

Private Financing in Build and Operate of Infrastructures Rules, 2064 (2007)

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In exercise of the powers conferred by Section 49 of the Private Financing in Build and Operate of Infrastructures Act, 2063 (2007), the Government of Nepal has framed the following rules.

Chapter-1

Preliminary

1. **Short title and commencement:** (1) These Rules may be called as the "Private Financing in Build and Operate of Infrastructures Rules, 2064 (2007)".
(2) These Rules shall come into force immediately.
2. **Definitions:** Unless the subject or the context otherwise requires, in These Rules,
 - (a) "Act" means Private Financing in Build and Operate of Infrastructures Act, 2063 (2006).
 - (b) "Evaluation committee" means the letter of intent and proposal evaluation committee formed pursuant to Rule 24.

Chapter-2

Provisions relating to project approval

3. **To maintain updated details of project:** (1) The Ministry shall, on suggestion of the Committee, maintain updated details of the projects to be implemented pursuant to Section 3 of the Act.
(2) While updating the details pursuant to Sub-rule (1), the Ministry shall also specify the priority of projects, as per necessity.

4. **Approval of project:** If the Ministry thinks it proper to implement any project, it has to make a submission, setting out the following details, to the Government of Nepal for approval.
- (a) Name of the project,
 - (b) Matter as to in which of the modes mentioned in Section 3 of the Act the project is to be implemented,
 - (c) Whether the project is included in the approved policy, annual programme of the Government of Nepal or the running Five-year Plan or not,
 - (d) Whether the project can be implemented by the Government of Nepal or not; and if it cannot be so implemented, the reasons therefor,
 - (e) Grounds showing the feasibility and propriety of implementation of the project with private financing,
 - (f) Whether any kind of assistance has been sought from a donor agency for the implementation of the project or not; and if such assistance has been sought, whether such assistance will be received or not,
 - (g) Whether the project has been surveyed or not; and if it has been surveyed, estimated cost thereof,
 - (h) If any project already built or in running condition is to be implemented with private financing, the running condition of that project,
 - (i) If more than one project of the same nature are to be implemented, priority of such projects,
 - (j) Other necessary matters.
5. **To approve project:** (1) If it appears feasible and proper to have the project, received pursuant to Rule 4, implemented with private financing,

Government of Nepal may approve such project for implementation with private financing.

(2) If, while making approval pursuant to Sub-rule (1), it appears proper to implement more than one project of the same nature under any Ministry, Government of Nepal shall also specify the priority of those projects.

(3) Prior to approving the project pursuant to Sub-rule (1) for implementation, Government of Nepal may, if it so thinks necessary, enquire the Ministry about additional matters pertaining to the project.

(4) If it appears necessary to study additional matters pertaining to any project, Government of Nepal shall to write the same to the concerned Ministry.

(5) If the project is approved by the Government of Nepal pursuant to Sub-rule (1), the Ministry has to publish a notice thereof in at least Two leading newspapers to be published in Nepal, for information to the general public, and such a notice shall also to be put in the website, to the extent possible.

Chapter-3

Provisions relating to letter of intent and proposal

6. Preparation of document relating to letter of intent and proposal:

Prior to making invitation for the letter of intent and proposal, the Ministry shall prepare the documents on the following matters:

- (a) Details of the project,
- (b) Concept on the minimum design of the project, operational standards and specifications,
- (c) If the survey of, or any other kind of study of, the project has been carried out, short details thereof,

- (d) Detailed grounds for the evaluation of the letters of intent and proposals,
- (e) Instructions to be given to the person submitting the letter of intent and proposal,
- (f) Main terms of the agreement to be concluded with the proponent for the implementation of the project,
- (g) Other necessary matters.

7. **To invite letter of intent:** For the implementation of the project approved pursuant to Rule 5, the Ministry has to invite a letter of intent by publishing a notice, setting out the following matters, in a leading newspaper in Nepal, and such notice shall also be published in the website and a leading newspaper to be published outside Nepal, to the extent possible.

- (a) Short details of the project,
- (b) Matter as to in which of the modes mentioned in Section 3 of the Act the project is to be implemented,
- (c) Qualifications of the person who can submit the letter of intent,
- (d) The Ministry where the documents on the letter of intent may be purchased from and the fees therefor,
- (e) The manner, place, deadline and time for the submission of the letter of intent,
- (f) The date, time and place for the opening of the letter of intent,
- (g) The grounds for selecting the letter of intent,
- (h) The date for making decision on the letter of intent,
- (i) Other necessary matters.

8. **Letter of intent documents purchase fee:** A fees of Twenty Thousand Rupees shall be charged as for the purchase of the letter of intent documents.

9. **To submit the letter of intent:** (1) A person who intends to submit the letter of intent has to purchase the letter of intent documents bearing the seal of the Ministry and the signature of the concerned official and submit to the Ministry a sealed letter of intent, with being filled up therein the details as mentioned in the documents, and also setting out, *inter alia*, the matters mentioned in Sub-section (2) of Section 4 of the Act.

(2) If the letter of intent is received pursuant to Sub-rule (1), the Ministry shall register the letter of intent and give a receipt thereof to the person submitting the letter of intent.

10. **Selection of persons submitting letters of intent:** (1) While selecting the person submitting the letter of intent by the Ministry, selection shall be made on the grounds of the technical and financial capacity and experience of such person. For that purpose, a total of 100 marks shall be taken as the full marks, which shall be divided on the following basis:

- (a) For the technical capacity 40 marks
- (b) For the financial capacity 40 marks
- (c) For the experience 20 marks

(2) The technical and financial capacity and the experience as referred to in Sub-rule (1) shall be evaluated as follows:

- (a) While evaluating the technical capacity of the person submitting the letter of intent, if any machine, equipment or human resource is required for the implementation of that project, on the grounds whether or not that person has such machine, equipment or manpower,
- (b) While evaluating the financial capacity of the person submitting the letter of intent, on the grounds of such financial capacity of that person as required for the

survey, operation and repair and maintenance of the project, and in the case of the person submitting the letter of intent being a company, on the grounds as to how much amount is proposed to be chargeable in the assets of the company for the project or where a loan is to be borrowed, as to how much sum is proposed to be borrowed and through which process,

- (c) While evaluating the experience of the person submitting the letter of intent, on the grounds as to whether or not that person has experience in the construction of an infrastructure, construction and operation of an infrastructure in private investment or in the implementation of any other project of nature similar to that of the project for implementation of which the letter of intent has been invited.

(3) The persons submitting the letters of intent who secure at least Sixty marks on the evaluation made pursuant to Sub-rule (2) shall be selected. If, on such evaluation, at least Two persons securing Sixty marks cannot be selected, the other persons who secure at least Fifty marks shall also be selected.

- 11. To re-invite letter of intent:** (1) If only one letter of intent is received after making an invitation for the letter of intent pursuant to Rule 7 or if at least Two persons submitting the letters of intent cannot be selected from the evaluation made pursuant to Rule 10, the Ministry has to re-invite the letter of intent, after fulfilling the procedures as referred to in Rule 7.

(2) While making an invitation for the letter of intent pursuant to Sub-rule (1), the persons selected pursuant to Sub-rule (3) of Rule 10 shall be held to remain valid if they so wish.

- 12. Preparation of short list:** (1) After selecting the persons submitting the letters of intent pursuant to Rule 10, the Ministry shall prepare a short list thereof.
- (2) No later than Seven days after the preparation of the short list pursuant to Sub-rule (1), the Ministry has to give written information thereof to the persons included in that list.
- 13. To invite proposal:** After preparing the short list pursuant to Rule 12, the Government of Nepal has to invite proposals, setting out the following matters, from the persons included in that list.
- (a) The Ministry where the proposal documents may be purchased from and the fees therefor,
 - (b) The manner, place, deadline and time for the submission of the proposal,
 - (c) The place, date and time for the opening of the proposal,
 - (d) The grounds for the evaluation of the proposal,
 - (e) The estimated/probable date for making decision on the proposal,
 - (f) Other necessary matters.
- 14. Letter of intent documents purchase fee:** (1) A fees of Twenty Thousand Rupees shall be charged as for the purchase of the proposal documents.
- (2) Notwithstanding anything contains in Sub-rule (1), the proponent requests for a duplicate copy of the study report made on the project, the Ministry has to provide it to the proponent free of cost.
- 15. To submit proposal:** (1) A person who intends to submit a proposal has to purchase the proposal documents bearing the seal of the Ministry and the signature of the concerned official and submit to the Ministry the proposal in a sealed envelope containing in it the technical and financial proposals in

Two separate sealed envelopes, with being filled up therein the details as mentioned in the documents.

(2) The proponent has to set out the matters mentioned in Sub-section (2) of Section 6 of the Act in the technical proposal as referred to in Sub-rule (1).

(3) The proponent has to set out the following matters in the financial proposal as referred to in Sub-rule (1).

- (a) The proposed charges to be collected while implementing the project and other necessary matters pertaining thereto,
- (b) If any kind of royalty or amount is to be paid to the Government of Nepal while implementing the project, the rate of such royalty and installments of the amount to be paid,
- (c) Proposed term of the agreement.

(4) While submitting the financial proposal pursuant to Sub-rule (3), the proponent may submit more than one alternative proposal in respect of the matters as referred to in Clauses (a), (b) and (c) of that Sub-rule.

(5) After submission of a proposal pursuant to Sub-rule (1), the Ministry has to register the proposal and give a receipt thereof to the person submitting the proposal.

- 16. Provisions relating to invitation of proposal for project already surveyed:** In order to implement a project already surveyed pursuant to Sub-section (3) of Section 6 of the Act, the Ministry may invite a proposal directly from the persons included in the list as referred to in Rule 12. While so inviting the proposal or submitting the same, the provisions and procedures as referred to in Rules 13, 14 and 15 have to be followed.

17. Selection of proposal: (1) After receipt of the proposals pursuant to Rule 15 or 16, the Ministry shall first open the technical proposals and evaluate them on the following grounds:

- (a) The status of the proponent,
- (b) The technical capacity and experience of the proponent,
- (c) The efficiency and experience of the proposed manpower,
- (d) The organizational provision on the implementation of the project, implementation modality and schedule of works,
- (e) The engineering design of the project,
- (f) The environmental study report of the project and measures to be adopted to mitigate the possible adverse impacts on the environment,
- (g) The financial source for the implementation of the project and plan pertaining thereto,
- (h) The other alternative proposals submitted to make the project more viable and useful.

(2) While evaluating the technical proposals pursuant to Sub-rule (1), the Ministry has to select the proposals of those proponents who secure at least Sixty percent marks. If, on such evaluation, at least Two proposals securing Sixty percent marks cannot be selected, the Ministry has to accept the technical proposals of the other proponents who secure at least Fifty marks.

(3) After the acceptance of the technical proposals pursuant to Sub-rule (2), the Ministry has to give a notice to the proponents whose technical

proposals have been accepted, thereby setting out the place, date and time for the opening of the financial proposals.

(4) If the technical proposal is not accepted pursuant to Sub-rule (2), the Ministry has to notify the person submitting the proposal to withdraw the financial proposal. If that person comes to withdraw the financial proposal within Thirty days of such notice, the Ministry shall return the proposal to that person.

(5) The financial proposals shall be evaluated on the following grounds:

- (a) Proposed charges to be collected from the users while implementing the project,
- (b) Proposed royalty or other kind of amount to be paid to the Government of Nepal and the time and method of payment of that amount,
- (c) Proposed term of the agreement.

(6) After evaluating the financial proposals pursuant to Sub-rule (5), the Ministry has to select the most responsive proposal.

(7) If, in evaluating the financial proposals pursuant to Sub-rule (5), more than one proposal appears to be responsive, the Ministry has to select alternative proposals, with setting their order of ranking.

(8) No later than seven days after the selection of the proposal pursuant to Sub-rule (6) or (7), the Ministry has to give information thereof to the concerned proponent.

18. Implementation of project by alternative proponent: If, after selection of the proposal pursuant to Rule 17, the concerned proponent fails to furnish the amount or bid bond within the time limit referred to in Rule 20 or if the proposal is canceled pursuant to Section 11 of the Act or if the agreement cannot be concluded with the proponent pursuant to Section 12

of the Act, the Ministry may have the project implemented by the alternative proponent. If the project is to be so implemented, information thereof has to be given to the concerned alternative proponent.

19. Provisions relating to implementation of project by negotiations:

(1) A person who intends to implement a project by negotiations pursuant to Section 9 of the Act, has to submit to the Ministry an application setting out the following matters:

- (a) The name and address of the applicant,
- (b) If the applicant is a company, the name and address of such company, year of its incorporation, its organizational structure, ownership and main area of business,
- (c) The name of the project intended to be implemented, modality and short details thereof,
- (d) The details relating to the utility and feasibility of the project,
- (e) The details relating to the financial and technical capacity and experience of the applicant to implement the project,
- (f) The machine, equipment and manpower available to implement the project,
- (g) The reasons for the implementation of the project by negotiations.

(2) The Ministry may, if it so deems necessary on examination of the application received pursuant to Sub-rule (1), require additional documents or details from the applicant.

(3) If it appears, on examination of the application received pursuant to Sub-rule (1), that the proposed project appears to be useful and feasible,

that the applicant has the financial and technical capacity and experience to implement the project and that the project is suitable for being implemented by negotiation pursuant to the provisions contained in Sub-section (2) of Section 8 of the Act, the Ministry has to forward the details, along with the received application, and also accompanied by its opinion, to the Committee.

(4) The Committee has to examine the details along with the application received pursuant to Sub-rule (3) and send its opinion as to whether or not it is proper to implement that project by negotiations.

(5) If the Committee recommends for implementing the project by negotiations pursuant to Sub-rule (4), the Ministry has to submit the project details to the Government for the approval of the project.

(6) If, on examination of the project details received pursuant to Sub-rule (5), it appears reasonable to implement the proposed project by negotiations, the Government of Nepal shall give approval to implement that project by negotiations.

(7) If the Government of Nepal gives approval to implement the project by negotiations pursuant to Sub-rule (6), the Ministry may specify the time limit and invite a financial proposal along with the details from the applicant, pursuant to Sub-section (2) of Section 6 of the Act; and the applicant has to submit the details and the financial proposal as referred to in Sub-rule (3) of Rule 15 to the Ministry within the specified time limit.

(8) If, on examination of the financial proposal along with the details received pursuant to Sub-rule (7), it appears reasonable to give permission to the applicant to implement the project, the Ministry has to make decision to that effect and give information thereof to the concerned applicant.

20. To furnish amount or bid bond: (1) No later than Fifteen days of the selection of the proposal pursuant to Rule 17 or of the receipt of

information on the implementation of the project pursuant to Rule 18 or Sub-rule (8) of Rule 19, the proponent has to furnish with the Ministry the amount to be set by 0.1 percent of the cost estimate of the project and such amount as specified by the Ministry in the case of a project of which cost estimate has not been made or a security equivalent thereto or a bid bond equivalent thereto issued by a commercial bank.

(2) The bid bond/security furnished pursuant to Sub-rule (1) shall be forfeited in the following circumstances:

- (a) Where the proposal has been submitted by a joint venture, any person gives information to the Ministry that he/she has detached from the venture and the remaining persons alone do not appear able to implement the project or they fail to include another person with the same qualifications in the venture,
- (b) Where the memorandum of understanding or preliminary project agreement has been concluded pursuant to Section 9 of the Act, the proponent does any act in contravention of the memorandum of understanding or preliminary project agreement.
- (c) The proponent fails to submit the details required to be submitted pursuant to Section 10 of the Act within the time limit as referred to in that Section.

21. To execute deed in opening letter of intent or proposal:(1) The Ministry has to open the letters of intent or proposals in presence of the persons submitting the letters of intent or proposals or their authorized agents, at the specified place, time and date, execute a recognizance deed and get it signed by them, as well. If there appears any defect while so

opening the letters of intent or proposals, that matter has also to be mentioned in the recognizance deed.

(2) No action shall be taken on the letter of intent or proposal which has been submitted without fulfilling the requirements referred to in these Rules.

22. Power to amend or extend time limit: (1) If the Ministry thinks it necessary to make any amendment to the procedures for submission of the letter of intent or proposal documents or any details, it may make such amendment, setting out the reasons therefor, subject to the Act.

(2) If there remains a time limit of less than Thirty days as a result of the amendment made pursuant to Sub-rule (1), the Ministry may so extend the time limit that it is of at least Thirty days, and if, for any other reason, it appears necessary to extend the time limit for submitting the letter of intent or proposal, it may, setting out the reasons therefor, extend the reasonable time limit, subject to the Act. If the time limit has been extended, the person submitting the letter of intent or the proposal, as the case may be, may maintain his previous letter of intent or proposal or may withdraw such a letter of intent or proposal and submit another letter of intent or proposal.

(3) A person who submits another letter of intent or proposal pursuant to Sub-rule (2) has to purchase the letter of intent or proposal documents by paying the fees payable under these Rules.

23. Clarification or submission of document: (1) If a person who submits a letter of intent or proposal makes a request in writing to the Ministry for clarification of any matter contained in the letter of intent or proposal documents, in advance of at least Fifteen days prior to the deadline for submitting the letter of intent or proposal, the Ministry has to make clarification of the matter no later than Seven days of such request.

(2) If it appears necessary to provide the matter clarified pursuant to Sub-rule (1) also to the other persons who submit the letters of intents or proposals, the Ministry has to provide information through the same means as used for inviting the letter of intent or proposal.

(3) If any matter contained in the letter of intent or proposal is not clear or any ordinary document appears to be lacking, the Ministry may require the person submitting the letter of intent or proposal to clarify such matter or submit lacking documents.

Provided that, while so clarifying any matter or requiring submission of any document, no matter contained in the letter of intent or proposal shall be amended or altered.

24. Letter of intent and proposal evaluation committee: (1) A letter of intent and proposal evaluation committee shall be formed as follows to evaluate the letter of intents and proposals and make recommendation.

- (a) Gazetted class One officer at the Ministry designated by the Secretary at the Ministry - Chairperson
- (b) Two experts related with the project designated by the Secretary at the Ministry - Member
- (c) Chief of the Financial Administration Section in the Ministry and if he/she is not available, officer at the Office of the Financial Comptroller General -Member
- (d) Law officer at the Ministry, and if he/she is not available, officer designated by the Ministry of Law, Justice and Parliamentary Affairs - Member

(2) Such officer level employee in the Ministry as designated by the Ministry shall act as the secretary of the evaluation committee.

(3) If the evaluation committee thinks it necessary, it may invite any expert in the concerned field to take part in its meeting as an observer.

(4) Other procedures, including the meetings, of the evaluation committee shall be as determined by the committee itself.

Chapter-4

Provisions relating to formation, meeting of

Board and review of charges

25. Formation of Board: (1) For purposes of reviewing the charges pursuant to Section 35 of the Act, the Government of Nepal may form an Infrastructure Service Charges Review Board, as follows:

- (a) A person having gained at least Fifteen years of experience in the construction or operation of an infrastructure or in the economic or financial sector -Chairperson
- (b) A person from amongst the persons having done master's degree in civil engineering and gained at least Ten years of experience in the construction or operation of an infrastructure -Member
- (c) A person from amongst the persons having done master's degree in economics and gained at least Ten years of experience in the concerned field

(d) One person from amongst the users -Member

(2) The representative of the concerned project shall be an *ex-officio* member of the Board.

(3) The Government of Nepal shall nominate the chairperson and member referred to in Sub-rule (1).

(4) At least Gazetted class Two officer at, and designated by, the National Planning Commission shall act as the secretary of the Board.

(5) The tenure of the chairperson and member of the Board shall be of four years.

(6) The secretariat of the Board shall be seated at the National Planning Commission Secretariat.

26. Procedures relating to meeting of Board: (1) The meeting of the Board shall be held at such place, date and time as specified by the chairperson of the Board.

(2) The secretary of the Board has to give a notice of meeting, accompanied by the agenda to be deliberated at the meeting, to the members of the Board in advance of at least Seven days of the holding of the meeting of the Board.

(3) The presence of more than Fifty percent members of the total number of members of the Board shall be deemed to constitute a quorum for the meeting of the Board.

(4) The meeting of the Board shall be presided over by the chairperson of the Board, and, in his/her absence, the meeting shall be presided over by a member selected by the members present at the meeting from amongst themselves.

(5) A majority opinion at the meeting of the Board shall be valid, and in the event of a tie, the person presiding over the meeting may exercise the casting vote.

(6) The Board may invite any expert in the concerned field to participate in its meeting.

(7) The decisions of the Board shall be authenticated by the secretary of the Board.

(8) Other procedures relating to the meetings of the Board shall be as determined by the Board itself.

27. Conditions for reviewing charges: The charges shall be reviewed according to the conditions, if any, mentioned in the agreement in respect of reviewing the charges, and failing such conditions, the charges shall be reviewed on the following conditions:

- (a) Where the agreement does not mention specific charges but does mention any specific method only, in every Five years,
- (b) Where the agreement mentions that the licensee is entitled to a certain percent profit accrued from the operation of the project, and the rate of such profit is changed,
- (c) Where the agreement contains a provision that the Government of Nepal is entitled to a certain royalty or profit accrued from the project, and the Government of Nepal intends to give up or decrease such royalty or profit to decrease charge,
- (d) Where the term of the agreement is altered,
- (e) Where the application made by the licensee, showing any specific reason, to have the charges reviewed appears to be reasonable,
- (f) Where the Ministry, showing any specific reason, thinks it necessary to review the charges.

28. Grounds for fixation of charges: (1) If the agreement contains any grounds for reviewing the charges, the Board shall, subject to Section 35 of the Act, fix the charges based on those grounds.

(2) If the agreement does not contain any grounds for reviewing the charges, the Board shall, subject to Section 35 of the Act, review the charges, also having regard to the following grounds:

- (a) Tax, royalty and other kind of amount required to be paid by the licensee to the Government of Nepal,
- (b) Economic and social standards of the users and consumer price index,
- (c) Proper benefits to be made by the licensee,
- (d) Term of the license,
- (e) Rate of depreciation,
- (f) Other matters.

29. **To review and forward charges:** After having reviewed the charges pursuant to Rule 27, the Board has to forward the grounds deployed to review the charges and the rate of new charges to the Ministry.

30. **Meeting allowances:** The chairperson, member and secretary of the Board shall receive the meeting allowances of One Thousand Rupees for having attended the meeting of the Board.

Chapter-5

Miscellaneous

31. **Grounds for fixing term of license:** The term of the license shall be fixed based on the following grounds, pursuant to Section 18 of the Act:

- (a) Nature of the project,
- (b) Cost of the project,
- (c) Charges which the licensee is entitled to collect while operating the project,
- (d) Tax, royalty or other kind of amount required to be paid by the licensee to The Government of Nepal,

- (e) Reasonable profits which the licensee may make from the operation of the project,
- (f) Total period required to build the project and the period during which the licensee is entitled to operate the project by collecting charges,
- (g) Financial source of the project,
- (h) Matter as to whether or not the Government of Nepal has made joint investment in the project,
- (i) Other matters.

32. Compensation fixation committee: (1) There shall be a compensation fixation committee as follows, in order to fix compensation to be provided under Section 26 or 27 of the Act:

- (a) At least gazetted class Two officer at, and designated by, the Ministry - Chairperson
- (b) Such concerned technician or expert as may be designated by the Ministry
- (c) Representative of the concerned Local Body - Member
- (d) Representative of the concerned licensee -Member
- (e) Such a person as may be designated by the Ministry from amongst the users -Member

(2) The compensation fixation committee shall itself determine the procedures to be adopted for fixing the compensation.

33. Power to examine and inspect project: (1) The Ministry may examine or inspect, or cause to be examined or inspected, any project as to whether

the project is being implemented in accordance with the Act and these Rules.

(2) If, while making, or causing to be made, examination or inspection pursuant to Sub-rule (1), it appears that any project is not being implemented in accordance with the Act and These Rules, the Ministry may, setting out the reasons therefor, give direction to the concerned licensee to implement the project; and it shall be the duty of the concerned licensee to observe the direction so given by the Ministry.

34. Repeal and saving: (1) Private Financing in Build and Operate of Infrastructures Rules, 2060 (2004) is, hereby, repealed.

(2) All acts done and actions taken pursuant to Sub-rules (1), of shall be deemed to have been done and taken under these Rules.

NEPAL LAW COMMISSION