambia.

Assignment of agreement

50. (1) Except as otherwise provided in section *forty-nine*, the rights and obligations of the concessionaire under an agreement may not be assigned to a third party without the prior written consent of the appropriate contracting authority.

(2) An agreement shall set out the conditions under which a contracting authority shall give its consent to an assignment of the rights and obligations of the concessionaire under the agreement, including the acceptance by the new concessionaire of all obligations there under and evidence of the new concessionaire's technical and financial capability as shall be necessary for providing the service or undertaking the project.

Transfer of controlling interest in concessionaire

51. (1) Except as otherwise provided in an agreement, a controlling interest in the concessionaire's company shall not be transferred to third parties without the consent of the appropriate contracting authority.

(2) An agreement shall set forth the conditions under which the consent of a contracting authority shall be given.

Operation of infrastructure facility

52. (1) An agreement shall set out, as appropriate, the extent of a concessionaire's obligations to ensure—

(a) the modification of the service so as to meet the demand for the service;

(b) the continuity of the service;

(c) the provision of the service under essentially the same conditions for all users; and

(d) the non discriminatory access, as appropriate, of other service providers to any public infrastructure network operated by the concessionaire.

(2) A concessionaire shall have the right to issue and enforce rules governing the use of the infrastructure facility, subject to the approval of the appropriate contracting authority or regulatory agency.

Compensation for specific changes in legislation

53. An agreement shall set out the extent to which a concessionaire is entitled to compensation in the event that the cost of the concessionaire's performance of the agreement has substantially increased or that the value that the concessionaire receives for such performance has substantially diminished, as compared with the costs and the value of performance originally

foreseen, as a result of changes in legislation or regulations specifically applicable to the project or the services it provides.

Revision of agreement

54. (1) Without prejudice to section *sixty three,* an agreement shall set out the extent to which a concessionaire is entitled to a revision of the agreement with a view to providing compensation in the event that the cost of the concessionaire's performance of the agreement has substantially increased or that the value that the concessionaire receives for such performance has substantially diminished, as compared with the costs and the value of performance originally foreseen, as a result of—

(a) changes in economic or financial conditions; or

(b) changes in legislation or regulations not specifically applicable to the project or the services it provides:

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

(i) occur after the conclusion of the agreement;

(ii) are beyond the control of the concessionaire; and

(iii) are of such a nature that the concessionaire could not reasonably be expected to have taken them into account at the time the agreement was negotiated or have avoided or overcome their consequences.

(2) An agreement shall establish procedures for revising the terms of the agreement following the occurrence of any changes.

Takeover of project

55. (1) A contracting authority shall have the right, under the circumstances set out in an agreement, to temporarily take over the operation of an infrastructure project or facility, for the purpose of ensuring the effective and uninterrupted delivery of a service or timely completion of the project, in the event of a material default by the concessionaire in the performance of its obligations and to rectify the breach within a reasonable period of time after having been given notice by the contracting authority to do so.

(2) In the event that a contracting authority elects to take over a project under subsection (1), the contracting authority —

(a) shall collect and pay any revenues that are subject to lien to satisfy any obligation;

(b) may develop and operate the project, impose user levies and comply with any service contract existing; and

(c) may solicit proposals, as appropriate, for the construction, maintenance or operation of the infrastructure project.

Substitution of concessionaire

56. (1) The Unit may agree with any entity extending financing for a project and a concessionaire to provide for the substitution of the concessionaire with another person appointed to perform under the existing agreement, upon a material default by the concessionaire or other event that could otherwise justify the termination of the agreement.

(2) The Government may facilitate a concessionaire to securitise any project receivables and assests in favour of a lender subject to such terms as the Government may determine in order to safeguard the successful implementation, completion, working, management and control of the project.

Duration and extension of agreement

57. The duration of a public private partnership shall be set forth in an agreement and the contracting authority may not agree to extend its duration except as a result of the following circumstances:

(a) delay in completion or interruption of operation due to circumstances beyond the reasonable control of either party;

(b) project suspension brought about by acts of the Unit or a contracting authority or other public authority;

(c) increase in costs arising from requirements of the Unit or a contracting authority not originally foreseen in the agreement, if the concessionaire would not be able to recover such costs without such extension; or

(d) on agreement with the concessionaire, for reasons of national or public interest, as justified in the record to be kept by the Unit.

Termination of agreement by contracting authority

58. A contracting authority or the Unit may terminate an agreement

(a) in the event that it can no longer be reasonably expected that the concessionaire will be able or willing to perform its obligations, owing to insolvency, material default or otherwise; or

(b) for compelling reasons of national or public interest, subject to payment of compensation to the concessionaire as agreed in the agreement.

Termination of agreement by concessionaire

59. A concessionaire shall not terminate an agreement except under the following circumstances:

(a) in the event of material default by the Unit or a contracting authority or other public authority of its obligations under the agreement;

(b) if the conditions for a revision of the agreement under subsection(1) of section *fifty-four* are met but the parties have failed to agree on a revision of the agreement; or

(c) if the cost of the concessionaire's performance of the agreement has substantially increased or the value that the concessionaire receives for such performance has substantially diminished as a result of acts or omissions of the Unit or a contracting authority or other public authority and the parties have failed to agree on a revision of the agreement.

Termination of agreement by either party

60. Either party has the right to terminate an agreement by mutual consent or if the performance of its obligations is rendered impossible by circumstances beyond either party's reasonable control.

Compensation upon termination of agreement

61. An agreement shall stipulate how compensation due to either party shall be calculated in the event of termination of the agreement and shall provide, where appropriate, for compensation for the fair value of works performed under the agreement, costs incurred or losses sustained by either party, including, as appropriate, lost profits.

Management of public private partnership

62. A contracting authority shall be responsible for ensuring that the agreement is properly implemented, managed, enforced, monitored and reported on by the concessionaire.

Winding up and transfer measures

63. An agreement shall provide, as appropriate, for —

(a) mechanisms and procedures for the transfer of assets to a contracting authority in case of a winding up;

(b) the compensation to which the concessionaire may be entitled in respect of assets transferred to a contracting authority or to a new concessionaire or purchased by a contracting authority;

(c) the transfer of technology required for the operation of a project;

(d) the training of a contracting authority's personnel or of a successor concessionaire in the operation and maintenance of project; and

(e) the provision, by the concessionaire, of continuing support services and resources, including the supply of spare parts, if required, for a reasonable period after the transfer of the project to a contracting authority or to a successor concessionaire.

PART VI

SETTLEMENT OF DISPUTES AND GENERAL PROVISIONS

Disputes between contracting authority or Unit and concessionaire Act No. 19 of 2000

64. Any disputes between the Unit or a contracting authority and the concessionaire shall be settled through the dispute settlement mechanisms agreed by the parties in the agreement or, failing such agreement, in accordance with the Arbitration Act, 2000.

Disputes involving customers or users

65. The Unit may, where a concessionaire provides services to the public or operates an infrastructure facility which is accessible to the public, require the concessionaire to establish simplified and efficient mechanisms for handling claims submitted by its customers or users of the infrastructure facility.

Regulations

66. (1) The Minister may, by statutory instrument, make regulations for the carrying out of the purposes of this Act.

(2) Without prejudice to the generality of subsection (1), the Minister may make regulations for—

(a) any thresholds relating to the procurement process;

(b) any matter relating to competitive public bidding and direct negotiations;

(c) mechanisms for settling of disputes under this Act;

(d) the imposition, revision and collection of user levies; and

(e) anything that is required to be prescribed under this Act.

Savings

67. (1) Where an agreement was entered into before the commencement of this Act, and that agreement or arrangement would have been a public-private partnership arrangement if this Act was in operation on such date, then the agreement shall have effect as if this Act was in operation when the agreement or arrangement was entered into.

(2) An agreement entered into after the commencement of this Act shall comply with this Act.

FIRST SCHEDULE

(Sections 3 and 4)

INFRASTRUCTURE PROJECTS AND FACILITIES

The following public private partnership arrangements with their variations and combinations may be entered into by the Unit or contracting authority for undertaking any project. The arrangements enumerated in this Schedule are indicative in nature and the Unit or contracting authority may evolve and arrive at such agreement or arrangement incorporating any of the arrangement enumerated hereinafter or any other arrangements as are necessary or expedient for any specific project:

Build and Transfer (BT)

1. A contractual arrangement whereby a concessionaire undertakes the financing and construction of a given project and after its completion hands it over to the Government or a contracting authority. The Government or the contracting authority would reimburse the total project investment, on the basis of an agreed schedule. This arrangement may be employed in the construction of any project, including critical facilities, which for security or strategic reasons must be operated directly by the contracting authority.

Build Lease and Transfer (BLT)

2. A contractual arrangement whereby a concessionaire undertakes to finance and construct any project and upon its completion hands it over to the Government or a contracting authority concerned on a lease arrangement for a fixed period, after which ownership of the project is automatically transferred to the Government or the contracting authority concerned.

Build Operate and Transfer (BOT)

3. A contractual arrangement whereby a concessionaire undertakes the construction, including financing, of a given infrastructure facility, and the operation and maintenance thereof. The concessionaire operates the facility over a fixed term during which the concessionaire is allowed to collect user levies fees, rentals and other charges not exceeding those proposed in the bid or as negotiated and incorporated in the agreement or regulations to enable the recovery of the investment in the project. The concessionaire transfers the project to the Government or the contracting authority concerned at the end of the fixed term that shall be specified in the agreement. This shall include a supply and operate situation which is a contractual arrangement whereby the supplier of equipment and machinery for a given project, if the interest of the Government or the contracting authority so requires, operates the facility providing in the process technology transfer

and training to Government, regulatory agency or the contracting authority nominated individuals.

Build Own and Operate (BOO)

4. A contractual arrangement whereby a concessionaire is authorised to finance, construct, own, operate and maintain a project from which the concessionaire is allowed to recover this total investment by collecting user levies. Under the project, the concessionaire owns the assets of the project and may choose to assign its operation and maintenance to a project operator. The transfer of the project to the Government or the contracting authority is not envisaged in this structure. However, the Government or contracting authority may terminate its obligations after specified time period.

Build Own Operate Transfer (BOOT)

5. A contractual arrangement whereby a concessionaire is authorised to finance, construct, maintain and operate a project and whereby the project is to vest in the concessionaire for a specific period. During the operation period, the concessionaire will be permitted to charge user levies specified in the agreement, to recover the investment made in the project. The concessionaire is liable to transfer the project to the Government or the contracting authority after the expiry of the specified period of operation.

Build Transfer and Operate (BTO)

6. A contractual arrangement whereby the Government or a contracting authority contracts out a project to a concessionaire to construct the facility on a turn key basis, assuming costs overruns, delays and specified performance risks. Once the facility is commissioned satisfactorily, the concessionaire is

given the right to operate the project and collect user levies under an agreement. The title of the project always vests with the Government or the contracting authority in this arrangement.

Contract Add and Operate (CAO)

7. A contractual arrangement whereby the concessionaire adds to an existing project which it rents from the Government or a contracting authority and operates the expanded project and collects user's levies, to recover the investment over an agreed franchise period. There may or may not be a transfer arrangement with regard to the added facility provided by the concessionaire.

Develop Operate and Transfer (DOT)

8. A contractual arrangement whereby favorable conditions external to a new project which is to be built by a concessionaire are integrated into the BOT arrangement by giving that entity the right to develop adjoining property and thus, enjoy some of the benefits the investment creates such as higher property or rent values.

Rehabilitate Operate and Transfer (ROT)

9. A contractual arrangement whereby any existing facility is handed over to the private sector to refurbish, operate and collect user levies in the operation period to recover the investment and maintain for a franchise period, at the expiry of which the facility is turned over to the Government or a contracting authority. The term is also used to describe the purchase of an existing facility from abroad, importing, refurbishing, erecting and consuming it within the host country.

Rehabilitate Own and Operate

10. A contractual arrangement whereby an existing facility is handed over to the concessionaire to refurbish and operate with no time limitation imposed on ownership. As long as the concessionaire is not in violation of its franchise, it can continue to operate the facility and collect user levies in perpetuity.

Build Own Operate and Maintain contract

11. A contractual arrangement whereby a concessionaire undertakes to finance, construct, operate and maintain a project and whereby such project is to vest in the concessionaire for a specified period. During the period of operation of the project, the concessionaire may be permitted to charge user charges as specified.

Lease Management Contract

12. A contractual arrangement whereby the Government or a contracting authority leases a project owned by the Government to the person who is permitted to operate and maintain the project for the period specified in the agreement and to charge user charges therefor.

Management Contract

13. A contractual arrangement whereby the Government or a contracting authority entrusts the operation and management of a project to a person for the period specified in the agreement on payment of specified consideration. In such agreement, the Government or the contracting authority may charge the user charges and collect the same either itself or entrust the collection, for consideration, to any person who shall after collecting the user charges pay the same to the Government or the contracting authority.

Service Contract

14. A contractual arrangement whereby an existing project is vested in a person to renovate, operate and maintain. The concessionaire shall be permitted to charge levies as specified in the agreement.

Supply Operate and Transfer

15. A contractual arrangement whereby a person undertakes to provide services to the Government or contracting authority for a period. The Government or the contracting authority shall pay the person an amount according to the agreed schedule.

Supply Operate and Transfer

16. A contractual arrangement whereby a person supplies to the Government or a contracting authority the equipment and machinery for a project and undertakes to operate the project for a period and consideration specified in the agreement. During the operation of the project, the person shall undertake to train employees of the Government or contracting authority to operate the project.

SECOND SCHEDULE

(Section 6 (2))

Administration Of The Council

Tenure of office and vacancy

1. (1) Subject to the other provisions of this Schedule, a member of the Council, shall hold office for a period of three years from the date of appointment and may be re-appointed for a further period of three years.

(2) Subject to the other provisions of this Schedule, a member shall, on the expiration of the period for which the member is appointed, continue to hold office until another member is appointed to succeed that member.

(3) The office of a member becomes vacant —

(a) upon the member's death;

(b) if the member is adjudged bankrupt;

(c) if the member is absent from three consecutive meetings of the Council of which the member has had notice, without the prior approval of the Council;

(d) upon the expiry of one month's notice of the member's intention to resign from office, given by the member in writing to the Council;

(e) if the member becomes mentally or physically incapable of performing the duties of a member of the Council; or

(f) if the member is convicted of an offence involving dishonesty or fraud under this Act or any other written law.

(4) A member may resign from office by giving not less than one month's notice in writing to the President.

(5) The President shall, where the office of a member becomes vacant, appoint another member in place of the member who vacates office, and such member shall hold office for the remainder of the term.

Proceedings of Council

2. (1) Subject to the other provisions of this Act, the Council may regulate its own procedure.

(2) The Council shall meet for the transaction of business, at least once in every three months at such places and times as the Chairperson may determine.

(3) The Chairperson may, upon giving notice of not less than fourteen days, call a meeting of the Council and shall call a special meeting upon receiving a written request from at least five members of the Council.

(4) If the urgency of any particular matter does not permit the giving of the notice required under subparagraph (3), a special meeting may be called by the Chairperson upon giving a shorter notice.

(5) The quorum at a meeting of the Council shall be half of the members of the Council.

(6) There shall preside at any meeting of the Council—

(a) the Chairperson;

(b) in the absence of the Chairperson, the Vice-Chairperson; and

(c) in the absence of both the Chairperson and the Vice-Chairperson, such member as the members present may elect from amongst themselves for the purpose of that meeting.

(7) A decision of the Council on any question shall be by a majority of votes of the members present and voting at the meeting and, in the event of an equality of votes, the person presiding at the meeting shall have, in addition to a deliberative vote, a casting vote.

(8) The Council may invite any person whose presence in its opinion is desirable to attend and to participate in the deliberations of a meeting of the Council but such person shall have no vote.

(9) The validity of any proceedings, act or decision of the Council shall not be affected by any vacancy in the membership of the Council or by any defect in the appointment of any member or by reason that any person not entitled so to do, took part in the proceedings.

(10) The Council shall cause minutes to be kept of the proceedings of every meeting of the Council and every meeting of any sub-committee established by the Council.

Committees of Council

3. (1) The Council may, for the purpose of performing its functions under this Act, constitute any committee and delegate to any such committee such of its functions as it thinks fit.

(2) The Council may appoint as members of a committee constituted under sub-paragraph (1), persons who are or are not members of the Council and such persons shall hold office for such period as the Council may determine.

(3) A committee of the Council may regulate its own procedure.

Allowances of members

4. There shall be paid to members of the Council such allowances as the Council may, with the approval of the President, determine.

Disclosure of interest

5. (1) A member or person who is present at a meeting of the Council at which any matter, in which that person or any member of the person's immediate family, is directly or indirectly interested in a private capacity, is the subject of consideration, shall, as soon as is practicable after the commencement of the meeting, disclose that interest and shall not, unless the Council otherwise directs, take part in any consideration or discussion of, or vote on any question relating to, that matter.

(2) A disclosure of interest made under this paragraph shall be recorded in the minutes of the meeting at which it is made.

Prohibition of publication of, or disclosure of information to unauthorised persons

6. (1) A person shall not, without the consent in writing given by or on behalf of the Council, publish or disclose to any unauthorised person, otherwise than in the course of duties of that person, the contents of any document, communication or information whatsoever, which relates to or which has come to the knowledge of that person in the course of that person's duties under this Act.

(2) A person who contravenes sub-paragraph (1) commits an offence and is liable, upon conviction, to a fine not exceeding two hundred thousand penalty units or to imprisonment for a term not exceeding two years, or to both.

(3) A person who, having any information which to the knowledge of that person has been published or disclosed in contravention of sub-paragraph (1), unlawfully publishes or communicates the information to any other person, commits an offence and is liable, upon conviction, to a fine not exceeding two hundred thousand penalty units or to imprisonment for a term not exceeding two years, or to both.