



Bangladesh
Private Sector Infrastructure Guidelines

Prime Minister's Office
Government of the People's Republic of Bangladesh
DHAKA

15 September 2004

Bangladesh
Private Sector Infrastructure Guidelines

CONTENTS

1	BACKGROUND.....	1
1.1	NEED FOR PRIVATE SECTOR INFRASTRUCTURE GUIDELINES	1
1.2	DEFINITIONS	2
2	DEVELOPMENT OF PRIVATE INFRASTRUCTURE PROJECTS.....	5
2.1	ELIGIBLE SECTORS	5
2.2	THE NATURE OF PRIVATE INFRASTRUCTURE PROJECTS	5
2.3	CLASSIFICATION OF PROJECTS	6
2.4	LICENSING	7
2.5	LAND FOR PRIVATE INFRASTRUCTURE PROJECTS	7
2.6	ASSOCIATED/LINKED PUBLIC SECTOR PROJECTS	8
2.7	TYPES OF PRIVATE INFRASTRUCTURE PROJECTS	8
2.8	TECHNICAL ADVISERS FOR PRIVATE INFRASTRUCTURE PROJECTS	9
3	INSTITUTIONAL FRAMEWORK.....	10
3.1	FORMATION OF A NATIONAL PRIVATE INFRASTRUCTURE COMMITTEE.....	10
3.2	OBJECTIVES OF THE PRIVATE INFRASTRUCTURE COMMITTEE.....	10
3.3	FUNCTIONS OF THE PRIVATE INFRASTRUCTURE COMMITTEE.....	10
3.4	ORGANISATION OF THE PRIVATE INFRASTRUCTURE COMMITTEE	12
3.5	WORKING PROCEDURES FOR THE PRIVATE INFRASTRUCTURE COMMITTEE	12
3.6	PRIVATE INFRASTRUCTURE PROJECT LIST	13
3.7	APPROVAL FOR INCLUSION IN THE LIST	13
3.8	PUBLIC INFRASTRUCTURE PROJECTS	13
3.9	CAPACITY BUILDING	13
3.10	MONITORING OF MACRO ECONOMIC AND FOREIGN EXCHANGE IMPACTS.....	14
3.11	INFRASTRUCTURE FUND FOR NON-RESIDENT BANGLADESHIS	14
4	FEASIBILITY STUDY.....	14
4.1	TECHNICAL CONSIDERATIONS.....	14
4.2	COMMERCIAL AND CONTRACTUAL CONSIDERATIONS.....	14
4.3	CODES AND STANDARDS	15
5	COMMERCIAL CONSIDERATIONS IN A PRIVATE INFRASTRUCTURE PROJECT	15
5.1	RISK ALLOCATION PRINCIPLES	15
5.2	CONTRACT DOCUMENT	16
5.3	TARIFF REGULATION	17
5.4	INCENTIVES.....	18
5.5	FINANCING OF PRIVATE INFRASTRUCTURE PROJECTS	18
5.6	ROYALTY	19
5.7	TERMINATION	19
5.8	INCREASING NEGOTIATION SKILLS	19
5.9	RECOMMENDED GOOD PRACTICES FOR LINE MINISTRIES	19
5.10	EXIT POLICY	21
5.11	SICK PROJECTS	21
5.12	ABANDONMENT OF PROJECT	21
6	TENDER AND AWARD PROCESS	22
6.1	MAJOR TERMS AND CONDITIONS COMMITTEE	22
6.2	THE PRE-QUALIFICATION AND TENDER EVALUATION COMMITTEE	22
6.3	SELECTION OF AN INVESTOR	23
6.4	COMPETITIVE TENDER PROCEDURES	23
6.5	PRE-QUALIFICATION CRITERIA.....	25
6.6	INVITATION FOR TENDERS	27
6.7	DIRECT NEGOTIATION	35
	ANNEXURE A: PROJECT PROGRESS MONITORING BY STAGES.....	37
	ANNEXURE B: ORGANISATION STRUCTURE OF PRIVATE INFRASTRUCTURE COMMITTEE.....	39
	ANNEXURE C: SEGREGATION OF PUBLIC AND PRIVATE INFRASTRUCTURE PROJECTS IN STAGE ZERO.....	40
	ANNEXURE D: FLOW-CHART FOR PRIVATE INFRASTRUCTURE PROJECTS	41
	ANNEXURE E: TYPES OF PRIVATE INFRASTRUCTURE PROJECTS.....	42
	ANNEXURE F: PROCESSING OF UNSOLICITED PROPOSALS.....	44

1 BACKGROUND

1.1 Need for Private Sector Infrastructure Guidelines

The Government of the People's Republic of Bangladesh has adopted the policy of promoting the development of infrastructure projects through the private sector. There has been some success in the power, gas and telecom sectors. The Government seeks more investment in these and other sectors such as ports, roads, water supply, waste management etc. This will result in the accelerated growth of the economy, being enhanced through the sufficient provision of infrastructure.

An infrastructure Project may be carried out through public sector financing (a “**Public Infrastructure Project**”) or through private financing (a “**Private Infrastructure Project**”). A Public Infrastructure Project is financed, owned and operated by Government authorities or utilities. In a Private Infrastructure Project, the development, engineering, financing, procurement, construction and operation are carried out through a private sector Investor through schemes such as build-operate-transfer (BOT), build-own-operate (BOO) and others including licensing regimes. Such a Project is usually Project financed. In reality, a Private Infrastructure Project is not a project, but a business for a lengthy period of time and as such, requires considerations that are different from a project.

Presently, Private Infrastructure Projects do not appear in the Annual Development Programme (ADP). In this respect, a Private Infrastructure Project is “invisible” in the government machinery. Its documentation and approvals at various stages are unclear. Procurement processes are less well known and understood compared to similar Public Infrastructure Projects.

An Investor is generally unable to carry out infrastructure projects on its own, as such projects generally require the Government or Regulator to grant the legal right to the Investor to carry out the functions of developing and operating the business. Although private Investors are “free” to develop non-infrastructure businesses in accordance with their perception of market demand, they do not have the same discretion to take up infrastructure businesses or determine the scope or size of their participation.

There exist detailed Government procedures to identify, process and finance a Public Infrastructure Project. A major cause for the lack of private sector participation in infrastructure projects is the absence of consistent procedures to identify, develop and process Private Infrastructure Projects. There are no guidelines for Government officials to follow in respect of developing and facilitating the progress of these private sector infrastructure projects. This document (the “**Private Sector Infrastructure Guidelines**” or “**Guidelines**” in short) therefore aims to serve three basic purposes:

1. to establish within the Government, procedures to identify Private Infrastructure Projects;
 2. to document a set of guidelines, for both the private sector Investors and Government, enabling the procurement and implementation of Private Infrastructure Projects; and
 3. to establish institutional arrangements to monitor and expedite the implementation of such projects at a national level.
-

1.2 Definitions

Whenever the following capitalised terms are used in the Guidelines, whether in the singular or the plural, in the future or past, they shall have the meanings ascribed to each of them below, unless the context otherwise requires:

“Annual Development Programme” or **“ADP”** means the annual programme of planned public sector projects published by the Planning Commission;

“BOI” means the Board of Investment of Bangladesh established under the Board of Investment Act, 1989 (Act XVII of 1989);

“Cabinet Committee on Economic Affairs” or **“CCEA”** means the committee established by the Government under Clause 18 of the Rules of Business, 1996;

“Commercial Operations Date” means a date on which a Project starts to produce its product or service commercially;

“Concessionaire” means the Project Company who has been awarded the concession to provide the infrastructure service;

“Consents” means all approvals, permissions, licenses, exemptions, waivers, concessions, registrations, etc. to be required and granted by the Government for a Project;

“Contract” means an agreement or a number of agreements *executed* between an Executing Agency, other governmental agency and/or Government and the Project Company or the Concessionaire for provision and/or operation of public utilities and other public services under BOO, BOT, BOOT, lease, management or capitalisation arrangements or such other forms of arrangements;

“Contract Document” means the *drafts* of implementation agreement, power purchase agreement, gas supply agreement, land lease agreement, concession agreement, BOT agreement, BOO agreement, operating agreement, management agreement, service agreement or other forms of agreement or agreements, enclosed with the Tender Document as applicable;

“Day” means a calendar day unless it is otherwise specified as a working day;

“ECNEC” means the Executive Committee for National Economic Council;

“Executing Agency” means a governmental agency working under a ministry, ministry, division, department belonging to, or attached to, Government or other unit or subdivision thereof, or any other local government agency responsible for providing infrastructure services, or granting the right to third parties to provide infrastructure services to the people of Bangladesh or certain areas of Bangladesh;

“Government” means the Government of the People's Republic of Bangladesh;

“Governmental Authority” means the ministry, department, agency, authority, statutory body, corporation, commission, Regulator or local government under the direct or indirect control of the Government, including their successors or assignees;

“Infrastructure” means projects that the private sector cannot undertake for investing, without a contractual agreement with, or a License from, a Governmental Authority;

“Infrastructure Investment Facilitation Center” or **“IIFC”** means the government-owned, not-for-profit company registered under the Companies Act 1994, created under the Economic Relations Division of the Ministry of Finance, for facilitating private investments in infrastructure;

“in writing” means communication in hand or machine written type duly signed and includes properly authenticated messages by facsimile or electronic mail;

“Investor” means a private party (proprietorship firm, partnership firm, corporation/limited company, or any joint venture) who plans to invest in infrastructure projects in Bangladesh, and includes the private party whose Tender has been accepted, who is awarded the Project, who has created a Project Company and has committed to invest in the Project Company to develop and/or operate a Private Infrastructure Project;

“Lead Investor” means the entity and/or individual who is responsible in connection with the Tender process.

“Licensing” or **“License”** means the permission by the Regulator or relevant Governmental Authority to a private Investor for providing an infrastructure service and Government does not enter into a Contract with the Project Company;

“Line Ministry” means the Ministry responsible for the relevant sector in which the proposed Project will be carried out;

“Major Terms and Conditions Committee” means an inter-ministerial committee set up by CCEA to prepare the major terms and conditions to be followed in the Tender for a Private Infrastructure Project.

“PTEC” means the Pre-qualification and Tender Evaluation Committee set up by an Executing Agency or the Line Ministry for the evaluation of Pre-qualification statements and Tender submissions and providing a report with recommendations after each evaluation;

“Performance Guarantee” means a bank guarantee, letter of credit, surety bond or any other commercially available bond, prescribed by the Executing Agency, submitted by a Project Company to the Executing Agency, Government, or Regulator for its performance obligations under any Contract or License;

“Person” means any physical or juridical individual or body of individuals, or company or association whether incorporated or not;

“Pre-qualification” means a method by which Investors are invited to demonstrate their qualifications prior to, and as a pre-condition for, being invited to submit Tenders;

“Pre-qualified Tenderer” means an Investor who has submitted a Pre-qualification statement and has been qualified by the Executing Agency to submit Tender for a Private Infrastructure Project;

“Private Infrastructure Committee” or **“PICOM”** means the committee set-up by the Government to co-ordinate, monitor and expedite Private Infrastructure Projects;

“Private Infrastructure Project List” or the **“List”** means the list of Projects, which have been earmarked for private sector investment, approved by CCEA and published by PICOM through its secretariat;

“Private Infrastructure Project” means an infrastructure Project developed by the private sector on the basis of a build-own-operate (BOO), build-operate-transfer (BOT), build-own-operate-transfer (BOOT), refurbish-operate-maintain (ROM), concession, license, franchise, lease, management or capitalisation arrangement or such other form of private sector participation arrangements, as described in Annexure E;

“Project Company” means a company duly incorporated under the laws of Bangladesh by the Investor and responsible for executing the Contract Documents necessary to build, operate and/or transfer the Project in accordance with the terms of the Contract Documents;

“Project” means the development and/or operation of a Private Infrastructure Project, designed, financed, constructed, operated and/or maintained by the Project Company;

“Public Infrastructure Project” means any publicly financed infrastructure Project carried out through the ADP;

“Regulator” means the organisation other than the ministry, set up by the Government under an Act, to bring competition in the sector with the introduction of private infrastructure, regulate the industry, make a level playing field, resolve disputes between industry participants and/or protect consumer interests. Where there is no Regulator in a sector, the Line Ministry regulates the sector.

“Shareholders” means the Investor or Investors investing in the Project Company to perform the obligations of the Project Company under the Contract;

“Tender” means the written submission of a Tenderer to the Executing Agency based on the specifications, terms and conditions as contained in the Tender Document for the financing, construction, operation and/or maintenance of a Private Infrastructure Project;

“Tender Document” or **“IFT”** means the Invitation for Tenders document that will be issued by an Executing Agency to the Pre-qualified Tenderers or Investors to prepare a Tender for a Private Infrastructure Project;

“Tenderer” means an Investor submitting a Tender in response to a Tender Document;

“US \$ or \$” means the lawful currency of the United States of America.

2 DEVELOPMENT OF PRIVATE INFRASTRUCTURE PROJECTS

2.1 Eligible Sectors

Under the Guidelines, infrastructure projects from the following sectors or sub sectors may be implemented as Private Infrastructure Projects:

- (a) telecommunication systems, networks and services including information and communication technology (ICT);
- (b) power generation, transmission, distribution and services;
- (c) port development (sea, river and land) including inland container terminals, inland container depot and other services;
- (d) highways and expressways including mass-transit, bridges, tunnels, flyovers, interchanges, city roads, bus terminals, commercial car parking, etc.;
- (e) exploration, production, transmission, and distribution of oil and gas;
- (f) airports, terminals and related aviation facilities;
- (g) tourism industry;
- (h) water supply and distribution, sewerage and drainage;
- (i) industrial estates and parks, city and property development, including services to support commercial and non-commercial activities;
- (j) land reclamation, dredging of rivers, canals, wetlands, lakes and other related facilities;
- (k) service sectors e.g. health and educational facilities, carried out by the Government through the private sector;
- (l) environmental, industrial and solid waste management projects;
- (m) railway systems, rolling stock, equipment and facilities;
- (n) other urban, municipal and rural infrastructure that the Government views as priority areas for development so as to support economic development activities; and
- (o) any other infrastructure project of similar nature.

2.2 The Nature of Private Infrastructure Projects

In general, these Guidelines shall be applicable in areas where free-market transactions are not possible for private sector investments. Some examples (not exhaustive) of such areas are:

- (a) those facilities which have a significant public interest;
- (b) those land, buildings/establishments or immovable properties for which buying and selling are restricted
- (c) those investments which require permission to use government khas land, government/semi-government agencies controlled land/buildings/establishments

- (d) private sector land/buildings/establishments that require the government to assist with acquisition;
- (e) those investments that require additional exemptions from taxes, duties and special incentives, beyond that allowed under existing laws and regulations
- (f) those investment that require the government to regulate and approve the tariff or charges for products and services, such as tolls, fees, electricity/gas/water rates transportation charges, surcharges etc.;
- (g) those investments in which government/semi-government agencies need to guarantee the off-take of products and services

2.3 Classification of Projects

In view of the different sizes of Private Infrastructure Projects that will be carried out, and in order to ensure that smaller projects progress quickly, all Projects shall be classified into Large Infrastructure Projects and Small Infrastructure Projects.

2.3.1 Large Infrastructure Projects

A Project, which is estimated to have a capital cost of \$25 million or above (at the time of appearing in the List), excluding on-going capital for expansion, shall be classified as a Large Infrastructure Project. The threshold value may be reviewed, as and when required, or on a periodic basis, after every five years.

2.3.2 Small Infrastructure Projects

A Project, which is estimated to have a capital cost of less than \$25 million (at the time of appearing in the List), excluding on-going capital for expansion, shall be classified as a Small Infrastructure Project.

2.3.3 Poverty Alleviation Projects

A Small Infrastructure Project may in certain circumstances fulfill the Government's objective for poverty alleviation in its poverty reduction strategy programme (PRSP). A few examples of poverty alleviation related projects are:

- Remote Area Power Supply Systems (RAPSS)
- Pourashava and village water supply
- Rural telephone projects
- River passenger terminals/landing stations
- Rural gas supply
- Any other similar project

Poverty alleviation infrastructure projects will be accorded special incentives for rapid implementation on a fast-track basis. PICOM shall prepare and after CCEA approval, publish criteria for identifying projects that qualify for poverty alleviation.

2.3.4 Fast-Track Rural Projects

In instances where there are a large number of rural Small Infrastructure Projects having similar conceptual framework, CCEA may grant them block approval in Stage 0, in order to

aid their speedy and fast-track implementation, and allow the Line Ministries/Executing Agencies to proceed, where:

- The Government is not the off-taker or purchaser of the services provided by the infrastructure
- Government does not provide direct cash subsidies or any loan guarantees
- The Project increases competition in the service provided i.e. it is not a monopoly
- The Project award entails some form of Licensing.

2.3.5 Convergence of Rural Infrastructure Services

In many cases, rural infrastructure services, such as the provision of electricity and telecommunication services in rural areas may not be viable on an independent basis. In such cases, the Line Ministries of the sectors involved may discuss measures to improve the viability of such services by combining or converging two or more, small infrastructure suppliers or maintaining sufficient provision in one infrastructure to accommodate the requirements of the other. In situations where there are differences between the times of implementation of different infrastructure projects, the Government may make arrangements to resolve the cash flow issues involved.

2.4 Licensing

Licensing is one of the forms of private sector participation in infrastructure, where the government engages the private sector to provide infrastructure service, by giving exclusivity rights or ensuring competition.

In such cases, the Regulator, or the Executing Agency where there is no Regulator, may give a License to Investors, found eligible on the basis of certain licensing criteria, permitting to provide a defined service in a defined area. The License shall contain conditions that the Licensee shall comply with in providing the service, including minimum performance standards and default penalties. The License shall not be treated as a Contract and shall not bind the government with any specific obligation towards the Project or the Project Company.

2.5 Land for Private Infrastructure Projects

The land required for Private Infrastructure Projects may be obtained by purchase, monthly/yearly rent, long-term lease or acquisition. For acquisition, the Government will provide assistance to the private sector. However, the private sector shall pay for all the costs related to such acquisition, e.g. cost to the owners, relocation of Project affected persons, mitigation of environmental impacts etc. as per the applicable laws, rules, ordinances or guidelines in Bangladesh.

The Ministry of Land shall give priority for land acquisition or other land matters for Private Infrastructure Projects. For Projects, which require land from one Ministry to be transferred to another, PICOM and the Ministry of Land shall make efforts for such transfer to take place expeditiously.

In property development Projects, a Line Ministry or Executing Agency may convert its full ownership of land to a partial ownership of land and buildings, and cash.

2.6 Associated/Linked Public Sector Projects

In order to aid the rapid development of Private Infrastructure Projects, the Planning Commission/Finance Division shall *give priority and allocate funds* for associated public financed activities such as the purchase of land, associated/linked public sector projects or consultant hiring, such that the funds are available at the beginning of the fiscal year. Associated/linked public sector projects shall include projects related to the supply of utilities such as electricity, gas, water, telephones, sewerage, etc. or obligations such as link roads, site compaction, transmission lines etc. as specified in the Contract and their completion shall be timed appropriate to the completion of the Project.

2.7 Types of Private Infrastructure Projects

The process of Project development and approval may follow one of the two forms discussed below, depending on whether a Private Infrastructure Project is solicited or unsolicited.

2.7.1 Solicited Tenders

In Projects involving solicitation, the Government, through the relevant Line Ministries or Executing Agencies, will identify eligible Projects, carry out feasibility studies, prepare commercial and contractual framework, prepare Tender Documents, and seek Tenders from Investors through transparent competitive processes. The Line Ministry or Executing Agency, through the PTEC, will then review, evaluate and rank the Tenderers using established Tender evaluation criteria. The processes to be followed are provided in Section 6.

2.7.2 Unsolicited Proposals

Investors may submit unsolicited preliminary project proposals in respect of projects that are not included in the List, if such projects have unique features and are a flagship for the sector. The preliminary proposals should be submitted to the respective Line Ministry, BOI or PICOM, but the processing will be carried out by the Line Ministry. On approval of the preliminary proposal by the Line Ministry, the Project proponent shall submit a detailed Project proposal, which must:

- (a) contain a brief description of the Project;
- (b) include a feasibility study of reasonable depth;
- (c) include technical specification, estimated Project cost in sufficient detail, performance parameters and the nature of output of the project;
- (d) demonstrate its economic, financial and environmental sustainability;
- (e) propose the rights and obligations of the Investor and the Government;
- (f) contain the qualifications, financial capability and experience of the Investors; and
- (g) not require Government subsidy or Government's existing assets, equity participation or direct loan guarantee.

If an unsolicited proposal containing the above is satisfactory to the Line Ministry against the above criteria, it will be sent to the respective Executing Agency to assess against their overall sector plans. If the Executing Agency determines that the Project is necessary and

beneficial to the economy, the Project will then be sent to PICOM for recommending to CCEA, for approval as a Private Infrastructure Project.

Upon receipt of such approval from CCEA and inclusion in the List, the Executing Agency shall solicit the Project in accordance with Section 6. In the Public Notice for pre-qualification of Investors, the Executing Agency shall mention the name of the proponent of the unsolicited proposal as being a Pre-qualified Tenderer. The processing of unsolicited proposals shall be guided by Annexure F.

2.8 *Technical Advisers for Private Infrastructure Projects*

2.8.1 Qualification and Hiring of Consultants

Line Ministries or Executing Agencies may hire local or foreign consultants if they do not possess sufficient experience to handle Private Infrastructure Projects. These consultants must possess experience in private sector infrastructure transactions, and must satisfy the Transaction Experience Consultant (TEC) criteria. In order to satisfy the TEC criteria, a consultant must have had significant involvement in at least two investment projects, with respect to the activities set out in Stages II to V of Annexure A. The consultant team should comprise at least one technical, one commercial/financial and one legal specialist who can be classified as TEC. In sectors in which there have been no significant private sector investment, and there are consequently, few experienced consultants able to meet the TEC criteria, the Executing Agency may relax the above requirement.

The long-term objective of the Government is to promote and develop local expertise in these areas and in this respect, local consultants will be given preference. Furthermore, through their consultant agreements, the foreign consultants shall be obliged to transfer technology and know-how to the counterpart local consultants and the Executing Agency.

The Line Ministry or Executing Agency, which requires services of consultants for Private Infrastructure Projects, may seek assistance from IIFC for technical support. They may also use IIFC for procuring and managing foreign consultants in Large Infrastructure Projects or acting as a Project implementation/management unit. The arrangements with IIFC shall be on a commercial basis, either through consultant fees, success fees or a combination of the two, as mutually agreed.

To the extent possible, Line Ministries or Executing Agencies shall use Government funds for the hire of such consultants. In addition, some of the consultants or advisers may also be engaged through success fees recovered from pre-qualified and/or successful Tenderers at different points in the tendering cycle. Success fee-based consultants have the advantage of: (a) good Project recognition skills; (b) rapid deployment; and (c) good Project progression. The Government may also set up a revolving fund with the Planning Commission, which is replenished as a percentage of the public funds saved.

2.8.2 Cost Recovery of Advisory Fees Based on Success

During the development and solicitation of a Project, the Line Ministry or Executing Agency may engage some of the required consultants or advisers on the basis of success fees for the preparation of feasibility reports, Pre-qualification documents, Tender Documents, Contract Documents, negotiations and other activities directly related to the Project.

The level of cost recovery shall be mutually agreed between the Line Ministry/Executing Agency and the consultant/adviser. The level and points in time for cost recovery shall be specified in the Tender Document. If any Tenderer declines to pay any such amount specified in the Tender Document, its Tender shall be deemed non-responsive and in case of a successful Tenderer, such amount shall be drawn from its Tender security deposited with the Executing Agency.

3 INSTITUTIONAL FRAMEWORK

3.1 Formation of a National Private Infrastructure Committee

For the promotion and efficient handling of Private Infrastructure Projects in Bangladesh, a national Private Infrastructure Committee (the “**Private Infrastructure Committee**” or “**PICOM**”) shall be established under the Prime Minister’s Secretariat, with the Principal Secretary as the Chairman of the committee. Generally, PICOM shall not be an approving agency, but rather a body to expedite and monitor the Private Infrastructure Projects.

3.2 Objectives of the Private Infrastructure Committee

PICOM shall co-ordinate, monitor and expedite the resources, strengths and capabilities of both the private and public sectors for the benefit of the nation through the implementation of Private Infrastructure Projects. PICOM shall be the focal point for promoting and progressing Private Infrastructure Projects across all infrastructure sectors in the country, with the following main objectives:

- (a) to facilitate, in discussion with the sponsoring Line Ministries and the Planning Commission, the initiation of Private Infrastructure Projects, resulting in the publication of the Private Infrastructure Project List; and
- (b) to assist the Line Ministry in achieving successful private sector projects, by monitoring their progress and implementation and assisting in removing any public sector hurdles encountered by the Executing Agencies or Investors.

3.3 Functions of the Private Infrastructure Committee

- (a) In association with the Planning Commission, Line Ministries and private sector, ensuring that Private Infrastructure Projects are carried out, keeping in view the integrated infrastructure requirements of the country.
- (b) Promoting private sector participation in financing, constructing, maintaining and/or operating infrastructure projects.

- (c) Overseeing and monitoring the actual Project progress (with respect to Annexure A) against the time-line of activities submitted by the Executing Agency, whether appearing in the List or otherwise.
- (d) Ensuring formative evaluation, and assisting in the smooth execution of Private Infrastructure Projects.
- (e) Sharing all its activities with concerned stakeholders and the media in a transparent manner, including publishing its activities and decisions on its website.
- (f) Assisting in negotiations with Investors of Large Infrastructure Projects, if required by the concerned Ministry.
- (g) Expediting decisions in the investment process by resolving complex inter-ministerial issues;
- (h) Overseeing that each proposed Project meets established socio-economic and environmental policy criteria and that it conforms to Government legislation.
- (i) Preparing and implementing plans for the development of expertise and capacity on the part of Government officials to understand and manage Private Infrastructure Projects and ensuring that such officials are retained within the infrastructure Line Ministries.
- (j) Promoting new laws, regulations and policies for successful implementation of Private Infrastructure Projects by creating enabling conditions and supportive framework for the encouragement of Investors in short-term and long-term investments.
- (k) Monitoring the contingent liabilities of Private Infrastructure Projects in Bangladesh and any other global issues related to such projects.
- (l) Identifying and analysing the causes for the lack of desired enabling environment for investment and lobbying with the appropriate authorities to address the causes.

3.4 Organisation of the Private Infrastructure Committee

PICOM shall consist of the following members:

1.	Principal Secretary to the Honourable Prime Minister	Chairman
2.	Secretary, Finance Division	Member
3.	Secretary, Economic Relations Division	Member
4.	Secretary, Internal Resources Division	Member
5.	Concerned Member, Planning Commission	Member
6.	Secretary, Ministry of Law, Justice and Parliamentary Affairs	Member
7.	Secretary, Line Ministry for the Project	Member
8.	Governor/Representative ¹ , Bangladesh Bank	Member
9.	President, The Federation of Bangladesh Chambers of Commerce & Industry (FBCCI)	Member
10.	President, Foreign Investors Chamber of Commerce and Industry (FICCI)	Member
11.	Executive Chairman/Member, Board of Investment (BOI)	Member-Secretary

The organisational structure of PICOM is set out in Annexure B. PICOM will have its secretariat in BOI, which will perform the functions of preparing documents, agendas, minutes of meetings, infrastructure investment promotions, etc. In performing these functions, BOI's power and capacity may be increased as necessary to carry out the work programmes.

PICOM shall have the power to co-opt additional members in discharging its functions. There should not be any subcommittee under PICOM, except for review of Appeals against Disqualification as mentioned in Section 6.5.4. It may, however, call in experts to hear their views to facilitate their decision-making process.

3.5 Working Procedures for the Private Infrastructure Committee

PICOM shall meet at least once every three (3) months to review the progress of Private Infrastructure Projects. The progress of Projects shall be reviewed against the milestones provided in the seven stages of project development illustrated in Annexure A. The Executing Agency shall provide to PICOM, the timeline/barchart of planned activities against the milestone in each stage, as soon as possible after the Project appears in the Private Infrastructure Project List. PICOM may hold special meetings for resolving critical issues or for receiving clarifications on any related subject. The departmental heads of the agencies concerned shall attend the PICOM committee meetings on invitation, for taking part in discussions on relevant projects.

PICOM shall act in close cooperation with Line Ministries and Executing Agencies for carrying out its functions. PICOM shall also liaise with the Planning Commission, Economic Relations Division, Board of Investment and private investors. After a Project appears in the

¹ Not below the rank of Deputy Governor

Private Infrastructure Project List, PICOM shall liaise with the Line Ministries, with a view that the approved Projects are initiated without delay. PICOM shall encourage the BOI to promote the Projects in the List to potential local and foreign Investors.

To the extent possible, PICOM shall decentralise decision-making and allow local governments to assume a more active role in private sector infrastructure development.

3.6 *Private Infrastructure Project List*

PICOM shall be the custodian of the List. Projects may be initiated for the List, through the following mechanisms (as illustrated in Annexure C):

- a) Submitted by a Line Ministry to PICOM
- b) Submitted directly by the private sector to the BOI
- c) Submitted directly by the private sector to PICOM

The initiation of projects for the List shall be made in forms or format prescribed by PICOM. For items 3.6(b) and 3.6(c), the relevant Line Ministry shall confirm whether the Project is consistent with the sector plan and is desirable.

3.7 *Approval for Inclusion in the List*

Projects shall be approved for inclusion in the List in the following manner:

- a) Projects of capital cost less than US\$ 5 million shall be approved by the Line Ministry and notified to PICOM for inclusion in the List;
- b) Projects of capital cost more than US\$ 5 million shall be approved by CCEA.

3.8 *Public Infrastructure Projects*

While identifying Public Infrastructure Projects for processing through the Planning Commission and ECNEC for ADP allocation as illustrated in Annexure C, Executing Agencies shall ensure that such projects cannot be carried out through private sector financing. While preparing the project concept paper/project proforma, the Executing Agency shall attach the justification and reasons as to why the project cannot be undertaken through private financing.

3.9 *Capacity Building*

PICOM shall prepare a comprehensive plan, in consultation with the Line Ministries and Executing Agencies, for developing the skills of Government officials for BOT, BOO etc. projects, in the following areas:

- Technical
- Financial and commercial
- Legal and
- Negotiations

PICOM shall ensure the retention of experienced trained officials, ensure re-training of officials, introduce appropriate training courses on private sector investment, in different government and other institutions including the Public Administration Training Centre (PATC), for changing the orientation of government officials and the business community.

PICOM will also identify proper professional personnel in order to create a cluster of such personnel, and their retention within the appropriate infrastructure Line Ministries.

In addition to retaining expertise within the Line Ministries and Executing Agencies, there shall be a panel of potential technical experts/advisers from the private sector that can be used by the government in implementing Private Infrastructure Projects.

With the emerging role of private sector with BOO, BOT, etc., there shall be a package of training programmes for both the public sector and the private sector, which will contribute to the process of partnership.

3.10 Monitoring of Macro Economic and Foreign Exchange Impacts

The macro economic and foreign exchange impacts arising from Private Infrastructure Projects shall be monitored on the basis of a format prepared by the Bangladesh Bank and approved by CCEA. The format shall include the currency of investment, whether local or foreign. The Bangladesh Bank, or a suitable organisation should be engaged to carry out this monitoring function. The organisation monitoring the information shall provide it to CCEA on a semi-annual basis.

Approval of new Private Infrastructure Projects shall take into account, the macro economic impact to the country and the needs for foreign exchange. The openness (or restrictions to entry, as the case may be) on foreign currency inflow in infrastructure projects shall be the same as that for non-infrastructure projects. Foreign investors willing to reinvest their profits in the country shall be given preference.

3.11 Infrastructure Fund for Non-Resident Bangladeshis

The Government shall encourage the development of an infrastructure development fund or funds in which non-resident Bangladeshis may invest for the purpose of developing Private Infrastructure Projects.

4 FEASIBILITY STUDY

4.1 Technical Considerations

The Executing Agency shall carry out a feasibility study, with broad functional specifications on technical matters but shall give more emphasis on commercial aspects and assess the risks and regulatory and monitoring frameworks very carefully. An Investor shall have the responsibility for the assessment of viability including commercial risks, detailed feasibility and engineering parameters, before a Tender is submitted.

The CCEA approval of the List shall be sufficiently flexible to accommodate changes in the technical parameters of a Project, attractive to an Investor. Such parameters shall only be firmed up during the preparation of the Tender Documents, after the feasibility is conducted.

4.2 Commercial and Contractual Considerations

The feasibility study report shall contain sufficient details of the commercial and contractual relationships between the Executing Agency and/or the Line Ministry and the Project Company.

Different options or models for private sector participation shall be discussed in terms of their risk, investment and market implications to the Government, Executing Agency, Project Company and consumers.

The following topics, shall be addressed in the report, as applicable:

- (a) Modes of private sector participation e.g. joint venture, BOT, BOO, lease, or licensing
- (b) Project parameters and boundaries
- (c) Regulating or not regulating the tariff, scope and quality of services;
- (d) Different tendering or selection parameters – minimum tariff, minimum subsidy, or maximum royalty
- (e) Different royalty and revenue sharing options
- (f) Legal and regulatory framework, including any changes necessary; and
- (g) Brief description of the proposed Contracts, including risk allocation between the public sector and the private sector

The information set out in the feasibility study report must be sufficiently detailed and any assumptions made must be reasonably realistic, so as to ensure that the optimum commercial or contractual arrangements may be determined.

4.3 Codes and Standards

The Executing Agency shall identify in the IFT, the codes and standards to be used in a Project by the Investor or the Project Company for the design, construction, operation and maintenance. Where these are not explicitly mentioned, Bangladesh standards shall be followed. If there are no applicable standards in Bangladesh, then internationally accepted codes and standards for the relevant industry shall be followed.

5 COMMERCIAL CONSIDERATIONS IN A PRIVATE INFRASTRUCTURE PROJECT

5.1 Risk Allocation Principles

The allocation of risk between the Government and the Project Company for a particular Private Infrastructure Project will be passed through the Contract Documents. The applicable principle in determining risk allocation is that the party best able to manage a risk should bear that risk. However, risks that are normally assumed by investors in non-infrastructure projects shall be assumed (to the extent possible) by Investors of infrastructure projects. In addition, it is recognised that in the first few flagship projects in a particular sector, the Government may need to assume more risks. Such risks to the Government shall however reduce over time as a sector matures with more private sector investments.

The Government shall prefer and give priority to those infrastructure projects in which Investors take the risk for the demand (business risk) for the infrastructure services provided under the Project.

5.2 Contract Document

The Executing Agency and/or the Line Ministry, and the winning Tenderer/the Project Company shall enter into a Contract for a Project. The Contract Document enclosed with the Tender Document must lay out in detail, the rights and obligations of the Executing Agency, the Government and the Project Company.

The Contract Document must set out details of the following:

- (a) the definition and boundaries of the Project;
- (b) delineation of responsibilities between Executing Agency and/or the Line Ministry, and Project Company for the timely construction of the Project;
- (c) responsibility for design, implementation, completion, operation, maintenance and transfer of the Project (if applicable);
- (d) the right to use land, roads, and other supporting facilities necessary for construction and operation of the Project;
- (e) minimum acceptable performance standards to be maintained during construction and operation, and expansion requirement that may need to be fulfilled;
- (f) provisions for tariff rates to be charged to customers and the rights to collect the charges (if applicable);
- (g) government soft funds, subsidies, any guarantees or assistance to the Project; and
- (h) measures to be taken upon termination.

The Contract Document shall take into account the interests of all the parties so that sufficient comfort is given to the Project Company and its lenders, in terms of obligations it has to bear, the tariff it can charge and the scope and extent of its business. At the same time, the Government and general consumers must benefit from a reasonable level of tariff or enhanced competition.

The term of a Private Infrastructure Project, which involves transfer of the facilities to the Government (*i.e.* BOT), shall be determined by reference to the time required to give the Investors a reasonable return on their equity. This period shall be no more than 20 (twenty) years for infrastructure projects involving process plant and machinery. For infrastructure projects dominated by investments in civil construction such as bridge, road, port, water supply etc, the term could be up to 30 (thirty) years. For projects that do not involve a transfer of the facilities to the Government (*i.e.* BOO), the term shall be determined by the economic life of the facilities. For projects involving leasing or some variation of leasing and investment, the term shall be between 5 (five) years to 20 (twenty) years as recommended by the Major Terms and Conditions Committee and approved by CCEA.

The following sets out as a broad outline, the parties' responsibilities that must be laid out in the Contract Document:

Ministry/Executing Agency	Project Company
<ol style="list-style-type: none"> 1) Defining the Project <ol style="list-style-type: none"> (a) Capacity/scope of the Project (b) Term of the Contract (c) Minimum equity percentage for Investors (d) Minimum performance standards (e) Interconnection and interface between other entities and the Project Company; e.g. gas supply, power purchase, interconnection between telecom operators (f) Provisions of fiscal incentives and repatriation of profit and capital (g) Defining the mechanisms for establishing tariffs, their escalation and collection 2) Providing and facilitating necessary Consents 3) Acquisition of land, or rent/lease of land sufficient for the term of the Project 4) Purchasing the output of the Project or supply of necessary inputs, if within scope of the Government/Executing Agency 5) Defining Termination provisions 	<ol style="list-style-type: none"> 1) Procuring funds for the Project, designing and constructing the necessary facilities on time, according to specified construction standards, operating and maintaining the facilities 2) Providing agreed services to the consumers with a specified performance standard without discrimination 3) Expanding consumer base and enhancing capacity to provide services to new consumers as specified in the Contract 4) Paying royalty and performance guarantees to the Government/Executing Agency on time as agreed 5) Complying to safety and environmental standards

5.3 *Tariff Regulation*

The Government intends to create competition, where possible, in delivering infrastructure services through the private sector. The competition shall be (a) for the market; or (b) within the market, as the case may be.

Any tariff that the Project Company may charge to the consumers shall have to be determined by open and competitive tender process.

5.4 Incentives

5.4.1 General Incentives

All infrastructure projects in the private sector will receive the applicable incentives, provided by the Government from time to time. Investors may contact the BOI or refer to their publication, “Bangladesh Investment Handbook”, for the most recent set of applicable incentives.

Where necessary, PICOM shall assess the fiscal incentives required for promoting the growth of a particular infrastructure sector, lobby with the appropriate government agencies for their approval by CCEA and publish the incentives in their website.

5.4.2 Special Incentives

Specific Large Infrastructure Projects, considered by the Major Terms and Conditions Committee to be pioneering initiatives, shall be given special incentives, on a case-by-case basis, necessary for their viability and attractiveness to the private sector. The review of the viability will take account of the life of the Project. Such incentives, after CCEA approval, shall be declared in the Tender Documents.

5.4.3 Pro-poor Incentives

Rural-based poverty alleviation projects shall be given incentives similar to the incentives provided in the Private Sector Power Generation Policy 1996, plus a further 10 to 15 years corporate tax holiday, upon certification of their eligibility by the Major Terms and Conditions Committee.

Remote Area Power Supply Systems (RAPSS) with their own power generation facilities will be given the incentives provided in the Private Sector Power Generation Policy 1996. In addition, they shall be given exemption from duties, value-added taxes, and other similar charges on the liquid fuels used for their power generation.

Government may provide subsidy to a Project deemed by the Major Terms and Conditions Committee as being one that serves the poverty alleviation objectives of the Government, if the above incentives are insufficient to cover costs. Subsidies may be provided from ADP or from a universal service fund created from contribution of the existing operators in the same industry or an arrangement recommended by PICOM and approved by CCEA.

5.5 Financing of Private Infrastructure Projects

Financing a Project shall be the sole responsibility of the private Investor. The Government shall not provide any direct sovereign guarantees of the Investor’s loans in a Project for the repayment of its debts in the event of default in its loan obligations. However, the Government may guarantee the performance of the obligations of a Governmental Authority as may be specified in a Contract with an Investor (for example, the obligation of the Bangladesh Power Development Board to pay for electricity received from a private power plant).

In general, the Government will not participate in providing equity for a Project, but in special circumstances, such as where a large complex Project is involved, it may do so, upon the recommendation of PICOM and approval by CCEA.

The Ministry and Executing Agency shall not consider any arrangement whereby returns are guaranteed to an Investor as a percentage of the capital cost.

5.6 *Royalty*

A Ministry or Executing Agency may impose a Royalty on a Project, implemented by way of a combination of fixed and variable components, including escalation indices or adjustments. The fixed component shall cover for land, existing facilities etc. The variable components may be a percentage of annual gross revenue of the operator, or parameters related to sales volumes, unit of goods or services supplied e.g. royalty per container for a container terminal project. The Royalty provisions shall be made known in the Tender Documents and included in the Contract Documents.

5.7 *Termination*

Efforts shall be made to prevent termination of a Contract by mitigating, at an early stage, the default conditions leading to termination. Termination shall be considered as a measure of last resort. The termination liability of the Government under the Contracts for all Large Infrastructure Projects shall be notified by the Executing Agency to PICOM so that they may monitor the overall contingent liability of the country.

In association with the Ministry of Finance, PICOM shall prepare a plan for meeting the obligations of the Government that could arise from the termination of one or more Private Infrastructure Projects.

In case of an occurrence of default on the part of the Government under the relevant agreements, such default giving rise to a right of the Project Company to terminate, the Executing Agency shall immediately inform PICOM. PICOM shall meet with the Project Company/shareholders/lenders and relevant Governmental Authorities to resolve the issues and avoid termination.

Despite its efforts, if termination does occur, PICOM shall oversee the payment by the Government of any amount owed to the private sector parties.

5.8 *Increasing Negotiation Skills*

The Government will accord priority for the development of negotiation skills for Government officials in respect of preparing Contract Documents, negotiations, contract management, and risk identification, allocation and mitigation techniques in Private Infrastructure Projects. Such efforts should also include lawyers, engineers and financial specialists who form part of the negotiation teams. Over a period of time (target of five years), the country will develop a core set of such specialists.

5.9 *Recommended Good Practices for Line Ministries*

- (a) The Line Ministries and Agencies or the Central Procurement Technical Unit (CPTU) of IMED of the Ministry of Planning, shall prepare standard model Contracts to be used

consistently in similar types of infrastructure projects. Such model Contracts shall have similar concepts and clauses for financing, Government obligations, fiscal incentives, penalties to Government and the Project Company, force majeure concepts, arbitration concepts, change in law, consents and approvals timeframes, definitions and so forth. PICOM may facilitate in developing such standardisation in association with the Line Ministries, CPTU and the Ministry of Law, Justice and Parliamentary Affairs. The standard model Contracts shall cover the delineation of detailed responsibilities and risks allocation between the Executing Agency and/or the Line Ministry, and the Project Company.

- (b) The Line Ministries and Executing Agencies shall always prepare Contract Documents with their own lawyers and experts and use these in the Tender Documents and as the negotiation starting points with Tenderers.
- (c) To the extent possible, the Executing Agency shall match the technical, financial, commercial, legal and negotiation skills of the Investors. Each Ministry will prepare a plan for capacity building on Private Infrastructure Projects. In addition, the speed and flexibility of employing good consultants shall match that of the Investors.
- (d) The Line Ministries and Executing Agencies shall always finalise the broad design parameters and specification of the Project before going out to tender. Alternate designs may be considered at an earlier stage, but the Tenders submitted by different Tenderers must have the same scope, performance and design quality.
- (e) The risk of capital cost overrun must be borne by the Project Company and its shareholders.
- (f) The Line Ministries and Executing Agencies will encourage local Investors through awareness creation, motivation etc, to participate in infrastructure projects, and in particular, poverty alleviation projects. A target over the next five years is to achieve at least 10% equity to be taken up by local entrepreneurs for Large Infrastructure Projects and up to 100% for Small Infrastructure Projects.
- (g) Where it is possible in terms of cost, quality and timely delivery, Private Infrastructure Projects shall attempt to maximise goods, equipment and services sourced from the local market.
- (h) Over a period of time, Executing Agencies may wish to carry out Private Infrastructure Projects themselves through joint ventures with the private sector and this shall be allowed only if (a) the Executing Agency is a company (b) possesses sufficient funds to provide the equity requirements (c) loans are not guaranteed by the Government.
- (i) In awarding an infrastructure Project to the private sector, the focus of the Government is to facilitate the rapid provision of new infrastructure services to the public in Bangladesh and *avoid the approach of maximising revenues* at the expense of slower infrastructure delivery. The approach shall be, to the extent possible, to enhance competition, rather than give a monopoly.
- (j) Each infrastructure Line Ministry shall set up a focal point to handle Private Infrastructure Projects, including monitoring their progression through its stages.

5.10 Exit Policy

The Government shall adopt the following policy with respect to the transfer of shares in a Private Infrastructure Project by an Investor:

- (a) For Large Infrastructure Projects, the Investor may be allowed transfer shares to a new Investor and exit from his investment after a period of 5 (five) to 7 (seven) years from the Commercial Operations Date, or as per the Contract. The Government shall approve such exit, after assessing the background and operational capability of the new Investor to operate the Project Company.
- (b) For Small Infrastructure Projects, the Investor may be allowed to exit from his investment after a period of 2 (two) years from the Commercial Operations Date, or as per the Contract.
- (c) The Investor may be allowed to disinvest up to 30% in the local capital market after a period of 2 (two) years from the Commercial Operations Date.

In the event of the withdrawal of a foreign investment in favour of local investment, then from the date of such sale/transfer, the dividend in foreign exchange shall be reduced in proportion to the withdrawal.

5.11 Sick Projects

The Government shall have no obligation for sick Projects, arising out of bad business judgment, mismanagement, competition, obsolescence, change in Government Policy, increase in taxes, reduction in fiscal incentives, force majeure, downturn in economy, or any other cause whatsoever, unless the cause is directly attributable to the Government and the Investor is protected from it in the Contract. For such sick projects that are protected in the Contract, the Government shall allow lenders step-in rights to cure the default in the performance of the facility, but shall not be obligated to pay-off the lenders. The Government may also allow change in ownership of the Project, provided the background, capability, financial strength etc. of the new owners are satisfactory to the Government.

5.12 Abandonment of Project

During the development and construction phase of a Project, an Investor shall not abandon the Project. There shall be provisions in the Contract to ensure the obligation of the Investor to complete the Project in time. In case of abandonment during construction, the Government shall have the right to take over the Project and to complete it for bringing into operation, provided that the lenders to the Project are not already exercising such a right.

In case of a similar abandonment during the operation phase, the Government will also exercise a similar right.

6 TENDER AND AWARD PROCESS

6.1 Major Terms and Conditions Committee

For each Private Infrastructure Project, the CCEA may establish an inter-ministerial committee called the Major Terms and Conditions Committee to establish the major technical and commercial parameters of the Project as detailed in sections 4 and 5. The Committee may consist of the following members:

- (a) Finance Division
- (b) Planning Commission
- (c) Relevant Line Ministry or Executing Agency
- (d) IRD
- (e) Bangladesh Bank
- (f) BOI
- (g) BIDS
- (h) Others as applicable

The determination of the major terms and conditions shall consider the following:

- (a) Use of moveable and immovable assets and establishment of timeframe for the lease;
- (b) Value of the moveable and immovable assets;
- (c) Completion of the project within a specified time;
- (d) Establishment of different service charges/tolls/fees/rates etc.;
- (e) Transportation charge;
- (f) Concession period;
- (g) Tax, VAT, duty related incentives/exemptions;
- (h) Return on investment;
- (i) Conditions for price escalation of products and services;
- (j) Employment and training of Bangladeshi citizens;
- (k) Transfer of technology etc.

The terms and conditions set by the Committee shall be on a project-by-project basis. While preparing the terms and conditions of a tender, the Committee shall ensure that there would not be any adverse macro economic impacts. Special care should be taken to protect the interests of the country.

6.2 The Pre-qualification and Tender Evaluation Committee

6.2.1 Large Infrastructure Projects

For Large Infrastructure Projects, the Executing Agency or the Line Ministry shall constitute a Pre-qualification and Tender Evaluation Committee (PTEC) consisting of the following members:

- (a) Convener from the Executing Agency
- (b) One member from Finance Division

- (c) One member from the Line Ministry
- (d) One member from Ministry of Law, Justice and Parliamentary Affairs (drafting wing)
- (e) One member (technical) from the Executing Agency
- (f) One member from the Executing Agency as member-secretary of PTEC
- (g) One member from FBCCI
- (h) One member from FICCI, and
- (i) One member from Bangladesh University of Engineering and Technology (BUET).

The PTEC may co-opt any person(s) as member(s) in the committee, who is recognised as a specialist in the areas of concern, to assist in the evaluation of Pre-qualification statements or Tenders. The person co-opted may be a consultant appointed by the Executing Agency or any other person from any other organisation having no voting power in the committee.

The members nominated from the chambers of commerce shall not have any ownership interest in any organization or company who have participated in the Tender.

6.2.2 Small Infrastructure Projects

For Small Infrastructure Projects, the Executing Agency or the Line Ministry shall constitute a PTEC consisting of the following members:

- (a) a Convener from the Executing Agency
- (b) one member from Finance Division
- (c) one member from the Line Ministry
- (d) one member from FBCCI, and
- (e) one member from the Executing Agency as member-secretary of the PTEC.

The PTEC for Small Infrastructure Projects may co-opt any person(s) as member(s) in the committee, in a manner similar to that for Large Infrastructure Projects.

The member nominated from the chambers of commerce shall not have any ownership interest in any organization or company who have participated in the Tender.

6.3 Selection of an Investor

The Executing Agency or the Line Ministry shall select an Investor through a competitive Tender process as provided in Sections 6.4 to 6.6 below.

6.4 Competitive Tender Procedures

6.4.1 Pre-qualification of Investors

Whenever a Project is identified in the List, the Executing Agency shall first solicit to pre-qualify interested and potential Investors for the relevant Project or a group of Projects of similar nature.

Under certain circumstances, in Small Infrastructure Projects, where a large number of potential local Investors are known to exist, the cost of putting together a Tender is assessed

to be low and undertaking the Pre-qualification process may be costly for Investors in comparison to the investment level and delay the implementation, the Executing Agency may go directly to tendering, keeping the qualification parameters as post-qualification criteria in the technical responsiveness tests.

Since Private Infrastructure Projects are relatively new in Bangladesh, and potential local and foreign Investors need to be made aware of the business opportunity, an Executing Agency may organise an investment promotion meeting, within 2 to 3 weeks after the issue of a Pre-qualification notice to create and generate Investor interest.

6.4.2 Public Notice

The Executing Agency shall publish the notice in national and international publication media inviting interested and potential Investors to participate in the process of Pre-qualification. In national publication media, the notice shall be published over a period of three weeks in at least four newspapers (English and Bengali). For Large Infrastructure Projects, the Executing Agency shall also publish the same notice within the first 3 weeks in UN Development Business or in any widely circulated international publication such as investment journals, trade journals, newspapers or magazines related to the relevant sector. The Executing Agency shall deliver a notice to all foreign embassies and High Commissions located in Bangladesh and Bangladesh embassies located in potential investment countries so as to circulate and promote the said investment to potential chambers of commerce and industries in such countries. The Public Notice shall also be posted on the websites of BOI and PICOM.

6.4.3 Legal Status of Potential Investors

A potential Investor who intends to participate in the competitive public tender pursuant to a Public Notice may be a proprietorship, partnership, corporation/limited company, joint venture between two or more of the foregoing entities. An Investor may be a local entity or a foreign entity or a combination of both. In the case of a joint venture, the participating members shall execute a joint venture agreement, which contains amongst other things, provisions setting out the roles and responsibilities of each member of the joint venture. Prior to a Tender submission, an Investor shall register a deed of such agreement in the relevant registration office in Bangladesh.

An Investor, in its individual capacity or as partner in a joint venture, can participate in only one application for Pre-qualification of Investors and/or Tenders.

If an Investor participates in more than one application, its membership only in the joint venture and its application as an individual shall immediately be disqualified. In the event that such Investor is also the Lead Investor in any joint venture, the application of such joint venture shall be immediately disqualified.

If the Investors, through separate legal entities, participate in more than one application but where all such legal entities have substantially common ownership, the applications of such Investors shall be disqualified.

6.4.4 Lead Investor

The Lead Investor shall have the responsibility to communicate with and receive instructions from the Executing Agency on all matters on behalf of the joint venture. The Lead Investor shall have controlling power in the joint venture with at least 51% interest (i.e. a majority share).

When a joint venture is pre-qualified, the Investor shall not be permitted to change any member in a joint venture without the prior written approval of the Executing Agency. In case of any change of any member in a joint venture, the Investor shall submit at any time to the Executing Agency all relevant papers of the replacement member, who must satisfy all of the requirements of the Pre-qualification no later than 45 days prior to the deadline for Tender submission. The Executing Agency shall review the papers of the proposed new member within 15 days and if it concludes that the modified joint venture fulfils the requirements of Pre-qualification, the proposed new member shall be allowed to assume the position of the replaced member. If the Executing Agency concludes otherwise and the Investor continues to insist on modification of the structure of the joint venture, the Executing Agency shall immediately disqualify the Investor.

However, neither the Investor shall seek nor the Executing Agency shall approve the change of Lead Investor in a joint venture. If the Lead Investor does not wish to participate in the Tender, the Executing Agency shall cancel the Pre-qualification of such Tenderer.

No change in the structure or composition of a joint venture shall be permitted between the submission and the award of a Tender. Any change in the composition of a joint venture in the period mentioned above shall lead to the forfeiture of Tender security and rejection of its Tender for further evaluation.

If a person is pre-qualified as part of a joint venture, that person shall not be allowed to individually participate in the Tender process unless its joint venture is dissolved or abandoned and such partner or member is separately pre-qualified by the Executing Agency.

After Pre-qualification, no Investor shall form a joint venture among the Pre-qualified Tenderers.

The number of partners or members in a joint venture shall preferably, not be more than five.

6.5 Pre-qualification Criteria

The Executing Agency shall prepare a Pre-qualification document, which shall contain a brief Project description, preliminary scope of work, evaluation criteria and the requirements of information, data, document and description from potential Investors for their appraisal to fulfill the evaluation criteria.

The Executing Agency shall generally use the following criteria for pre-qualifying an Investor in a Large Infrastructure Project:

(a) Legal Status

The Investor or the association must submit all necessary papers and documents required under the laws of Bangladesh to prove its legal status.

- (b) Technical and Managerial Capability
The Investor must have sufficient manpower to manage all technical and managerial matters related to the Project, the details of which will be set out in the Pre-qualification documents.
- (c) Financial Capability
The Investor must have adequate capability to sustain the financing requirements for the detailed engineering design, construction, operation and maintenance phases of the Project. The capability shall be measured in terms of proof of the ability of the Investor to provide a minimum equity to the Project, plus 10% of the total Project cost. In addition, the Investor shall also indicate experience in raising debt from commercial banks or financial institutions for at least one similar Project.
- (d) Project Development Experience
The Investor must have experience in developing greenfield projects (or brownfield as the case may be) up to commercial operation. The number and type of similar greenfield project developments to be met by the Investor shall be mentioned in the relevant Pre-qualification criteria.
- (e) Project Operating Experience
The Investor must have reliable operating experience for a certain number of years, for a similar type of Project with comparable capacity. Depending on the Project size, the period of operating experience shall not be less than 3 years or more than 5 years.
- (f) Current Ownership in Investment
The Investors shall furnish all information related to ownership of investment in similar projects. Current ownership shall be measured by multiplying the percentage of equity contributed by the Investor in the relevant Project with the capacity of the relevant Project in calculation.

In pre-qualifying an Investor for Small Infrastructure Projects, where local entrepreneurs shall be preferred and infrastructure experience may not be available, the requirements for similar projects in (c), (d) and (e) above may be relaxed. The experience and ownership required shall be in respect of process or industrial plants or other non-industrial investments of comparable size or complexity, and not for similar infrastructure.

The Executing Agency shall set the Pre-qualification criteria for each Project based on the above requirements. The Executing Agency shall identify all information, data, document and evidence, which are required to be submitted by an Investor in the Pre-qualification statement in pursuance of meeting the Pre-qualification criteria.

6.5.1 Time to Prepare Pre-qualification Statements

The Executing Agency shall allow prospective Investors at least 60 days from the date of first advertisement of Public Notice for the Project to prepare their respective Pre-qualification statements in accordance with the requirements set out in the Pre-qualification statement. Depending on the investment level and availability of expected Investors, such date may be extended for another 30 days if the potential Investors request such extension to complete their Pre-qualification statements or the Executing Agency feels that such extension may bring more potential Investors to create increased competition.

6.5.2 Submission of Pre-qualification Statements

As part of its Pre-qualification statements, an Investor shall attach a statement duly attested by a notary that it has accepted the Pre-qualification criteria as stipulated in the Pre-qualification statement and waive any right it may have to seek and obtain court injunction or restraining order against the Executing Agency or Line Ministry to prevent or restrain the Pre-qualification process, the holding of a Tender, the award of the Contract or any proceedings related thereto.

6.5.3 Evaluation Method of Pre-qualification Statements

The PTEC shall examine and evaluate the Pre-qualification statements of potential Investors in accordance with the requirements and criteria set out in the Pre-qualification statement and prepare a report containing their findings and recommendations and submit the report to the Executing Agency within 30 days. Such examination shall include establishing the commercial genuineness (*bona fide*) of the Investor. The Executing Agency shall approve the evaluation report within 10 days from the date of its submission and inform within 5 days to all participating Investors about the status (whether pre-qualified or not) and shall put the pre-qualified Investors' names in the pre-qualified list of Investors.

- (a) If the number in the pre-qualified list of Investors is less than three, the Executing Agency may:
 - (i) decide to invite second round Pre-qualification of Investors, keeping the Investors pre-qualified in the first round; or
 - (ii) decide to go directly to tendering, in which case the Pre-qualification process will be scrapped and Tender Documents issued directly.
- (b) After exercising option (a)(i) above and if the number in the list is still less than three, the Executing Agency shall negotiate the Project directly with the Pre-qualified Tenderer(s) identified in the two rounds. In such an event, Section 6.7 related to Direct Negotiations shall apply.

6.5.4 Appeal against Disqualification

An Investor being disqualified during the Pre-qualification or found technically non-responsive in the Tender, may appeal to PICOM to review its Pre-qualification statement or Tender, as the case may be, within 7 days of the receipt of status notification. The fee for the review will be \$2,500 for Pre-qualification and \$10,000 for Tender in Small Infrastructure Projects and similarly, \$5,000 and \$25,000 for Large Infrastructure Projects.

PICOM shall constitute a committee to review the appeal. PTEC members may not be members of this review committee.

6.6 Invitation for Tenders

The Executing Agency shall prepare and complete, by itself or through consultants, the Tender Documents, based on the terms and conditions or directions set by the Major Terms and Conditions Committee. The Executing Agency shall obtain the approval of the Tender Documents from the relevant Line Ministry. After such approval, the documents shall be

made available for delivery to the Pre-qualified Tenderers within 30 days from the date of notification of the list of Pre-qualified Tenderers.

The Tender Documents shall, as applicable, contain:

- (a) an invitation letter;
- (b) instructions to Tenderers;
- (c) Tender forms;
- (d) transparent Tender evaluation criteria, methodology and ranking process.
- (e) Contract Documents (mandatory)
- (f) approach to tariff or price regulation and sharing of revenue or other methods;
- (g) technical requirements;
- (h) minimum functional and technical specifications, quality and performance standards;
- (i) brief information on the Project and various information gathered or collected from various studies or sources, on non-binding basis; and
- (j) environmental issues and mitigation plans;

In some cases, items (f) to (j) may be compiled together as an Information Memorandum.

6.6.1 Instruction to Tenderers

The instruction to Tenderers, which shall establish the rules of the tendering, shall be clear and detailed, fair and equitable to all Tenderers, and may include the following:

- (a) general description and objectives of the Project;
- (b) contractual arrangement under which the Project shall be undertaken;
- (c) the method of financing, minimum debt equity ratio, identification of sources of funds and uses of funds for the various components of the Project in question, minimum equity contribution from the Investor, minimum lock-in period of equity, standby credit facility from Investor to meet cost and time overrun expenditure, treatment of shareholders loan and other requirements from shareholders (if any);
- (d) assistance in site visit by Tenderers and time for pre-Tender conference;
- (e) communication methods between the Executing Agency and the Tenderers and areas of communication;
- (f) cost recovery of advisory fees and mode of payment;
- (g) language of Tender and attachments;
- (h) Tenderers' responsibilities;
- (i) Tender and Tender security validity period;
- (j) causes of forfeiture of Tender security;
- (k) format, signing, numbers, sealing, marking and delivery of Tenders;
- (l) deadline for submission of Tenders;
- (m) treatment of late Tenders, withdrawal and modification of Tenders;

- (n) opening and evaluation of Tenders;
- (o) clarification of Tenders and correction of errors;
- (p) award and notification of Tenders;
- (q) rights and remedies of the Executing Agency and the Tenderers;
- (r) return of Tender security; and
- (s) degree of confidentiality about Tenders and evaluation;

6.6.2 Contractual Arrangement

During Pre-qualification, the Executing Agency shall clearly identify the number of agreements to be entered into between the Project Company and the Executing Agency and/or Governmental Authorities and describe their contractual and commercial relationship in brief.

During the IFT, the Contract Document prepared by the Executing Agency shall be included in the Tender Document.

6.6.3 Time to Prepare Tenders

The Executing Agency shall allow Tenderers a period of at least 90 days to prepare their Tenders, from the date of availability of Tender Documents. For a complex Large Infrastructure Project and upon request from at least two participating Tenderers, the Tender preparation period may be extended up to another 60 days to allow the Tenderers to prepare comprehensive Tenders.

6.6.4 Amount and Validity of Tender Security

The validity period of a Tender shall be at least 180 days from the deadline for submission of Tenders. The Tender security shall be in the form of an irrevocable bank guarantee, bank draft or pay order issued by a bank in Bangladesh or any foreign bank but duly endorsed by a bank in Bangladesh. The Tender security shall be submitted in its original form. No photocopies of the Tender security shall be allowed, and any Tender enclosing a photocopy of the Tender security or a Tender security that is not issued in the prescribed format as provided for in the Tender Documents, shall be immediately rejected.

The amount of Tender security shall be in the order of 1% to 3% of the total Project cost determined at the feasibility. However, such amount must be limited to the maximum of \$5 million depending on the size of the Project and the cost of Tender security. The validity period of Tender security shall be 30 days beyond the validity period of the Tender.

A Tender security shall be forfeited (on notice from the Executing Agency to the relevant Tenderer and the issuing bank) if:

- (a) the Tenderer withdraws its Tender after the deadline for Tender submission, but within the Tender validity period thereof;
- (b) the Tenderer does not accept any corrections of mathematical errors in its Tender; or
- (c) in the case of a successful Tenderer, the Tenderer fails to:

- extend the validity of the Tender security until the signing of the Contract as stipulated in the Letter of Intent;
- sign the Contract as stipulated in the Letter of Intent; or
- furnish the performance guarantee on the date of execution of the Contract (if applicable).

The Executing Agency may request extensions for Tender security validity period beyond the initial period. If this not acceptable by the Tenderer, the Tender shall not be considered for evaluation any further and the Tender security shall be returned immediately.

6.6.5 Site Visit

After public notification and upon receipt of a request from Investors to visit a Project site, which is restricted in nature, the Executing Agency or the relevant Governmental Authority having power by law to allow persons to visit the site shall permit such Investors to visit the site.

6.6.6 Pre-Tender Conference

The Executing Agency shall hold a pre-Tender conference at the venue and time specified in the Tender Document, but no earlier than 30 days after the notification of availability of the Tender Document, to clarify the obligations set out in the Tender Document and the Contract Documents. During the conference, the Executing Agency shall answer the questions of any Tenderer communicated earlier to the Executing Agency and further queries that they may have. Additional clarification meetings may be held at the request of at least three Tenderers.

The Tenderers shall have full right to seek clarification of any provisions of the Tender Document or the Contract Documents from the Executing Agency in writing at any time but no later than 25 days prior to the deadline for submission of Tender. Clarifications made by the Executing Agency to a Tenderer shall be communicated by the Executing Agency to all other Pre-qualified Tenderers.

6.6.7 Clarification of Tenders

The PTEC shall have full right to seek clarification in writing of any provisions of any Tender during the evaluation of Tenders from the relevant Tenderer. In providing clarification, the Tenderer shall not be permitted to provide any further material to influence the evaluation of the Tender, except to the extent that the new material clarifies the understanding of PTEC. The Tenderer shall respond to the queries as soon as possible, but no later than 5 days after the receipt of such queries from PTEC. If any Tenderer fails to respond to any request for clarification made by the PTEC within the above time limit, the PTEC shall evaluate the Tender using their best judgment, and the PTEC shall not be liable to such Tenderer or any other person for any misunderstanding of the Tender.

6.6.8 Mode and Language of Communication

All correspondence between the Executing Agency or the PTEC and any Tenderer shall be made in writing and transmitted through facsimile and pre-paid courier for record and claim but for urgent communications, electronic mail may be used.

Unless otherwise specified in any other law, the Public Notice, the Pre-qualification document, the Pre-qualification statements and its attachments, the Tender Document, the Contract Document, Tenders and their attachments and all correspondence shall be prepared and communicated in English.

6.6.9 Tenderers' Responsibility to Assess Project Viability

The Tenderers shall be solely responsible for the viability of the Project. The Tenderers shall take all necessary steps to carefully examine, review and consider the requirements and terms and conditions of the Tender Document with respect to the cost, size, capacity, risks in the Project, market size, expansion potential, tariffs, tolls, fees, payments, guarantees, service charges and its regulation, duration, and operation of the Project, as it affects the investment and the Tender.

The Tenderers shall fully satisfy itself, by collecting data and information, and more particularly carrying out a feasibility study of the Project as to the viability of the Project and shall not rely on the information and data (if any) provided or circulated to any Tenderer or in the Tender Document or any associated document before preparation and submission of its Tender. The Tenderer shall not have any right of recourse against the Executing Agency, any Governmental Authority, the Government or any of its consultants or advisers if the Project fails to earn sufficient revenue from its operation or otherwise does not perform as intended.

6.6.10 Tender Method

Unless otherwise specified in the Tender Document, the prospective Tenderer shall be required to submit at least one original and five copies of its Tender on or before the due time and date to the Executing Agency in a single envelope, comprising Part I and Part II of the tender. Part I shall contain the technical aspects of the Tender and Part II shall contain financial aspects of the Tender.

6.6.11 Withdrawal and Modification of Tenders

The Tenderer who has already submitted a Tender to the Executing Agency shall have the right to withdraw or modify its Tender before the deadline for submission of Tender.

6.6.12 Criteria for Tender Evaluation

The Executing Agency shall prepare a set of evaluation criteria suitable for the Project and based on the requirements provided in the Tender Document. The criteria provided below shall be designed on "Yes" and "No" basis and used for evaluating technical responsiveness of Tenders in Part I:

- (a) technical soundness such as engineering designs and drawings, codes and standards, design data and design life; feasibility study by the Tenderer, identification of various components of Project, machinery and plant specifications and sources of their availability, etc;
- (b) business plan including marketing strategy, financial projections, etc;

- (c) operational feasibility such as proposed organisation including structure, safety standards to be used, methods and procedures of operation and maintenance, performance standards to be met, working environment at site;
- (d) environmental standards such as identification of possible adverse impacts, mitigation plan, compliance of minimum quality and standards, identification of environment management plan, design of affluent treatment plan and types of equipment, compensation and resettlement action plan for Project affected people, etc;
- (e) financing plan for such type of financing, minimum equity commitment and contribution, lenders commitment letters, identification of total Project cost, construction cost, operation cost and maintenance cost, quarterly construction cash flows, milestone based cost, sources of funds, and possible estimate of foreign currency outflow during construction and operation, etc; and
- (f) general conditions such as compliance of Tender requirements, validity of Tender and Tender security, uses of Tender form and so on.

The evaluation criterion for the Part II of the tender may be one of the following:

- (a) lowest present value of tariff, tolls, fees or charges over the period of contract;
- (b) highest present value or percentage of revenue sharing (such as royalty) with the Executing Agency or the Government over the period of contract;
- (c) lump-sum amount of cash to the Government for the right to carry out the Project and purchase the existing assets (if any);
- (d) shortest Contract term where other financial conditions are fixed;
- (e) lowest present value of subsidy over the contract period where other financial conditions are fixed;
- (f) firm commitment for ongoing investment and/or capacity expansion, more connections etc.;
- (g) highest present value of lease payment or rent;
- (h) lowest present value of management fees; or
- (i) any other suitable financial basis.

In selecting a criterion, the Executing Agency shall consider the benefits to the economy, consumers, users, and the Government. When a criterion is selected for the financial evaluation, the Executing Agency shall fix other financial and non-financial parameters that may influence the criterion.

6.6.13 Single Tender

If only one Tender is received from the Pre-qualified Tenderers or Investors in a competitive Tender process, the Executing Agency may treat it as a valid and competitive Tender, and evaluate the Tender in accordance with the provisions of these Guidelines.

6.6.14 Opening of Tenders

The Line Ministry or the Executing Agency shall open the Tenders in the presence of authorised representatives of Tenderers who may be present. Relevant information such as names of Tenderers, tender security, validity, price/rate, modification, withdrawal, alternative proposals etc, shall be read out during the opening of Tenders. Approved minutes of tender opening shall be circulated later to all Tenderers.

6.6.15 Evaluation of Tenders

The PTEC shall examine and evaluate all Tenders and prepare an evaluation report including findings and recommendations. The Part I of the Tenders shall be evaluated first to determine the technical responsiveness of the Tenders. If a Tender is not found to be technically responsive, then the Part II of that Tender shall not be considered further. For the Tenders that are found to be technically responsive, the Part II shall be evaluated and the Tenders shall be ranked on the basis of the lowest (or highest depending on the criteria selected) evaluated Tenders, recommending the Tenderer who has been evaluated as the first ranked Tenderer. The evaluation report shall be submitted to the Executing Agency within 45 days (but 60 days for large and complex projects) from the opening date of Tenders. The relevant Line Ministry shall take all necessary steps (and in certain cases meeting with the PTEC and the Executing Agency for clarification of the report) to expeditiously send the report to CCEA for approval, but no later than 20 days after the receipt of such report.

6.6.16 Right to Reject or Accept Tenders

The Executing Agency reserves the right to accept or reject any Tender or annul the Tender process and reject all Tenders at any time prior to the award of any Tender without thereby incurring any liability to the affected Tenderer or Tenderers or any obligation to inform the affected Tenderer or Tenderers of the grounds for such action.

6.6.17 Confidentiality

The Executing Agency, the PTEC, the consultant appointed by the Executing Agency and any other person related to the evaluation of Tender or approval of Tender evaluation report, as the case may be, shall strictly keep in confidence all information, data, clarification, correspondence, the contents of the Tender, comparison of the Tenders and evaluation of the Tenders from disclosure to any Tenderer or any third parties.

6.6.18 Approval and Award of Tenders

The Executing Agency shall send the evaluation report of Part I and Part II of the Tenders along with its comments to (a) the Line Ministry for Projects less than US\$ 5 (five) million, and (b) through the Line Ministry to CCEA for Projects of US\$ 5 (five) million or above, for their decision to award the Project to the first ranked Tenderer. The relevant Line Ministry

shall pursue the obtaining of such approval from the CCEA as soon as possible, after the delivery of such report to the CCEA.

Within 7 days of receipt of the decision of the CCEA, the Executing Agency/Line Ministry shall prepare a Letter of Intent and issue it to the selected preferred Tenderer or shall prepare a letter of Tender cancellation of all Tenders and send it to all the Tenderers concerned.

The Letter of Intent, amongst other things, shall set out the following:

- (a) effectiveness and validity of the letter;
- (b) status of Tender validity and Tender security validity and mode of extension of Tender security validity;
- (c) obligations of the preferred Tenderer in relation to signing the Contract;
- (d) schedule for finalisation of the Contract Document;
- (e) creation of project company under the Companies Act, 1994;
- (f) any other payment obligation owed by the preferred Tenderer to the Executing Agency; and
- (g) the expected date of Contract signing.

6.6.19 Contract Finalisation and Execution

The selected preferred Tenderer or the Project Company created by the preferred Tenderer shall finalise the Contract Document with the Executing Agency and other Governmental Authority within 60 days after issuance of the Letter of Intent and shall initial the agreed draft Contract. Depending on the volume of the Contract Document, the Executing Agency may extend the period by another 60 days.

The Ministry of Law, Justice and Parliamentary Affairs shall vet and send the Contract to the relevant Line Ministry as soon as possible, but no later than 30 days after receipt of such initialed Contract from the relevant Line Ministry.

The relevant Line Ministry shall approve the Contract, after the comments in the vetting are incorporated and forward it to the Executing Agency for immediate execution with the Project Company.

6.6.20 Failure to Execute Contract

If the preferred Tenderer or the Project Company fails to finalise and initial the Contract, within the timeframes specified above (except in the case of such delay being caused by the Government or any Governmental Authority), the Executing Agency may revoke the Letter of Intent issued to the preferred Tenderer, and forfeit the Tender security. The Executing Agency shall issue a new Letter of Intent on the same terms and conditions to the second ranked Tenderer as approved by the CCEA and follow the same procedure as provided in Section 6.6.19 above.

6.6.21 Return of Tender Security

The Executing Agency shall return the Tender securities to the Tenderers (except the first and second ranked Tenderers) after the preparation of the tender evaluation report by PTEC. The Executing Agency shall return the Tender securities of the first and second ranked Tenderers within 10 days of the execution of the Contract.

6.6.22 Conditional Tenders and Tenders of Insufficient Scope

In general, conditional Tenders or Tenders with insufficient scope of work from Investors are discouraged. Executing Agencies shall make all efforts to explain the queries from the Tenderers, on technical scope and quality, commercial and legal basis for the investment. In instances where a Tenderer has submitted a conditional Tender with a significant condition, or has provided an insufficient scope of work, and the PTEC determines that the significant condition or insufficient scope materially changes the level playing field nature of the Tender, and the Tenderer declines to withdraw the significant condition or include the required scope, then the PTEC, may make the Tenderer non-responsive.

In the event of very large and complex projects (such as in the rail sector), where a number of Tenderers have made significant conditions and the Tenders are on different scope of work, then following negotiations, the Executing Agency may prepare an absolute set of modified conditions and a more definitive scope of work, and invite fresh offers from the top three ranked contenders of the previous Tender.

6.6.23 Two Stage Tendering

In order to maximize competition and to facilitate Tender evaluation with respect to large and complex contracts where the problem of technically and commercially unequal Tenders is likely to be encountered, a two-stage Tender procedure may be adopted. Under this process, in the first stage, Tenderers shall submit the technical offers, plus other Tender requirements, without prices, in accordance with minimum operating specifications and performance requirements. Each of the technical Tenders shall be discussed individually among the Tenderers in confidence and the responsive Tenderers shall be identified by PTEC. Through the discussions, the Executing Agency will identify the adjustments to the Tender Document that need to be made, to firmly establish the technical, commercial and contractual aspects of the Project.

In the second stage, the adjustments to the Tender Documents, containing firm definition regarding the technical scope, risks and responsibilities of the parties and all other general and special conditions of the modified Contract Document shall be issued to the Tenderers who are responsive in the first stage. The Tenderers shall submit their priced “best and final” Tenders based on the adjustments to the Tender Document, for evaluation by PTEC.

6.7 *Direct Negotiation*

The Executing Agency shall consider negotiating a Project directly if:

- (a) during Pre-qualification, no Investor shows an interest in the Project after two rounds, other than the proponent of an unsolicited proposal,

- (b) during Pre-qualification, only two Investors are pre-qualified after two rounds, or
- (c) during Tender with issue of IFT, only one Tenderer, from among the list of Pre-qualified Tenderers or in the case of direct Tender (i.e. without the Pre-qualification process), purchases Tender Documents.

In such a situation, the Executing Agency shall first critically review whether the Project can be reconfigured or unbundled into smaller Projects for lowering Investor risk and achieving better competition.

On being satisfied that such an unbundling option does not exist, the Executing Agency may consider Direct Negotiation and request the Investor to submit technical and financial proposals based on the Contracts Document and section 6.6. The PTEC shall evaluate the proposal in accordance with the criteria set out in section 6.6.12 and carry out negotiations on both the technical and financial proposals as appropriate. The rate of return on equity to be used shall be approved by PICOM and be in the range 15% to 25% on a before tax, nominal basis.

If the Project cannot be negotiated satisfactorily as a Private Infrastructure Project, the Executing Agency shall terminate the negotiations and consider the Project in the public sector.

ANNEXURE A: PROJECT PROGRESS MONITORING BY STAGES

The development of infrastructure projects typically requires a long lead-time, particularly for the first few or flagship projects when there is no precedent for private sector projects in that sector. The Project development phase for a Large Infrastructure Project is typically long (and usually lasts at least 2 to 3 years). Financing and construction may require a further 2 to 3 years, resulting in total project development duration of 5 to 6 years.

Once a few Private Infrastructure Projects are carried out in a particular sector, such that the policies and regulatory processes are well established, Contract Documents are prepared, risk allocation between Government and private sector well understood and the sectoral officials become familiar with the processes of Private Infrastructure Projects, the development phase may be reduced by 1 to 2 years.

Due to the long time-frames involved, the progress of Private Infrastructure Projects must be very carefully monitored. Such monitoring may be carried out by identifying and segregating the different stages through which a Project will typically progress.

It is envisaged that *PICOM* will monitor the stage progression of different projects on a quarterly basis. *PICOM* will also resolve any inter-ministerial or other issues that may arise while the projects are progressing towards commercial operations.

The development of a Private Infrastructure Project may be segregated into seven stages for monitoring as illustrated in the figure below. Each stage completion milestone (except Stage I) reflects a firm commitment from the Government, Investor or lender. Monitoring between Stages may be carried out through creating intermediate milestones within a Stage.

In Stage 0, the Executing Agency or the private sector may propose a Project for development through the private sector. Project details are prepared (similar in depth to a Public Infrastructure Project) and the project forwarded through the Line Ministry to *PICOM* for CCEA approval. The process is covered in Annexure C.

In Stage I, the Executing Agency engages its own staff and/or consultants, who may be expatriate and local, to carry out the feasibility study. Care shall be taken to ensure that 50% of the principal consultants preferably have experience in transactions involving Stages II to V (such consultants are classified as TEC). Consultants shall avoid spending a lot of time and effort studying detailed technical issues and focus on the financial, commercial and contractual aspects including allocation of risks and regulatory structure.

Stage II relates to preparing the contractual framework for the investment and is the most critical phase as it is the heart of a transaction. In this Stage, the risk allocation between Government and the Investor takes place, and concession design, regulatory structure, Tender parameters, evaluation parameters, fiscal incentives etc. are identified.

In this Stage, Investors shall not be allowed to participate in preparing the Contract Documents, in order to avoid conflicts of interest with Stage IV. In addition, potential lenders to the Investors, being a part of the Project Company, shall also not be allowed to participate in this Stage to avoid conflicts of interest with Stage V.

Project Development Stages

	Stage 0	Stage I	Stage II	Stage III	Stage IV	Stage V	Stage VI
Name of Stage	Project Identification	Feasibility	Commercial Framework	Evaluation	Negotiation	Financing	Construction
Stage Completion Milestone	CCEA Approval	Feasibility Study Completed	Issue RFP	Issue Letter of Intent (LOI)	Sign Agreement	Financial Closure	Start of Commercial Operation
Processes and Actions	<ul style="list-style-type: none"> • Executing Agency or private sector identifies Project and prepares Project papers • Project approved by CCEA/Line Ministry for private sector development • Project published in Private Infrastructure Project List 	<ul style="list-style-type: none"> • Executing Agency secures funds and engages consultants • Project ideas elicited and needs defined • Identify regulatory and policy issues (first few projects only) • Identify and agree major technical, commercial and contractual parameters • Complete feasibility study 	<ul style="list-style-type: none"> • Prepare commercial framework and Information Memorandum • Executing Agency approval of Pre-qualification Documents & issue • Conduct investment promotions meeting • PTEC evaluates PQ submission • Allocate risk between Govt. & private sector • Prepare Contract Documents • Prepare Tender Documents • Issue IFT 	<ul style="list-style-type: none"> • Pre-qualified Tenderers prepare Tenders • Answer Tenderers' queries and hold Tenderers' conference • Executing Agency receives Tenders and PTEC prepares evaluation report • Government approval of successful Tenderer • Issue LOI to preferred Tenderer 	<ul style="list-style-type: none"> • Prepare for negotiations • Form Government negotiating team with good technical, financial, commercial, legal skills • Carry out negotiations between Investor and Government entities • Signing of Contract between Executing Agency and Investor 	<ul style="list-style-type: none"> • Investor makes loan applications to lenders • Lenders perform due diligence • Government and Investor renegotiations for lenders requirements • Loan documents prepared • Financial closure 	<ul style="list-style-type: none"> • Executing Agency to carry out Contract Administration functions • Oversee of construction by Lenders' Engineer • Conduct satisfactory completion tests • Commercial Operations Date
Approx. Time required							
Small Projects	2 to 6 months	3 to 6 months	1 to 6 months	4 to 8 months	1 to 3 months	1 to 6 months	1 to 3 years
Large Projects	6 months to 1 year	6 months to 18 months	3 to 8 months	6 to 8 months	1 to 6 months	6 to 12 months	2 to 4 years

Notes: High end of the time range for the first few Projects, especially of complex nature
 Low end of the time range for repeated Projects

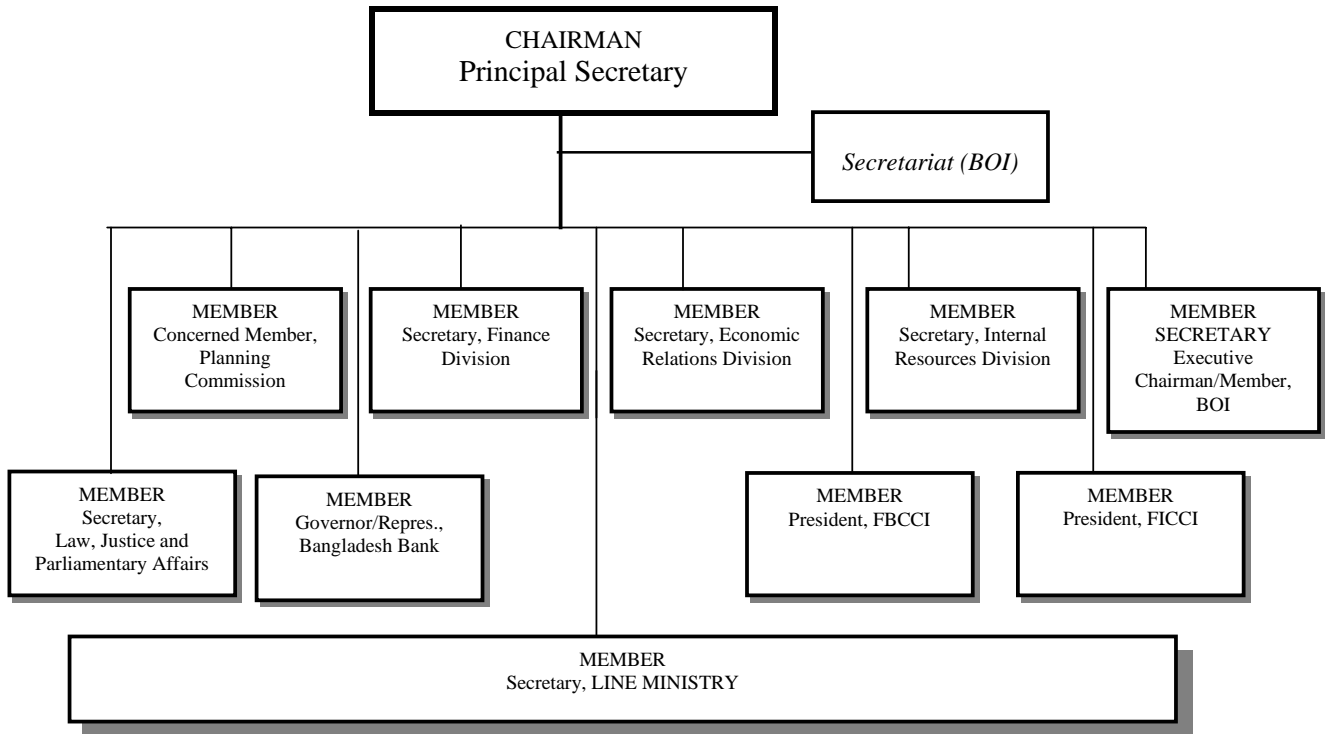
In Stage III, project promotions takes place, Tenderers are Pre-Qualified, Tenders received and evaluated. This stage ends with the identification of the successful Investor, now becoming the preferred Tenderer.

In Stage IV, the Executing Agency negotiates the Project with the preferred Tenderer. This is carried out with support in the form of technical, commercial, financial and legal assistance. This stage ends with the Contract being signed with the Investor.

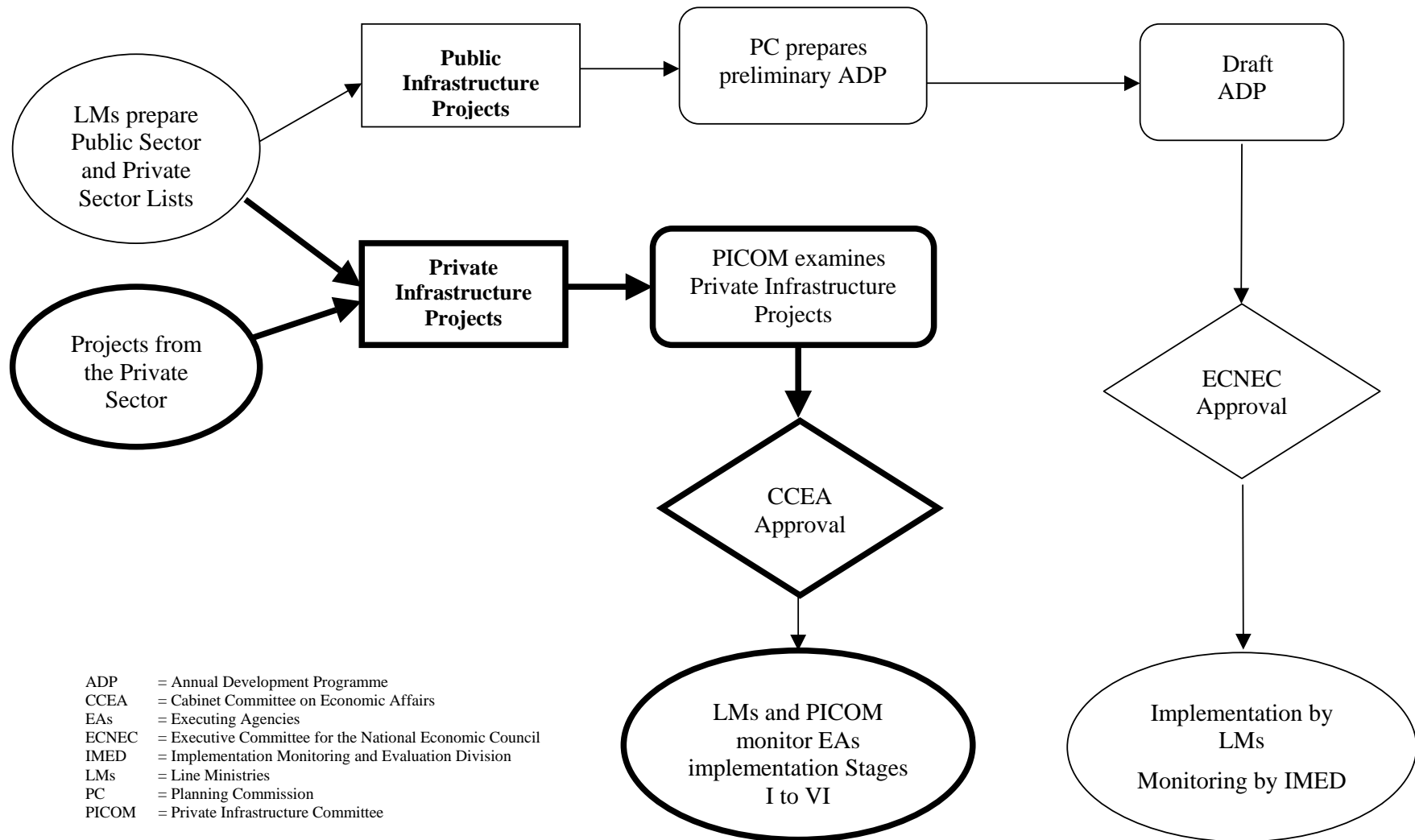
In Stage V, the Investor seeks financing from different lenders and this stage ends with financial closure.

In Stage VI, with equity and loan funds in place, the Investor engages the construction contractor and physical construction starts. At the end of the stage, the facility enters commercial operations.

ANNEXURE B: ORGANISATION STRUCTURE OF PRIVATE INFRASTRUCTURE COMMITTEE

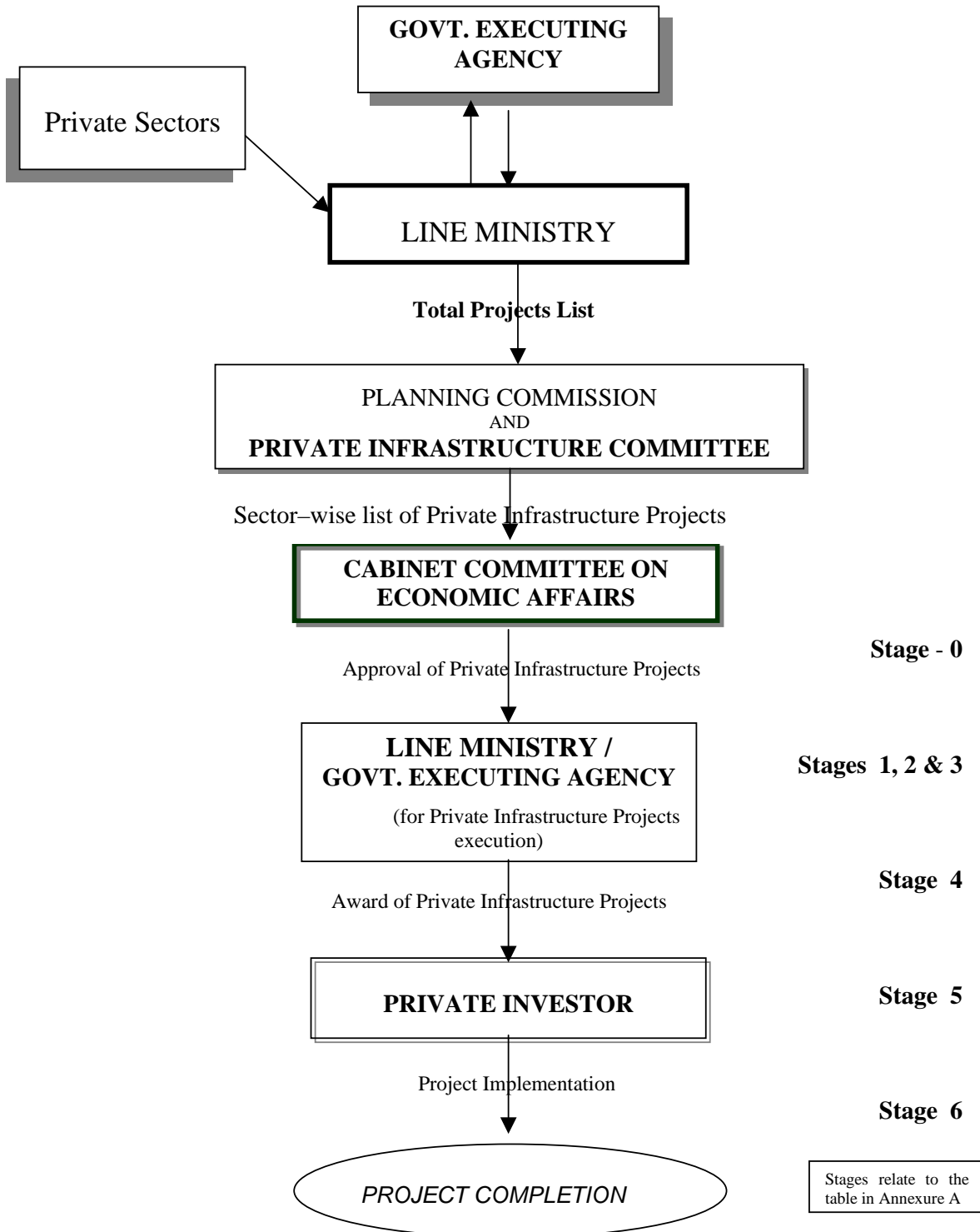


ANNEXURE C: SEGREGATION OF PUBLIC AND PRIVATE INFRASTRUCTURE PROJECTS IN STAGE ZERO



ANNEXURE D: FLOW-CHART FOR PRIVATE INFRASTRUCTURE PROJECTS

(From initiation to implementation)



ANNEXURE E: TYPES OF PRIVATE INFRASTRUCTURE PROJECTS

1. **Build-Operate-Transfer (BOT):** A Contract whereby an Investor undertakes to finance, construct, maintain and operate a Project and whereby such Project is to vest in the Investor for a specified period. During the period of operation of the Project by the Investor, he may be permitted to charge user charges as specified in the Contract. The Investor is required to transfer the Project to a Governmental Authority after the expiry of the period of operation.
2. **Build-Own-Operate (BOO):** A Contract whereby an Investor undertakes to finance, construct, operate and maintain a Project and whereby such Project is to vest in the Investor for specified period. During the period of operation of the Project, he may be permitted to charge user charges as specified in the Contract.
3. **Capitalisation:** Capitalisation is selling the earning potential of an existing asset rather than the asset itself, on a lump-sum basis, to an Investor, for a defined period of time. The Investor is allowed to charge user fees during this time, while operating and maintaining the facility.
4. **Securitisation:** Securitisation is selling the earning potential of an existing asset rather than the asset itself, to a group of Investors in the capital market, for a defined period of time without any recourse to the original Governmental Authority. A Special Purpose Vehicle (SPV) with defined operating procedures and regulated by an independent Board of Trustees, is responsible for operating and maintaining the facility, including collecting charges and user fees and servicing the Investors from the charges and user fees collected.
5. **Build and Transfer (BT):** A Contract whereby an Investor undertakes to finance and construct a Project. After the completion of the Project, the Investor is required to transfer the Project to the Governmental Authority. The Investor is paid such amount as is fixed in an amortization schedule specified in the Contract.
6. **Build Lease and Transfer (BLT):** A Contract whereby an Investor undertakes to finance and construct the Project. On completion of the Project, the Investor hands it over to a Governmental Authority for operation under a lease agreement for period specified in the Contract, after the expiry of which, the Project is transferred to the Governmental Authority.
7. **Build Transfer and Operate (BTO):** A Contract whereby an Investor undertakes to finance and construct the Project. On completion of the Project, the Investor transfers the Project to a Governmental Authority, which permits the Investor to operate the Project on its behalf for a specified period.
8. **Lease Management Agreement:** A Contract whereby the Governmental Authority leases a Project owned by the Governmental Authority to the person who is permitted

to operate and maintain the Project for the period specified in the Contract and to charge the users.

9. **Management Agreement:** A Contract whereby the Governmental Authority entrusts the operation and management of a Project to a person for a specified period on payment of specified consideration. In such a Contract, the Governmental Authority may charge the user charges and collect the same either itself or entrust the collection for consideration to any person who shall, after collecting the user charges, pay the same to the Governmental Authority.
10. **Rehabilitate-Operate-Transfer (ROT):** A Contract whereby an existing Project is vested in a person to renovate, operate and maintain for the period specified in the Contract, after the expiry of which the Project is required to be transferred to Governmental Authority. During the period of operation of the Project by the Investor, he is permitted to receive specified user charges.
11. **Rehabilitate-Operate-Maintain (ROM):** A Contract whereby an existing Project is vested in a person to renovate, operate and maintain. The Investor shall be permitted to receive user charges as specified in the Contract.
12. **Service Contract:** A Contract whereby a person undertakes to provide services to the Governmental Authority for a specified period. The Governmental Authority shall pay him an amount according to the agreed schedule.
13. **Supply-Operate-Transfer (SOT):** A Contract whereby an Investor supplies to the Governmental Authority the equipment and machinery for a Project and undertakes to operate the Project for a period specified in the Contract. During the period of operation of the Project by the Investor, he is permitted to receive user charges as specified in the Contract. The Investor is required to transfer the Project, along with the equipment, to a Governmental Authority after the expiry of the period of operation. (in port sector, this is referred to as the Landlord model)
14. **Joint Venture Agreement:** A Contract whereby the Governmental Authority enters into an agreement with an Investor to jointly finance, construct, operate and maintain a Project for a specified period. After the expiry of the period, the Project may or may not be required to be transferred to the Governmental Authority.

ANNEXURE F: PROCESSING OF UNSOLICITED PROPOSALS

The key features to be applied to unsolicited proposals shall be:

1. All unsolicited proposals must be initially approved and then introduced into the same competitive process as public tenders;
2. Government decides final Project characteristics in the Tender Documents;
3. Original Project proponent shall be treated as a pre-qualified Tenderer, but must submit Tender in the formalised competitive process.
4. In case the original Project proponent does not win in the competitive process, no reimbursements shall be made for Project development costs.

The following steps shall be followed for unsolicited proposals:

Step 1	Review Process	As an expression of intention to submit an unsolicited proposal, the original private Project proponent first submits to the appropriate Line Ministry, PICOM or BOI, a preliminary Project proposal that consists of the technical and commercial description of the Project.
Step 2		The Executing Agency and the Ministry reviews the preliminary Project proposal, seeking additional information as necessary.
Step 3		If the preliminary Project proposal is accepted by the Line Ministry, the Executing Agency shall accord recognition of the Project and request the submission of the formal proposal in accordance with section 3.7.2. The Project proponent may go directly to Step 3, but increases the risks on his Project development costs, as the Project may be found unacceptable to the Line Ministry.
Step 4		The detailed Project proposal is reviewed by PTEC. At the end of a stipulated time period, the Project may be approved for a competitive process or rejected. If the Project is rejected, the original Project proponent may resubmit a modified version. If the Project is accepted, then the Project is forwarded to PICOM for CCEA approval.
Step 5	Competitive Process	On CCEA approval, the competitive tender process starts, with the Project proponent a Pre-qualified Tenderer.
Step 6		After other Tenderers are Pre-qualified, the Executing Agency seeks competitive Tenders for the Project, using specifications suited to their requirements.
Step 7		The original Project proponent must submit Tender, along with other Tenderers.