

**KHYBER PAKHTUNKHWA**

Published by Authority

PESHAWAR, WEDNESDAY, 25th MAY, 2022.**GOVERNMENT OF THE KHYBER PAKHTUNKHWA**
FINANCE DEPARTMENT**NOTIFICATION**Dated Peshawar, the 15th February, 2022.

No20/VG/FD/2022 —In exercise of powers conferred by section 30 of the Khyber Pakhtunkhwa Public Private Partnership Act, 2020 (Khyber Pakhtunkhwa Act No. XLII of 2020), read with section 22 thereof, the Government of Khyber Pakhtunkhwa is pleased to make the following rules, namely:

THE KHYBER PAKHTUNKHWA PUBLIC PRIVATE PARTNERSHIP
(VIABILITY GAP FUND) RULES, 2022.**Chapter-I****Preliminary**

1. Short title and commencement.—(1) These rules may be called the Khyber Pakhtunkhwa Public Private Partnership (Viability Gap Fund) Rules, 2022.

(2) These rules shall come into force at once.

2. Definitions.—(1) In these rules, unless there is anything repugnant in the subject or context,-

- (a) “**Act**” means the Khyber Pakhtunkhwa Public Private Partnership Act, 2020 (Khyber Pakhtunkhwa Act No. XLII of 2020);
- (b) “**annual report**” means a monitoring report, submitted by Risk Management Unit, to the Committee in due compliance with sub-rule (4) of rule 6 of these rules;
- (c) “**availability payments**” mean compensation, paid to the

- (d) Private Partner, for making an asset or a segment of asset, available for use as agreed with the Contracting Authority in the Public Private Partnership Agreement;
- (e) “**capital grant**” means a sum of money, paid to the Private Partner, during the construction of a Project;
- (f) “**commercial loan**” means a loan, given on prevailing lending rate, on such commercial terms, as can be obtained from the market;
- (g) “**commercial operations date**” means the date, agreed between the parties in the Public Private Partnership Agreement, on which the Project becomes available for users;
- (h) “**concession period**” means the term for which the Public Private Partnership Agreement of a Project is valid;
- (i) “**concessional loan**” means a loan, given on lower interest rates, than can be obtained from the market and repayment thereof, which can be deferred or be made income-contingent;
- (j) “**equity**” means monetary contribution, made in exchange for shares, representing ownership in the company, running the Project;
- (k) “**Form**” means Viability Gap Fund Proposal Form, appended to these rules;
- (l) “**scheduled bank**” means a bank, having paid-up capital and reserves of rupees five hundred (500) million or more and declared to be a scheduled bank, under clause (a) of sub-section (2) of section 37 of the State Bank of Pakistan Act, 1956 (Act No. XXXIII of 1956);
- (m) “**subsidy during operational period**” means the grants, during the effective period of Public Private Partnership Agreement, to meet or reduce the effective cost of operations, borne by the Private Partner; and
- (n) “**volume-based payments**” mean payments, made to Private Partner by the Contracting Authority, based on the number of users of the infrastructure or service.

(2) Words and expressions, used but not defined in these rules, shall have the same meanings as are assigned to them in the Act.

Chapter-II**Procedure for Establishing, Replenishing and Disbursing Viability Gap Fund**

3. Establishment.---(1) For the purposes of the Act, there shall be a fund to be known as the Viability Gap Fund, which shall consist of-

- (a) monies as may be provided by Government from time to time;
- (b) grants or other allocations from Federal Government;
- (c) donation or grants from international financial institutions, development financial institutions or any other development partner; and
- (d) monies from other sources.

(2) The Risk Management Unit shall maintain a designated account in a scheduled bank, wherein the monies, injected in the Viability Gap Fund, shall be kept and disbursed upon withdrawal request, made in the manner, specified by Risk Management Unit.

4. Replenishment.---(1) The replenishment of Viability Gap Fund may be carried out by creating a provision for the same in the annual budgetary allocation of Government. The budgetary allocation and replenishment of funds shall be such as may be specified.

(2) The recommendation, with regard to the annual allocation in the Viability Gap Fund account, shall be made by the Risk Management Unit, based on the forecast of the amount that shall be required to support Projects, in the pipeline. The Risk Management Unit shall co-ordinate with the PPP Unit in determining the forecast of Projects in the pipeline and the estimated fund allocations for forecast period.

(3) The amount, allocated in the Viability Gap Fund account, if not planned for disbursement, may be invested by Risk Management Unit, under such investment policy, as may be specified. The profit from the investment shall be routed to Viability Gap Fund account.

(4) The Viability Gap Fund may also be replenished by means of revenue from proceeds of the Project, share of dividends and sale proceed from the Viability Gap Fund equity stake of Projects, principal and interest, received from commercial and concessional loans, grants provided by the Federal Government, Government or multilaterals or foreign donors.

5. Disbursement mechanism.---(1) Release of committed funding from Viability Gap Fund shall be made only after submission of satisfactory progress reports in such form and manner as specified by the Contracting Authority and set out in the Public Private Partnership Agreement.

(2) On fulfillment of provision, set out in the Public Private Partnership Agreement or the Viability Gap Fund Agreement, the Private Partner shall submit a request for Viability Gap Fund disbursement to the Project Implementation Unit, with a copy to the Risk Management Unit. On receipt of the Viability Gap Fund disbursement request the Project Implementation Unit shall disburse the funds in line with provisions and terms and conditions, set out in the Public Private Partnership Agreement.

(3) The Risk Management Unit shall be responsible to verify that the conditions, required to be met to allow disbursement of Viability Gap Fund, are met and the amount, requested for a particular phase of the Project, is not more than that agreed in the Public Private Partnership Agreement.

(4) Subject to the terms and conditions of the Public Private Partnership Agreement or the Viability Gap Fund Agreement, the Risk Management Unit may transfer up to eighteen (18) months of future Viability Gap Fund disbursement amounts for a Project to an escrow account, set up for one or more Projects and the funds shall be held therein until the request for disbursement has been made by the Private Partner and duly processed by the Risk Management Unit.

(5) Capital grant Viability Gap Fund shall only be disbursed once the Private Partner has spent a pro rata amount of the equity contribution, it has committed in relation to the Viability Gap Fund amount. The grant may be released before, alongside or after the amount, committed by commercial lender or a consortium of commercial lenders, as agreed during the negotiations.

(6) Commercial loan Viability Gap Fund shall only be disbursed on a pro rata basis with amounts committed, by other commercial lenders or after such amounts by commercial lenders have been disbursed.

(7) Equity contribution Viability Gap Fund, in the form of funds, shall only be disbursed on a pro rata basis with equity contribution committed by the Private Partner.

6. Monitoring---(1) The Contracting Authority shall ensure effective and transparent utilization of Viability Gap Fund by detailing the achievement of milestones vis-à-vis release of Viability Gap Fund amount. The same shall be detailed in the quarterly reports, submitted to the PPP Unit as mandated under clause (1) of sub-section (3) of section 7 of the Act.

(2) Risk Management Unit shall be required to submit quarterly reports on each Project that is provided financing through Viability Gap Fund, to the Committee. The report shall highlight the update on direct liabilities and a lesson learnt from contingent liabilities that may have arisen during the course of the Project.

(3) The Risk Management Unit may advise the Contracting Authority to provide regular updated reports on the Project, including information about its

implementation process and compliance with performance requirements in line with Public Private Partnership Agreement.

(4) The Risk Management Unit shall submit an annual report in relation to the Viability Gap Fund funding to the Committee through PPP Unit. Without prejudice to the generality of the aforesaid, the annual report shall comprise the following:

- (a) total amount of Viability Gap Fund;
- (b) injection of new funds;
- (c) the amount of return realized from investing the Viability Gap Fund;
- (d) release and utilization of Viability Gap Fund;
- (e) comparison of forecasted and actual requirement of Viability Gap Fund;
- (f) breakup of funding for Viability Gap Fund solicited, released and status thereof; and,
- (g) such other details that are expedient to track transparency of the disbursement and efficiency of Viability Gap Fund utilization.

Chapter-III
Types of Viability Gap Fund

7. **Types of Viability Gap Fund.**--- The Viability Gap Fund shall have the following types, namely:

- (a) capital grant;
- (b) subsidy during operations period;
- (c) concessional loan;
- (d) commercial loan; and
- (e) equity.

8. **Capital grant.**---(1) The Committee, subject to receipt of recommendation from Risk Management Unit, may approve Viability Gap Fund in the form of capital grant.

(2) The capital grant may be provided from the date of financial close up to the first year of commercial operations date.

9. Subsidy during operations period.---(1)The Committee may subsidize Projects by providing operational grants to such Projects that are not expected to generate sufficient revenues, within the concession period, or to support Government policy decisions to support the availability of public services at affordable rates.

(2) The operational grant may be provided over the operational period after commercial operations date in the form of availability payments, volume-based payments or other similar payment arrangements, as the Contracting Authority may deem appropriate and may be applied generically or to an identified segment of users.

10. Concessional loan.---(1)The Committee may utilize the Viability Gap Fund to provide loans on concessional terms and conditions with a view to reduce the financing cost, thereby increasing affordability of the envisioned service for the public or enhancing the commercial viability of the Project.

(2) The Risk Management Unit shall recommend terms and conditions of debt financing on concessional basis with interest rates, based on, *inter alia*, the affordability and value for money considerations.

11. Commercial loan.---(1) The Committee may apply the Viability Gap Fund to provide loans on commercial terms and conditions in circumstances when commercial loan is unavailable from the market to fully meet the financing requirements of the Project.

(2) The Risk Management Unit shall recommend terms and conditions of debt financing on commercial basis with interest rates, based on, *inter alia*, the risk profiling of the Project.

12. Equity.---(1)The Contracting Authority may propose injection of equity in order to form a joint venture with the Private Partner.

(2) The justification for providing the equity contribution shall be conclusively stated by the Contracting Authority and shall be approved by the Committee, upon receiving recommendation in favor of Contracting Authority's request by the Risk Management Unit.

13. Supplemented Viability Gap Fund.---Two or more types of Viability Gap Fund, prescribed in these rules, may be extended to the Private Partner.

14. Limit on Viability Gap Fund.---(1) The Viability Gap Fund amount in terms of capital grant, operational subsidy or as a combination of both shall be capped at forty percent (40%) of the total capital cost, including capitalized interest of the Project, as estimated by the Contracting Authority, unless it is a Project in education, health, home, water, waste management, population welfare, wastewater and sanitation sector or such other sector as may be approved by the Committee in which case the grant shall be capped at sixty percent (60%).

(2) Notwithstanding anything contained in sub-rule (1) of this rule, Government may allow a Viability Gap Fund, amount in excess of the afore-stated limits for a Project, upon receipt of such request from the Contracting Authority. The Contracting Authority, as part of such request, shall submit a justification to the effect that how injecting the solicited amount of Viability Gap Fund, does not undermine value for money proposition.

Chapter-IV
Criteria for Viability Gap Fund

15. Applicability.— The Viability Gap Fund shall be provided to support such Projects that are being carried out under the Act. However, in the event that the Viability Gap Fund support has to be extended to an entity whose services are procured under section 19 of the Act, prior approval from Government shall be required.

16. Viability Gap Fund as Government's proposition.— The Contracting Authority, after receiving concurrence from PPP Unit and Risk Management Unit,

may reveal the amount of Viability Gap Fund, offered for a Project in the Request for Proposal or may declare it a bid evaluation parameter.

17. Rationale for soliciting Viability Gap Fund.—(1) The relevant Contracting Authority, while submitting a request for funds from the Viability Gap Fund to the Committee for a Project, shall make an express statement regarding the rationale for Viability Gap Fund request, and clarification as to why increasing the Project term, or user fee is not a possible option to reduce or eliminate the requirement for the Viability Gap Fund.

(2) Request for Viability Gap Fund shall also make a conclusive statement regarding the value for money of the Project in the PPP mode. The request shall also mention appropriate transaction structure to achieve value for money.

18. Procedure for approval of Viability Gap Fund for a Project.—(1) The process to seek approval of Viability Gap Fund for a Project shall be initiated by the concerned Contracting Authority. The Contracting Authority shall submit a duly completed Form along with feasibility report of the Project attaching applicable supporting documents to the Committee through PPP Unit, with a copy of the application to the Risk Management Unit.

(2) The concerned Contracting Authority shall review the feasibility study of solicited Projects or the unsolicited proposals before making an application for Viability Gap Fund to determine whether to take a Project forward and consider the need for Viability Gap Fund and the potential type of Viability Gap Fund that may be required.

(3) The Contracting Authority may appoint transaction advisors or consultants to support its assessment of Viability Gap Fund requirement for a Project. In relation to

unsolicited proposals, the Contracting Authority may seek submission of additional information and clarification to verify the need for Viability Gap Fund.

(4) The Risk Management Unit shall liaise with the PPP Unit to take into account any comments and may seek further clarifications from the Contracting Authority in completing their review of the application for Viability Gap Fund. Once the review process has been completed the Risk Management Unit may endorse, reject or ask a resubmission of the application.

(5) Once the PPP Unit has received the concurrence of the Risk Management Unit, it shall table the proposal of Viability Gap Fund for approval by

the PPP Committee. Where the Risk Management Unit has rejected the submission or asked resubmission of the application from the Viability Gap Fund with additional information, the PPP Unit shall inform the Contracting Authority accordingly.

FORM
[see rules 2(1)(j) and 18(1)]
Viability Gap Fund Proposal

1. General Information	
Project Title	
Contracting Authority	
Project Objectives: (Clarify the benefits that will be delivered through the project)	
Description of Project: (Clarify the infrastructure assets that will be built, enhanced and/or modernized, the operational services that will be delivered.)	
Project Location	
PPP delivery model: (Describe the type of PPP arrangement that is being considered.)	
Term of the PPP Project (mention clearly the indicative construction phase and O&M phase)	

Estimated lifetime of the asset	
Means of Project revenue (user fees/ availability payments/ mixed revenue). Mention proportion of revenue in case of mixed revenue	
2. Request for Viability Gap Fund as capital funding	
Requested Viability Gap Fund amount as capital grant	
Total estimated capital cost of the project (including break up of costs in relation to major heads of expenditure; detailed breakdown to be attached as Annexure - B)	
Break up of capital Viability Gap Fund amount (clearly mention the percentage of total Viability Gap Fund requested in terms of grant, concessional loan, commercial loan, or equity share)	Grant amount:
	Concessional/ Regular loan amount:
	Equity amount:
Suggested milestone for Viability Gap Fund disbursement as capital grant (attach a Gantt chart herewith as Annexure-C)	
3. Request for Viability Gap Fund as operational subsidy	
Total amount of operational subsidy requested for a Project	
Estimated amount of annual operational expenses and the loan repayments (insert figures for Years 5 and 10 of operation; detailed annual breakdown over the project term to be provided as Annexure - D)	
Type of operational payment (availability-based volume of use-based, etc.)	
Indicative payment schedule (state milestones and amount of payments against the same)	

<p>Confirm whether the Viability Gap Fund amount be fixed for the project or if it will be included as a financial evaluation criteria to be fixed as part of the procurement process.</p>	
<p>4. Application Request</p>	
<p>Is the project being carried out under Khyber Pakhtunkhwa Public Private Partnership Act, 2020?</p>	<p>(Yes/ No)</p>
<p>Has the project been approved under the procedures set out in the Khyber Pakhtunkhwa Public Private Partnership Act, 2020? (if yes, please attach a copy of the approval as Annexure - E</p>	<p>(Yes/ No)</p>
<p>Has the feasibility study for the Project under consideration been conducted? (If yes, indicate completion date of the feasibility study report and attach a copy of the report as Annexure – F)</p>	<p>(Yes/ No)</p>
<p>Has a Financial Model been completed for the Project? (If yes, attach the Financial Model as Annexure – G)</p>	
<p>Is Viability Gap Fund support recommended in the Feasibility Study or any other project related report? If yes, summarize the reasons for the Viability Gap Fund request set out in the report. Explain the recommended amount and break up thereof (break up would suggest the amount of grant, loan, equity share, operational subsidy recommended).</p>	<p>Rationale for VGF:</p>
	<p>Grant amount:</p>
	<p>Loan amount:</p>
	<p>Suggested loan mark-up:</p>
	<p>Equity share:</p>
	<p>Operational subsidy:</p>

Clarify why increasing the user fee is not an option to reduce or eliminate the requirement for Viability Gap Fund? Please provide the justification for the response, including if there are regulatory restrictions that limit the increase of user fees; and attach copies of relevant supporting documents, including reference to relevant statutes as Annexure H.	
Clarify why increasing the increasing the Project term is not an option to reduce or eliminate the requirement for Viability Gap Fund? Please provide the justification for the response; attach copies of relevant supporting documents as Annexure I	
Has any other form of Government support been solicited in addition to Viability Gap Fund?	

Name of applicant:

Designation:

Department:

Signature:

**Secretary
Government of the Khyber Pakhtunkhwa
Finance Department**