

The Legal Side of PPPs

1. OVERVIEW OF PPP LAWS IN SINDH AND THE AGREEMENTS INVOLVED

1.1 OVERVIEW OF THE LEGAL FRAMEWORK FOR PPP PROJECTS IN SINDH

1.1.1 Introduction to Public Private Partnerships in Sindh

In the province of Sindh, projects implemented on a PPP basis are governed by the Sindh Public-Private Partnership Act, 2010 (Sindh PPP Act) (read with the Sindh PPP Policy and the Sindh Public Procurement Rules (Sindh SPPRA Rules). The Sindh PPP Act aims to create an enabling environment for private sector participation in “*infrastructure development projects*” in the province of Sindh through “*public-private partnership*” by¹:

- (a) expanding the provision of infrastructure services and improve their reliability and quality for accelerating economic growth and achieving the social objectives of the GoS;
- (b) mobilizing private sector resources for financing, construction, maintenance and operation of infrastructure projects;
- (c) improve efficiency of management, operation and maintenance of infrastructure and development facilities by introduction of modern technologies and management techniques;
- (d) incorporate principles of fairness, competition and transparency in public-private partnership projects; and
- (e) to provide for the matters ancillary thereto.

1.1.2 Definition of Public Private Partnership

1.1.2.1 The Sindh PPP Act defines “*Public Private Partnership*” as follows:

“a partnership carried out under a Public-Private Partnership Agreement between the public sector represented by an Agency and a private party for the provision of an infrastructure facility, management functions and / or service with a clear allocation of risks between the two parties”². [Emphasis Added]

1.1.2.2 Based on the above referred definition, it is noted that PPPs are:

- (a) arrangements / partnerships between:

¹ See Preamble of the Sindh PPP Act.

² See clause (w) (*Public-Private Partnership*) of Section 2 (*Definitions*) of the Sindh PPP Act.

- (i) a public sector entity, referred to as the “agency”³ (i.e. Government Agency(ies)); and
- (ii) a “private party”, referring to “a person who enters into a Public-Private Partnership Agreement with an Agency”⁴;
- (b) for the purposes of providing:
 - (i) “infrastructure”⁵ facilities and services in one of the sectors listed in Schedule I of the Sindh PPP Act;
 - (ii) management functions; and / or
 - (iii) “services” meaning “any of the professional activities concerning imparting of public benefits in publicly owned institution or facility or the objective ancillary thereof”⁶;
- (c) carried out pursuant to a “PPP Agreement”, being an agreement in writing between the GoS (including a Government Agency) and private party for the purpose of Public-Private Partnership⁷; and
- (d) with clear allocation of “risks” (i.e., “an event of event or circumstance affecting the project which can adversely affect performance and costs of any of the contractual obligations related thereto including feasibility, design, construction, financing, operation and / or maintenance”⁸) between the parties to such PPP Agreement.

1.1.3 **The Institutional Framework**

1.1.3.1 In Sindh, there are four (04) entities responsible for the identification, preparation and implementation of PPP projects, each having defined roles and functions. The following scheme highlights the PPP organizational structure in Sindh:

The PPP Policy Board

- (i) The PPP Policy Board is the highest decision-making authority for PPP projects in Sindh. It is composed as follows⁹:

Chairman	Chief Minister, Sindh
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³ See clause (b) (Agency) of Section 2 (Definitions) of the Sindh PPP Act.

⁴ See clause (s) (Private party) of Section 2 (Definitions) of the Sindh PPP Act.

⁵ See clause (m) (Infrastructure) of Section 2 (Definitions) of the Sindh PPP Act; the term “Infrastructure” includes “facilities and services in one of the sectors listing in Schedule I”.

⁶ See clause (z-i) (Service) of Section 2 (Definitions) of the Sindh PPP Act.

⁷ See clause (x) (Public Private Partnerships Agreements) of Section 2 (Definitions) of the Sindh PPP Act.

⁸ See clause (z) (Risk) of Section 2 (Definitions) of the Sindh PPP Act.

⁹ See Section 4(2) (Policy Board) of the Sindh PPP Act.

Vice Chairman	Minister, or as the case may be, Advisor for Finance
Members	Minister, or as the case may be, Advisor for Law
	Minister, or as the case may be, Advisor for Planning and Development
	Chief Secretary
	Two members of provincial assembly of Sindh to be nominated by the Chief Minister
	Chairman / Chairperson, Planning and Development Board, Planning and Development Department or Additional Chief Secretary (as the case may be)
	Senior Member, Board of Revenue, Sindh
	Secretary Finance
	Secretary Law
	Director General PPP Unit
	Three (03) members from the private sector to be nominated by the Chief Minister, Sindh
	Sector Specialist to be nominated by the Chief Minister, Sindh
	Chief Executive Officer of Project Support Facility
Co-opted Members	Minister, or as the case may be, Advisor of the concerned department
	Secretary of concerned department
	Any other official of the Government department, or entity owned or controlled by Government if nominated by the Chief Minister as co-opted member
Secretary	Secretary Finance

(ii) The PPP Policy Board has the following roles¹⁰:

	Formulate a PPP policy and rules for the GoS.
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¹⁰ See Section 5 (*Functions of the Board*) of the Sindh PPP Act.

Legislative Regulatory	Issue risk management guidelines to assess that the government support for projects is included in the annual budget of the province and that such support is fiscally sustainable and establish procedures to implement such guidelines consistent with the Sindh PPP Act.
Supervisory	Supervise and coordinate the implementation of the PPP policy by the Government Agencies.
Decisional	Approval, rejection or sending back for reconsideration the project proposal submitted by a Government Agency within six (06) months.
	Decide on any direct or contingent support for a project proposal submitted by a Government Agency.
	Approval of the funding for projects receiving support through the project development facility.
	Approval, rejection or sending back for reconsideration the recommendation submitted by a Government Agency for the contract award to a ' <i>private party</i> '.
	Acting as the final deciding authority for all the projects.
Assistance	Providing assistance to the Government Agencies in solving major problems impeding project preparation and implementation.
General	Take all other necessary steps for giving effect to the provisions of the Sindh PPP Act.

(I) THE PROJECT SUPPORT FACILITY

Project Support Facility is non-profit company established by the GoS under section 42 of the Companies Act. One of the functions of the Project Support Facility is to approve the financial support claimed for the purposes of a PPP project. Project Support Facility supports PPP projects and finances the gaps between the project revenues constrained by factors including, but not limited to, affordability considerations, initial capital requirements and revenue needed to generate fair return on investment for PPP projects¹¹. Note that the Viability Gap Fund shall cease to exist on or after January 01,

¹¹ See Section 22(A)(1) (*Project Support Facility*) of the Sindh PPP Act.

2022 (if so notified by the GoS) and all assets, liabilities, rights and obligations thereof shall stand transferred to Project Support Facility (without the need for any further action, deed or thing)¹².

(II) THE PPP UNIT

(i) The PPP Unit is established within the Finance Department of the GoS, to promote and facilitate the development of PPP projects in Sindh, assist the Government Agencies in preparing and executing PPP projects, and act as a catalyst for PPPs.

(ii) The PPP Unit has the following roles¹³:

Legislative / Regulatory	Develop operating guidelines, procedures and model documents for projects to be approved by the PPP Policy Board.
Support and Assistance	Technical support to the PPP Policy Board (the PPP Unit acts as the PPP Policy Board's secretariat) and in formulating and implementing the Sindh policy.
	Develop technical and human resources to support PPP initiatives at the Government Agencies.
	Provide technical support and assistance to the Government Agencies throughout the PPP process.
	Prepare and regularly update a pipeline of projects.
	Submit all project proposals for consideration to Project Support Facility for the purpose of approval of funding if deemed appropriate by the Project Support Facility.
	Prepare semi-annual review, annual consolidated reports and project completion reports on the PPPs in the province and submit the same to the PPP Policy Board.
Evaluation	Evaluate and prioritize the project proposals submitted by the Government Agencies.

¹² See Section 22(2) of the Sindh PPP Act.

¹³ See Section 6(2) (*Public-Private Partnership Unit*) of the Sindh PPP Act.

	Evaluate the type and amount of government support sought for a project.
Review	Bid evaluation report submitted by a Government Agency.
General / Delegation	Employ such persons, as it deems necessary for the performance of functions and duties assigned to it under the Sindh PPP Act, which shall be governed by the human resource policy and guidelines notified by the Finance Department, GoS, from time to time.
	Any other functions as may be assigned to it by the PPP Policy Board.

(III) THE GOVERNMENT AGENCIES, THE PPP NODES AND THE PI UNIT

(i) *GOVERNMENT AGENCIES*

In terms of the Sindh PPP Act, Government Agencies (that includes a department, attached department, body corporate, autonomous body of the GoS, local government, or any organization or corporation owned or controlled by the GoS or local government, excluding the PPP Unit)¹⁴ are responsible for identification, conceptualization and preparation of PPP project proposals for projects (from its master plans and other planning documents) proposed to be implemented on PPP mode¹⁵.

(ii) *THE PPP NODES*

The administrative head of each Government Agency that seeks to implement a project under PPP mode shall form a PPP Node with the approval of the concerned minister(s).

PPP Nodes comprise of officers from within the relevant Government Agency (or from other Government Agencies as the case may be) and may include representative from the Finance Department, GoS and independent technical and legal experts (if deemed appropriate) to develop the PPP project¹⁶.

The PPP Nodes have the following roles:

Projects Identification	Identify suitable projects and prioritize them within its sector or geographical area of responsibility.
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¹⁴ See the definition of "Agency" as per clause (b) (Agency) of Section 2 (Definitions) of the Sindh PPP Act.

¹⁵ See Section 10(1)-(2) of the Sindh PPP Act.

¹⁶ See Section 7(1) (Departmental Public-Private Partnership Nodes) of the Sindh PPP Act.

Projects Preparation	Procure the services of transaction advisors for project preparation and tendering, unless exceptional reasons exist for not doing so as recorded in writing and recommend to the GoS to enter into agreements for such services.
	Supervise the preparation of the feasibility study, and on positive outcome, submit the project proposal through the PPP Unit to the PPP Policy Board.
Projects Tendering	Conduct a competitive tendering process in accordance with the SPPRA Act and the SPPRA Rules to select the ‘private party’.
	Carry out bid evaluation and submit recommendation on contract award to the PPP Policy Board.
Post-Bidding Process	Negotiate and sign the PPP Agreement.
	Monitor and evaluate implementation and operation of the project.
	Prepare periodic progress reports on the Government Agency’s projects to be submitted to the PPP Policy Board through the PPP Unit.

(iii) **THE PROJECT IMPLEMENTATION UNIT (PI UNIT)**

A PI Unit is required to be established following award of the “*concession*”¹⁷ at the discretion of the administrative head of the relevant Government Agency. A PI Unit is comprised of¹⁸:

- (a) officers from within the Government Agency;
- (b) officers from outside of the Government Agency, if appropriate; and

¹⁷ See clause (f) (Concession) of Section 2 (Definitions) of the Sindh PPP Act – “grant of a right of a public asset by an agency through the approval of Government in return for stipulated services or a promise that the right will be used for a specific purpose in the form of Build Operate Transfer (BOT), Design Build Finance Operate (DBFO) and any other variant of PPP in terms of the Public-Private Partnership Agreement”.

¹⁸ See Section 8(1) (Project Implementation Unit) of the Sindh PPP Act.

- (c) professional and consultants, if appropriate.

The PI Unit has the following roles¹⁹:

Implementation of the Project	Oversee day-to-day implementation of the project.
	In particular during construction period: compliance with PPP Agreements and laws in force.
	Liaise between the GoS and the private company for effective project implementation.
	Responsible to the administrative head of the Government Agency and shall provide the administrative head of the Government Agency and the PPP Unit with periodic progress reports.

(IV) ROLE OF GOVERNMENT UNDER THE SINDH PPP ACT

The Sindh PPP Act sets out certain matters on which approval from GoS is required in relation to a PPP project. Some of such matters have been set out in the table below.

MATTER	DESCRIPTION
Grant of concession	<ul style="list-style-type: none"> GoS to approve the grant of a right to public asset by a Government Agency²⁰.
Approval for change of control and transfer	<ul style="list-style-type: none"> GoS's prior approval required by the members of a consortium (that enters into PPP Agreement), and subject to the terms of PPP Agreement, to cause, permit or undergo any change of control or transfer their interest in the Concessionaire to third parties²¹.
Power to exempt	<ul style="list-style-type: none"> GoS is empowered to grant an exemption to foreign governments, or entities which are owned or controlled by a foreign government or a foreign government's company incorporated under the laws of Pakistan from: (a) the requirement of public competitive bidding under the Sindh PPP Act; and (b) the operations of SPPRA Rules (or

¹⁹ See Section 8 (*Project Implementation Unit*) of the Sindh PPP Act.

²⁰ See Section 2(f) (*Concession*) of the Sindh PPP Act.

²¹ See Section 14(3) of the Sindh PPP Act.

	any other law regulating public procurement and the rules and regulations made thereunder) ²² .
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1.1.4 **Project Identification and Prioritization Process**

1.1.4.1 **First Phase: Government Agency / PPP Node**

1.1.4.1.1 A Government Agency will identify and conceptualize potential projects from its master plans or other planning document and then prepare project proposals²³. Such preparation will consist of²⁴:

- (a) a feasibility study;
- (b) initial environment examination / environmental impact assessment²⁵;
- (c) risk analysis;
- (d) analysis of the need for government support;
- (e) stakeholder consultations;
- (f) determination of the PPP modality; and
- (g) bidding documents, including a draft PPP Agreement.

1.1.4.1.2 The relevant Government Agency will prioritize the projects within its sector or geographical area²⁶.

1.1.4.1.3 Prioritization criteria will include supply and demand gap, social and economic benefits, financial attractiveness, risks and uncertainties involved,

²² See Section 19-A of the Sindh PPP Act.

²³ See Section 10(2) (*Project identification and preparation*) of the Sindh PPP Act.

²⁴ See Section 10(3) (*Project identification and preparation*) of the Sindh PPP Act.

²⁵ Note that a report is prepared by the relevant Government Agency based on an internal assessment and after the award of a project, the successful private party is required to conduct initial environmental examination or environmental impact assessment (as the case may be) and is required to obtain relevant approvals for the project.

²⁶ See Section 10(4) (*Project identification and preparation*) of the Sindh PPP Act.

readiness for implementation²⁷. Upon prioritization of a project, if the Government Agency considers the project to be viable, it shall, through the PPP Unit, submit the project proposal to the Project Support Facility for approval of financial support²⁸.

1.1.4.2 Second Phase: Review of the PPP Unit and Project Support Facility

- 1.1.4.2.1 The PPP Unit exercises quality control by reviewing the viability of a project proposal and its completeness in terms of documentation²⁹.
- 1.1.4.2.2 The PPP Unit will review and analyze all requests for government support with budgetary implications and shall evaluate: (a) the justification and eligibility; and (b) the fiscal impact of the related direct and contingent liabilities, of such support requested³⁰.
- 1.1.4.2.3 If the Project Support Facility approves the project for financial support, the Government Agency shall submit such project proposal through the PPP Unit to the PPP Policy Board for approval³¹.
- 1.1.4.2.4 In case the Project Support Facility refuses to provide financial support to any project, the Government Agency may submit the project proposal (along with the reasons for refusal by Project Support Facility) to the PPP Policy Board (through PPP Unit) to seek financial support from Viability Gap Fund. However, no project, seeking financial support from Viability Gap Fund, shall be allowed to be submitted to the PPP Policy Board after December 31, 2021³², as in terms of Section 15(1)(III) of the Sindh PPP Act, no support from the Viability Gap Fund shall be provided to any new projects after December 31, 2021. As per section 22(2) of the Sindh PPP Act, the Viability Gap Fund shall cease to exist on or after January 01, 2022 (if so notified by the GoS) and all assets, liabilities, rights and obligations thereof shall stand transferred to Project Support Facility, without the need for any further action, deed or thing.

²⁷ Ibid.

²⁸ See Section 10(5) (*Project identification and preparation*) of the Sindh PPP Act.

²⁹ See Section 11(1) (*Project prioritization and approval*) of the Sindh PPP Act.

³⁰ See Section 12(2) (*Approval of government support*) of the Sindh PPP Act.

³¹ See Section 10(6) (*Project identification and preparation*) of the Sindh PPP Act.

³² See Section 10(7) (*Project identification and preparation*) of the Sindh PPP Act.

- 1.1.4.2.5 Based on its review, the PPP Unit shall make recommendations to the PPP Policy Board for approval, rejection or reconsideration (an integral part of a project proposal) of the requested government support³³.
- 1.1.4.2.6 The project proposal will be submitted by the PPP Unit (on behalf of the Government Agency) to the PPP Policy Board for approval.
- 1.1.4.2.7 Project proposals approved by the PPP Policy Board shall be included by the PPP Unit in a priority list of the Province and widely publicized³⁴.
- 1.1.4.2.8 If the government support is approved by the PPP Policy Board for a project, the PPP Unit shall make necessary arrangements for inclusion of such support in the budget of the Province³⁵.

1.1.4.3 Final Phase: The Decision of The PPP Policy Board

The PPP Policy Board takes into account the recommendations of the PPP Unit and may approve a project proposal with or without modifications, reject it or return it to the Government Agency for reconsideration.

1.1.5 Government Support

1.1.5.1 In terms of the Sindh PPP Act, the government support which may be approved by the PPP Policy Board may include any of the following³⁶:

- (a) Administrative support;
- (b) Asset based support;
- (c) Financial assistance through Viability Gap Fund; and
- (d) Government guarantees for political risks under the GoS control and other risks such as force majeure, demand risk etc.

1.1.5.2 An overview of the government support available to a private party in terms of the Sindh PPP Act are discussed in further details in Section 4.2 (*Overview of the Government Support under Sindh PPP Act*) of this Chapter.

1.1.6 PPP Agreement

1.1.6.1 The Sindh PPP Act defines “*Public Private Partnership Agreement*”³⁷ as an agreement

³³ See Section 12(3) (*Approval of government support*) of the Sindh PPP Act.

³⁴ See Section 11(3) (*Project prioritization and approval*) of the Sindh PPP Act.

³⁵ See Section 12(4) (*Approval of government support*) of the Sindh PPP Act

³⁶ See Section 15(1) of the Sindh PPP Act.

³⁷ See clause (x) (*Public Private Partnership Agreement*) of Section 2 (*Definitions*) of the Sindh PPP Act.

in writing between the GoS (including the Government Agency) and private party for the purpose of Public-Private Partnership. The draft PPP Agreement is required to form a part of the bidding documents³⁸ and defines the legal relationship between the Government Agency and the selected '*private party*' as well as their respective rights and responsibilities, including the specific GoS support for the PPP project³⁹.

1.1.6.2 ***Key Provisions of the PPP Agreement***

1.1.6.2.1 Section 16(3) of the Sindh PPP Act sets out the following key provisions (without limitation) to be included in the PPP Agreement:

- (a) type of project;
- (b) terms of PPP Agreement;
- (c) scope of work and services to be provided under the project;
- (d) main technical specifications and performance standards;
- (e) environmental and safety requirements;
- (f) implementation milestones and completion date of the project;
- (g) cost recovery scheme through user fees, including a mechanism for periodical adjustment;
- (h) performance bonds for construction works and operations;
- (i) minimum insurance coverage;
- (j) acceptance tests procedures;
- (k) rights and obligations of the parties to the PPP Agreement, including risk sharing;
- (l) penalties and liquidated damages provisions for delay;

³⁸ See Section 16(1) of the Sindh PPP Act.

³⁹ See Section 16(2) of the Sindh PPP Act.

- (m) type and amount of government support;
- (n) hand back requirements at the end of the term of the PPP Agreement, if any;
- (o) warranty period and procedures after the hand back;
- (p) requirements and procedures for variations of the PPP Agreement;
- (q) grounds for and effects of termination of the PPP Agreement, including force majeure;
- (r) compensation formula for early termination scenarios;
- (s) procedures and venue for dispute resolution;
- (t) financial reporting by the 'private party';
- (u) supervision mechanism of the Government Agency;
- (v) negotiation to address a situation or an eventuality that was not envisaged or contemplated at the time of preparation or signing of PPP Agreement, subject to the approval of the PPP Policy Board; and
- (w) innovation to add value to and in the interest of a PPP project subject to approval of the PPP Policy Board.

Overview of other Agreements involved in PPPs

Besides the PPP Agreement, many other agreements are also entered into between the private party and GoS depending on the structure of the PPP project. These agreements include:

A. Project Site License Agreement

As the name suggests, this agreement contains the terms and conditions on which the project site is licensed to the private party for the purpose of implementation of the project. The license of project site commences from handing over vacant possession to private party. Providing vacant possession of project site to private party is usually one of the main conditions precedent of GoS under concession agreement.

B. Equity Funding Utilization Agreement

The purpose of this Agreement is to set out the terms and conditions and the procedures for funding of the equity amount as committed by the private party and the GoS during the construction phase of a project. Usually, the GoS is issued, against its equity, class B shares with no voting rights and the sponsors, i.e. preferred bidder, who establishes a project company for the implementation of a project, is issued, against its equity, class A shares with voting rights. By virtue of these class A shares with voting rights, the sponsors acquires the power to run, manage and take day to day decisions required for the implementation of the project.

C. Price Escalation Agreement

Where the GoS has agreed to assume 100% or 50% risk of the price escalation of four major items (i.e., cement, steel, bitumen, POL) used during construction of an infrastructure project, this agreement is entered into between GoS and sponsors, where the risk assuming party undertakes to bear and fund the price escalation (to the extent specified by GoS in bidding documents) on account of these four items during the construction phase as specified in the bidding documents. Any price escalation other than these four items are in any case the responsibility of private party and is borne by it. In addition, if private party fails to complete a project by schedule substantial completion date due to reasons attributable to it, any price escalation risk on account of these four items (besides other items) is completely borne by private party.

D. Independent Auditor Agreement

PPPs have introduced the concept of independent auditor appointed from big four chartered accountancy firms with mutual consent by GoS and private party. The independent auditor issues various certifications, determinations, verifications and other reports in relation to financial matters related to a project which includes, force majeure costs, change in law amount, termination payments, period payments either on account of annuity with necessary indexation and adjustments, such as KIBOR, minimum revenue guarantee payments. While detailed procedure for appointment of the independent auditor is provided in the concession agreement, this agreement sets out the terms and conditions and scope of work of the independent auditor and fee for providing services. The fee is solely borne by private party.

E. Independent Engineer Agreement

The independent auditor is also appointed with mutual consent of the parties and issues various certifications, determinations, verifications and other reports in relation to technical matters related to a project, which includes, approval of detailed engineering design, EPC contractor, EPC contract, O&M Contract, O&M contractor, force majeure costs and assist the independent auditor with various certifications, determinations and verifications. While detailed procedure for appointment of the independent engineer is provided in the concession agreement, this agreement sets out the terms and conditions and scope of work of the independent engineer and fee for providing services. The fee is solely borne by private party.

F. Annuity Amount Payment Agreement

In annuity based projects where the demand risk is not assumed by the private party, GoS provides annuity payments to private party against the performance obligations of the private party evaluated against key performance indicators, including making the facility available for public/users. This agreement, therefore, sets out the detailed mechanism for payments of annuity amounts, mechanism for adjustment to annuity payments, standing instructions to GoS annuity account. It is important to note that this agreement comes into play from commercial operation date.

G. Escrow Agreement

This agreement is entered into among GoS, private party and lenders, where private party has assumed either 100% demand risk or demand risk up to certain extent and sets out mechanism for collection and deposit of toll in escrow account, payment of minimum revenue guarantee amounts by GoS to cover shortfall, if any, in the revenues required to run a project. Besides, it all contain standing instructions to escrow agent from GoS and private party in relation to their respective accounts to make sure the escrow agent debit and credit such accounts automatically upon receipt of certificates issued by independent auditor and independent engineer for smooth operation of project. It is important to note that this agreement comes into play from commercial operation date.

H. Concession Direct Agreement

This agreement is entered into by and between GoS, private party and lenders. Under this agreement, lenders seek direct commitments from GoS regarding its funding obligations towards private party and issuance of security to secure debt raised for a project by private party. In addition, lenders also get GoS to acknowledge assignment of private party rights under concession agreement and other project related documents in favor of lenders. It also provides for step in rights that may be exercised by lenders upon event of default of private party, in which case, lenders endeavors to help private party rectify such default or in case of failure find a substitute private party to take over the project.