

**Disclaimer:** this document is an unofficial English translation of the original Arabic text of Decree No 78 of 2015 published in the Official Gazette No. (1229) dated (29 / 03 / 2015) issuing the Executive Regulations of Law No 116 of 2014. This unofficial English translation is only provided for guidance and the Arabic text is the only one which should be relied upon. In the event of any contradiction or discrepancy between the English and Arabic versions or in the event of any ambiguity in the interpretation of the Law, the original Arabic version shall prevail.

**Decree No 78 of 2015**  
**issuing the Executive Regulations**  
**of Law No 116 of 2014**  
**Regarding Public Private Partnerships**

- Having reviewed the Constitution,
- And Law No 116 of 2014 regarding Public Private Partnerships,
- And based on the proposal of the Minister of Finance,

And following the approval of the Council of Ministers,

**We hereby endorse the following**

**Article One**

The provisions of the Executive Regulations of Law No 116 of 2014 shall take effect along with the provisions and terms attached to this decree.

**Article Two**

The ministers shall, each within his competences, implement this decree, which shall take effect as of the date of its publication in the Official Gazette.

The Emir of Kuwait  
**Sabah Al-Ahmad Al-Jaber Al-Sabah**

The Prime Minister  
**Jaber Moubarak Al-Hamd Al-Sabah**

The Minister of Finance  
**Anas Khaled Al-Saleh**

Issued at Seif Palace on: 27 Jumada I 1436 H.  
Corresponding to: 18 March 2015 G.

**Executive Regulations**  
**of Law No 116 of 2014 regarding Public Private Partnerships**

**Chapter One**

**DEFINITIONS**

**Article (1)**

In the application of the provisions of these Executive Regulations, each of the following terms shall have the meaning hereby assigned to it:

- **Agreement Documentation:** the set of agreements and the annexations thereof to be entered into for the implementation of a PPP Project which together shall form an integral instrument for the interpretation and the implementation of the PPP Agreement.
- **Competition Committee:** the joint unit established through a decision of the Authority following the approval of the Higher Committee independently for each Project in order to review, study and prepare all of the project's documents and instruments, to evaluate technical and financial proposals recommending the award of the project, and its membership shall include, in addition to employees nominated by the Authority from its personnel, representatives of Public Entities related to the project being procured.
- **Competitive Dialogue:** the terms and proceedings adopted by the Authority when having an intermediary bid submission in

- order to receive the suggestions of the private sector with regards to the project's components and procurement terms.
- **Concept Proposer:** any natural person or legal entity, Kuwaiti or non-Kuwaiti, presenting a Concept for the implementation of a project in accordance with the PPP Model before the Authority through a preliminary feasibility study of the project in compliance with the State's strategy and development plan for the approval and the procurement thereof in accordance with the provisions of the Law.
  - **Confidentiality Agreement:** one of the Agreement Documentation executed prior to the collection of the project's procurement documents, under which, the parties adhere to ensure the confidentiality of the information exchanged in connection with the implementation of the Agreement Documentation.
  - **Consortium Company:** the company established in the State of Kuwait to implement the project either directly or through the acquisition of shares in the Project Company – as the case may be – by the Successful Investor either directly or indirectly as per the project's procurement documents.
  - **Construction Term:** the term prescribed for under the PPP Agreement for the completion of construction and preparatory/outfitting or development works, starting as of the date of signature of the PPP Agreement; it shall not be considered part of the Investment Term.
  - **Distinguished Project:** a PPP Project approved by the Higher Committee based on a comprehensive feasibility study presented by the Concept Proposer and providing an economic or a social return that is in line with the State's strategy and development plan.

- **Executive Regulations:** the executive regulations of Law No 116 of 2014 regarding Public Private Partnerships.
- **Final Feasibility Study:** the feasibility study prepared by the project's Successful Investor.
- **Financial Close:** the date on which the financial agreements are entered into between the Project Company and the Lenders to initiate the financing of the project and to transfer the amounts agreed upon with the Lenders in accordance with the ratios stated under the project's procurement documents and the PPP Agreement.
- **Grievance Committee:** the committee established in accordance with Article (32) of the Law for the review of complaints and grievances submitted by concerned persons against decisions or proceedings undertaken by the Higher Committee or the Authority.
- **Guidebook:** the guidebook prepared by the Authority regarding public private partnerships in order to guide the application of the provisions of the Law and these Executive Regulations.
- **Initiative:** an innovative PPP Project of a creative Concept unprecedented in the State of Kuwait, approved by the Higher Committee, based on a comprehensive feasibility study submitted to the Authority by the Concept Proposer, providing an economic or a social return that is in line with the State's strategy and development plan.
- **Investment Term:** the term prescribed for under the PPP Agreement, starting as of the completion of construction and preparatory/outfitting works or as of the date of the partial or total completion of the development works, as provided for under the project's procurement documents and not exceeding (50) fifty years.

- **Law:** Law No 116 of 2014 regarding Public Private Partnerships.
- **Letter Agreement:** one of the Agreement Documentation executed by the Public Entity, the Authority and the Successful Investor to which shall be attached the final agreed upon Agreement Documentation, and which shall include conditions precedent of specific and preparatory obligations for the valid effectiveness of the PPP Agreement.
- **Post-qualification:** the proceedings undertaken by the Authority to determine the capabilities of potential investors to implement a PPP Project through a proposal comprising the qualification as well as technical and financial offers.
- **Prequalification:** the proceedings undertaken by the Authority to determine the capabilities of potential investors to implement a PPP Project prior to allowing them to present their technical and financial proposals.
- **Request for Expression of Interest:** an optional stage whereby the Authority surveys the interest of the parties wishing to participate in one of the PPP Projects.
- **Substitution Agreement:** one of the Agreement Documentation setting the terms and conditions for the substitution of the Contracting Investor with another investor fulfilling the same or better qualifications and Terms of Reference criteria based on which the project was awarded in order to complete the term of the Agreement.

## **Chapter Two**

### **METHODS FOR PROPOSING PPP PROJECTS AND APPROVAL MECHANISM**

#### **Article (2)**

## **PROPOSING A PPP PROJECT**

The proposal for the procurement and implementation of a PPP Project may be submitted by the following entities:

1. **Public Entities:** a Public Entity wishing to propose a project that falls within its competences in accordance with the PPP Law shall submit a request to the Authority along with the comprehensive feasibility studies of the project in accordance with the Law, its Executive Regulations and the Guidebook.
2. **The Higher Committee:** the Higher Committee approves the request of the relevant Public Entity for the procurement of a PPP Project in accordance with a PPP Model, and it may propose PPP Projects to Public Entities.
3. **The private sector:** the private sector may submit before the Authority draft Concepts along with preliminary feasibility studies, as per the Authority's requirements, for the implementation of a project and the approval of the procurement thereof in accordance with the provisions of the Law.

The Authority shall in coordination with the Public Entity review the feasibility studies presented by the aforementioned entities and finalize the same, as needed, in order to submit an appropriate recommendation thereon to the Higher Committee.

The Authority may prepare the project's comprehensive feasibility studies and procurement documents, and it may in all cases seek support from advisory firms and specialized offices whether local or foreign as it deems suitable for this purpose in accordance with the provisions of the laws and regulations.

### **Article (3)**

## **COMPETITION COMMITTEE**

The Authority shall establish, following the approval of the Higher Committee and in accordance with the requirements of the business, a committee for each PPP Project named “Competition Committee”, in which the Public Entity(ies) whose competences and responsibilities correspond to the nature of the project shall be represented, by at least one member being no less than an assistant undersecretary, and provided that technical, financial and legal expertise are also represented therein.

The committee shall review, complete and prepare project related studies, instruments and procurement documents and shall approve the same. The committee shall also evaluate the technical and financial offers and shall supervise the public session set for opening the financial envelopes of the technically accepted offers.

The quorum for the committee’s meetings shall be at least three quarters of its members. The committee shall issue its decisions and recommendations upon a majority vote of the attending members of the committee. In case of a tie in voting, the vote of the president of the committee shall prevail. The committee may seek support from any expert as it deems necessary and the latter shall have no voting rights.

The committee is considered a one-window service through which the Investor deals. Each member of the committee shall be granted all the powers of the Public Entity he represents, within the competences of the committee, thus allowing him to collaborate in taking necessary decisions and recommendations without having to refer to the related Entity.

#### **Article (4)**

#### **METHOD FOR APPROVAL OF CONCEPTS PROPOSED BY THE PRIVATE SECTOR**

The Authority shall, in coordination with the proposed Public Entity, present the results of the initial feasibility studies of the Concepts proposed



by the private sector to the Higher Committee along with the Authority's recommendation for the preliminary approval of the project as an Initiative or a Distinguished Project or the rejection thereof. In case of approval of a project Concept, the Concept Proposer shall be granted a period of six months to prepare the comprehensive feasibility studies unless the Authority decides, based on the nature of the project, to grant him an additional period for this purpose in accordance with the terms and proceedings set by the Authority and approved by the Higher Committee.

## **Article (5)**

### **METHOD FOR APPROVAL OF PROPOSED PROJECTS**

The Authority shall present to the Higher Committee the results of the comprehensive feasibility study, whether prepared by the Competition Committee, the private sector or the Public Entity, along with the Authority's recommendations for the approval of the project and its procurement in accordance with the PPP Model, or the rejection thereof.

If the approval of the project in accordance with the PPP Model is recommended, the recommendation shall include the following:

1. Proposed method of competition for the procurement of the project either through a competitive bidding process or a competitive tender process.
2. Type of proposed PPP Model to be adopted.
3. identification of the Public Entity(ies) which have competences and responsibilities for a project of this nature, in order for them to participate in the preparation of the procurement documents, approve the technical specifications, participate in the evaluation of offers in preparation for the award of the project, sign the PPP Agreement and follow-up on the implementation and operation until the transfer to the State.

4. The proposed timetable for the project's procurement stages and proceedings.
5. The proposed Investment Term.
6. The proposed exemptions and privileges as well as any specific advantage to be granted if the project was submitted through a Concept for approval.
7. The proposed service to be provided, its economic, social and/or service importance, or whether it is a development or improvement of an existing service or reduction of the cost thereof or improvement of its efficiency.
8. Any request for the allocation of land for the project, if any.
9. Any other specifications or requirements according to the nature of the project and based on the Guidebook.

#### **Article (6)**

#### **DECISION OF THE HIGHER COMMITTEE REGARDING PPP PROJECTS**

The Higher Committee shall issue its decision regarding the submitted projects in light of the recommendations presented by the Authority in accordance with the previous Article.

### **Chapter Three**

#### **PROJECT FEASIBILITY STUDY**

#### **Article (7)**

#### **STANDARDS FOR PREPARING THE FEASIBILITY STUDY**

The project to be tendered for investment in accordance with the PPP Model must meet, the following criteria, based on its feasibility study:

1. The project shall conform to all the technical, legal and environmental requirements and shall be economically viable,

and the benefits offered by the project to the State or to the beneficiaries of the service provided shall be suitable according to the parameters set in the feasibility study and the best practice applicable in this regards.

2. It shall be established through the comparison between the implementation of the project in accordance with the PPP Model or its implementation by the Public Entity, provided that the comparison is conducted in light of any or all of the following criteria,:
  - a. Implementation cost (value for money).
  - b. Risk allocation.
  - c. Transfer of knowledge and use of technology.
  - d. The project shall have a promising rewarding financial yield to the Investor and the investment risk shall be allocated in an acceptable manner towards the private sector thus creating an opportunity for competition thereon and motivating the Lenders to finance it.
  - e. Any other standards or requirements set by the Guidebook.

## **Article (8)**

### **THE INITIAL FEASIBILITY STUDY**

The initial feasibility study shall contain a preliminary analysis of the comprehensive feasibility study components. The Guidebook shall provide for the general framework for the preparation of the feasibility study of PPP Projects including the proposed service to be offered, its economic, social and service outcome, the benefit and the expected return of the project, as well as the means of comparison for its tendering in accordance with the PPP Model or by the Public Entity, taking into consideration the allocation of the project's investment risks whether during the construction, implementation or operation phase, as well as the hypothetical term of the

project and the financial, social and economic aspects and other requirements as per the best practices in this regards.

## **Article (9)**

### **THE COMPREHENSIVE FEASIBILITY STUDY**

The comprehensive feasibility study shall particularly determine the technical and operational aspects of the project's Concept as well as its economic aspect, taking into consideration the following rules:

1. Technical aspects of the project.
2. Operational aspects of the project.
3. Assumptions with regards to the project's ability to recover the cost and the expected internal rate of return of the project.
4. Assumptions with regards to the participation of the private sector in the project and its interest to participate in the implementation thereof.
5. The expected Total Cost for the project including the suggested capital in addition to the anticipated operational and maintenance expenses for one year of operation.
6. Schedule for project risk allocation.
7. Determination of the anticipated economic benefits of the project.
8. Suggestion of the proposed incentives and tax and custom exemptions as well as other exemptions essential for the success of the project.
9. Determination of the Investor's role.
10. Determination of the contractual framework of the project.
11. Setting the proceedings to ensure the selection of the Investor on a competitive basis.
12. Determination of the legal documents.
13. Setting the roles and duties of the proposed parties to participate in the project.

14. Setting a timeline for the implementation of the project including the proposed Construction Term and the Investment Term.
15. Funding sources.

## **Article (10)**

### **THE PREPARATION OF THE FEASIBILITY STUDY**

The Public Entity wishing to procure one of the PPP Projects falling within its competences for implementation in accordance with the PPP Model shall prepare a comprehensive feasibility study of the project in accordance with the provisions of the Law, its Executive Regulations and the Guidebook. The Public Entity shall also draft the Terms of Reference of the study setting the tasks and elements of required research in connection with the project and shall submit the same to the Authority for approval.

However, in exception to the above, the Authority may prepare the feasibility study of a PPP Project in collaboration and cooperation with the Public Entity, provided that the Public Entity provides it with all the data, documents and studies required for the same. The Authority may seek assistance from whomever it deems suitable for this purpose including local or foreign consultancy firms as well as other Public Entities according to the nature and the requirements of the project.

## **Article (11)**

### **COMPONENTS OF THE TOTAL COST FOR PREPARATION OF THE FEASIBILITY STUDY**

The Total Cost of a PPP Project shall be determined in accordance with the project's feasibility study, which shall include the following components:

1. The market value for the usufruct right of the project's land, if any.

2. The value of the assets provided by the Public Entities to the Investor or the fee due for the land usufruct right.
3. The estimated expenses for the implementation of the project including capital expenditures, comprising fees for the establishment, design, construction, financing and equipping.
4. The estimated expenses for the operation of the project for one year.
5. Any other expenses in accordance with the nature of the project.

## **Article (12)**

### **PROJECT DURATION AND THE METHOD OF CALCULATION THEREOF**

The feasibility study shall include a recommendation with regards to the proposed term for the implementation of a PPP Project in accordance with its nature and requirements, and specifically the proposed Construction Term, which shall in addition to the Investment Term constitute the full term of the PPP Agreement.

When setting the term of a PPP Agreement, the following criteria shall be taken into consideration:

1. The economic or social benefits that the State aims at providing through the project in accordance with the State's strategic plan.
2. The proposed cost of the capital required for the implementation of the project.
3. The estimated cost for financing the project and its anticipated revenues as well as the return on capital and internal return on the project.
4. The project's estimated cash flow.
5. The term required to attain an appropriate return rendering the PPP Project attractive for companies with expertise and good reputation to compete thereon thus allowing the provision of higher quality services and infrastructure through the project.

6. The ideal term for the contracting Public Entity to recover the assets provided by the Investor and the transfer thereof to the State in a manner that is consistent with the nature of the project and the useful operational life of the equipment as per the recommendations of the manufacturing companies compared to the Investment Term and operation term.

## **Chapter Four**

### **GENERAL TERMS FOR PROCUREMENT OF PPP PROJECTS**

#### **Article (13)**

##### **PROCUREMENT STAGES – EXPRESSION OF INTEREST**

The Authority may announce the Request for Expression of Interest for PPP Projects, as a procedure preceding the qualification proceedings, in order to assess the interest and willingness of the private sector to participate in the implementation of the project prior to undertaking the procurement proceedings, in the Official Gazette and other local or international media that are suitable with the nature of the project, and through the publication of the same on the website of the Authority.

The announcement shall include a short description of the project, its objectives and the proposed location for the implementation thereof – if any – the method for presenting the request and any other information or conditions related to the project. The duration for receipt of a Request for Expression of Interest shall be no less than two weeks from the date of publication of the announcement.

The Requests for Expression of Interest may be accepted through electronic mail.

The Authority shall review and study the Requests for Expression of Interest submitted by the Investors. The Authority shall, upon that study, decide on the feasibility for undertaking the proceedings set by the law and invite

interested parties for Prequalification to participate in the competition for the implementation of the project or to refrain from undertaking such proceeding, in preparation to present a recommendation in this respect to the Higher Committee.

## **Article (14)**

### **INVITATION FOR QUALIFICATION**

The Authority shall, following the approval of the Higher Committee on the PPP Project and the determination of the PPP Model and the method of procurement in accordance with the provisions of Article (8) of these Executive Regulations, in collaboration with the Public Entity appointed by the Higher Committee, announce the invitation for qualification for the project in the Official Gazette and at least two Kuwaiti dailies in both Arabic and English, and in local or international media as may be deemed necessary in accordance with the nature of the project, as well as publishing it on the website of the Authority.

The announcement of the invitation for qualification shall include the following:

1. Determination of the Public Entity or the Public Entities relevant to the project.
2. A short description of the project and its objectives.
3. The required expertise for qualification.
4. The contracting model and term.
5. The fee due for the collection of qualification documents. The Authority may postpone the payment thereof until the submission of qualification requests.
6. The duration fixed for submission of the requests for qualification, the address for its submission and the mail or electronic mail address as per the circumstances. The duration for submission of the qualification requests shall be no less than (15) fifteen days from the



date of publication in the Official Gazette unless it was decided to undertake a Post-qualification in which case the duration shall be included in the duration for submission of proposals.

## **Chapter Five**

### **TERMS FOR QUALIFICATION**

#### **Article (15)**

Each investor wishing to participate in a project being tendered in accordance with the provisions of the Law shall prove its capacity to implement the project and fulfill its obligations in case it would be awarded the project through the competition and contracted in that respect.

The determination of the investor's capacity is undertaken through qualification proceedings. The Higher Committee may either undertake a Prequalification or a Post-qualification process based on the recommendation of the Authority and in accordance with the nature of the project, in order to ensure the proper selection of investors capable of implementing each project separately.

#### **Article (16)**

### **PREQUALIFICATION**

After the approval of the Higher Committee of the feasibility studies and qualification documents, the Authority shall announce the acceptance of requests for qualification from investors wishing to invest in a PPP Project through the Prequalification proceedings, in order to ensure the ability of the applicant for a request for qualification to implement the project, based on the terms and conditions specified in the qualification documents.

## **Article (17)**

### **POST-QUALIFICATION**

The Higher Committee may decide to merge the qualification phase with the request of proposals phase; in this case the qualification of Investors wishing to invest in the project shall be considered a Post-qualification.

The terms of Post-qualification shall be similar to that of the Prequalification. The investor wishing to invest shall present the qualification documents in an envelope that is separate from the other envelopes containing the technical and financial proposals.

The envelopes of Post-qualification shall be opened prior to the opening of the technical and financial envelopes and a list of the qualified applicants shall be prepared and submitted to the Higher Committee for approval prior to reviewing and evaluating the technical and financial proposals.

The investors who do not meet the Post-qualification criteria may request the reimbursement of their bid bonds.

## **Article (18)**

### **QUALIFICATION DOCUMENTS**

Taking into consideration the special nature of each PPP Project, the qualification documents shall comprise the following:

1. Information for the parties wishing to apply for qualification indicating the means for preparation and submission of the request of qualification.

2. A description of the PPP Project procured for investment including its location, nature and main features as well as the surface of the proposed land for project implementation, if any.
3. A statement of specific expertise that the investor is required to meet in order to be qualified in the qualification phase.
4. Qualification standards.
5. The deadline for collection of qualification documents, indicating the date and hour thereof.
6. The place and the method of submission of qualification documents; the Higher Committee may decide to accept them through means of electronic communication.
7. The deadline for submission of qualification documents which shall be no less than (15) fifteen days as of the date of the publication of the announcement for qualification in the Official Gazette.

## **Article (19)**

### **REQUESTS FOR QUALIFICATION SUBMITTED BY CONSORTIA**

Should a consortium of several companies apply for qualification, such consortium shall elect a leader to undertake through official proxies issued by the consortium members their representation before the Authority.

The consortium leader shall meet all the expertise conditions and the ownership ratio that shall be held by the consortium leader as predefined in the qualification documents.

When evaluating the requests for qualification submitted by consortia, the qualifications and capacities of each consortium member shall be considered and whether collectively they meet the qualifications and capacities or not. The request for qualification shall be reviewed based on the role of each member of the consortium in accordance with its

proposed tasks in terms of design, construction, equipping/outfitting, operation, development, maintenance, qualification or financing, in accordance with the nature of the project and the adopted PPP Model and the terms stated in the qualification documents.

A consortium member may not participate in the qualification through more than one consortium except with the prior approval of the Authority.

Qualified consortium members may request that the Authority consent their transfer to another consortium, or to the formation of other new consortia formed of such members, provided that such new consortium meets the terms stated in the qualification documents.

## **Article (20)**

### **EVALUATION OF QUALIFICATION DOCUMENTS**

Requests for qualification shall be evaluated based on the standards representing the required elements to be available in the request and relative weights of these elements, in accordance with the terms provided for in the qualification documents, specifically:

1. Prior works of the applicant for qualification in the management, implementation and operation of PPP Projects.
2. Similar expertise in terms of size and nature of PPP Projects in the sector in which the proposed project is included.
3. The capacity of the applicant for qualification to secure technical and managerial requirements in order to prepare the required designs of the PPP Project when being procured.
4. The capacity of the applicant to secure the necessary equipment and machineries for the implementation of the project.
5. The financial solvency of the applicant for qualification and its ability to secure financing and funding.

6. Any other terms and standards in accordance with the nature of the project.

## **Article (21)**

### **QUALIFICATION DECISION**

The Competition Committee shall review and study the requests for qualification submitted by the investors, and it shall prepare a report addressing all of its review and the results of the evaluation of the qualification requests, as well as the investors that are approved to participate in the second phase of the procurement, the investors who are proposed to be excluded and the justifications of any such exclusions. A report regarding the same shall be presented to the Authority.

After reviewing the aforementioned report, the Authority shall present its recommendations with regards to the requests for qualification to the Higher Committee so that it may issue an appropriate decision in this matter. The Authority shall notify the investors of the final decision regarding their requests for qualification at the addresses stated in their requests.

## **Chapter Six**

### **BASIS FOR PROCUREMENT OF THE PROJECT FOR INVESTMENT**

## **Article (22)**

### **PROCUREMENT DOCUMENTS**

The Public Entity in collaboration with the Authority shall prepare the project's procurement documents in accordance with the provisions of the Law, and shall submit the same to the Higher Committee in order to issue an appropriate decision in this regard. The Authority may seek the

assistance of local or international consultancy firms to review and prepare such documents.

The project's procurement documents shall mainly include the following:

1. Instructions to bidders.
2. The Terms of Reference comprising the technical and financial terms and standards of the project and the formulae defined for the award of the project.
3. The Confidentiality Agreement.
4. The model Agreement Documentation(s) and its language, including the draft PPP Agreement and the lease agreements of the land, if any.
5. The Letter Agreement – should the project be awarded to a consortium – and the Substitution Agreement allowing the substitution of the Investor in cases of default.
6. Any other terms or documents in accordance with the nature of the project.

## **Article (23)**

### **INSTRUCTIONS TO BIDDERS**

The instructions to bidders shall in particular include the following:

1. Means for the preparation of proposals and the number of required envelopes and their content and place for submission. The Higher Committee may approve the submittal of Proposals through electronic means of communication which support the necessary confidentiality, as per the proceedings set by the Higher Committee.
2. Specify the deadline for submitting proposals indicating the date and hour, provided that the duration for submission of proposals

is no less than (90) ninety days from the date of publication of the announcement for request of proposals in the Official Gazette.

3. The value of the initial bid bond, to be settled in Kuwaiti Dinar through a certified check or letter of guarantee issued or confirmed by a bank licensed to operate in the State of Kuwait as per the form provided in the instructions to bidders.
4. Duration of validity of proposals and the method for extension thereof.
5. The financial proposal must be fixed in the official currency of the State of Kuwait upon submission.
6. Documents and information that the Investor submitting a proposal must include therewith.
7. The required documents from any consortium submitting a proposal including a copy of the consortium agreement certified by the Public Entities and an identification of the person entitled to represent the consortium and its appointment document.
8. Statement of amount of the required performance bond to be submitted by the Contracting Investor, and the submission thereof in the form of a letter of guarantee issued or confirmed by a bank licensed to operate in the State of Kuwait and indicating the wording of this guarantee and its time of delivery after the appointment of the Successful Investor along with its validity period and means of renewal.
9. Statement indicating whether the PPP Project was procured for investment based on a Concept approved by the Higher Committee as an Initiative or Distinguished Project. A statement of the specified percentage set by the Higher Committee as a preference margin or the percentage allocated to the Proposer of the accepted Concept in the shares of the Public Joint Stock Company to be established for the implementation of the Project.
10. Any other terms necessary in accordance with the nature of the project and the best practices for the completion of the instructions to bidders.

## **Article (24)**

### **THE TERMS OF REFERENCE**

Taking into consideration the nature of the PPP Project, its type and PPP Model as well as the adopted method for competition and the specific considerations related to its implementation, the request for proposals document shall include the following:

1. Detailed information regarding the project, including its specifications, proposed location for implementation and the specifications of the services to be provided through the project.
2. Technical, financial, legal and environmental terms and other matters required for the submission of proposals and implementation of the project.
3. The formulae adopted by the Higher Committee within the project procurement documents based on which the project shall be awarded, to be set in light of the relative technical, financial and legal weights and project risk allocation.
4. Surface Area of the land allocated for the project, if any, and the price of its usufruct right, as well as any other assets existing upon the land or to be provided by the Public Entity to the Contracting Investor and whether the Investor will be paying any fee in return for the use thereof.
5. A statement indicating the costs for the preparation of studies and the amounts due to the Concept Proposer, if any, as well as any other expenses that the Contracting Investor must settle for the benefit of the Authority at Financial Close.
6. The incentives and exemptions to be granted for the project.
7. A statement of criteria for the determination of non-negotiable issues considered as a Material Deviation that might affect the competitive ranking between accepted proposals.



8. A statement of the number of envelopes comprised in the proposal. The envelopes shall be separate and signed by the Investor or its legal representative with a note on the back of the envelope indicating the content thereof.
9. Any other terms required as per the nature of the project.

## **Article (25)**

### **THE DRAFT AGREEMENT**

Taking into consideration the nature of each PPP Project, its type and the PPP Model as well as the adopted method for competition and the special considerations in connection with the method of implementation thereof, the draft PPP Project documentation shall, inter alia, include the following:

1. The PPP Agreement.
2. The land lease agreements, if any.
3. The Letter Agreement.
4. The Substitution Agreement.
5. The Confidentially Agreement.

## **Article (26)**

### **THE PPP AGREEMENT**

The PPP Agreement must, inter alia, include the following:

1. The subject of the agreement.
2. The term of the agreement including the Construction Term and the Investment Term.
3. The commitment to develop the project.
4. The identification of the services and the cost accrued thereon.
5. Declarations, guarantees and undertakings.

6. Operation proceedings.
7. Testing and method for evaluation.
8. The operation of the project.
9. Accounting method and the currency for payments.
10. The insurance.
11. Reports and records.
12. The assignment.
13. Events allowing the termination of the agreement without any notification or judicial order.
14. The liquidation of the project and the termination of the agreement for public interest.
15. Basis for indemnification.
16. The approved language of the agreement.
17. Dispute resolution methods.
18. The usufruct right of any in-kind assets provided by the state.
19. The technical, environmental, financial and economic terms of the projects.
20. Security and safety conditions.
21. Any other terms and conditions determining the relationship between the parties and their obligations.

## **Article (27)**

### **BASIS FOR THE COLLECTION OF SERVICE FEES**

The PPP Agreement must set the basis for the Project Company to collect payments (fees) for the services provided or works undertaken, in each or both the following forms:

1. From the Public Entity, in return for:
  - a) Provision of a service that is compliant with the agreed criteria.

- b) Usage of the service or the infrastructure provided by the PPP Project.
  - c) The minimum capacity payments related to the estimated demand for the service or infrastructure to be provided by the PPP Project.
  - d) Completion of specific stages agreed upon in the implementation, operation or infrastructure, subject to agreement on the timetable adopted for the implementation of the project.
  - e) Achieving an internal return as stated under the project's procurement documents.
2. From the beneficiaries of the services or the infrastructure other than the Public Entities and in accordance with the mechanism set forth in the PPP Agreement for the method of calculation of such fees.

## **Article (28)**

### **METHOD FOR DETERMINATION OF THE VALUE OF FEES**

The PPP Agreement shall specify the mechanism for the calculation of the fees to be paid to the Project Company in return for the provision of the services or the infrastructure works undertaken in accordance with the nature of the PPP Project and its requirements. The following considerations and basis must be observed while determining such fees:

1. Prices for the services and works provided through the PPP Project shall be appropriate in light of the special considerations related to the quality thereof.
2. Observance of the interest of the consumer in light of the prices due for similar services and works and the commercial value thereof.

3. Achieving an appropriate financial return for the Investor, in accordance with the basis stated in the project's feasibility study assuming the achievement of the required efficiency for the implementation and operation of the project.
4. Taking into consideration inflation rates when determining the fees for services provided and works performed through the project should the prices be fixed in the agreement, such prices should be linked to clear adjustment indicators throughout the duration of the agreement to address funding and exchange rate commitments if they would have a negative impact on the Investor's returns or disrupt the financial balance of such agreement, all in such manner that the prices of the service and the adjustments thereof are automatic and agreed upon in the agreement documents.
5. Any support provided by the government for the project.

### **Article (29)**

#### **MEANS FOR COLLECTION BY THE PUBLIC ENTITIES OF ANY FEES FROM THE INVESTOR**

The Public Entities shall collect from the Project Company fees for any in-kind assets provided to the Investor for use in the project taking into consideration the following rules:

1. Getting the appropriate return on the assets taking into consideration the cost of alternative opportunities.
2. The rate of financial return which is expected to be achieved through the project.
3. The nature of the project and its requirements.
4. The effects of the fees collected in return for in-kind assets provided by the State and the land lease on the service fees in order to issue the appropriate decision with regards to their value.

5. The Total Cost of the project.
6. The rate of internal return expected for the project.

The Higher Committee shall set, based on the recommendation of the Authority, the fees to be collected by the Public Entity from the Project Company in return for the assets provided and project land, if any, in light of the aforementioned basis and in accordance with the nature of the procured project.

### **Article (30)**

#### **EXEMPTIONS AND INCENTIVES**

The Terms of Reference shall set the incentives provided to Investors to submit their proposals and the incentives granted to the Contracting Investor including the exemption from income tax, or any other taxes, custom duties or any other fees based on the decision of the Higher Committee, as well as any other benefits provided for under Law No 116 of 2013 regarding the Promotion of Direct Investment in the State of Kuwait.

The Authority shall in collaboration with the Public Entity while preparing the project's procurement documents propose the incentives and the tax and customs exemptions taking into consideration the nature of the project and shall draft a report regarding the same to be presented to the Higher Committee in order to issue the appropriate decision thereon.

The decision of the Higher Committee issued in this regard shall be binding towards all the State's authorities concerned with the implementation thereof.

### **Article (31)**

#### **INVITATION FOR SUBMISSION OF PROPOSALS**

The Authority in collaboration with the Public Entity shall invite the qualified Investors to collect the project's procurement documents and to submit their proposals. The invitation shall be made through publication in the Official Gazette and at least two Kuwaiti dailies in both Arabic and English and other local or international media as may be deemed necessary as per the nature of the project, as well as through publication on the website of the Authority, as the Authority deems appropriate in this regard.

The invitation for submission of proposals shall include the following:

1. The deadline for the collection of the project's procurement documents.
2. The relevant Public Entity(ies) that will enter into the PPP Agreement and the appendices thereto.
3. The Investment Term.
4. The location of the project stating whether it is being implemented on State-owned land.
5. The fees due and the method of collection of the project's procurement documents, after signing the confidentiality agreement.
6. The deadline for submission of proposals indicating the date and hour which shall be no less than ninety days after the date of publication of the invitation in the Official Gazette, as well as the method and place for submission.
7. The incentives and tax and custom exemptions granted for the project.

The proposals may be submitted by electronic means of communication which support the necessary confidentiality provided the prior approval of the Higher Committee thereon.

## **Article (32)**

## **CLARIFICATIONS WITH REGARDS TO THE PROJECT'S PROCUREMENT DOCUMENTS**

The Authority may, in collaboration with the Public Entity, request clarifications from the bidders with respect to their request for qualification or proposals and that in connection with any inquiry or ambiguity it might find in a proposal. It may as well, in any stage of the procurement, request information, data and additional documents confirming the ability of the Investor to implement the project. Such clarifications or documents provided by the Investor in this regard shall constitute an integral part of its proposal.

The Investors may submit inquiries with regards to the terms of qualifications and competition in accordance with the conditions and limitations set in the qualification documents and project procurement documents.

### **Article (33)**

#### **AMENDMENT OF THE TERMS OF REFERENCE**

The Authority may, in coordination with the Public Entity, amend the procurement documents before the deadline set for the submission of proposals and provided the qualified Investors are granted a sufficient time for the preparation of their proposals.

Such amendments shall be issued through an addendum signed by the director of the Authority and approved by the Higher Committee in light of the proposal of the Competition Committee. The Authority shall invite the qualified Investors that have purchased the procurement documents to collect such addendum without any fee. Such addenda shall form an integral part of the procurement documents.

In all cases, all such amendments shall not prejudice the acquired rights of the qualified Investors.

## **Article (34)**

### **PROCUREMENT OF THE PROJECT IN TWO STAGES**

The Higher Committee may, based on the recommendation of the Authority, decide to procure the project in two stages in accordance with the nature and requirements thereof, and conduct a Competitive Dialogue at the intermediary bid-submission of the process in order to obtain clarifications in relation to the elements of the technical and financial offers presented during this stage. In the second stage, final proposals shall be submitted.

Shall the project be procured in two stages, the Authority in coordination with the relevant Public Entity must, during the first stage, prepare the procurement documents provided they include the following:

1. General information regarding the project, its specifications, standards and performance indicators or requirements for financing or its specific basic contractual arrangements and any other information as the Authority deems necessary.
2. The obligation for the Investor to submit its suggestions with regards to its mark-up/annotations/observations made on the project's documents, to be reviewed by the Competition Committee and taken as guidance during the stage of preparation of the final project procurement documents.
3. The initial offers shall not include any information or financial data regarding competitive prices to be offered by the Investor. The offers submitted at this stage shall be limited to the technical, legal, environmental and general financing issues as well as topics permitted under the Terms of Reference.

Upon receipt of the initial offers and the review and study thereof, the Authority may invite the Investors that have presented their offers to undertake a Competitive Dialogue with them with regards to their



proposed comments made to the project's elements and the initial terms for its procurement. In case the aforementioned invitation to the Investors is made, the Investors must all be granted an equal opportunity/duration for discussion.

The Authority, in coordination with the Public Entity, shall review the characteristics of the project and the proposed standards and performance indicators, the financing arrangements and the contractual terms as well as any other matter for which a Competitive Dialogue has been undertaken, in order to specify those that comply with the public interest, in preparation for making appropriate amendments to the project's final procurement documents to be prepared by the Competition Committee as per the procedures set under the Law, its Executive Regulations and the Guidebook. The Authority must review and study such amendments and prepare appropriate recommendations thereon to be presented to the Higher Committee in order to consider approval thereof as the project's procurement documents.

## **Article (35)**

### **MODULE OF THE PROPOSAL SUBMITTED BY THE INVESTOR**

Taking into consideration the nature of the PPP Project, the proposal shall be submitted in the form of separate envelopes as stated in the procurement documents. In case of post-qualification, the proposal must include the request for qualification in a separate envelope. The proposal must mainly include the following:

1. The appointment of a legal representative for the qualified single investor or for the qualified consortium comprising more than one investor, with the appointment of a representative for the consortium based on official proxies made by the consortium members for their representation during the qualification

proceedings, along with a certified copy of the agreement entered into between the members of the qualified consortium.

2. The technical offer must include:

- a) The proposed technique and technical method for the provision of the public service or the implementation of the project's structure as per the project's procurement documents.
- b) The suggested arrangements with regards to the design and implementation of structural works required to achieve the project's objectives and the provision of required supplies and equipment for that purpose.
- c) The proposed time schedule for the implementation of the project.
- d) The specialized technical and administrative units for the implementation and operation of the project, and the main subcontractors which are proposed to be hired for the implementation of the works.
- e) Information, data and proposed method to comply with the standards for protection of the environment, safety and security.

3. The financial offer, must include:

- a) The expected costs for the preparation of designs and the establishment, operation and maintenance of the project.
- b) The cost of financing the project and the sources of any such financing.
- c) The projects estimated investment return.
- d) The financial costs incurred by the State in light of the adopted formulae for the award of the project.

## **Article (36)**

### **RECEIPT OF PROPOSALS AND THEIR SAFEKEEPING**

Proposals must be submitted to the Authority by the person entitled to represent the submitting entity. The Authority shall make all the necessary arrangements to receive the proposals comprising the offers and ensure the safekeeping thereof. The proposals shall not be opened until the convening of the Competition Committee for this purpose.

The proposal shall comprise the technical bid, the financial bid and the bid bond of the Investor in accordance with the provisions of the Law and as per the project's procurement documents, as well as a request for qualification in case of Post-qualification.

Bidders may not withdraw or amend their proposals after the final deadline for the submission of proposals; however prior to the final deadline they may withdraw from the competition or present an alternative offer in a new envelope stating thereon that this is a new proposal and provided the submission thereof follows the same method specified for submission of offers and is prior to the final deadline for submission of offers.

## **Article (37)**

### **EVALUATION OF OFFERS**

The Competition Committee shall undertake the evaluation of the technical proposals based on the standards and weights stated in the project's procurement documents, prior to reviewing the financial offer.

A proposal that does not include a bid bond as stated in the procurement documents shall be rejected.

The evaluation of the technical offer must conform to the following:

1. Provisions for technical safety included in the offer, including the technology to be used and techniques complying with the terms specified in the project's procurement documents.
2. Conforming to the environmental standards specified under the procurement documents.
3. Evidence of the quality of the services and facilities to be implemented and provided through the project and their conformity with standards and performance indicators specified under the Terms of Reference.
4. The extent to which suitability between the main components of the project have taken into consideration the provisions of the technical offer and the financial offer.
5. Feasibility of the proposed time schedule for the implementation of the project and the effects of such schedule.

The Competition Committee shall submit a report with respect to the evaluation of the technical offers along with its recommendations to the Authority for approval thereof. The Authority shall notify the Investors whose technical offers were approved and those who were rejected. The latter may submit a grievance as to this before the Grievance Committee in accordance with the terms and conditions provided for under Chapter Ten of these Executive Regulations.

### **Article (38)**

#### **SESSION FOR OPENING FINANCIAL ENVELOPES**

The Competition Committee shall arrange a public session to open the financial envelopes for the offers submitted by the Investors. The qualified Investors whom?? have submitted their offers in connection with the project being tendered shall be invited. A representative of the relevant Public Entity(ies) shall also be invited to attend the session.

The Committee immediately at the beginning of the public session shall confirm the attendance and ensure the safekeeping of the financial envelopes, and it shall prepare a report with regards to the same.

The financial envelopes shall be opened in alphabetic order of the bidders' names. The value of each proposal shall be read out and shall be recorded in a schedule made for this purpose. In case of inclusion of several values within the same proposal, the highest value shall be retained, without prejudice to the Authority's right to exclude/reject such proposal in accordance with the terms of the project's procurement documents.

### **Article (39)**

#### **DETERMINATION OF THE SUCCESSFUL INVESTOR**

The Competition Committee must prepare a report in connection with the evaluation of the technical and financial offers in light of the conclusions made during the public session in preparation for the submission thereof to the Authority, including its recommendation for the appointment of the Preferred Investor and the subsequent Investor in terms of preference among the submitted proposals.

The Authority shall specify in light of the recommendation presented by the Competition Committee the Preferred Investor as being the provider of the best proposal in accordance with the Terms of Reference based on which the project is being procured. The Authority must notify the concerned Investor and the Public Entity of the Investor that was determined as being the Preferred Investor in order to proceed with the negotiations with it.

The Authority must also notify the other Investors who passed the financial proposals phase of their ranking. The Authority shall keep the bid bond of the Preferred Investor and the subsequent Investor in the ranking and it may release the bid bonds of the other Investors unless it decides to keep them until the appointment of the Successful Investor or the expiry of the

duration of the submitted bonds or their refusal to renew their bonds or the extension thereof as per the terms provided for under the project procurement documents.

#### **Article (40)**

##### **SUBMISSION OF ONE PROPOSAL**

In case of submission of only one proposal or if the other proposals were invalid because they were in breach or they did not conform/comply with the terms for participation in the competition, the Competition Committee must prepare a report in this respect and submit it to the General Director of the Authority in preparation for the presentation of the same before the Higher Committee along with the recommendation he deems appropriate. The Higher Committee may decide to approve the sole offer or to re-procure the project or to undertake amendments it deems appropriate in the project's procurement documents or it may cancel the investment opportunity without any liability whatsoever.

#### **Article (41)**

##### **PROCEEDINGS IN CASE OF EQUALITY BETWEEN THE TWO BEST OFFERS**

In case of two equal offers where each forms the best offer as per the terms of the competition, the proposal presenting/including a better technical offer must prevail whenever the technical offer has weight in the formulae used for the award of the project.

Otherwise, the bidders may be requested based upon the recommendation of the Authority and the approval of the Higher Committee to submit two new financial offers, within the limits of their submitted offer, in new envelopes. A public session must be held for the opening thereof, to which the submitters of the two offers must be invited. The value of the offers

must be read out during the session. The Competition Committee shall prepare a report in this respect to be submitted to the Authority in preparation for the submission thereof to the Higher Committee to issue its decision in this respect without prejudice to the Higher Committee's right to cancel the competition or to re-procure the project without any liability whatsoever.

## **Article (42)**

### **THE NEGOTIATION WITH THE PREFERRED INVESTOR**

The Authority shall invite the Preferred Investor to negotiate the offer it has submitted along with the details and clarifications thereon and its reservations???? to the project's procurement documents.

The Authority shall specify in the invitation the topics that shall be negotiated and term of such negotiation. The Competition Committee, under the supervision of the Authority shall handle negotiations with the Preferred Investor, and it may seek assistance of professionals, experts and consultancy firms, whether local or foreign, with which the Authority may enter into agreements to perform its works/duties.

In all cases, the negotiations shall not address any contractual terms deemed in the invitation for submission of proposals as being non-negotiable or as Material Deviations according to the project's procurement documents. No amendments may be undertaken with respect to the technical and financial terms and conditions upon which the proposals have been evaluated. The negotiations may not lead to an amendment in the competition terms presented to the Preferred Investor, or relieve it from its liabilities in accordance with the provisions of the Terms of Reference under the risk allocation schedule specified in the project's procurement documents.

The minutes of negotiations shall be recorded in a report to be signed by the Investor and the negotiating parties; any clarifications or details made by the Preferred Investor in this respect shall be considered an integral part of its offer.

### **Article (43)**

#### **FAILURE OF THE NEGOTIATIONS**

Should the negotiations fail to reach a final agreement with the Successful Investor with respect to the agreement's documents, the Authority must notify the Investor of the suspension of the negotiations and will request from it the provision of its final position in writing of the best offer that it can provide, and such offer will be presented to the Higher Committee to issue its decision in this respect along with the Authority's recommendations thereon.

Should the offer be rejected or should the Preferred Investor fail to submit the required offer within the period provided, negotiations must be terminated with it, subject to the approval of the Higher Committee.

After the lapse of the grievance duration of the decision for suspension of the negotiations, the Authority shall invite the other bidder or bidders as per their ranking to negotiate in order to reach a final agreement with one of them with respect to the terms of the agreement and the settlement thereof.

The Authority may not resume the negotiations with any of the bidders with whom negotiations were terminated and it may not negotiate with two bidders or more at the same time. It also may not waive for the benefit of the subsequent Preferred Investor a condition that was a point of disagreement with the former Preferred Investor.

In all cases, the Higher Committee may decide to cancel the investment opportunity and re-procure the project.



## **Article (44)**

### **AWARD OF THE COMPETITION**

The award of the competition is in all cases subject to the approval of the State Audit Bureau in accordance with Article (31) of the Law. The procurement documents and the offer of the Preferred Investor shall all be presented to the State Audit Bureau, as well as any the minutes of any negotiations undertaken with it and the final terms agreed upon, taking into consideration the duration of validity of the bid bond.

After obtaining the approval of the State Audit Bureau, the Authority in collaboration with the Public Entity shall draft a comprehensive report on this matter for submission before the Higher Committee along with the Authority's recommendations for approval of the Successful Investor and inviting it to sign the Letter Agreement.

## **Article (45)**

### **LETTER AGREEMENT**

If an agreement is reached with the Preferred Investor, and after the approval of the Higher Committee of the recommendation for the nomination thereof as Successful Investor, the latter shall be invited to sign with the relevant Public Entity and the Authority a Letter Agreement enclosed to the agreement's documents that has been agreed upon. Such documents, except for the Confidentiality Agreement, shall not be effective and shall not produce their legal effects and be binding to the State until the fulfillment of the conditions precedent for contracting stated under the Letter Agreement.

After the signature of the Letter Agreement, the Authority shall return the bid bonds to the bidders, except for the second Investor ranked subsequent to the Preferred Investor, until the signature of the PPP Agreement with the Successful Investor or the lapse of the duration of validity of the bid bond provided in the second Investor's offer and its refusal to extend it.

## **Article (46)**

### **INVITATION TO SIGN THE PPP AGREEMENT**

The Successful Investor and the relevant Public Entities shall start the process ??? (more court related) required to execute the terms of the Letter Agreement in preparation for the signature of the Partnership Agreement as approved by the Higher Committee.

Should the Successful Investor be a consortium, it shall establish one or more Consortium Companies in accordance with the project's requirements and the laws of the State of Kuwait and based on what was agreed in the Letter Agreement. Each member of the consortium must fulfill all requirements requested by the Authority or the Public Entity such as certified official documents proving its ownership of the shares of the company that has been established, whether directly or indirectly, taking into consideration the guarantees provided by the Successful Investor to the State.

In case of projects with a Total Cost not exceeding (60) sixty million Kuwaiti Dinar or the projects excluded(exception) exempted according to the provisions of Article (16) of the Law, the consortium company may enter into the PPP Agreement directly and implement the project.

In other cases, where the establishment of a Public Joint Stock Company is required for the project, the Successful Investor shall acquire through the Consortium Company or companies the shares allocated to the private sector.

The relevant Public Entity shall sign the Agreement Documentation including mainly the final PPP Agreement and the land lease agreement, if any, and the Substitution Agreement for the substitution of the Investor should it fail to perform its obligations. In the case of nomination of several Public Entities for the project, it is permissible to provide the other Public Entities with a specific addendum of the terms of agreement in accordance with the nature of their competences and contractual tasks resulting from the project, to be signed by such entities.

The rights and obligations of the Successful Investor shall be transferred to the consortium company or the Project Company as the case may be. The Authority shall notify the relevant Public Entity for the project in this respect in order to establish the date for signature of the Agreement Documentation and to invite the Project Company to the signing thereof.

#### **Article (47)**

##### **PROCEEDINGS IN CASE OF WITHDRAWAL OF THE SUCCESSFUL INVESTOR OR ITS FAILURE TO SIGN**

If the Successful Investor withdrew or abstained from signing the Letter Agreement or the Agreement Documentation, or if it fails to provide the required final bond, or establish the Consortium Company or the Project Company or if it refrained from subscribing to the shares of the Public Joint Stock Company allocated to it upon the establishment, the Authority shall present a report to the Higher Committee in this respect along with the recommendation it deems appropriate. The Higher Committee may issue a decision inviting the next-ranked Investor to negotiate with it in order to reach a final agreement as per the terms and proceedings undertaken with the former prior Investor.

#### **Article (48)**

## **UTILIZATION???? OF THE COMPETITION GUARANTEE**

The Authority may call upon the competition guarantee without prior notification or judicial decision in the following cases:

1. If the Investor withdrew its offer or undertook amendments thereon after the final deadline for submission of offers and prior to the termination of such offer's specified validity period.
2. If the Investor abstained from responding to the Authority's invitation to enter into negotiations with respect to its offer or in case of abuse during the negotiations after the lapse of 15 working days as of the date of its invitation sent to the address indicated in its offer.
3. If the Successful Investor refrained from initiating the proceeding for the establishment of the Consortium Company or the Project Company or to arrange required project financing in accordance with the terms agreed upon or if it abstained from subscribing to its allocated shares in the Public Joint Stock Company within the period granted to it by the Authority as per the requirements and instructions of the Authority.
4. If the Successful Investor did not fulfill any of the conditions precedent agreed upon under the Letter Agreement in preparation for the signature of the PPP Agreement.
5. If the Successful Investor refused to sign the Letter Agreement within a period of (10) ten working days as of the date of its notification for the signature thereof at its address stated in its proposal.
6. If the Contracting Investor did not submit a performance bond or any other bond required under the Terms of Reference within the period stated in the PPP Agreement.
7. Any other cases specified in the project's procurement documents.

### **Article (49)**

## **THE SUBSTITUTION AGREEMENT AND THE TERMS FOR SUBSTITUTION OF THE CONTRACTING INVESTOR**

The substitution of the Contracting Investor with another Investor who replaces it to fulfill the terms of the agreement may be undertaken subject to the approval of the Higher Committee and based on the request of the Public Entity supervising the project, the Authority or the Lenders. Substitution shall be undertaken in accordance with the terms provided in the Agreement Documentation and the Substitution Agreement and it shall principally occur in the following cases:

1. If the Contracting Investor failed to execute its contractual obligations provided in the PPP Agreement or if it breaches any of the terms and fails to remedy the same within the period provided to it in accordance with the terms specified in the PPP Agreement thus hindering the proper course of the PPP Project.
2. If the Contracting Investor commits a grievous error hindering the proper course of the project or leading to the interruption thereof and exposing it to bankruptcy.

The PPP Agreement must include a condition providing for the prior acceptance of the Contracting Investor of the waiver of ownership of its shares in the Project Company – and other assets owned by the Project Company, in order to maintain the continuity of the project and to allow the new Investor the implementation of its contractual obligations.

### **Article (50)**

#### **SUBSTITUTION REQUEST**

If the Lenders should request the substitution of the Contracting Investor with another Investor, they must submit a request regarding the same to the Higher Committee, including the identification of the candidate they deem appropriate to substitute the Contracting Investor, without affecting the liability and responsibilities of the Lenders as to the candidate they

have elected as well as the Lenders' obligations provided in the PPP Agreement entered into for the implementation of the project.

The Authority shall in collaboration with the relevant Public Entity prepare a report comprising the proposed obligations to ensure the continuity of the project in preparation for the submission thereof to the Higher Committee in order to issue the appropriate decision in this regard.

In case a request for substitution was submitted by the Public Entity or the Authority, the requesting entity shall prepare a report in this respect along with new Terms of Reference to announce the request for substitution and attract a new investor for the implementation of the project, provided the terms agreed upon with the Lenders under the Substitution Agreement are observed. In this case, the duration for submission of proposals shall not exceed one month from the day of announcement of the request for substitution in the Official Gazette. The new Investor shall conform to the same conditions that the Contractual Investor was required to have during the procurement of the project.

In all cases, the selection of the new Investor shall be subjected to the approval of the Higher Committee and it must comply with the same or better terms of qualifications upon which the project was procured.

## **Article (51)**

### **HINDERED PROJECT**

The project is hindered if the Project Company was subject to involuntary circumstances prejudicing the course of the project and rendering the company incapable of performing its contractual obligations as per the terms agreed upon.

The Contracting Investor or the Project Company shall exert due care to deal with the circumstances that hinder the project and shall work on eliminating their causes. If they are incapable of doing so, they may request

that the Higher Committee place the project under the direct management of a Public Entity or another professional company to manage for consideration under the supervision of the Authority, provided that such investment is undertaken under the name and for the account of the Contracting Investor without prejudice to the Project Company's commitment to indemnify the Public Entity for damages caused due to a breach of the PPP Agreement.

The substituted/alternative Investor responsible for the management undertakes to compensate for all damages occurring due to the fault of its management of the project, and such management shall expire if the reasons for the project's hindrance no longer exist or if the project was liquidated.

## **Chapter Seven**

### **CONCEPTS PRESENTED BY THE PRIVATE SECTOR**

#### **Article (52)**

#### **SUBMISSION OF A CONCEPT THROUGH A PRELIMINARY FEASIBILITY STUDY**

Any person, whether a natural person or a legal entity, Kuwaiti or non-Kuwaiti, may submit a Concept before the Authority that comprises a request for the implementation of a project in accordance with a PPP Model, and such request shall include the following:

1. An initial feasibility study showing the project's components and the preliminary estimates of its expenses and benefits in accordance with the provisions of the Law and these Executive Regulations and in compliance with the instructions stated in the Guidebook.
2. Information with regards to the Concept Proposer, his expertise and management, and technical and financial capabilities to implement the project or a part thereof.

3. The fee as set by the Higher Committee for the review and study of the Concept and the analysis of the elements of the initial feasibility study.

### **Article (53)**

#### **INITIAL STUDY OF A CONCEPT**

The Authority shall communicate with the Public Entity(ies) whose capacities and authorities are consistent with the Concept to cooperate for the completion of the requirements of the feasibility study presented by the Concept Proposer.

The Public Entities shall provide the Authority with their responses on an urgent basis in a period not exceeding (20) twenty working days for matters requiring economic and financial analysis and (10) ten working days for matters which do not require such analysis.

Upon the receipt of the Public Entities' responses, the Authority shall undertake the study of the Concept and prepare a report in this regard together with its recommendation and present it to the Higher Committee.

### **Article (54)**

#### **THE DECISION OF THE HIGHER COMMITTEE**

The Higher Committee shall issue a decision approving the Concept and considering it an Initiative or a Distinguished Project or rejecting it, in light of the Authority's recommendation which shall be based on the feasibility study presented by the Concept Proposer.

The Authority shall notify the Concept Proposer of the Higher Committee's decision within five working days from the date of issuance



thereof. The Concept Proposer may submit a grievance before the Grievance Committee in case of rejection of its Concept.

The decision of the Higher Committee approving the Concept shall include particularly the following:

1. Determine the Concept Proposer, the type of the Concept, whether an Initiative or a Distinguished Project.
2. The proposed name for the project and the service provided therefrom.
3. Costs of the approved feasibility study.
4. The Public Entity.
5. The estimated cost of the project.
6. The rights of the Concept Proposer approved as per the circumstances and the preference granted to it – if any -, or the percentage of shares allocated to it in the Public Joint Stock Company, if any.

## **Article (55)**

### **PREPARATION OF THE FINAL FEASIBILITY STUDY**

Once the Concept Proposer is notified of the acceptance of its Concept, it shall commit to the following:

1. Submit a Final Feasibility Study for the project addressing all the technical, financial and environmental aspects as well as other aspects as may be requested by the Authority, in accordance with the nature of the project, the provisions of the Law and the Guidebook within a period of (6) six months extendable subject to the approval of the Authority.
2. Settle the fee due for the analysis of the Final Feasibility Study.
3. Present a request indicating the percentage of shares it wishes to own from the shares of the Public Joint Stock Company which shall be allocated to the Concept Proposer in a percentage not exceeding

(10%) of the shares of the company to be established for the implementation of the project if the cost of the project exceeds sixty million Kuwaiti Dinar, without prejudice to its right to fully or partially renounce such request within a period not exceeding one month from the date of publication of the announcement of project procurement for investment in the Official Gazette.

### **Article (56)**

#### **PREPARATION OF THE PROCUREMENT DOCUMENTS AND ASSURANCE OF CONFIDENTIALITY**

The Authority shall in collaboration with the Public Entity(ies) stated in the decision of the Higher Committee prepare the project procurement documents in accordance with the provisions of the Law, ensuring the non-disclosure of confidential technical, economic and financial information of the project submitted by the Concept Proposer and specifically the technical designs of the project and any technique proposed for the implementation thereof as well as any other confidential information.

The principle of confidentiality shall not hinder the procurement of the project in accordance with the principles of free competition, whereby during the preparation of the project documents all the sufficient data and information to prevent the project's monopoly by the Concept Proposer are provided, ensuring the competition thereon while being procured as per the standards of transparency and fairness.

### **Article (57)**

#### **THE INITIATIVE**

The approval by the Higher Committee of a feasibility study presented by a Concept Proposer and its consideration as an Initiative entails the granting of the following rights to its proposer:

1. The reimbursement of the costs of the feasibility study as approved by the Higher Committee's decision plus 20% of such cost or two hundred thousand Kuwaiti Dinars, whichever is less. Such amount shall be mentioned in the project procurement documents and shall be paid by the Project Company at Financial Close.
2. A preference of 5% granted to its proposal which meets the terms of the project's procurement documents over the value of the best proposal, unless the implementation of the project is to be undertaken through a Public Joint Stock Company.
3. The allocation of a percentage determined by the Higher Committee of the shares of the Public Joint Stock Company not exceeding 10% of the shares of the company at their nominal value in addition to the issuance fee, to be deducted from the percentage allocated to the Investor under Clause (2) of Article (13) of this Law, if the project is implemented through a Public Joint Stock Company. The Concept Proposer that is considered an Initiative shall initiate the subscription to the shares allocated to it within a period not exceeding (15) fifteen working days as of the day of its notification. If the Concept Proposer refrains from subscribing fully or partly, the provisions of the aforementioned clause shall apply, without prejudice to the Authority's right to confiscate the guarantee it has submitted.

## **Article (58)**

### **THE DISTINGUISHED PROJECT**

The Concept Proposer which Concept has been approved as a Distinguished Project shall have the right to be reimbursed only for the costs of the feasibility study, as per the decision of the Higher Committee, plus 10% of

its cost as approved by the Higher Committee or one hundred thousand Kuwaiti Dinars, whichever is less. Such amount shall be mentioned in the project's procurement documents and shall be paid by the Project Company at Financial Close.

## **Chapter Eight**

### **PROCEEDINGS FOR THE ESTABLISHMENT OF PROJECT COMPANIES**

#### **Article (59)**

##### **ESTABLISHMENT OF THE CONSORTIUM COMPANY**

The successful consortium that was awarded a PPP Project shall establish one or more consortium company(ies) in accordance with the laws of the State of Kuwait according to the needs and requirements of the project.

In case of establishment of a public joint stock company, the consortium company shall acquire the shares allocated to the Investor in the public joint stock company procured in accordance with the provisions of the Law and all the Successful Investor's rights and obligations shall be transferred thereto.

#### **Article (60)**

##### **ESTABLISHMENT OF A KUWAITI PUBLIC JOINT STOCK COMPANY**

The Successful Investor shall establish the Project Company for the PPP Project with a Total Cost not exceeding (60 m KWD) sixty million Kuwaiti Dinars.

Following the procurement of the project and the selection of the Successful Investor, the Authority undertakes the establishment of a public joint stock company for the PPP Project of a Total Cost exceeding (60 m

KWD) sixty million Kuwaiti Dinars, and shall notify the Ministry of Commerce and Industry of the commercial name chosen for the company, and determine the company's capital.

The shares of the company shall be distributed as follows:

1. A percentage of no less than six percent (6%) and no more than twenty-four percent (24%) shall be allocated to the Public Entities entitled to acquire shares.
2. A percentage of shares no less than twenty-six percent (26%) of the shares shall be allocated for subscription by the Successful Investor in accordance with the Law and the Executive Regulations, taking into account the percentages indicated under Article 20 of the Law allocated to any Initiative proposer.
3. Fifty percent (50%) shall be allocated for subscription through an initial public offering to living Kuwaitis listed in the Public Authority for Civil Information's register on the date of the invitation to settle the price of the shares in compliance with the provisions of the Law and its Executive Regulations.

## **Article (61)**

### **ESTABLISHMENT PROCEEDINGS**

The establishment of the public joint stock company and the consortium company – if any – shall be subject to the provisions of Decree Law No 25 of 2012 issuing the Companies Law and its amendments as well as applicable laws and the proceedings adopted by the Ministry of Commerce that do not contradict with the provisions of this Law.

## **Article (62)**

### **AUTHORITY'S SUBSCRIPTION METHOD**

The Authority shall communicate with the Public Entities that have shown interest in investing in the projects procured by the Authority, in order to determine the number of shares to which the Public Entities are willing to subscribe for from the shares allocated to Public Entities as per the Law and the Authority shall establish a public joint stock company for the implementation of the projects.

The Authority shall, in all the cases prescribed for under the Law for subscription on behalf of the Public Entities, subscribe to the shares allocated to such entities according to the percentages agreed under the memorandum of association and the shareholders agreement of the public joint stock company of the value of the shares as signed by the founders. The shares shall be registered under the name of the Authority with a note indicating their allocation to the Public Entity that requested their acquisition in accordance with the information memorandum when distributed as per the provisions of the Law.

The Authority shall ensure that the Successful Investor or the consortium company – as the case maybe – has settled the subscription value of the percentages allocated to it of the share prices it has been awarded in the public joint stock company allocated for Public Entities.

After the completion of the establishment proceedings, and the convening of the general assembly, and the preparation of the prospectus, the Authority shall subscribe on behalf of Kuwaitis in the percentage agreed upon in the memorandum of association and the shareholders agreement of the public joint stock company of the shares' value allocated to Kuwaitis. The Authority shall supervise the full contribution of the company's capital in accordance with the terms agreed in the memorandum and articles of association between the paid capital and the authorized capital.

### **Article (63)**

#### **TRANSFER OF SHARES**

Upon full operation of the project, the Authority shall ensure the full authorized capital contribution and shall evaluate it in accordance with the actual costs of establishment. The authorized capital of the public joint stock company may not be modified except with the prior approval of the Higher Committee based on the recommendation of the Authority, in anticipation of the invitation to the Public Entities and Kuwaitis for the settlement of the value of the their allocated shares.

In case of approval of the Higher Committee, the Authority shall undertake the following:

1. Invite the Public Entities and Kuwaitis on behalf of whom subscription was undertaken to settle the value of such subscription to the State, including the nominal value of the shares and the issuance fees, without any further amounts; the invitation shall be made in the Official Gazette and Kuwaiti media determined in the decision to issue the invitation. The invitation shall state the aggregate amount that shall be paid for each share as well as the place and the acceptable means for settlement and the final deadline for payment, provided that the settlement of the subscription value is made in a period not exceeding sixty days as of the first day of the month following the month in which the invitation for subscription was made.
2. The shares shall be transferred in the names of each of the Public Entities and Kuwaitis who settled the value of the shares allocated to them upon the settlement and receipt of such amounts in accordance with the aggregate price to be paid for each share, in the place of settlement and according to the specified settlement method and within the period prescribed in the invitation.

The Clearing Agency shall issue receipts indicating the ownership of shares in collaboration and coordination with the competent authorities.

Public Entities and Kuwaitis shall be deprived from their right to subscribe for shares for which they have not settled the value within the prescribed periods and according to the terms stated in the invitation.

#### **Article (64)**

#### **UNSETTLED SHARES**

The Authority shall offer the unsettled shares within the period prescribed by the previous Article, as well as the fractions of shares resulting from the distribution process, for sale at market value to Public Entities other than the Public Entities deprived from their subscription right in accordance with the previous Article or to the Investor or through an offering on the stock market, as the Authority deems appropriate. The surplus over the nominal value of the shares resulting from their sale shall be transferred to the State's public treasury.

If the shares could not be sold in accordance with the terms of the previous paragraph, then, such shares shall remain registered in the name of the Authority on behalf of the State until disposal thereof.

The Authority shall have all the shareholders' rights relating to the shares it has subscribed to whether during the establishment and until the transfer of such shares or thereafter for the shares for which the value has not been settled. The ownership and the subscription by the Authority to the shares of the company or its management on behalf of third-parties shall not lead to considering the assets of the company as public assets in accordance with Law No 1 of 1993 regarding the protection of public assets.

### **Chapter Nine**

#### **AGREEMENTS COMING TO TERM**

#### **Article (65)**



The Authority shall in collaboration with the relevant Public Entity, within an appropriate period of no less than two years prior to the expiry of the Investment Term, evaluate the project in order to determine the consideration for the State or the Investor, as of the circumstances, and to this end, it may seek support of whoever it deems appropriate for this purpose including local or foreign consultancy firms in order to prepare a comprehensive study of the project and its procurement documents, and it shall present its recommendations in this regards to the Higher Committee.

#### **Article (66)**

The Higher Committee shall issue a decision for the re-procurement of the project in light of the recommendations presented by the Authority during the last year of the Investment Term. The Higher Committee may decide to allow the Public Entity to directly manage or manage and develop the project or to terminate its activity.

#### **Article (67)**

The Higher Committee shall mandate the Authority in collaboration with the relevant Public Entity to procure the management or the management and the development of projects one year prior to their transfer to the State through competition according to the nature of the project. The Higher Committee shall issue all the decisions necessary with regards to the proceedings for the procurement of the project.

#### **Article (68)**

Upon the expiry of the term of PPP Agreements, the projects shall be re-procured and awarded in accordance with the provisions of these Executive Regulations.

### **Article (69)**

The Investor, whose agreement has expired, will benefit from an awarding preference if it participates in the competition for the award of the project, in accordance with the following percentages schedule:

The type of Investor whose agreement has expired	Percentage
Projects that do not require the establishment of a public joint stock company	5% of the best proposal
Projects that require the establishment of a joint stock company	10% of the best proposal

## **Chapter Ten**

### **GRIEVANCES AND COMPLAINTS REVIEW PROCEEDINGS**

#### **Article (70)**

The Grievance Committee established through a Council of Ministers decision in accordance with Article 32 of the Law shall review all complaints and grievances submitted by concerned persons with regards to any proceeding or decision issued in violation of the provisions of the Law and its Executive Regulations.

The complaint or grievance shall be submitted to the committee within (15) fifteen days after the notification to the concerned person or after the concerned person became aware of such decision.

The committee shall have a secretary in charge of receiving complaints and grievances submitted to the committee and of preparing registers to record all such complaints and grievances along with associated memoranda, documents and files. The secretary shall also record the minutes of meetings of the committee, he shall follow-up on the implementation of the decisions issued by the committee and shall undertake all other actions and tasks as may be requested by the committee.

The secretary shall record the complaint or grievance immediately upon receipt thereof in a register prepared for that purpose and he shall submit the same to the president of the Grievance Committee within a period not exceeding the end of the next working day following the date of receipt of the complaint or the grievance, and he shall, within that same period, notify the Higher Committee or the Authority of the submission of the complaint or grievance.

The secretary shall stamp a copy of the complaint or grievance with a stamp indicating the date of submission thereof and shall provide its applicant with a proof of receipt thereof.

### **Article (71)**

The register provided for under the preceding Article could be an electronic register, in which case it shall abide by the requirements provided for under Article (20) of the Law No 20 of 2014 regarding electronic transactions. The notification of the Higher Committee and the Authority of the submission of a complaint or grievance might also be made through electronic mail or facsimile, in which case the notification shall be delivered to the Higher Committee and the Authority's electronic mail address and fax.

### **Article (72)**

The complaint or grievance shall be submitted in writing, and shall include the following:

1. The name of the complainant or the grievant, his capacity, his profession and full address including his civil number or commercial registration number for companies, telephone, fax and electronic mail address.
2. The complaint or grievance substance along with the supporting documents.
3. Date of issuance of the decision object of the grievance or complaint, and the date of its notification to the grievant or when the grievant became aware of such decision.
4. The signature of the complainant or the grievant or his legal representative placed on the complaint or the grievance.
5. Date of submission of the complaint or grievance.
6. Name of the person against whom the grievance or complaint has been submitted and his full address including his phone number, fax and electronic mail address.

### **Article (73)**

The Grievance Committee shall convene, when necessary, at the invitation of its president who shall preside at its meetings. The quorum for the committee's meetings shall be at least four of its members provided the president or the vice-president is present. Members with unexcused absence for two consecutive meetings shall be automatically considered to have resigned from their duties.

### **Article (74)**

The Grievance Committee shall review the complaints or the grievances submitted to it, it may request from concerned persons clarifications and documents it deems necessary, and it may also seek support of specialized

persons as it deems necessary in order to provide it with a professional opinion that is material for deciding on the merit of the complaint or the grievance.

Decisions and orders of the committee are to be issued upon a majority of votes of the attending members of the committee. In case of equal votes, the side comprising the president of the committee shall prevail. The deliberations of the committee shall be confidential.

#### **Article (75)**

The Grievance Committee shall issue a justified recommendation with regards to complaints or a justified decision for the settlement of grievances within a maximum period of fifteen working days starting as of the date of submission of the complaint or grievance.

The committee's secretary shall notify the Authority, the Higher Committee and the complainant or the grievant with the recommendation or the decision of the Grievance Committee with regards to the complaint or the grievance as per the circumstances, within a maximum period of three working days as of the date of issuance of the recommendation or the decision. The secretary shall also follow-up on the implementation of the decisions and recommendations issued by the Authority.

#### **Article (76)**

The Higher Committee may undertake whatever it deems appropriate with regards to the Grievance Committee's recommendations or decisions in connection with complaints and grievances. The Higher Committee's decisions made in this regards shall be considered final.