

## **PUBLIC PRIVATE PARTNERSHIP ACT, 2020 (ACT 1039)**

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REPUBLIC OF GHANA

**THE ONE THOUSAND AND THIRTY-NINETH  
ACT  
OF THE PARLIAMENT OF THE REPUBLIC OF GHANA  
ENTITLED  
PUBLIC PRIVATE PARTNERSHIP ACT, 2020**

**AN ACT** to provide for the development, implementation and regulation of public private partnership arrangements between contracting, authorities and private parties for the provision of infrastructure and services, to establish institutional arrangements for the regulation of public private partnerships, and to provide for related matters.

**DATE OF ASSENT:** 29th December, 2020.

**PASSED** by Parliament and assented to by the President

Preliminary Provisions

Section 1—Objects of the Act

(1) The objects of this Act are to

- (a) regulate public private partnership arrangements; and
- (b) promote the use of private sector resources for the provision of infrastructure and services through public private partnerships.

(2) For the purpose of subsection (1), the objects shall encompass the

- (a) creation of an environment and framework to enable private parties to participate in partnership project and offer value for money to the public sector and users of the partnership projects;
- (b) delivery of efficient infrastructure and services With assured quality;
- (c) establishment of efficient institutional arrangements for The identification, structuring, procurement, implementation and monitoring of partnership projects;

- (d) leverage of public assets to encourage private sector investment in the provision of infrastructure and services;
- (e) protection of the interests of public and private sector stakeholders and end users;
- (f) establishment of a framework for optimal risk sharing in partnership projects;
- (g) promotion of local participation in partnership projects;
- (h) establishment of a regulatory framework for contracting authorities for the purpose of partnership arrangements; and
- (i) establishment of a framework for the management of financial commitments in respect of partnership arrangements.

## Section 2—Application

(1) This Act applies to

- (a) all contracting authorities;
- (b) public sector projects undertaken in the form of partnership arrangements between a contracting authority and a private party;
- (c) functions that relate to the identification, studies, document preparation, structuring, bidding, evaluation, award, implementation and monitoring of partnership arrangements; and
- (d) commercial arrangements carried out through partnership arrangements In respect of contracting authorities including the security services.

(2) This Act does not apply to

- (a) the outsourcing of government services without the transfer of financial and operational risks to a private party;
- (b) the grant of a mineral right under the Minerals and Mining Act, 2006 (Act 703) or any other applicable enactment on mining;
- (c) the grant of any right for exploration, development or production under the Petroleum (Exploration and Production) Act, 2016 (Act 919) and any other relevant enactment;
- (d) the divestment of ownership or equity of a state-owned enterprise;
- (e) the procurement of goods, works and services primarily with the use of public funds by any contracting authority under the Public Procurement Act, 2003 (Act 663), except as otherwise provided under this Act; and
- (f) non-commercial activities that are the exclusive preserve of the security services.

## Obligations of Contracting Authorities

### Section 3—Compliance

A contracting authority shall ensure that persons assigned responsibility under this Act

- (a) keep records of decisions, and

(b) account for decisions made.

#### Section 4—Safeguards

(1) A contracting authority shall ensure that the partnership arrangements of that contracting authority contain measures designed to safeguard the interest of the general public, interested persons and employees affected by the project.

(2) A contracting authority shall ensure that public private partnership activities conform to the environmental laws of the country and the highest standards of environmental, climate and social safeguards.

#### Section 5—Risk allocation

A contracting authority shall ensure that

(a) risks associated with a partnership arrangement are in the first instance allocated to the party best able to control and manage the risk in order to minimise the overall project risk; and

(b) the documents that set out the partnership arrangement show the allocation of risks to the party best able to Control and manage the risks.

#### Section 6—Affordability and sustainability,

(1) In accordance with subsection (5) of section 33 of the Public Financial Management Act, 2016 (Act 921), a contracting authority shall conduct a feasibility study of a potential partnership project to determine

(a) the capital and operational costs of the partnership project based on efficiency and economy in project operations;

(b) long-term affordability for the end users; ,

(c) sustainability of the budgetary commitments of the Government;

(d) the appropriate returns on private sector investment; and

(e) other factors that the contracting authority may consider necessary,

(2) To ensure affordability and sustainability of the budgetary commitments of the Government, the Minister shall

(a) conduct a review of the overall exposure of contracting authorities to partnership projects on an annual basis;

(b) advise Cabinet on steps required to be taken to mitigate any adverse potential impact that a partnership project may have on the finances of the State; and

(c) report to Parliament in accordance with section 21 of the Public Financial Management Act, 2016 (Act 921),

#### Section 7—Fairness and transparency

(1) The procurement process relating to a partnership project shall be fair, transparent and competitive.

(2) Without limiting subsection (1), the procurement of a partnership project shall be based on the following factors:

- (a) a well-defined bidding process as required under this Act;
- (b) clear instructions to bidders and interested persons to Prevent manipulation or abuse of the process; and
- (c) the requirements of the bidding documents under this Act.

(3) Except as otherwise provided in this Act, the procurement methods for partnership projects shall be based on a competitive selection criteria.

(4) Each qualified and short-listed bidder who complies with the bidding process provided under this Act has a right to equal opportunity and access to information.

(5) Subject to this Act and any other applicable enactment, each aspect of the partnership process shall be accessible to the public.

(6) A contracting authority or public official shall consider an unsolicited proposal only if that proposal meets the requirements of this Act.

(7) A contracting authority shall state the reasons in support of the decision of that contracting authority or public official in respect of an unsolicited proposal.

#### Section 8—Stakeholder consultation by contracting authority

A contracting authority shall ensure that adequate stakeholder consultation is carried out at each stage of the public private partnership process in respect of each partnership arrangement that the contracting authority engages in.

#### Section 9—Application of procurement procedures

Despite a provision to the contrary contained in any other enactment the procurement procedure for all partnership arrangements shall be consistent with this Act, the Regulations and Guidelines.

#### Section 10—Local content and technology transfer

A contracting authority shall ensure that public private partnership projects are structured to facilitate

- (a) the use of local content;
- (b) technology transfer; and
- (c) the promotion of local industries and the private sector.

#### Section 11—Value for money

(1) A contracting authority that seeks to pursue a public private partnership arrangement shall ensure that a net benefit accrues to the contracting authority in terms of cost, price, government support in the form of viability gap funding and tax exemptions, quality, timeliness and risk transfer as compared to the public sector comparator.



(2) For the purpose of subsection (1), a contracting authority shall conduct a qualitative and quantitative value for money assessment as part of the feasibility study for the partnership project to guide decision making.

(3) the contracting authority shall, at each stage of the public private partnership process, conduct assessment to determine value for money and demonstrate that there is greater value for money than the best realistic public sector project designed to achieve similar service outputs.

#### Section 12—Parliament

Parliament shall be the final approval authority for a public private partnership project that requires the approval of Parliament in accordance with

- (a) articles 174 and 181 of the Constitution;
- (b) section 33 of the Public Financial Management Act, 2016 (Act 921); and
- (c) the First Schedule,

#### Section 13—Cabinet

A contracting authority shall submit public private partnership projects

- (a) requiring compliance with articles 174 and 181 of the Constitution, and
- (b) with threshold requiring approval by Cabinet as specified in the First Schedule, to Cabinet for prior approval.

#### Section 14—Sector Ministries

The Public Investment Unit of the respective Sector Ministries shall be the appraising authority for partnership projects of Departments, Agencies, public corporations and state-owned enterprises.

#### Section 15—Office of the Regional Coordinating Council

The respective Regional Planning Coordinating Unit of the Regional Coordinating Council shall be the appraising authority for the local government authorities within their jurisdiction.

#### Section 16—General Assembly of District Assembly

The General Assembly of a District Assembly, through a formal session as provided for in the standing orders of the Assembly shall be the approving authority for public private partnership projects in accordance with the First Schedule.

#### Section 17—Controller and Accountant-General's Department

The Controller and Accountant-General shall

- (a) ensure that transactions related to public private partnership projects are covered in the national accounts; and
- (b) apply International Public Sector Accounting Standards relating to public private partnership arrangements and projects.

## Section 18—Audit Service

(1) The Auditor-General shall

(a) in carrying out audit functions specified in the Public Financial Management Act, 2016 (Act 921), annually carry out a compliance audit to ascertain compliance of a contracting authority to the provisions of this Act, the Regulations and Guidelines; and

(b) audit

(i) the Project Development Facility;

(ii) the Viability Gap Facility; and

(iii) any other government support, as part of the annual audit of the Ministry.

(2) The special purpose entity shall submit to the Office and the Auditor-General copies of the

(a) annual audited accounts, and

(b) financial statements,

to be published on the website of the Ministry as part of disclosure arrangements in respect of the public private partnership.

## Section 19—Public Private Partnership Committee

There is established by this Act, a Public Private Partnership Committee for the purpose of considering requests of contracting authorities to undertake public private partnership projects.

## Section 20—Functions of the Public Private Partnership Committee

The Public Private Partnership Committee shall

(a) approve public private partnerships subject to this Act and the Regulations;

(b) examine and grant approval for the feasibility study conducted by a contracting authority under this Act;

(c) consider and grant approval for the Bid Evaluation Report submitted by a contracting authority under this Act;

(d) consider the report on negotiation and the corresponding public private partnership project;

(e) consider the concession agreement for approval or recommendation to Cabinet and Parliament for approval in accordance with sections 12 and 13 and the First Schedule;

(f) determine matters concerning the cancellation of a tender;

(g) review the legal, institutional and regulatory framework of public private partnerships;

(h) recommend for approval, financial support and any other form of support granted by the Government in the implementation of projects under this Act;

(i) ensure fiscal accountability in the management of financial and any other form of Government support for public private partnerships;

- (j) grant exemptions from applications of any specified procedures in respect of small projects in accordance with this Act;
- (k) consider requests relating to unsolicited proposals; and
- (l) perform any other function as may be conferred on the Committee under this Act or any other legislation.

#### Section 21—Composition of the Public Private Partnership Committee

- (1) The Public Private Partnership Committee consists of
  - (a) the Minister as the chairperson;
  - (b) the Attorney-General and Minister responsible for Justice;
  - (c) the Minister responsible for Trade and Industry;
  - (d) the Director-General of the National Development Planning Commission;
  - (e) the Chief Executive Officer of the Ghana Investment Promotion Centre;
  - (f) the Chief Executive Officer of the Public Procurement Authority;
  - (g) the Executive Director of the Environmental Protection Agency;
  - (h) the Executive Secretary of the Lands Commission;
  - (i) one representative of the Chartered Institute of Bankers nominated by the Chartered Institute of Bankers;
  - (j) one representative of the Ghana Institution of Engineers nominated by the Ghana Institution of Engineers; and
  - (k) two persons nominated by the President at least one of whom is a woman and the other person with experience in investment banking and project finance.
- (2) The members of the Committee shall be appointed by the President.
- (3) The Chief Director of the Ministry is the secretary to the Public Private Partnership Committee.
- (4) The Executive Committee of a local government authority shall be considered to be the Public Private Partnership Committee of the local government authority.
- (5) The Committee may establish sub-committees as the Committee may consider necessary for the effective performance of the functions of the Committee.

#### Section 22—Meetings of the Public Private Partnership Committee

- (1) The Committee shall meet at least once every two months for the conduct of business at a time and place determined by the chairperson.
- (2) An Executive Committee of a local government authority shall meet as and when necessary to deliberate on a public private partnership project.

(3) The chairperson shall, at the request in writing of not less than four members of the Committee, convene an extraordinary meeting of the Committee at a time and place determined by the chairperson.

(4) The quorum at a meeting of the Committee is five members of the Committee.

(5) The Committee may co-opt a person to attend a meeting of the Committee but that person shall not vote on a matter for decision at the meeting.

(6) The chairperson shall preside at meetings of the Committee and in the absence of the chairperson, a member of the Committee elected by the members present from among their number shall preside.

(7) Matters before the Committee shall be decided by a majority of the members present and voting and in the event of an equality of votes, the person presiding shall have a casting vote.

(8) Subject to the provisions of this Act, the Minister shall issue guidelines on the procedure for meetings and the keeping of records of the meetings of the Committee.

(9) For purposes of a public private partnership arrangement, the provisions of this section, other than subsection (4), apply to an Executive Committee of a local government authority.

(10) In the case of a local government authority, the quorum shall be half of the membership of the committee.

#### Section 23—Disclosure of interest

(1) A member of the Committee who has an interest in a matter for consideration

(a) shall disclose in writing the nature of the interest and the disclosure shall form part of the record of the consideration of the matter; and

(b) is disqualified from being present at, or participating in the deliberations or determination of the Committee in respect of that matter.

(2) A member ceases to be a member of the Committee if that member has an interest in a matter before the Committee and

(a) fails to disclose that interest; or

(b) is present at or participates in the deliberations of the Committee in respect of the matter.

#### Section 24—Allowances

Members of the Committee and sub-committees, members of the Fiscal Commitment Technical Committee and the Complaints Panel shall be paid allowances approved by the Minister.

#### Section 25—Ministerial responsibility

(1) The Minister may give policy directives that are consistent with the objects of this Act to the Committee and contracting authorities and the Committee and the contracting authorities shall comply.

(2) The Minister shall, with the assistance of the Office the Public Private Partnership Committee and other relevant contracting authorities,

(a) develop a plan that specifies the priorities relating to the development and implementation of partnership projects over a period of five years; and

(b) review annually the plan referred to in paragraph (a).

(3) The plan referred to in paragraph (a) of subsection (2) shall be consistent with

(a) the Public Investment Plan;

(b) the Medium Term Fiscal Framework; and

(c) the National Infrastructure Plan pursuant to the Public Financial Management Regulations, 2019 (L.I. 2378).

(4) The Minister shall with the assistance of the Office and Public Private Partnership Committee

(a) issue the Seal of Quality approving the feasibility study of the public private partnership project to qualify the project to be

(i) part of the portfolio of projects; and

(ii) considered as part of the Public Investment Plan;

(b) countersign all partnership agreements that require government support; and

(c) sign all government support agreements to make them effective after the relevant approvals.

#### Section 26—Public Private Partnership Office

(1) There shall be an office responsible for Public Private Partnerships, within the Division responsible for public investments and assets in the Ministry.

(2) The Office shall be under the supervision of the Chief Director of the Ministry in accordance with the Civil Service Act, 1993 (P.N.D.C. L. 327).

#### Section 27—Functions of the Office

(1) The Office shall promote efficiency and effectiveness in the development and implementation of partnership arrangements and ensure compliance with this Act.

(2) Without limiting subsection (1), the Office shall

(a) serve as the secretariat to

(i) the Public Private Partnership Committee; and

(ii) the Fiscal Commitment Technical Committee;

(b) coordinate and oversee the partnership processes and procedures established under this Act;

(c) provide technical support and guidance to contracting authorities in the structuring, procurement, implementation and evaluation of partnership projects;

(d) promote investment in partnership projects;

- (e) review the reports and proposals referred to the Office in pursuance of the provisions of this Act;
- (f) recommend the granting of approvals required under this Act';
- (g) generate and disseminate information in respect of standardised bidding documents, partnership agreements and manuals for public private partnerships;
- (h) explore and develop innovative mechanisms for financing investment in infrastructure and services;
- (i) oversee the monitoring and evaluation of public private partnerships from commencement to post completion stage;
- (j) recognise and promote best practice in partnership arrangements;
- (k) guide and support contracting authorities in the selection of experts or transaction advisors;
- (l) maintain a register of potential partnership projects proposed by contracting authorities;
- (m) undertake capacity building programmes for contracting authorities and relevant stakeholders;
- (n) promote awareness of public private partnerships in the country generally;
- (o) collate and analyse information including data on contingent liabilities and budgetary Issues related to public private partnerships;
- (p) manage financial and any other form of Government support including the Project Development Facility and Viability Gap Facility; and
- (q) perform any other functions that the Minister may assign to the Office under this Act.

#### Section 28—Fiscal Commitment Technical Committee

There is established by this Act, a Fiscal Commitment Technical Committee.

#### Section 29—Composition of the Fiscal Commitment Technical Committee

(1) The Fiscal Commitment Technical Committee consists of

- (a) the Chief Director of the Ministry as chairperson;
- (b) the Director responsible for the Public Debt Management Office of the Ministry;
- (c) the Director responsible for the Budget Office of the Ministry;
- (d) the Director responsible for Economic Strategy and Research of the Ministry; and
- (e) the Director responsible for Public Investment and Assets.

(2) The head of the Office shall be the secretary to the Fiscal Commitment Technical Committee.

#### Section 30—Functions of the Fiscal Commitment Technical Committee

(1) The Fiscal Commitment Technical Committee shall, through the Office, serve as a technical advisory committee to the Public Private Partnership Committee.

- (2) Without limiting subsection (1), the Fiscal Commitment Technical Committee shall
- (a) identify, assess, monitor and report to the Public Private Partnership Committee on all fiscal commitments and contingent liabilities associated with public private partnerships projects as well as the implications of the project with respect to the Viability Gap Facility;
  - (b) consider affordability of fiscal commitment in the light of the budget and liability management; and
  - (c) make recommendations to the Public Private Partnership Committee based on the assessment of fiscal risk.

#### Section 31—Contracting authority

- (1) The Principal Spending Officer of a contracting authority shall, in preparing the
- (a) Medium Term National Development Plan,
  - (b) Public Investment Plan, and
  - (c) Budget of the contracting authority in respect if infrastructure and services, include partnership projects and partnership arrangements in furtherance of the objects of this Act.
- (2) A contracting authority shall, subject to obtaining the relevant approvals, have the primary responsibility for the management of each phase of a partnership project.
- (3) A contracting authority may, where necessary, engage the services of
- (a) an expert,
  - (b) a consultant, or
  - (c) a transaction advisor, for a specified period to guide or assist that contracting authority in the diagnostic studies and management of the procurement phase of a public private partnership project.
- (4) Despite the engagement of an expert or consultant by a contracting authority, the contracting authority is responsible for the I decisions the contracting authority makes whether or not the decisions are based on the advice of the expert or consultant.
- (5) A contracting authority shall ensure that the requisite approvals specified in the First Schedule are obtained.

#### Section 32—Public Investment Unit

- (1) The Public Investment Unit set up under the Public Financial Management (public Investment Management) Regulations 2020 (L.I. 2411) shall be the focal unit for Public Private Partnership Projects for the contracting authority.
- (2) In the case of local government authorities, the Metropolitan, Municipal and District Planning Coordinating Units shall be the focal unit for public private partnership projects.
- (3) The Public Investment Unit shall consist of the technical, financial, economic, legal, procurement and environmental and social safeguards personnel that the contracting authority

considers necessary for the performance of a Public Investment Unit in relation to a partnership project under this Act.

### Section 33—Functions of a Public Investment Unit

(1) A Public Investment Unit shall, on behalf of the contracting authority

(a) prepare and appraise a project in accordance with this Act and the Regulations issued by the Minister to ensure technical, legal, environmental, social, economic and financial viability;

(b) ensure that the parties involved in a public private partnership project comply with the provisions of this Act;

(c) undertake the tendering process in accordance with this Act",

(d) oversee the management of a public private partnership project in accordance with the project agreement entered into by the contracting authority;

(e) monitor public private partnership projects and submit to the Office, annual or any other periodic reports on project agreements entered into by the contracting authority;

(f) maintain a record of all documentation and agreements entered into by the contracting authority relating to a project; and

(g) perform any other functions as may be assigned to the Public Investment Unit by the contracting authority.

(2) In performing the functions under subsection (1), a Public Investment Unit shall report to the Office through the contracting authority and shall

(a) implement the recommendations of the Office; and

(b) submit relevant information that may be required by the Office.

(3) In the case of a local government authority, the Public Investment Unit shall report to the Office through the contracting authority, Regional Coordinating Council and Ministry of Local Government and Rural Development on all matters related to partnership projects.

### Public Private Partnership Process

#### Section 34—Stages of public private partnership process

(1) A contracting authority which seeks to undertake a public private partnership project shall comply with the public private partnership process specified in subsection (2).

(2) The public private partnership process comprises the following stages:

(a) the project preparation stage;

(b) the procurement stage; and

(c) the contract and post-contract award management stage.

#### Section 35—Transaction advisor

(1) Where a contracting authority lacks the technical capacity for the preparation of public private partnership projects including



- (a) pre-feasibility and feasibility study reports, and
  - (b) related transaction advisory services such as procurement of a private party the contracting authority may procure the services of a transaction advisor in accordance with the Public Procurement Act, 2003 (Act 663).
- (2) A transaction advisor shall
- (a) conduct the pre-feasibility, feasibility or any other related study;
  - (b) prepare a report on the study; and
  - (c) submit to the contracting authority, all documents related to the assignment and the project financial and economic model.
- (3) A transaction advisor shall not
- (a) participate in the implementation of the public private partnership project for which the services were procured; and
  - (b) provide transaction advisory services to any bidder in the process of bidding towards participating in the implementation of the public private partnership project in which that transaction advisor has previously provided advisory services

#### Public Private Partnership Project Preparation Stage

##### Section 36—Project Concept Note and pre-feasibility study report

- (1) Where a contracting authority intends to undertake private partnership project, the contracting authority shall prepare and submit to the Office prepare and
- (a) a Project Concept Note; and
  - (b) Pre-feasibility Study Report.
- (2) The preparation, appraisal and submission of the Project Concept Note and Pre-feasibility Study Report of a partnership project shall be in accordance with the Public Financial Management (public Investment Management) Regulations, 2020 (L.I. 2411).

##### Section 37—Feasibility study

- (1) Upon acceptance of the Pre-feasibility Study Report by the contracting authority, the appraising authority and the Office, that the project qualifies to be undertaken as a partnership project, the contracting authority shall proceed to undertake a feasibility study of the partnership project to determine
- (a) the technical requirements of the project;
  - (b) the legal requirements to be met by both parties to the project;
  - (c) the social, economic, and environmental impact of the project;
  - (d) the appropriate transfer of risks to the party best able to control and manage the risks;
  - (e) any contingent liabilities;

- (f) options of public private partnerships including the most appropriate type of public private partnership structure;
  - (g) the financial viability of the project;
  - (h) the fiscal affordability and the end user affordability; and
  - (i) value for money for the contracting authority and government as a whole.
- (2) The contracting authority shall ensure that at each stage of the project preparation phase, adequate stakeholder consultations are undertaken to solicit a buy-in of the project.
- (3) A contracting authority shall, where necessary, appoint a transaction advisor in accordance with subsection (3) of section 31 to undertake a feasibility study.
- (4) In undertaking a pre-feasibility study and feasibility study, the contracting authority and the transaction advisor shall, pursuant to the Public Financial Management (Public Investment Management) Regulations, 2020 (L.1. 2411), ensure that only established parameters and conversion factors developed, administered and published on the website of the Ministry are applied.
- (5) The Public Investment Unit of the contracting authority shall review the Feasibility Study Report and submit the Feasibility Study Report with recommendations to the appraising authority through the Principal Spending Officer.
- (6) The appraising authority shall upon appraising the partnership project, submit the Feasibility Study Report and recommendation, to the Office for
- (a) the consideration of the Committee for approval; and
  - (b) issuance of the Seal of Quality by the Minister.
- (7) The Feasibility Study Report from a public corporation or state-owned enterprise on a partnership project, shall require the approval of the governing body of the public corporation or state-owned enterprise and the Sector Ministry before submission to the Office through the State Interests and Governance Authority.
- (8) In the case of a local government authority, the feasibility study shall require the approval of the Executive Committee of the District Assembly before submission to the Office through the Office of the Regional Coordinating Council after the appraisal by the Regional Planning Coordinating Unit.
- (9) The Executive Committee shall communicate the decision of the Executive Committee to the General Assembly and the Ministry responsible for Local Government and Rural Development through the Regional Coordinating Council.
- (10) In considering a Feasibility Study Report for a partnership project under this Act, the Committee shall take into account
- (a) the Feasibility Study Report and the Appraisal Report; and
  - (b) the memorandum on the partnership project submitted by the Office including recommendations of the Fiscal Commitment Technical Committee.

(11) A contracting authority shall commence the procurement process for a private party only after

(a) the Feasibility Study Report and the Appraisal Report have been approved by the Committee; and

(b) the Seal of Quality by the Minister has been granted.

#### Public Private Partnership Procurement Stage

##### Section 38—Public private partnerships solicitation process

(1) The procurement process for public private Partnerships shall be

(a) open, competitive, transparent, cost effective, equitable fair: and

(b) conducted in accordance with this Act.

(2) Prior to the initiation of the procurement process, the contracting authority shall

(a) undertake adequate and comprehensive stakeholder consultations to ensure a buy-in of the project;

(b) ensure the promotion of the project to prospective bidders without limiting competition using market sounding among others; and

(c) prepare procurement documents in respect of request for qualification, request for proposals and public private partnerships agreement by adopting model and standard documents developed by the Office.

(3) In the absence of the standard or model procurement documents referred to in paragraph (c) of subsection (2), the procurement documents developed shall be submitted to the Office by the contracting authority for approval before usage.

(4) The procurement process shall be a two-stage national or international competitive tendering process comprising

(a) the qualification stage; and

(b) the proposal stage.

##### Section 39—Request for qualification

(1) The contracting authority shall invite applications to pre qualify.

(2) The contracting authority shall publish an invitation to prequalify in at least

(a) two daily newspapers of national circulation in the case of a national or international competitive tendering process;

(b) one daily newspaper or publication of international circulation in the case of an international competitive tendering process; and

(c) the website of the contracting authority and the Ministry.

(3) The minimum qualifications required of a bidder for a public private partnership project shall be specified in the invitation to prequalify.

(4) Where a public private partnership project is required to be partially funded by a contracting authority, the contracting authority shall, prior to procuring a private party, obtain written confirmation from the Minister of the availability of funds for the implementation of the project.

#### Section 40—Qualification of private party

(1) A bidder for a public private partnership project, be it a firm, consortium or a person shall

(a) have the legal capacity to enter into the contract;

(b) possess the required

(i) professional and technical qualifications and competence that the contracting authority and the Office consider appropriate;

(ii) financial resources;

(iii) personnel, managerial capability, reliability, experience and reputation in public private partnership arrangements and agreements;

(e) be solvent;

(d) not be in receivership, bankruptcy or be in the process of being wound up;

(e) have relevant industry experience;

(f) not be the subject of legal proceedings that materially affect the capacity of the bidder to enter into a contract;

(g) have fulfilled the obligations of the bidder to pay taxes and social security contributions and any paid compensation due, for damage caused to property;

(h) have directors or officers who have not been

(i) convicted of any offence relating to professional conduct, false statements or misrepresentations as to qualifications to enter into a public private partnership contract, within a period of ten years preceding the commencement of the procurement proceedings for the public private partnership project; or

(ii) disqualified pursuant to administrative proceedings or disbarment proceedings; and

(i) meet any other criteria as the contracting authority and the Office consider appropriate.

(2) The contracting authority may require bidders to provide appropriate documentary evidence or other Information that the contracting authority considers relevant to satisfy the contracting authority that the bidders are qualified in accordance with the criteria referred to in subsection (1).

(3) A requirement in this section stated in the tender documents with respect to the application for prequalification and other documents for the invitation of proposals, shall apply equally to the bidders.

(4) The contracting authority shall evaluate the qualifications of the bidders or prospective private parties in accordance with the criteria and procedures stated in the documents referred to in subsection (3).

(5) The contracting authority shall disqualify a prospective private party who submits a document containing false information for purposes of qualification.

(6) The contracting authority may disqualify a prospective private party if the contracting authority determines that the information submitted concerning the qualifications of a private party was materially inaccurate or materially incomplete.

#### Section 41—Prequalification proceedings

(1) The contracting authority shall respond to any request by a bidder or prospective private party for clarification of the prequalification documents if the request is made at least ten days before the deadline for the submission of applications to prequalify.

(2) The contracting authority shall communicate the response of the contracting authority to the bidders within a reasonable time and in any event within a period of at least seven days to enable the bidders or prospective private party make a timely submission of the application to prequalify.

#### Section 42—Prequalification bidders' conference

(1) The contracting authority in consultation with the Office shall organise a prequalification bidders' conference at which discussions will be held on issues related to the prequalification documentation and any other concerns of bidders in relation to the public private partnership project.

(2) Clarifications sought by bidders or prospective private parties and responses provided at the prequalification bidders' conference shall be communicated to all bidders in writing to enable the bidders and the prospective private parties finalise the prequalification bids for submission.

#### Section 43—Evaluation and decision on prequalification

(1) The contracting authority shall constitute an evaluation panel to evaluate the prequalification applications or bids after the bid submission date and time.

(2) The evaluation panel shall consist of persons with technical, financial, economic, legal, and environmental and social safeguards expertise and relevant experts.

(3) The evaluation panel shall evaluate the bids based on the criteria set out in the request for qualification bidding document.

(4) The evaluation panel shall submit the report and recommendations to the Head of the contracting authority.

(5) The Head of the contracting authority shall

(a) give notice in writing to each bidder that submitted an application to prequalify that indicates whether or not that bidder has been prequalified; and

(b) make available to any other person upon request, the names of bidders who have been prequalified.

(6) Bidders who have been prequalified may participate further in the public private partnership procurement process.

(7) The contracting authority shall communicate to a bidder who has not been prequalified, the grounds for disqualification.

(8) The number of bidders prequalified after the evaluation of application for prequalification shall not exceed six.

#### Section 44—Request for proposals

(1) The contracting authority in consultation with the Office shall issue request for proposal documents to shortlisted prequalified bidders.

(2) The request for proposal documents shall include the following information:

(a) instructions for preparing the tender;

(b) project information necessary for the preparation of the bid supplemented with information provided in a virtual data room accessible to bidders;

(c) the required minimum specifications of the project outputs including technical and financial conditions and quality characteristics such as

(i) the service to be rendered;

(ii) the level of service;

(iii) measurable performance indicators;

(iv) safety, security and environmental preservation requirements to be met by a bidder;

(v) the envisaged commercial arrangements;

(vi) forms and documents to be filled including the form of the financial bid and the desired construction and operational period of the concession;

(d) the criteria to be used by the contracting authority to determine the successful tender including any margin of preference for domestic business in respect of local content and any criteria other than the bid price;

(e) a draft public private partnership agreement indicating the terms and conditions of the public private partnership contract, including specific and measurable output specifications and risk allocation;

(f) the manner in which the tender price will be formulated including a statement on whether the price covers applicable taxes and custom duties;

(g) any requirements of the contracting authority connected with the issue, nature, form, amount and principal terms and conditions of the bid security to be provided by bidders submitting tenders;

- (h) a statement that a bidder may modify or withdraw the bid prior to the expiry date for the submission of bids without forfeiting the tender security;
- (i) the manner, place and deadline for the submission of tenders;
- (j) the means by which bidders may seek clarification of the invitation document;
- (k) a statement as to whether the contracting authority intends to have a meeting of bidders and whether a competitive dialogue will follow the meeting of bidders;
- (l) the period during which tenders will be valid;
- (m) the procedures for opening and examining tenders; and
- (n) any other requirements established by the contracting authority under this Act and the Regulations relating to the preparation and submission of tenders and other aspects of the procurement proceedings.

#### Section 45—Margin of preference for domestic business

- (1) A contracting authority may grant a margin of preference for a domestic business in respect of the level of local content.
- (2) The margin of preference for domestic business in respect of the local content to be applied to a specific partnership project shall be stated in the bidding documents.
- (3) A bidder shall not enjoy the margin of preference unless the business of that bidder is incorporated in the country and the majority ownership of the company is held by Ghanaians.
- (4) A request for proposals and a partnership agreement shall contain a provision to indicate that an entity which enjoys a margin of preference shall not alter a majority stake held by Ghanaians within the first ten years of the term of the partnership agreement.

#### Section 46—Response to bidders and bidders' conference

- (1) The contracting authority shall respond to any request by a bidder or prospective private party for clarification of the request for proposal documents if the request is made at least ten days before the date for the submission of the request for proposal documents.
- (2) The response of the contracting authority shall be given within a reasonable time and in any event within a period of at least seven days to enable the bidder or prospective private party make a timely submission of proposal documents.
- (3) The contracting authority shall, in consultation with the Office, organise a bidders' conference at which discussions will be held on issues related to the request for proposal documents and any other concerns of bidders in relation to the public private partnership project.
- (4) Clarifications sought by bidders or prospective private parties and responses provided at the bidders' conference shall be communicated to all bidders in writing in a Bid Bulletin to enable the bidders finalise the proposals for submission.

#### Section 47—Submission and opening of bids

- (1) The bids shall be

- (a) submitted by a bidder before or on the date and time scheduled for the opening of the bids; and
  - (b) opened at the time and place scheduled for the opening of the bids and in the presence of the bidders, their representatives or agents in attendance.
- (2) A bidder shall submit a technical bid and financial bid in two separate sealed envelopes.
  - (3) The financial bid shall be opened only after the technical proposal has been opened and approved.
  - (4) The procedure for submission and opening of bids shall be in accordance with
    - (a) the rules on the submission of bids indicated in the request for proposal; and
    - (b) this Act, Regulations and Guidelines.

#### Section 48—Evaluation of bids

- (1) The contracting authority shall constitute a Proposal Evaluation Panel for the purpose of evaluating bids submitted by bidders.
- (2) The Proposal Evaluation Panel shall consist of representatives from
  - (a) the Public Investment Unit;
  - (b) the transaction advisors, if any; and
  - (c) any other person or institution considered relevant by the contracting authority in the areas of technical, financial, economic, legal, and environmental and social safeguards.
- (3) The Proposal Evaluation Panel shall evaluate and compare the bids that have been accepted to ascertain the successful bidder in accordance with the procedures and criteria set out in the request for proposals document.
- (4) The Proposal Evaluation Panel shall prepare and submit a Proposal Evaluation Report to the Head of the contracting authority.
- (5) The contracting authority shall submit the Proposal Evaluation Report to the Public Private Partnership Committee for consideration.
- (6) The Proposal Evaluation Report shall indicate among others the application of the obligations of the contracting authority in sections 3 to 11 in the evaluation of the bids.
- (7) The successful proposal or preferred bid shall be the most favourable compliant bid with respect to the evaluation criteria and the bid that offers the best value for money.
- (8) The Head of the contracting authority shall, after the evaluation and approval by the Public Private Partnership Committee, give notice of the results of the evaluation in writing to each bidder that submitted a proposal.

#### Section 49—Negotiations

- (1) A contracting authority shall, further to the approval of the Proposal Evaluation Report by the Committee,



- (a) constitute a multi-disciplinary negotiation team consisting of representatives from the
  - (i) Public Investment Unit;
  - (ii) contracting authority;
  - (iii) transaction advisor;
  - (iv) Office; and
  - (v) Office of the Attorney-General;
- (b) enter into negotiations with the successful bidder; and
- (c) request the second ranked bidder to extend the validity of the bid of that second ranked bidder pending the completion of negotiations with the successful bidder.
- (2) The negotiation team shall enter into negotiations with the successful bidder on the technical and financial terms of the project agreement.
- (3) Where the negotiations carried out with the successful bidder are unsuccessful, the negotiation team shall enter into negotiations with the second ranked successful bidder without varying the technical and financial terms of the project agreement referred to in subsection (2).
- (4) Upon completion of negotiations, the negotiation team shall submit to the contracting authority concerned, a report specifying the negotiated terms and recommendations of the negotiation team.
- (5) The contracting authority shall
  - (a) review the report submitted to the contracting authority under subsection (4); and
  - (b) where the contracting authority is satisfied with the recommendations of the negotiation team, submit the report to the Committee.
- (6) The Committee shall consider
  - (a) the project negotiation report; and
  - (b) the recommendations of the Fiscal Commitment Technical Committee on the report after confirming the fiscal commitments and contingent liabilities in accordance with the project agreement before the approval of the project negotiation report.
- (7) Where the Committee is not satisfied with the recommendations of the negotiation team, the contracting authority shall refer the report to the negotiation team with reasons and request for a review of the report.

#### Section 50—Cancellation of tender

- (1) A contracting authority may cancel a tender process at any time before the execution of the related contract if fundamentally adverse consequences are likely to occur with the progress of the tender process.
- (2) A contracting authority shall not cancel a tender unless
  - (a) the Committee approves the cancellation; and

(b) the proposal evaluation team submits the recommendations of the proposal evaluation team to the contracting authority on the cancellation of the tender.

(3) A cancellation by a contracting authority under subsection (1) shall

(a) be by notice in writing issued to the bidders of a tender advertised by the contracting authority; and

(b) contain reasons for the cancellation of the tender by the contracting authority.

(4) The bidders of a tender that is cancelled under this section shall not be entitled to compensation for the cancellation of the tender.

(5) In the event of the cancellation of a tender, the contracting authority may

(a) restart the competitive tender process; or

(b) apply to the Committee to procure the project through the Ghana Infrastructure Investment Fund subject to the approval of the Ghana Infrastructure Investment Fund.

#### Procurement of public private partnership project through Ghana

##### Section 51—Infrastructure Investment Fund

(1) Subject to the approval of the Ghana Infrastructure Investment Fund to act as a lead arranger for a consortium to achieve efficient and timely procurement, a partnership project may be procured through the Ghana Infrastructure Investment Fund where

(a) the use of a competitive solicitation method proves unsuccessful as evident in the cancellation of tender; or

(b) there is an urgent need for execution of a potential partnership project, determined after feasibility studies to be economically and financially viable, in order to serve strategic national interest.

(2) The procurement of a partnership project through the Ghana Infrastructure Investment Fund shall not be used without written approval from the Committee.

##### Section 52—Approval of partnership projects

(1) The Minister and the Minister responsible for the contracting authority concerned shall

(a) consider the project negotiation report; and

(b) jointly submit a report to Cabinet on the recommendation of the Committee.

(2) Subject to the Constitution, the approval authorities required to grant final approval are as set out in the First Schedule.

##### Section 53—Approval of partnership projects by local government authority

(1) The Executive Committee of a local government authority shall consider a partnership project submitted to the Executive Committee and make a recommendation to the General Assembly of the local government authority, for consideration and approval of the partnership project.

(2) Where the General Assembly of the local government authority approves the undertaking of a partnership project, the District Coordinating Director shall forward the Public Private Partnership Agreement to the Office through the Regional Co-ordinating Council and the Ministry of Local Government and Rural Development.

(3) Where the value of the partnership project exceeds the threshold for the local government authority, the District Assembly shall, through the Regional Coordinating Council and the Ministry of Local Government and Rural Development, seek approval in accordance with the First Schedule.

#### Unsolicited Proposals and Related Matters

##### Section 54—Unsolicited proposal

For the purposes of this Act, an unsolicited proposal is

- (a) a proposal made by a Private party to undertake a partnership project; and
- (b) submitted at the initiative of the private party rather than in response to a request from a contracting authority.

##### Section 55—Requirements for unsolicited proposals

(1) A contracting authority shall consider and proceed with

- (a) an unsolicited proposal, or
- (b) a private sector led proposal,

if the project is not in the Medium Term Development Plan of the contracting authority and has not already been considered by the contracting authority for implementation as part of the public private partnership pipeline of projects of the contracting authority.

(2) The proposal must demonstrate innovation and not place onerous conditions on Government.

(3) The unsolicited proposal shall be consistent with

- (a) the coordinated programme of economic and social development policies specified in clause (5) of article 36 of the Constitution;
- (b) the National Medium Term Development Policy Framework; or
- (c) the National Infrastructure Plan.

(4) An unsolicited proposal or private sector led proposal shall

- (a) be economically and financially viable;
- (b) offer the best value for money;
- (c) be affordable; and
- (d) not require government support in the form of a viability gap funding or tax exemptions.

(5) The private party or proponent shall submit to the contracting authority, with a copy to the Office,

(a) an unsolicited proposal in the form of an initial business case regarding the proposed project, and

(b) all the necessary supporting documents, for preliminary review by the contracting authority.

(6) The contracting authority shall, as part of the preliminary review, ensure that

(a) the conditions in subsections (1) and (2), and

(b) the obligations of the contracting authority, have been complied with.

(7) If the contracting authority decides to reject the

(a) unsolicited proposal, or

(b) private sector led proposal,

the contracting authority shall notify in writing the authorised representative of the private party or the proponent of the unsolicited proposal, that the contracting authority has rejected the proposal.

(8) The intellectual property right with respect to the initial business case, Feasibility Study Report or any other diagnostic document submitted by the proponent in furtherance of the proposal shall be protected in accordance with the intellectual property right laws of Ghana unless the holder of the right agrees in writing to waive the right of that holder.

(9) A holder of an intellectual property right who discloses the intellectual property right for the purposes of the partnership is considered to have waived the intellectual property right unless the holder of the intellectual property right designates and the parties agree in writing that the intellectual property right is not waived.

(10) A no-claim relationship shall be maintained at all times between the private party or proponent and the contracting authority.

(11) Any correspondence between the contracting authority and the private party does not put the contracting authority under any obligation to a private party or proponent of an unsolicited proposal.

(12) Where the contracting authority intends to consider or promote the unsolicited proposal or private sector led proposal, the contracting authority shall

(a) notify the Office of the decision in writing accompanied by the initial business case prepared by the private party or proponent;

(b) submit a report on the review carried out on the unsolicited proposal by the contracting authority, after the initial screening; and

(c) state in the report

(i) the decision to consider or promote the unsolicited proposal; and

(ii) the reasons for consideration of the unsolicited proposal.

(13) The Office shall register the project but the registration of the project shall not

(a) be construed as a registration of any identified private party or proponent; or

- (b) constitute a commitment of the contracting authority to
  - (i) execute the project; or
  - (ii) grant exclusivity for the project to the private party or the proponent of the unsolicited proposal.
- (14) The contracting authority shall, after the registration of the project, notify in writing the private party or proponent of the unsolicited proposal of the decision of the contracting authority to consider or promote the unsolicited proposal.
- (15) The proponent shall, upon the notification referred to in subsection (12), undertake
  - (a) a feasibility study on the project in the prescribed format and in accordance with the Public Financial Management (public Investment Management) Regulations, 2020 (L.I. 2411); and
  - (b) any other relevant studies
    - (i) at no cost to the contracting authority; and
    - (ii) submit the Feasibility Study Report to the contracting authority.
- (16) The contracting authority and the appraising authority shall
  - (a) appraise the Feasibility Study Report; and
  - (b) submit the Feasibility Study Report and Appraisal Report to the Office for consideration by the Committee.
- (17) Where the Committee approves the feasibility study, the contracting authority may conduct an open bidding process to enable other interested parties, other than the original proponent of the unsolicited proposal, to make a technical and financial bid in accordance with the public private partnership solicitation process.
- (18) Where the original proponent is unsuccessful after the evaluation of the bid the original proponent has the option to match the winning bid to emerge as the preferred bidder.
- (19) Where the preferred bidder is not the original bidder, the preferred bidder shall pay not more than two per cent of the capital cost of the potential partnership project at financial close in accordance with paragraph (c) of subsection (1) of section 78 to the Office to reduce
  - (a) the cost of appraisal; and
  - (b) the cost of the project development by the original Proponent.
- (20) Despite subsections (17), (18) and (19), the contracting authority may declare the original proponent as the preferred bidder.
- (21) Where a contracting authority declares the original proponent as the preferred bidder, that preferred bidder shall
  - (a) receive a defined return; and
  - (b) apply an open book method.

(22) Where a contracting authority intends to apply subsection (20), the contracting authority shall, in the request submitted to the Committee for prior approval, include the grounds and circumstances that the contracting authority relied on to justify the use of the method in subsection (20).

(23) The process of negotiation and approval of an agreement related to an unsolicited proposal shall be in accordance with this Act.

#### Contract and Post Contract Award Management

##### Section 56—Public private partnership arrangements

Subject to the provisions of this Act, a contracting authority may enter into a public private partnership arrangement with a private party as specified in the Second Schedule.

##### Section 57—Form of partnership agreement

(1) A contracting authority shall prepare a partnership agreement based on the standardised documents formulated by the Office and where appropriate in collaboration with the Office of the Attorney-General and Ministry of Justice.

(2) The Office of the Attorney-General and Ministry of Justice shall review forms of partnership agreements and determine conformity with relevant requirements.

(3) Where amendments are recommended by the Office of the Attorney-General and Ministry of Justice, the contracting authority shall incorporate the amendments in the partnership agreement before the agreement is submitted to the approval authority.

(4) A partnership agreement shall be in the English language and in any other language that may be approved by the Minister.

##### Section 58—Scope of partnership agreement

(1) Subject to the requirements and transaction structure of a partnership project, a partnership agreement may consist of one or more agreements or a principal agreement with subsidiary agreements.

(2) A partnership agreement shall conform to this Act.

(3) A partnership agreement may require the private party to

(a) perform or undertake a specified project or render a particular service;

(b) assume financial, technical or operational risks in connection with the performance of a public function or the use of public property; and

(c) receive consideration for performing a public function or utilising public property, by way of

(i) a fee or charge from any revenue fund or budgetary fund of the Government;

(ii) user levies or tariffs collected by the private party from end-users or customers for a service provided by the private party; or

(iii) a combination of the consideration paid under subparagraphs (i) and (ii).

(4) The parties to a partnership agreement may include a provision in the partnership agreement to enable the private party to retain for a specified period, all or part of the charges, fees or tariffs paid by the end-users for the use of a facility related to the partnership project.

(5) The charges, fees or tariffs paid by the end-users in subsection

(4) shall constitute part or all the compensation to that private party.

(6) The imposition of a tariff or user levy payable by a third party or an end-user of a facility related to a partnership project is subject to

(a) this Act and the Regulations; and

(b) the terms and conditions of the relevant partnership agreement.

(7) The partnership agreement may, where applicable, provide methods and formulae for the establishment and adjustment of user levies, fees or tariffs.

(8) For the purposes of subsections (6) and (7), the imposition of levies, fees or tariffs for a partnership agreement shall be regulated by the partnership agreement subject to this Act and the Regulations.

(9) A contracting authority may make payments to a private party, in accordance with the partnership agreement, this Act and the Regulations

(a) for a service rendered to or on behalf of that contracting authority under a partnership agreement;

(b) as a contribution towards capital costs of a partnership project; or

(c) as a substitute for or in addition to user fees, levies or tariffs for the use of a partnership project or services.

(10) A partnership agreement shall explicitly provide for

(a) fair compensation to a private party in the event of termination of that agreement on account of default by the contracting authority or expropriation by the Government, and

(b) fair compensation to a contracting authority in the event of termination of that agreement on account of default by the private party.

(11) A partnership agreement shall explicitly specify the minimum contractual obligations required to be met by the parties as set out in the Third Schedule.

#### Section 59—Contract execution

(1) Subject to this Act and the Regulations,

(a) the Head of a contracting authority shall execute a partnership agreement on behalf of that contracting authority in respect of a partnership arrangement; and

(b) the head of a private party or an authorised officer of that private party shall execute a partnership agreement on behalf of that private party in respect of a partnership arrangement.

(2) The Office shall register, monitor and evaluate the implementation of all partnership agreements.

#### Section 60—Contract management

(1) A contracting authority shall

(a) before a partnership agreement is entered into, identify and adopt measures to ensure that the terms of the contract can be implemented;

(b) immediately after the execution of the contract and before the date of the commencement of the contract, submit copies of the executed contracts and related documents to the Office;

(c) generally, oversee the management of the partnership agreement; and

(d) submit to the Office, quarterly and annual reports on the implementation of the contract and the partnership project.

(2) A partnership agreement involving the performance of a function of a contracting authority by a private party shall not divest that contracting authority of the responsibility of protecting the public interest and ensuring that the relevant functions are effectively and efficiently performed by the private party on behalf of the contracting authority.

(3) A partnership agreement involving the use of property of a contracting authority by a private party shall not divest that contracting authority of the responsibility of ensuring that the property is appropriately protected against forfeiture, theft, loss, wastage or misuse.

#### Section 61—Amendment to contract

(1) A contracting authority or private party which seeks to amend a partnership agreement shall apply to the Public Private Partnership Committee through the Office stating reasons for the amendment.

(2) The Public Private Partnership Committee shall approve the amendments only if the amendments

(a) do not compromise the obligations of the contracting authority; and

(b) may lead to a more efficient and effective service delivery.

(3) The contracting authority shall ensure that upon approval of the amendments, the process outlined in this Act and the Regulations for negotiations, approval and execution of agreements are complied with to bring into effect the amended partnership agreement.

#### Section 62—Governing law of public private partnership agreement

(1) The governing law of a partnership agreement is the law of Ghana.

(2) The parties shall determine the place of arbitration in respect of a partnership agreement.

#### Section 63—Ownership of assets

(1) A partnership agreement shall specify which asset is or shall constitute public property and which asset is or shall constitute the private property of the private party involved.

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



(a) assets that the private party 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 partnership agreement;

(b) assets that the contracting authority, at its option, may purchase from the private party; and

(c) assets that the private party may retain or dispose of on the expiry or termination of the partnership agreement.

(3) The parties shall, in making the provision relating to the ownership and the transfer of assets in a partnership agreement, be guided by the key objectives of the partnership agreement including, where applicable, the need to ensure continuous provision of the services and other deliverables of the partnership project.

(4) Where provision is not made in a partnership agreement for the treatment of an asset in accordance with subsections (1) to (3), that asset shall be considered to be public property.

#### Section 64—Acquisition of rights related to project site

(1) Where the nature of a partnership project requires that a specific site land be acquired, allocated or otherwise dedicated for the purpose, a contracting authority may, either on the initiative of the contracting authority or through the relevant public entity, make the land available for the purpose of the partnership project in accordance with the terms of the partnership arrangement.

(2) A contracting authority may, where the circumstances require, assist a private party in obtaining the title, access, possession and rights related to a project site as may be necessary for the implementation of the partnership project.

(3) A contracting authority may acquire land and related rights subject to the State Lands Act, 1962 (Act 125).

#### Section 65—Easements

Subject to the payment of appropriate compensation that may be required, a contracting authority or other public entity may, for the purposes of a partnership project and in accordance with the Lands (Statutory Wayleaves) Act, 1963 (Act 186) and a partnership agreement, assist the private party concerned to

(a) enjoy the right to enter upon,

(b) transit through, or

(c) work or fix installations upon,

property of third parties, as appropriate for the implementation of a partnership project.

#### Section 66—Payment of compensation

Where compensation is required to be paid to a person who has an interest in or rights over the land acquired, the compensation shall, depending on the nature of the project, be paid by

(a) the relevant contracting authority; or

(b) the private party undertaking the partnership project and included in the project cost.

## Complaints and Settlement of Disputes

### Section 67—Complaints Panel for bidding process

- (1) There is established by this Act a Complaints Panel for the bidding process consisting of seven persons.
- (2) The members of the Complaints Panel consist of the following:
  - (a) one Judge nominated by the Chief Justice as the Chairperson;
  - (b) one representative of the Ghana Bar Association nominated by the Ghana Bar Association;
  - (c) one representative of the Association of Ghana Industries nominated by the Association of Ghana Industries;
  - (d) one representative of the Ghana Institution of Surveyors nominated by the Ghana Institution of Surveyors;
  - (e) one representative of the Chartered Institute of Procurement and Supply nominated by the Chartered Institute of Procurement and Supply;
  - (f) one Chief State Attorney nominated by the Attorney General and Minister responsible for Justice; and
  - (g) one person nominated by the Minister responsible for Finance who shall be Secretary to the Complaints Panel.
- (3) The members of the Complaints Panel shall be appointed by the Minister.
- (4) The quorum for a meeting of the Complaints Panel is four members.
- (5) The Complaints Panel may seek the guidance of experts in the determination of matters before the Complaints Panel.

### Section 68—Complaint procedure for bidding process

- (1) A person may lodge a complaint under this Act if that person or the entity that person represents is aggrieved as a result of a breach of any aspect of the bidding process.
- (2) The person may submit a written complaint to the Office with a copy to the contracting authority concerned within thirty days from the date the complainant becomes aware of the breach to which the complaint relates.
- (3) Despite subsection (2), in the case of evaluation results, only written complaints substituted within thirty days from the date the complainant receives notice of evaluation results shall be considered.
- (4) The Office shall, within ten days of receipt of a complaint, refer the complaint to the Complaints Panel.

### Section 69—Suspension of bidding process by Complaints Panel

- (1) Where the Complaints Panel is of the view that
  - (a) a complaint lodged is not frivolous, and

(b) the complainant may suffer irreparable harm or damage if the bidding process is not suspended, the Complaints Panel shall suspend the bidding process for the respective partnership project for a period of not more than sixty days.

(2) The Complaints Panel may, on receipt of a complaint and pending the resolution of the complaint, issue a notice of the complaint to all bidders, and to the contracting authority concerned.

(3) The Complaints Panel shall not act upon the complaint unless the complainant deposits, at the Office, a complaint bond in an amount specified by the Minister.

#### Section 70—Decision of Complaints Panel

(1) The Complaints Panel shall hear and review complaints in accordance with this Act and the Regulations.

(2) The Complaints Panel shall

(a) resolve a complaint within sixty days after the receipt of that complaint;

(b) issue a written decision indicating the reason for the decision; and

(c) indicate whether the complaint is upheld in whole or in part and the factors that were taken into account in arriving at the decision.

(3) The Complaints Panel shall, not later than five days after a decision is made, submit the decision and the record of proceedings to the Committee.

(4) The Committee shall, within five days of receipt of the decision from the Complaints Panel, furnish the complainant and the contracting authority with a copy of the decision.

(5) A person aggrieved with an order or decision of the Complaints Panel may appeal to the High Court within thirty days after the receipt of that order or decision.

#### Section 71—Complaints on services

(1) Where a private party is required to provide services directly to the general public or operate a facility for the benefit of the public under a partnership arrangement, that private party shall establish simplified and efficient mechanisms for the lodging of complaints and claims by the public and end users.

(2) A person affected by the services provided by a private party under a partnership arrangement may lodge, within thirty days, a complaint with the private party for expeditious redress.

(3) The private party shall inform the complainant of the decision taken on the complaint within thirty days after receipt of the complaint.

(4) The private party shall, within fifteen days after every six months, submit to the Office and the contracting authority concerned, information regarding complaints received in respect of the implementation of the partnership project and how the complaints have been resolved.

(5) The contracting authority may make recommendations or give directions to the private party with regard to measures to minimise or resolve the complaints.

(6) The efficiency of the resolution of a complaint by the private party shall be taken into account by the regulatory authority and the contracting authority when assessing the performance of the private party.

#### Section 72—Dispute between a contracting authority and private party

A dispute between a contracting authority and a private party arising from a partnership agreement shall be settled in accordance with the dispute resolution mechanism agreed by the parties in the partnership agreement or by default, in accordance with the Alternative Dispute Resolution Act, 2010 (Act 798).

#### Special Purpose Entity, Information and Equity Participation

##### Section 73—Special purpose entity

(1) A private party which seeks to

(a) enter into a partnership agreement as a special purpose entity solely for the purpose of a partnership project, or

(b) take over the rights of a private party that previously participated in a partnership process shall be incorporated in Ghana.

(2) A special purpose entity established under subsection (1)

(a) may, subject to the Regulations, include a public entity as a shareholder in the company; and

(b) shall provide the performance security and the conditions specified in the project agreement and in the

(3) Subject to the Companies Act, 2019 (Act 992), the directors of a Special purpose entity established under subsection (1) shall not

(a) wind up the company,

(b) alter the legal structure of the company, or

(c) reduce the share capital of the company unless the directors have applied for and obtained the written approval of the contracting authority and the Minister.

(4) A majority shareholder of a special purpose entity shall not transfer any shares held in a project company before the issuance by the contracting authority of an acceptance certificate confirming the acceptance of the contracting authority of the quality of the project undertaken in accordance with the project agreement executed by the parties.

(5) Despite the Companies Act, 2019 (Act 992), where a transfer of shares results in the transfer of the control of a project company to a third party, the transfer shall not be valid unless the shareholder applies for and obtains the written approval of the contracting authority and the Minister.

##### Section 74—Record keeping

A contracting authority shall keep a record of all matters relating to the selection and award proceedings for a partnership project in the prescribed manner.

#### Section 75—Access to information

(1) The contracting authority shall ensure that, subject to the requirements of any enactment on, access to information, relevant information in respect of a partnership project 15 made available to any person interested in the information subject to the payment of a fee to cover the cost of reproduction of the information requested by that person.

(2) The Office and the contracting authority shall ensure that the following information is made available on the website of the contracting authority and the Ministry that permits access by the public:

- (a) public private partnership projects registered with the Office;
- (b) project brief;
- (c) requests for qualification;
- (d) the names of pre-qualified and shortlisted private parties; and
- (e) notices of contract awards.

#### Section 76—Request for information

(1) The Minister or a contracting authority through the Office may, in the performance of functions under this Act

(a) by notice in writing, require a bidder or an official of a contracting authority or a relevant person in the private or public sector to provide information in a form and manner and within the period specified in the notice, to ensure compliance with this Act; and

(b) interview a person and request that person to provide particulars that are required for specific purposes under this Act.

(2) A notice referred to in subsection (1) shall

(a) state that the notice is served in exercise of the powers conferred by this section; and

(b) include a general statement of the purpose for which the information or response is required.

(3) Where a requirement to provide information or particulars under this Act is made, the response shall be provided by the person concerned not later than the time specified in the notice or within an extension period that the authority issuing the notice may grant.

#### Government Support Mechanisms

##### Section 77—Project Development Facility

There is established by this Act, a Project Development Facility which shall be a revolving fund.

##### Section 78—Sources of moneys for the Project Development Facility

(1) The sources of moneys for the Project Development Facility are

- (a) moneys approved by Parliament;
- (b) loans and grants from development partners;

(c) not more than two per cent of the capital cost of a potential partnership project paid by the winning bidder on financial close; and

(d) refunds of project development cost as a first charge on the approved budget of the contracting authority for other public Investment projects funded from the Project Development Facility.

(2) For the purposes of paragraph (a) of subsection (1), the Minister shall create a vote in the National Budget under Other Government Obligations for the Project Development Facility.

(3) The provisions of the Earmarked Funds Capping and Realignment Act 2017 (Act 947) shall not apply to the Project Development Facility.

#### Section 79—Management and use of moneys of Project Development Facility

(1) The Division responsible for Public Investment and Assets of the Ministry shall manage the Project Development Facility.

(2) The moneys for the Project Development Facility shall be used to finance

(a) project preparation;

(b) project structuring and procurement of private party;

(c) project management, monitoring and evaluation;

(d) public investment management capacity building;

(e) the public investment management system; and

(f) transaction advisory services.

(3) The Project Development Facility shall operate in accordance with this Act, the Regulations and Guidelines.

#### Section 80—Viability Gap Facility.

There is established by this Act, a Viability Gap Facility.

#### Section 81—Sources of moneys for the Viability Gap Facility

(1) The sources of moneys for the Viability Gap Facility are

(a) moneys approved by Parliament;

(b) loans and grants from development partners; and

(c) concession fees.

(2) For the purposes of paragraph (a) of subsection (1), the Minister shall create a vote in the National Budget under Other Government Obligations for the Viability Gap Facility.

(3) The provisions of the Earmarked Funds Capping and Realignment Act, 2017 (Act 947), shall not apply to the Viability Gap Facility.

#### Section 82—Management and use of moneys of Viability Gap Facility

- (1) The Division responsible for Public Investments and Assets of the Ministry shall manage the Viability Gap Facility.
- (2) The Viability Gap Facility shall provide financial support to projects which are technically, economically, socially and environmentally viable but are not financially viable.
- (3) The funds from the Viability Gap Facility shall be used for the following government support instruments:
  - (a) Construction Grants or Capital Grants;
  - (b) Operation Grant or Operational Cost Contribution;
  - (c) Availability Payments, Service Payments or Annuity Payments; and
  - (d) Minimum Revenue Guarantees.
- (4) Any tax exemptions granted by Government to make a partnership project commercially or financially viable shall be estimated and counted as part of the support from the Viability Gap Facility.
- (5) The Viability Gap Facility support with or without a tax exemption shall
  - (a) be determined in a transparent manner through an open competitive bidding process, and
  - (b) not exceed thirty per cent of the capital cost of the project.
- (6) Despite subsection (5), the Viability Gap Facility support may exceed thirty per cent of the capital cost of the project, as may be determined by the Minister but shall not exceed fifty per cent of the capital cost of the project.
- (7) The Viability Gap Facility support shall not be applied to an unsolicited proposal or a private sector led proposal.

#### Miscellaneous

##### Section 83—Reports and plans of public authorities

A contracting authority shall, at the end of each year, submit to the Minister

- (a) reports on public private partnership projects undertaken during that year; and
- (b) plans of the contracting authority for the ensuing year.

##### Section 84—Annual report by Minister

The Minister shall, within the first quarter of every year after receipt of the report and plans of each contracting authority, submit to Parliament a report on all public private partnership projects undertaken and plans of the contracting authorities for the ensuing year.

##### Section 85—Offences and penalties

- (1) A person who fails to provide information requested under section 76 shall pay to the Office an administrative penalty of five hundred penalty units.
- (2) A person who

- (a) knowingly provides misleading or false information or material;
- (b) wilfully obstructs the provision of information under this Act,
- (c) contravenes or knowingly permits another person to contravene a provision of this Act or the Regulations; or
- (d) instigates another person to contravene a provision of this Act or the Regulations, commits an offence and is liable on summary conviction to a fine of not less than five hundred penalty units and not more than two thousand and five hundred penalty units or to a term of imprisonment of not less than six months and not more than two years or to both.

#### Section 86—Regulations

(1) The Minister may, by legislative instrument, make Regulations for the effective and efficient implementation of this Act.

(2) Without limiting subsection (1), the Regulations may provide for

- (a) the public private partnership process;
- (b) the procedures for the application of the margin of preference for domestic business;
- (c) the procedures for procurement through the Ghana Infrastructure Investment Fund;
- (d) the procedures for unsolicited proposals or private sector led proposals;
- (e) complaints procedure;
- (f) the management of the Project Development Facility and Viability Gap Facility;
- (g) special purpose entity;
- (h) contract management and amendment; and
- (i) early termination payments.

#### Section 87—Guidelines

(1) The Minister may issue Guidelines in respect of administrative and procedural matters required under this Act.

(2) The Minister shall publish the Guidelines on the website of the Ministry.

#### Section 88—Interpretation

In this Act, unless the context otherwise requires,

“appraising authority” means the relevant Sector Ministry and institution mandated to review the project concept note, Prefeasibility study and feasibility study before the submission of the studies to the Office;

"approval authority" includes the entities set out in the second column of the First Schedule and any public body, institution, entity or committee that has the power to give a form of approval at any stage in the public private partnership process;



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

"bidder" includes

(a) a person that participates in the submission of a response or bid for selection proceedings in respect of a partnership project; and

(b) a representative of a person referred to in paragraph (a);

"bidders conference" means a forum in which pre-qualified bidders present their comments on the draft request for proposals and the draft contract documents and receive response on the drafts;

"bidding documents" means the Request for Proposals and the accompanying documents used for inviting offers for a partnership project, on the basis of which bidders are to prepare and submit their bids

"capital cost of the project" includes

(a) a one-time expenditure that will be incurred for creating the public private partnership project assets or for substantial modernisation or renovation of any of the existing project assets such as the cost incurred on civil and construction works, purchase of plant, machinery and equipment, installation, commissioning and supervision expenses for the plant, machinery and equipment; and

(b) recurring expenses during the project construction period that are capitalised such as interest during construction, project insurance expenses, project management and consultancy fees, debt syndication fees and contingencies;

(c) but does not include

(i) the cost of land and the expenses for the project incurred by the contracting authority in respect of the resettlement and rehabilitation of affected parties; and

(ii) operating expense to be incurred during the operating period;

"commercial close" means reaching an agreement on the commercial terms of a public private partnership contract by the parties to the contract prior to completion of the financing;

"Committee" means the Public Private Partnership Committee established under section 19;

"complaint bond" means a bond required for submission by a person who lodges a complaint or who applies for a review of a decision to the Complaints Panel;

"Complaints Panel" means the Complaints Panel established under section 67;

"concept note" means a preliminary diagnostic report that presents an initial appraisal of the viability of a potential public private partnership project, from the standpoint of technical, financial, legal, social and environmental considerations and any other relevant considerations from other relevant disciplinary standpoints;

"concession fees" mean the entry fee and performance fee as specified in the Project Agreement to be paid by a private party to the contracting authority or the Viability Gap Facility;

"contracting authority" includes

- (a) the Executive, Legislature and Judiciary;
- (b) constitutional bodies;
- (c) Ministries, Departments, Agencies and local government authorities;
- (d) the public service;
- (e) autonomous agencies;
- (f) statutory bodies;
- (g) state owned enterprises and public corporations; and
- (h) an entity owned by any of the entities under paragraphs (a) to (g) which intends to enter into a partnership arrangement with a private party;

"contract award" means the award of a public private partnership contract to a private party by a contracting authority in accordance with the provisions of this Act;

"contract management" means the process of managing and administering the public private partnership project from the time the project was agreed at contract signature to the end of the contract term;

"data room" means a facility which is set up by the contracting authority containing technical, financial, legal, social, environmental and any other information that is relevant to the pre-qualified private parties to undertake the due diligence that is necessary prior to compiling technical and financial proposals in furtherance of a request for proposals;

"diagnostic phase" means the phase of a public private partnership process that entails either the pre-feasibility study, feasibility study or both:

"direct agreement" means an agreement between a contracting authority and the provider of funds to a private party;

"District Assembly" includes a Metropolitan and Municipal Assembly;

"domestic business" means any business that has been registered under the laws of the Republic of Ghana;

"end user" means a person who benefits directly from the services of a project undertaken through the implementation of a partnership arrangement;

"evaluation criteria" includes the criteria for the scoring framework used for the examination of responses to request for qualification or request for proposals or other related examination of responses to a specific partnership project in order to determine bidders' responsiveness, qualification and suitability for the prospective award of a contract;

"evaluation of proposals" means a two-step evaluation of technical and financial proposals by the panel set up in accordance with this Act;

"expert" means a person who has specialized and proven knowledge of a relevant discipline or activity and may be in the nature of a consultant;

"feasibility study" means a diagnostic study, undertaken with respect to a potential public private partnership project, to appraise in final detail the strategic option adopted by Government based on technical, financial, economic, legal, social and environmental considerations and any considerations from any other relevant discipline prior to the placement of the project on the market;

"Feasibility Study Report" means the report which is the outcome of a feasibility study;

"financial close" means the date at which all documentation for the financing of project contracts have been signed by the parties to the contract and conditions precedent to the initial drawing of the debt have been fulfilled;

"financial commitment" means a direct and contingent liability and commitment assumed by the Government under a partnership agreement;

"financial proposal" means a proposal from a private party which indicates the

(a) concession fees that a private party proposes to pay to the Government; or

(b) tariffs payable to the private party and a tariff escalation formula, with or without a subsidy from Government, as part of the mechanism to establish a financial equilibrium to the public private partnership contract;

"forward commitment" means an undertaking by the Government for a future payment;

"Guidelines" means the Guidelines issued by the Minister pursuant to section 87;

"local content" includes

(a) expertise development;

(b) utilisation of local expertise, goods and services;

(c) the financing and development of local capacities through education and skills transfer; and

(d) local equity participation in special purpose entity;

"margin of preference" means the specific arithmetical margin made pursuant to this Act and contained in a public bidding document which may prescribe a criterion designed to assist domestic businesses become more competitive in the partnership bids;

"marketing a project" means to bring the potential public private partnership project to the attention of potential investors through advertisements, road shows, correspondence and any other appropriate means;

"market sounding" means the process of assessing the reaction of the market to a proposed project requirement and the level of market interest in the project;

"Minister" means the Minister responsible for Finance;

"Ministry" means the Ministry responsible for Finance'

"National Infrastructure Plan" means a plan which sets out the Infrastructure objectives of the Medium-Term National Development Policy Framework and serves as a basis for Prioritising infrastructure development for the achievement of national socio-economic development

"Net Present Value" means the discounted value of the cash inflows of an investment minus the discounted value of the cash outflows of the investment',

"Office" means the Public Private Partnership Office established under section 26;

"open book" means a method of procuring an unsolicited project where the contracting authority signs the contract with the original proponent who receives a defined return and must conduct a transparent bidding process for each component of the project in order to get the best price;

"partnership" means a public private partnership;

"partnership agreement" means an agreement or concession between a contracting authority and a private party for the implementation of a partnership project;

"partnership arrangement" means the legal, regulatory, contractual, financial, administrative and other arrangements for and in respect of partnerships;

"partnership process" means the series of activities from the initiation of a partnership project to the conclusion of a partnership project;

"partnership project" means a project or public service implemented under a partnership agreement between a contracting authority and a private party in accordance with this Act;

"pre-feasibility report" means the report that emanates from a prefeasibility study;

"pre-feasibility study" means an intermediate diagnostic study undertaken to develop and appraise the viability strategic options of a potential public private partnership project from a technical, financial, economic, legal, social and environmental standpoint and any other relevant disciplinary standpoint;

"preferred bidder" means a bidder who is selected by a contracting authority after evaluation of bids based on a predetermined evaluation criterion as the party the contracting authority intends to award a public private partnership contract subject to the completion of negotiations and legal arrangements;

"private party" means a person from the private sector who enters into a partnership agreement or undertakes a partnership project and includes a person who engages in a bidding process for the award of a partnership project;

"private sector-led proposal" means an unsolicited proposal as defined in section 54;

"project" means an infrastructure project or related service undertaken between a contracting authority and a private party under this Act;

"project agreement" means a contract or ancillary agreement concluded between a contracting authority and a private party in relation to partnership project;

"project company" means a special purpose entity that has been incorporated in accordance with the laws of the Republic of Ghana solely to implement a partnership project;

"Project Development Facility" means the facility established in section 77 for the purpose of providing moneys to support the projects and services specified in subsection (2) of section 79;

"project preparation" includes development of concept notes, pre-feasibility studies, feasibility studies and other forms of appraisals of partnership projects;

"project structuring" means the allocation of responsibilities and risks to the parties to a public private partnership agreement and the determination of a finance structure to a public private partnership project;

"proponent of an unsolicited proposal" means a private party who submits an unsolicited proposal;

"Public Investment Plan" means a plan of prioritised and costed capital projects consistent with the Medium Term Fiscal Framework and the Medium Term Expenditure Framework approved by Parliament;

"public private partnership" means a form of contractual arrangement or concession between a contracting authority and a private party for the provision of public infrastructure or public service traditionally provided by the public sector, as a result of which the private party performs part or all of the Infrastructure or service delivery functions of Government, and assumes the defined risks over a significant period of time;

"public private partnership agreement" means an agreement between a contracting authority and a private party for the implementation of a partnership project;

"public private partnership arrangement" means the legal, regulatory, contractual, financial, administrative and other arrangement for and in respect of partnership;

"public private partnership project" means a public infrastructure project or public service implemented under a partnership agreement between a contracting authority and a private party in accordance with this Act;

"Public Procurement Authority" means the Public Procurement Authority established under the Public Procurement Act, 2003 (Act 663);

"public sector comparator" means

(a) the most efficient public procurement cost of a project including all capital and operating costs and share overheads which have been adjusted for risk to achieve the required service delivery outcomes; and

(b) the tool used as a benchmark to compare the projection of cost estimates for the contracting authority under the public private partnership option to determine whether that option offers value for money;

"public sector project" means a project which is stated in the National Plan, the National Infrastructure Plan, the Public Investment Plan or the District Development Plan and other approved Sector Plans;

"Regional Coordinating Council" means the Council established under section 186 of the Local Governance Act, 2016 (Act 936);

"Regulations" means the Regulations made under Act;

"Request for Qualification" means a formal submission to a contracting authority by a private party stating its intention to be pre-qualified and short-listed for the bidding process of a partnership project;

"request for qualifications" means a request which is lodged by a contracting authority to shortlisted private parties to seek evidence of their ability to undertake the obligations of a private party in a public private partnership project;

"Seal of Quality" means a certificate granted by the Minister stating that the Ministry is confident that the partnership project has a positive economic and financial Net Present Value, and is technically, financially and economically viable;

"security services" includes

- (a) Armed Forces;
- (b) Police;
- (c) Immigration Service;
- (d) Ghana National Fire Service;
- (e) Prisons Service; and
- (f) other intelligence agencies;

"selection of pre-qualified bidders" means the process under which responses to a request for qualification are evaluated and a short list is compiled of potential private parties who demonstrate the ability to undertake the obligations of a public private partnership project;

"small project" means a partnership project with a capital expenditure threshold of up to the Ghana Cedis equivalent of two million United States Dollars',

"special purpose entity" means a company incorporated in Ghana by the successful bidder for the sole purpose of executing the public private partnership contract awarded;

"stakeholders' forum" means a forum held to inform the stakeholders of a public private partnership project of the objectives, scope or impact, of a proposed public private partnership project, the connection between the public private partnership project and the relevant sector plan, rationale for implementing the project as a public private partnership project and the implication of the public private partnership project on end-user charges or tariffs, among others;

"standardised document" means a document which has been approved by the Office in consultation with the Office of the Attorney-General and Ministry of Justice, as a generic document that may be used by a contracting authority for the project of the contracting authority by making project specific modifications in the manner specified in the document or by an order of the Agency;

"state-owned enterprise" means an entity whether or not incorporated under the Companies Act, 2019 (Act 992) whose shares are wholly held or controlled by Government;

"technical proposal" means a proposal from a private party providing details on the strategic, planning, organisational, operational, engineering, financial and other corporate arrangements

of the private party that underpins the service delivery of the private party under a public private partnership contract;

"technology transfer" means transfer of expertise and technological knowledge;

"transaction advisory services" means external advisory services rendered in respect of the diagnostic or implementation phases, or both phases of a public-private partnership process;

"unsolicited proposal" has the meaning assigned to it by section 54;

"user levy" means a toll, fee, tariff, charge or similar monetary value that a contracting authority may grant a private party to levy and recover moneys from the user of a partnership project for use of any service or output;

"value for money" means a net benefit that accrues to the contracting authority in terms of cost, price, government support in the form of viability gap funding and tax exemptions, quality, timeliness and risk transfer as compared to the public sector comparator; and

"Viability Gap Facility" means a facility for providing grants or other financial support to projects that are economically viable but not financially viable.

#### Section 89—Savings and transitional provisions

(1) A partnership agreement entered into before the coming into force of this Act shall be governed by the laws that existed at the time the agreement was executed.

(2) The contracting authority shall, within twelve months after the coming into force of this Act, register all public private partnership projects that existed before the coming into force of this Act with the Office.

(3) A contracting authority that has entered into a partnership agreement before the coming into force of this Act, shall within three months after the coming into force of this Act, submit three copies of the partnership agreement to the Office.

#### Section 90—Consequential amendments

The Fees and Charge (Miscellaneous Provisions) Act, 2018 (Act 983) is amended in section 3 by the addition of a new subsection (4) as follows:

"(4) Where a public private partnership agreement is approved by Parliament or the General Assembly of a local government authority, the fees and charges shall be determined and fixed by the partnership and adjusted periodically as provided by the partnership."

### SCHEDULES

#### FIRST SCHEDULE

#### THRESHOLDS FOR APPROVAL AUTHORITIES

(sections 12 (c), 13 (b), 16, 20(e), 31(5), 52(2) and 53(3))

Criteria	Approval Authority	Notes
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Partnership Projects which require the Republic of Ghana to comply with article 174 or 181 of the Constitution. Parliament This shall be applicable irrespective of the financial threshold or capital outlay of the project.

Partnership Projects with an estimated capital cost of project exceeding the Ghana Cedi equivalent of two hundred million United States Dollars (Dollars (USD200m). Cabinet

The amount established at feasibility study stage shall be used to determine the threshold.

Partnership Projects with an estimated capital cost of not more than the Ghana Cedi equivalent of two hundred million United States Dollars (Dollars (USD200m). Public Private

Partnership Committee The amount established at feasibility study stage shall be used to determine the threshold.

Partnership Projects undertaken by Metropolitan, Municipal and District Assemblies with estimated capital cost of less than

(a) the Ghana Cedi equivalent of one million United States Dollars (USD 1m) in the case of a District Assembly;

(b) the Ghana Cedi equivalent of two million United States Dollars (USD 2m) in the case of a Municipal Assembly;

(c) the Ghana Cedi equivalent of five million United States Dollars (USD 5m) in the case of a Metropolitan Assembly. General Assembly of the Metropolitan, Municipal and District Assemblies for Local Government Authority projects The amount established at pre-feasibility or feasibility study stage shall be used to determine the threshold.

## SECOND SCHEDULE

### PUBLIC PRIVATE PARTNERSHIP ARRANGEMENTS

(section 56)

The following Public Private Partnership arrangements with their variations and combinations may be entered into by the Contracting Authority for undertaking any Public Private Partnership Project. The arrangements enumerated in this Schedule are indicative in nature and the contracting authority may evolve and arrive at such agreement or arrangement incorporating any of the arrangements enumerated hereinafter or any other arrangements as are necessary or expedient for any specific project subject to the extent of financial and technical involvement and risk taken by the private party and upon approval of the Minister.

1. Build Own Operate (BOO): A contractual agreement that authorises a private party to finance, build, manage, operate as well as maintain the infrastructure facility and provide services for a defined period of time. Private party remuneration is either through user charges, government budgets, or a combination of both. The transfer of the project to the government or the contracting authority is not envisaged in this structure.

2. Build, Own, Operate and Transfer (BOOT): A contractual agreement in which the private party designs, finances, builds, operates and maintains an infrastructure facility for a specified



time period, after which the private party transfers the facility to the contracting authority. During the term of the contract the private party holds the legal and economic rights to the asset. The private party recoups their investment either through user charges, government budgets, or a combination of both.

3. Build, Operate and Transfer (BOT): A contractual arrangement where the private party finances, constructs, operates and maintains an infrastructure facility and transfers the facility to the contracting authority at the end of a specified term. Legal ownership of the asset shall remain with the government or contracting authority for the duration of the contract agreement. The private party recoups their investment either through user charges, government budgets, or a combination of both.

4. Build, Transfer and Operate (BTO): A contractual arrangement where the private party constructs an infrastructure facility and assumes the costs and risks associated with the construction of the building and upon completion, transfers ownership of the facility, both legally and economically to the contracting authority. Operation of the facility is done on behalf of the contracting authority. Remuneration of the private party is either through user charges, government budgets, or a combination of both.

5. Concession: Where a contracting authority issues a contractual licence to the private party to operate, maintain, rehabilitate or upgrade an infrastructure facility and to charge a user fee while paying a concession fee to the contracting authority.

6. Design, Build, Finance, Operate and Maintain (DBFOM): A contractual agreement which enables the private party to design, build, finance, operate and maintain an infrastructure facility for a specified period of time, after which the facility is transferred to the contracting authority. Legal ownership of the asset for the duration of the contract agreement remains with the government or contracting authority. The private party recoups their investment either through user charges, government budgets, or a combination of both.

7. Develop, Operate and Transfer (DOT): A contractual arrangement where favorable conditions external to a proposed infrastructure project by a private party are integrated into the arrangement by giving that private party the right to develop adjoining property and enjoy the benefits the investment creates as the parties agree on condition that the private party transfers the infrastructure facility to the contracting authority within a specified period and the developed property remain the property of the private party in perpetuity.

8. Operation and Maintenance (O&M): A contractual agreement in which the private party is responsible for the operation, maintenance and management of an infrastructure facility for a specified period of time and the contracting authority retains ownership of the facility and capital assets. Under the public private partnership, they are typically performance-based, long-term, and require substantial private capital investment.

9. Rehabilitate, Operate and Transfer (ROT): A contractual agreement where the private party refurbishes, operates and maintains for a specified period, an existing facility at the expiry of which the private party transfers the facility to the contracting authority.

### THIRD SCHEDULE

#### MINIMUM CONTRACTUAL OBLIGATIONS REQUIRED TO

## BE SPECIFIED IN PROJECT AGREEMENT

(section 58 (11))

1. The nature and scope of works and services that the parties shall carry out and the conditions for their implementation.
2. The rights of a contracting authority, the project company and where applicable, the lender, in relation to the project including step-in rights of lenders.
3. A description of any property to be contributed by a party to the project agreement.
4. A description of any utilities to be provided in relation to the project and the responsibility of the project.
5. The ownership of the project assets, the obligations of parties related to the hand-over and receipt of the project site.
6. The responsibility of obtaining authorisations, permits and approvals.
7. A description of any sharing of revenue between the contracting authority and the private party.
8. Mutual financial obligations and their relation to the funding mechanism including the requirements relating to performance bonds and guarantees.
9. The preparation and submission of financial and other reports and the carrying out of financial audits in relation to the project.
10. The end-user levy, tariff or the viability gap funding on which the project is based and the rules for its determination and amendment, either by an increase or decrease, as well as the indexation mechanisms to reflect inflation or changes in the interest rate, if required.
11. The means of quality assurance and quality control and supervision as well as administrative, financial and technical monitoring of the project operation, utilisation and maintenance.
12. The extent of the right of the contracting authority to vary the conditions of the project and other obligations imposed on private party and the basis and mechanisms of compensation for any loss resulting from the variation order.
13. The types of insurance to be taken for the project and the risks of its operation or utilisation, executive warranties issued in favour of the public authority and provisions and procedures for their release.
14. The basis of risk allocation in respect of a change in the law, unforeseeable accidents, force majeure or discovery of antiquities, as the case may be, and the resultant compensation.
15. The duration of the contract.
16. Early termination events under which a party may terminate the contract prior to the expiry of the project agreement and the rights of the parties in relation to the termination.
17. The process of handing over the project on expiry or on termination of the project agreement by a party to the agreement.

18. Mechanism for dispute resolution including resolution of disputes by way of arbitration or any other amicable dispute resolution mechanism.
19. The events giving rise to compensation and the mechanisms for payment of the compensation or penalties.
20. Performance securities required when undertaking a project, the value and renewal mechanisms.
21. Appointment of independent experts or engineers.
22. Direct agreements and lenders rights where applicable.
23. Termination and expiry of the project agreement.
24. Obligations of undertakings and warranties by contracting parties.
25. Cases of emergency step-in by either contracting authority or lenders in case of private party default.

**Date of Gazette Notification : 29th December, 2020**