



POLICY NOTE

ANTI-COMPETITIVE CONCERNS RAISED AS A CONSEQUENCE OF AMENDMENT MADE TO SECTION 28 OF KHYBER PAKHTUNKHWA PUBLIC PRIVATE PARTNERSHIP ACT, 2014

1. The Competition Commission of Pakistan (the ‘**Commission**’) is mandated under the Competition Act, 2010 (the ‘**Act**’) to ensure free and fair competition in all spheres of commercial and economic activity. Under clause (b) of Section 29 of the Act the Commission is empowered to review policy frameworks for fostering competition and to make recommendations for amendments to laws or policies that affect competition in the country.
2. Keeping in view the aforesaid mandate of the Commission, it has been observed that the amendment made by the Government of Khyber Pakhtunkhwa (the ‘**GoKP**’) in Section 28 of the Khyber Pakhtunkhwa Public Private Partnership Act, 2014 (the ‘**KP PPP Act**’), i.e., Section 28A (the ‘**Amendment**’) on April 14, 2017, raised serious competition concerns in the province of Khyber Pakhtunkhwa (the ‘**KP**’) with reference to award of infrastructural and developmental project contracts.¹ The Amendment gives substantial exemptions to the KP Government by allowing it direct award of contracts in certain unjustified cases for projects undertaken by the GoKP under the Public Private Partnership (PPP) mode.
3. Owing to its anti-competitive nature, the Commission, through issuance of this policy note, recommends an amendment in Section 28A of the KP PPP Act, to create a level playing field in the said sector in the KP province.

¹ <http://www.pakp.gov.pk/2013/acts/the-khyber-pakhtunkhwa-public-private-partnership-amendment-act2017/>

BACKGROUND

4. It has been noticed that an amendment had been made to Section 28 of the KP PPP Act by the GoKP. The KP PPP Act has been enacted by the KP Government on April 02, 2014, “to provide for the participation of the private sector in the financing, construction, development, operation, or maintenance of infrastructure or development Projects or other related services of the Government through Concession Contracts in Public Private Partnership mode and the establishment of institutions to regulate, monitor and supervise the implementation of Public Private Partnership contracts.”² It is pertinent to note that the scope of the KP PPP Act extends specifically to the province of KP.
5. It was further observed that the Amendment had the potential to significantly disrupt the process of fair competition in KP, particularly with respect to contracts awarded for execution of infrastructural and developmental projects under the PPP mode. The said amendment is reproduced below:

“Insertion of Section 28A to the Khyber Pakhtunkhwa Act No. XX of 2014

(1) In the said Act, after section 28, the following new section shall be inserted (both inclusive) and section 29 shall not apply to-

a. Projects that are undertaken in Public Private Partnership mode but where the concessionaire is an entity, agency, corporation, company a consortium or other body or institution owned or controlled by the Federal Government of Provincial Government;

b. Projects where the Concessionaire is a person wherein the majority shareholder therein is state owned enterprise, entity, agency, corporation or company, owned’ or controlled directly or indirectly by a foreign state; and

c. Projects undertaken in result of international obligation, commitment or arrangement of the Government arising out of an international agreement or arrangement with a foreign state or states, or any international multilateral financial institution or a person.

(2) Provisions relating to competition, advertisement, and response time so provided in Public Procurement Rules shall not apply to the projects undertaken under this section.”

6. Section 28 and Section 29 of the KP PPP Act fall under Chapter – V of the said Act which deals with “NEGOTIATION OF CONCESSION CONTRACTS WITHOUT COMPETITIVE PROCEDURES”, i.e., it establishes the circumstances under which the Contracting

² <http://www.pakp.gov.pk/2013/acts/the-khyber-pakhtunkhwa-public-private-partnership-act2014/>

Authority is permitted to award projects, that have been assumed under the PPP mode, directly to undertakings, without being obligated to follow the process of competitive bidding. Where Sections 16 to 27 of CHAPTER - IV (*SELECTION OF THE CONCESSIONAIRE*) of the KP PPP Act, primarily set forth the procedures through which contracts are to be awarded to Concessionaires under the PPP mode while ensuring fair competition between firms.

7. In conclusion, for infrastructural and developmental projects to be funded and executed through the PPP mode, the Amendment suspends the requirement of competitive bidding in the following cases:
 - i. If the Concessionaire is predominantly a state (domestic and foreign) owned enterprise; and/or
 - ii. If the project under consideration is a consequence of international agreements/commitments with foreign state(s), international financial institution(s) or person(s).

ISSUE

8. This policy note aims to establish whether the Amendment, by allowing direct award of contracts in the abovementioned conditions to certain entities, disrupts the level playing field and gives an undue advantage to certain entities, which in principle hampers the competition within the relevant market of infrastructural and developmental projects sector in the in KP.

COMPETITION CONCERN

9. The demand for infrastructure and development projects is generated by the local, provincial and federal governments in accordance with their relevant development policies. Owing to the growing pressure on its budget, the Government of Pakistan has adopted an innovative approach to finance these projects. In pursuit of this strategy, the Government of Pakistan formulated the PPP policy framework in 2010 which was aimed at facilitating private investment in government initiated/owned projects.³ This policy, therefore, resulted in execution of public sector projects through PPP mode.
10. However, the 18th Amendment made to the Constitution of the Islamic Republic of Pakistan in 2010 empowered the provincial governments to execute and administer this policy at provincial level. Therefore, the KP PPP Act was promulgated by the GoKP in 2014, to provide for participation by the private sector in provision of public infrastructure projects

³ http://www.ipdf.gov.pk/prod_img/PPP%20Policy%20FINAL%2014-May-2010.pdf

and related services, aimed at social uplifting, in a nondiscriminatory, competitive and transparent manner.

11. As mentioned earlier, Section 28 of the KP PPP Act sanctions direct award of contracts under certain circumstances, specified therein, to maintain flexibility in the said Act and allow for prompt responsiveness in a crisis situation. Nonetheless, the KP PPP Act through Section 29 also gives clear directions pertinent to the ensuing procedures in case Section 28 is evoked. Consequently, even in presence of CHAPTER V of the KP PPP Act, which gives flexibility to the said Act and is necessary to allow effective and appropriate responsiveness to a crisis, the process of competitive bidding is still upheld under regular circumstances as the said chapter comes into force only under clearly defined exceptional situations, which maintains a level playing field for the prospective participants, private as well as state owned entities, in the relevant market.
12. However, the clauses added to Section 28 of the KP PPP Act through the Amendment is capable of distorting the competition considerably. The competitive market environment is disrupted vide Section 28A(a) and (b) when the Contracting Authorities are granted exemptions from following the procedures laid down in CHAPTER IV of the KP PPP Act. These additional clauses authorize them to give preferential treatment to state (domestic and foreign) owned enterprises through direct award of contracts in PPP projects, thus, giving them an undue advantage over the private firms.
13. Furthermore, due to Section 28A(c), the competitors in the sector are further confronted with discrimination when such projects are being executed under agreements and/or commitments with foreign state(s) and person(s) or are funded by international donor institutions. In such cases, the Contracting Authority, once again, has the authority to award contracts to a Concessionaire (private or state owned/domestic or foreign) of its choice without the compulsion of following the process of competitive bidding.
14. In addition, in the event of the China Pakistan Economic Corridor (the ‘CPEC’), these provisions have further elevated the magnitude of the adverse impact. It should be noted that CPEC has led to initiation of numerous high valued infrastructural and developmental projects in Pakistan, including KP, which would significantly impact the overall dynamics of this sector. Since CPEC projects are a result of agreements signed with the Chinese Government, the Amendment has the ability to make the market further anti-competitive. As the Amendment allows direct award of contracts in case of projects arising out of international agreements such as the CPEC Agreement, this clause can be misused without difficulty. As a result, the high valued projects initiated under the CPEC umbrella can be directly awarded to firms favored by the Contracting Authorities and consequently due to the disruption in level playing field competition shall be hampered.

15. In this reference, it is imperative to note that the foundation of the KP PPP Act is based on adopting evolving strategies to cater for the increasing demand of infrastructural and developmental projects in the country so that sustainable social and economic development may be guaranteed. Whereby KP PPP Act was enacted to facilitate this objective by encouraging participation of the private sector in public sector projects. This was done to lower fiscal burden on limited resources of the Government and to simultaneously strengthen and enhance the capacity of the private sector in the relevant market. Whereas the Amendment defeats the basic purpose of the said Act.
16. Therefore, the Commission is of the view that the Amendment to the KP PPP Act is discriminatory in nature; creates significant barriers to entry for the private sector through Section 28A(a) and (b) of the KP PPP Act; metes out unjustified advantage to favored firms of the Contracting Authorities vide Section 28A(c) of the KP PPP Act, and is highly anti-competitive in principle.

RECOMMENDATIONS

17. In view of the foregoing, and pursuant to its mandate, the Commission recommends that the Amendment may be repealed by the GoKP and a fair and competitive environment is reinstated in the relevant sector in the province of KP. Furthermore, this issue requires a prompt response from the GoKP to enable legitimate integration of the private sector in delivery of the forthcoming (high valued) projects under the CPEC umbrella based on the principles of fair competition without any further delay.

Islamabad the 29th November 2018