

**PUBLIC PRIVATE PARTNERSHIP (RE-
ENACTMENT) LAW, 2020.**

NO. 10 OF 2020

EKITI STATE OF NIGERIA.

PUBLIC PRIVATE PARTNERSHIPS (RE-ENACTMENT) LAW, 2020.

ARRANGEMENT OF SECTIONS.

PART I.

APPLICATION.

1. Application.

PART II

THE EKITI STATE DEVELOPMENT AND INVESTMENT PROMOTION AGENCY.

2. Functions of the Agency.
3. Powers of the Agency.
4. Regulations.

PART III

GENERAL PROVISIONS.

5. Approving authority.
6. Entering into Concession Contracts.
7. Eligible sectors.
8. Duration of a Public Private Partnership.
9. Submission and approval of Project lists.
10. Publication of approved Projects.
11. State Government support measures.
12. Guarantees against expropriation of assets.
13. Annuity PPP guarantee product (APGP).

PART IV

PROCUREMENT OF PUBLIC PRIVATE PARTNERSHIPS.

14. Open competitive bidding.
15. Purpose and procedure of pre-selection.
16. Pre-selection criteria.
17. Participation of consortia.
18. Decision on pre-selection.
19. Invitation to bid.
20. Two stage tendering.

21. Content of the request for proposals.
22. Clarification and modification of the request for proposals.
23. Restricted Procurement.
24. Emergency procurement.
25. Bid security.
26. Submission and Opening of Bids.
27. Confidentiality.
28. Evaluation criteria.
29. Comparison and evaluation of Bids.
30. Admissibility of unsolicited proposals.
31. Procurement proceedings for unsolicited proposals.

PART V

SELECTION OF THE CONCESSIONAIRE.

32. Domestic preferences.
33. Rejection of Bids.
34. Final negotiations.
35. Award of Concession.
36. Notice of award of Concession.
37. Record of selection and award proceedings.

PART VI

CONTENTS AND IMPLEMENTATION OF THE CONCESSION CONTRACT.

38. Contents of the Concession Contract.
39. Operation of the infrastructure.
40. Ownership of the assets.
41. Acquisition of rights related to the Project site.
42. Easements.
43. Security interests.
44. Assignment of Concession Contracts.
45. Transfer of controlling interests in the Concessionaire.
46. Revision of Concession Contracts.

PART VII
DURATION, EXTENSION AND TERMINATION OF THE CONCESSION
CONTRACT.

47. Duration and extension of Concession Contracts.
48. Substitution of the Concessionaire.
49. Compensation upon termination of Concession Contracts.
50. Wind-up and transfer measures.

PART VIII
TARIFFS.

51. Authorisation to collect Tariffs.
52. Calculation of Tariffs.
53. Payment of Tariffs.
54. Offences and penalties.

PART IX
MISCELLANEOUS PROVISIONS.

55. Issuance of notices.
56. Decisions of the Agency.
57. Delegation by the Agency.
58. Repeal and savings.

PART X
INTERPRETATION AND CITATION.

59. Interpretation.
60. Citation.

SCHEDULES

FIRST SCHEDULE.

Contents of a request for proposal.

SECOND SCHEDULE.

List of eligible sectors.

THIRD SCHEDULE.

Contents of a Concession Contract.

**A LAW TO REPEAL THE PUBLIC PRIVATE PARTNERSHIPS LAW,
NO. 12 OF 2011, AND TO PROVIDE FOR THE REGULATORY
FRAMEWORK FOR THE PROCUREMENT OF PUBLIC PRIVATE
PARTNERSHIPS, SELECTION OF THE CONCESSIONAIRES, AWARD
OF CONCESSIONS, AND FOR OTHER PURPOSES CONNECTED
THEREWITH.**

NO. 10 OF 2020.

EKITI STATE OF NIGERIA

Commencement /

ENACTED BY THE EKITI STATE HOUSE OF ASSEMBLY *as follows:*

**PART I
APPLICATION.**

1. This Law shall apply to the procurement of all Public Private Partnerships and every contract for the financing, construction, operation, equipping or maintenance of a project undertaken as a Public Private Partnership in Ekiti State.

**PART II.
THE EKITI STATE DEVELOPMENT AND INVESTMENT PROMOTION
AGENCY.**

Functions of the Agency.

2. The functions of the Ekiti State Development and Investment Promotion Agency shall be expanded to include the following:
 - (a) be responsible for the administration and enforcement of the provisions of this Law with respect to Public Private Partnerships in the State;
 - (b) prepare and develop on behalf of the State, strategic master plans for the development and execution of Public Private Partnerships within the State;
 - (c) formulate or approve standards, guidelines and procedures for awarding contracts and Standardised bid documents;
 - (d) carry out the procurement of Public Private Partnerships for the development, operation and maintenance of public infrastructure within the State;

- (e) publish request for proposals and evaluate Bids by Bidders interested in the development, operation and maintenance of Public Private Partnership Projects within the State;
- (f) examine and approve the feasibility study conducted for the purpose of developing public infrastructure in the State under the Annuity PPP or any structure or model;
- (g) conduct pre-qualification proceedings for Bidders willing to enter into Public Private Partnerships for the development, operation, and maintenance of public infrastructure within the State;
- (h) act on behalf of the State or any of its agencies in Public Private Partnerships under this Law and develop optimal means of financing the cost of public investment Projects in order to achieve value for money;
- (i) form, or cause to be formed, limited liability companies or limited liability partnerships, subject to the provisions of the Law for the purpose of securing finance for public investment Projects or to facilitate Public Private Partnerships within the State;
- (j) liaise with State agencies and parastatals to facilitate the issuance of approvals, licenses, permits and other requirements for the execution of an infrastructure Project that is being developed or executed under a Public Private Partnership Arrangement within the State;
- (k) verify and monitor performance of the terms and conditions of Concession Contracts by Concessionaires;
- (l) ensure that each Concession Contract is consistent and in compliance with the provisions of this Law; and
- (m) undertake such other activities as are necessary or expedient for giving full effect to the provisions of this Law.

Powers of the Agency.

3. (1) The powers of the Ekiti State Development and Investment Promotion Agency shall be expanded to include the following:
 - (a) publish a list of approved Projects to be carried out in the State through Public Private Partnerships;
 - (b) liaise and co-ordinate all State agencies and parastatals with respect to participation in the provision and development of public infrastructure Projects within the State;
 - (c) negotiate with Bidders for the purpose of awarding Concessions to the preferred Bidder;

- (d) award Concessions to persons interested in Public Private Partnerships for the design, construction, operation, management, control, maintenance, rehabilitation and financing of public infrastructure Projects within the State;
 - (e) inspect and monitor Concessionaires to ensure compliance with the terms of any Concession Contracts executed on behalf of the State;
 - (f) establish and operate an information management system with respect to Public Private Partnerships in the State;
 - (g) hold equity or other interest on behalf of the State in a Concessionaire or other entity involved in the Public Private Partnership arrangement with the State for such consideration and on such terms and conditions as it may agree with such persons;
 - (h) appoint professional advisers or consultants and delegate any of its powers under this Law to such advisers or consultants; and
 - (i) do all things that are necessary and expedient for the exercise of its powers.
- (2) Where the Agency holds any equity or other interest on behalf of the State in any Concessionaire or any other entity involved in or in furtherance of a Public Private Partnership, the Agency shall aim to ensure that such interest is:
- (a) minimal and must not amount to a Controlling Interest. Provided that it shall not be precluded from holding Controlling Interest where it is a promoter of a project and while seeking suitable private partners;
 - (b) in compliance with applicable laws and all rights attaching thereto are exercised in compliance with all appropriate corporate governance standards and best practices and the Agency enters into a shareholders' or other agreements setting out the rights and liabilities of the parties thereto;
 - (c) independent and devoid of political interference; and
 - (d) exercised to enhance the objective of the Public Private Partnership and upholding the relevant Concession Contract.

Regulations.

4. (1) The Agency may, with the approval of the Governor, make regulations generally for the purpose of this Law and in particular, without prejudice to the generality of the foregoing provisions, make regulations:
- (a) prescribing the contents of a request for proposal and other information required for the submission of Bids under this Law;
 - (b) prescribing the procedure for obtaining any information required under this Law; and
 - (c) prescribing any fees payable under this Law.
- (2) All regulations issued by the Agency shall be published in the official gazette of the State.

PART III GENERAL PROVISIONS.

Approving Authority.

5. (1) The award of a Concession by the Agency shall be subject to the approval of the Approving Authority.
- (2) The Governor may in its absolute discretion, delegate the power and authority to approve the award of a Concession to a Commissioner, and such authorisation shall not be effective until it has been published in the official Gazette of the State.

Entering into Concession Contracts.

6. (1) The Governor shall have the power to execute any Concession Contract on behalf of the State.
- (2) The Governor may delegate the power to execute a Concession Contract to the following persons:
- (a) the Commissioner for Investment, Trade and Industries/Special Adviser on Development and Investment Promotion Agency; or
 - (b) the Commissioner of Finance of the State; or
 - (c) the Attorney-General of the State.
- (3) The delegation of these powers shall be published in the official gazette of the State, before it has legal effect.

Eligible Sectors.

7. (1) The eligible sectors for which the Agency will procure Public Private Partnerships, are as stated in the Second Schedule.
- (2) The list of eligible sectors may be amended from time to time by the order of the Governor which shall be published in the official gazette of the State.

Duration of Public Private Partnerships.

8. (1) In determining the duration of a Public Private Partnership, the Agency shall take into account the following factors:
 - (a) the investment standards that are required to be maintained by each party to the Concession Contract throughout the duration of the Public Private Partnership;
 - (b) the economic and financial viability of the Project and the economic life of the facilities to be provided;
 - (c) the depreciation of the Project assets during the life of the Concession;
 - (d) the life span of the technology to be deployed during the life of the Concession;
 - (e) the period of time that may be required by the parties to the Concession to:
 - (i) meet and maintain throughout the duration of the Concession, the service delivery standards and investment levels; and
 - (ii) recoup their investment.
- (2) The duration of each Public Private Partnership shall be stated in the Concession Contract.

Submission and Approval of Project Lists.

9. The Agency shall prepare a list of Projects that it intends to undertake through Public Private Partnerships and shall submit the list to the Governor for assessment and approval.

Publication of Approved Projects.

10. The Agency shall publish on its electronic website and in any print media published and circulated in the State, the list of Projects that has been approved under Section 9 of this Law.

State Government Support Measures.

- 11.** (1) The State support measures shall be an integral part of the State's program to attract private investment for Projects by way of Public Private Partnerships.
- (2) The State Commissioner of Finance and the Commissioner for Investment, Trade and industries/Special Adviser on Development and Investment Promotion Agency may with the written approval of the Governor, give guarantees, letters of comfort or undertakings in respect of any Public Private Partnership in the State
- (3) Subject to the Ekiti State Development and Investment Promotion Agency (EKDIPA) Law, No. 8 of 2019, the Agency may facilitate the grant of credit enhancements, interest-free or low-interest loans to Concessionaires to lower the Project's financing cost. Such loans may be limited to a fixed sum or to a percentage of the total Project cost.
- (4) The Ekiti State Commissioner for Finance may with the written approval of the Governor, provide loan guarantees for the repayment of loans taken by Concessionaires for the projects undertaken in the State.
- (5) Where a Project is to be funded privately, the Accountant-General of the State may issue an Irrevocable Standing Payment Order for the purpose of supporting Projects carried out by Concessionaires.
- (6) Further to subsection (5) above, the Federal Ministry of Finance, Budget and Planning/Debt Management Office may at the written request of the State, issue an ISPO for an agreed annuity payment. The Irrevocable Standing Payment Order shall represent a first-line charge on the State's Federation Allocation Account.

Guarantees Against Expropriation of Assets.

- 12.** (1) Subject to subsections (2) and (3) of this Section:
- (a) the assets of a Concessionaire shall not be expropriated by the State; and
- (b) no Concessionaire who owns, whether wholly or in part, assets used for the development, operation and maintenance of public infrastructure in the State shall be compelled by law to surrender its interest in the assets to any other person.

- (2) There shall be no compulsory acquisition of an asset of the Concessionaire or a revocation of the right of the Concessionaire by the State, unless such acquisition or revocation is in accordance with the terms of the Concession Contract or for a public purpose and under a law which makes provisions for:
 - (a) payment of fair and adequate compensation; and
 - (b) a right of access to the courts for the determination of the Concessionaire's interest or right and the amount of compensation to which he is entitled.
- (3) Any compensation payable by the State under this Section shall be paid without undue delay and all authorisations required for the payment of the compensation shall be issued.

Annuity PPP Guarantee Product (APGP).

13. (1) The Agency, with the consent of the Governor shall have the power to grant a Concession to a Concessionaire under an Annuity PPP arrangement for a DBFOM project or such other Public Private Partnership Arrangements or projects as it may think fit.
- (2) Under the Annuity PPP, the State shall adopt a sustainable funding arrangement for financing identified and approved revenue generating infrastructure projects and the State shall issue a Federation Allocation Account or internally generated revenue linked irrevocable standing payment order to provide revenue assurance for the Project.
- (3) As credit enhancement for an Annuity PPP Project, the Concessionaire or any vehicle established specifically for that purpose shall subject to applicable laws and be entitled to raise long-term local currency financing from the domestic capital market or such other guaranteed financing arrangement from Institutional Investors as may be suitable, provided that such financing instruments are guaranteed by a Guarantor.

PART IV

PROCUREMENT OF PUBLIC PRIVATE PARTNERSHIPS.

Open Competitive Bidding.

14. (1) Except as provided by this Law, all procurements of Public Private Partnerships by the Agency shall be conducted by open competitive

bidding in consonance with the Public Procurement Law.

- (2) Any reference to open competitive bidding in this Law means the process by which the Agency based on previously defined criteria effects public procurements by offering to every interested bidder equal simultaneous information and opportunity to offer the works needed.
- (3) In procuring and awarding Concessions for Public Private Partnerships, the Agency shall be guided by the principles of transparency, free and fair competition and equal opportunity in accordance with this Law.

Purpose and Procedure of Pre-selection.

15. (1) The Agency shall engage in pre-selection proceedings with a view to identifying Bidders that are suitably qualified to implement the envisaged Project.
- (2) The invitation to participate in the pre-selection proceedings shall be published in at least two national daily newspapers and the electronic website of the Agency.
- (3) The invitation to participate in the pre-selection proceedings shall include the following information:
 - (a) a description of the Project to be undertaken;
 - (b) a summary of the main required terms of the Concession Contract to be entered into;
 - (c) the manner and place for the submission of applications for pre-selection and the deadline for the submission, expressed as a specific date and time, allowing sufficient time for Bidders to prepare and submit their applications;
 - (d) an indication of other essential elements of the proposed Project to be undertaken such as the description of the works to be carried out by the Concessionaire and the financial arrangements envisaged by the Agency; and
 - (e) the manner and place for the solicitation of the pre-selection documents.
- (4) The pre-selection documents shall include at least the following information:
 - (a) the pre-selection criteria in accordance with Section 16 of this Law;

- (b) whether the Agency intends to waive the limitations on the participation of consortia set forth in Section 17 of this Law:
- (c) whether the Agency intends to request only a limited number of pre-selected Bidders to submit Bids upon completion of the pre-selection proceedings and if applicable, the manner in which the pre: selection will be carried out;
- (d) whether the Agency intends to require the successful bidder to set up an independent company which shall be incorporated under the Laws of the Federal Republic of Nigeria.

Pre-selection Criteria.

16. (1) In order to qualify for the selection proceedings, interested Bidders must meet objectively justifiable criteria that the Agency considers appropriate in the particular proceedings and as stated in the pre-selection documents.
- (2) The criteria which interested bidders must meet according to subsection (1) above shall include the following:
- (a) adequate professional and technical qualifications, human resources, equipment and other physical facilities as necessary to carry out all the phases of the Project as may be appropriate for the specific Public Private Partnership Arrangement that is being procured;
 - (b) sufficient ability to manage the financial aspects of the Project and capability to sustain its financing requirements; and
 - (c) appropriate managerial and organizational capability and experience including previous experience in similar Projects.

Participation of Consortia.

17. (1) The Agency when inviting the participation of Bidders in the pre-selection proceedings may allow the Bidders to form bidding consortia.
- (2) The information required from members of bidding consortia to demonstrate their qualifications shall relate to the consortium as a whole as well as to the individual participants.
- (3) The Agency shall consider the capabilities of each of the members of the bidding consortia and assess whether the combined qualifications of the consortium are adequate to meet the needs of all the phases of

the Project.

Decision on Pre-selection.

18. The Agency shall make a decision with respect to the qualifications of each Bidder that has submitted an application for pre-selection and shall apply only the criteria that are set forth in the pre-selection documents.

Invitation to Bid.

19. (1) All pre-selected Bidders shall be invited by the Agency to submit Bids.
- (2) Every invitation to an open competitive bid shall be advertised in at least two national daily newspapers and on the electronic website of the Agency.

Two-stage Tendering.

20. (1) The Agency shall publish a request for proposal and related documents to each pre-selected Bidder.
- (2) The Agency may use a two-stage tendering procedure to request Bids from pre-selected Bidders, where it is not feasible to describe in the request for proposals the characteristics of the Project such as Project specifications, performance indicators, financial arrangements or contractual terms in a manner sufficiently detailed and precise to permit final Bids to be formulated.
- (3) Where a two-stage tendering procedure is used, the following provisions shall apply:
- (a) the initial request for proposals shall call upon the Bidders to submit, in the first stage of the procedure, initial Bids relating to Project specifications, performance indicators, financing requirements or other characteristics of the Project;
 - (b) the Agency may convene meetings and hold discussions with any of the Bidders to clarify questions concerning the initial request for proposals or the initial Bids and accompanying documents submitted by the Bidders;
 - (c) following examination of the initial Bids received, the Agency may review and as appropriate, revise the initial request for proposals by deleting or modifying any aspect

of the initial Project specifications, performance indicators, financing requirements or other characteristics of the Project to be carried out including the main contractual terms and any criterion for evaluating and comparing Bids.

- (d) the Agency shall indicate in the record of the selection proceedings the justification for any revision to the request for proposals.
- (e) in the second stage of the proceedings, the Agency shall invite Bidders to submit final Bids with respect to a single set of Project specifications, performance indicators or contractual terms in accordance with subsection 3 of this Section.

Content of the Request for Proposals.

- 21. The content of the request for proposals shall be as set out in the First Schedule to this Law.

Clarification and Modification of the Request for Proposals.

- 22. (1) The Agency may, whether on its own initiative or as a result of a request for clarification by a bidder, review and revise any element of the request for proposals.
- (2) The Agency shall indicate in the record of the selection proceedings the justification for any revision or review of the request for proposals.
- (3) Any review, modification or revision of the request for proposals shall be communicated to the Bidders in the same manner as the request for proposals at a reasonable time prior to the deadline for submission of Bids.

Restricted Procurement.

- 23. (1) The Agency may for reasons of economy and efficiency engage in procurement by means of restricted tendering if:
 - (a) the goods, works or services are available only from a limited number of persons; or
 - (b) the time and cost required to examine and evaluate a large number of Bids is disproportionate to the value of the goods, works and services to be procured.

- (2) The Agency shall select in a fair and transparent manner the number of Bidders to ensure effective competition.
- (3) For the purpose of subsection 2 of this Section, the Agency shall publish a notice of the restricted tendering on its electronic website and two national daily newspapers.

Emergency Procurement.

- 24.** (1) The Agency may carry out an emergency procurement where:
- (a) goods, works or services are only available from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the goods, works or services, and no reasonable alternative or substitute exists within Nigeria;
 - (b) there is an urgent need for the goods, works or services and engaging in a competitive tender process will be impractical due to unforeseeable circumstances giving rise to the emergency which is not the result of dilatory conduct of the Agency;
 - (c) goods, equipment, technology or services have been procured and the Agency determines that:
 - (i) additional supplies are required because of standardisation;
 - (ii) there is a need for compatibility with existing goods, equipment, technology or services having considered its effectiveness in meeting the needs of the Project;
 - (iii) the limited size of the proposed procurement in relation to the original procurement provides a justification for the emergency; or
 - (iv) there is need to change the contractual arrangements upon which such goods and services are to be supplied and it would be impractical and not cost effective to recommence the procurement process again.
 - (d) the Agency seeks to procure services for research, experiment, study or development;
 - (e) the State is threatened or confronted with a disaster, catastrophe, or an act of God;
 - (f) the condition or quality of equipment, building or publicly owned capital goods may seriously deteriorate unless action is

urgently and necessarily taken to maintain them in their actual value or usefulness; or

(g) a public Project may be delayed for want of an item of minor value.

- (2) The Agency shall invite Bids from a single supplier or contractor and shall include in the record of procurement proceedings a statement of the grounds for the emergency procurement and the circumstances in justification of the single source procurement.
- (3) All emergency procurement shall be handled with expedition but along principles of accountability and due consideration of fairness and transparency.

Bid Security.

25. (1) The request for proposal shall set forth the requirements with respect to the nature, form, amount and other principal terms and conditions of the required Bid Security.
- (2) A Bidder shall not forfeit any Bid Security that it has been required to provide except where it:
 - (a) withdraws or modifies its proposal after the deadline for submission of Bids;
 - (b) fails to enter into final negotiations with the Agency;
 - (c) fails to submit its best and final offer within the time limit prescribed by the Agency; or
 - (d) fails to sign the Concession Contract where selected as the preferred bidder.

Submission and Opening of Bids.

26. (1) The procedure for submission of Bids shall be determined by the Agency and communicated in the request for proposals.
- (2) The conditions for submission of Bids are as follows:
 - (i) Bids shall be submitted on or before the deadline specified in the request for proposal or any extension approved by the Agency in working.
 - (ii) The Bids shall be submitted physically or virtually in accordance with the requirements for Bids submission as set out in the requirement for proposal.

- (iii) The request for proposal shall specify opened and Bids opening ceremony shall be concluded.

Confidentiality.

- 27. (1) The Agency shall treat Bids in such a manner as to avoid the disclosure of their content to competing Bidders.
 - (2) No party to the procurement proceedings shall disclose to any other person, any technical or price related information in relation to the proposed Project, without the consent of the other party.
 - (3) All discussions and negotiations between the Agency and a bidder shall be confidential.
- Provided** that, the Agency shall disclose the content of all discussions and negotiations with a Bidder where required by law or a court of competent jurisdiction.

Evaluation Criteria.

- 28. (1) The criteria for the evaluation and comparison of technical Bids shall include:
 - (a) technical soundness and operational feasibility;
 - (b) compliance with environmental standards; and
 - (c) quality of services and measures to ensure their continuity.
- (2) The criteria for the evaluation and comparison of financial and commercial Bids shall include:
 - (a) the present value of the proposed Tariffs over the period of the Concession;
 - (b) the present value of any proposed direct payments or incentives given to the Concessionaire by the State;
 - (c) the costs for design and construction activities and annual operation and maintenance;
 - (d) the extent of financial support, if any, to be provided by the State;
 - (e) the soundness of the proposed financial arrangements;
 - (f) the social and economic development potential offered by the Bids; and
 - (g) the extent of acceptance of the negotiable contractual terms proposed by the Agency in the request for proposals.

Comparison and Evaluation of Bids.

29. (1) The Agency shall compare and evaluate each proposal in accordance with the evaluation criteria in Section 28 of this Law, the relative weight accorded to each criterion and the evaluation process as set forth in the request for proposals.
- (2) For the purpose of subsection 1 of this Section, the Agency may establish thresholds with respect to quality, technical, financial and commercial aspects of the proposal.
- (3) Bids that fail to meet the thresholds established pursuant to subsection 2 of this Section shall be rejected from the selection procedure.

Admissibility of Unsolicited Proposals.

30. The Agency may consider Unsolicited Proposals provided that such proposals do not relate to a Project for which selection proceedings have been initiated or announced.

Procurement Proceedings for Unsolicited Proposals.

31. (1) Following receipt and preliminary examination of an Unsolicited Proposal, the Agency shall promptly inform the Original Project Proponent whether or not the Project is considered to be potentially in the public interest.
- (2) If the Project is considered to be potentially in the public interest under subsection 1 of this Section, the Agency shall invite the Original Project Proponent to submit as much information on the Project as is feasible to make a proper evaluation of the Original Project Proponent's qualifications and the technical and economic feasibility of the Project.
- (3) For the purpose of subsection 2 of this Section, the Original Project Proponent shall submit a technical and economic feasibility study, an environmental impact study and satisfactory information regarding the concept or technology contemplated in the Unsolicited Proposal.
- (4) Where an Unsolicited Proposal is considered to be in the public interest, the Original Project Proponent shall be deemed to be a pre-selected Bidder in accordance with this Law.
- (5) The pre-selected Bidder pursuant to subsection 4 of this Section, shall be invited to submit its bid through the open competitive process.
- (6) In the evaluation criteria for the open competitive process, the Agency

shall at its discretion, determine which or a combination of the following principles will apply:

- (a) the Original Project Proponent may be credited bonus points of up to 10 percent of the total score or such other percentage as the Agency may think fit;
 - (b) the Original Project Proponent may be granted the right to counter-match the preferred bidder under the open competitive process; or
 - (c) automatically qualify the Original Project Proponent for the final tendering round in the competitive process.
- (7) Where following the competitive process, the original project proponent is unsuccessful in the bidding process, the Agency shall use its best efforts to ensure that the Original Project Proponent is reimbursed for reasonable project development costs incurred in the development of the Project by the State, the winning bidder, or both.
- (8) The amount of financial compensation for project development costs shall be determined through the estimated market value for the project proposal or an independent audit.

PART V. SELECTION OF THE CONCESSIONAIRE.

Domestic Preferences.

32. (1) Notwithstanding the provisions of Section 28 of this Law, the Agency may grant a preference in the evaluation of bids when comparing bids from local or indigenous Bidders with those of national or foreign Bidders.
- Provided always that, the domestic or indigenous bidder shall fulfil all criteria set out in accordance with this Law for the procurement of a Concessionaire.
- (2) The request for proposals shall clearly indicate any preference to be granted to domestic or indigenous Bidders in accordance with subsection 1 of this Section and the information required to establish the eligibility of a bid for such preference.

Rejection of Bids.

33. (1) The Agency shall reject all Bids that fail to meet the criteria set out in Section 28 of this Law.
- (2) Where a Bid is rejected in accordance with subsection 1 of this Section, the Agency shall issue a notice stating grounds for the rejection of the Bids, the notice shall be published on the electronic website of the Agency, and the notice shall be served on the Bidders.
- (3) The Agency shall have the right to determine the number of Reserved Bidders to be invited for negotiations.

Final Negotiations.

34. (1) The Agency shall rank all Bids that meets the criteria set out in Section 28 of this Law and designate the Bidders that submit the first ranked Bid and the second ranked Bid as the Preferred Bidder and the Reserved Bidder respectively.
- (2) The Agency shall invite the Preferred Bidder and the Reserved Bidders for final negotiations of the Concession Contract.
- (3) Where it becomes apparent to the Agency that the negotiations with the Preferred Bidder will not result in a Concession Contract, the Agency shall inform the Preferred Bidder of its decision to terminate the negotiation.
- (4) Notwithstanding the provisions of subsection 2 of this Law, the Agency may in its discretion give the Preferred Bidder reasonable time to formulate its best and final offer.
- (5) Where the Agency does not find the best and final offer acceptable, it shall terminate the negotiations with the Preferred Bidder.
- (6) The Agency shall then invite for negotiations, the Reserved Bidders in the order of their ranking until it successfully concludes on a Concession Contract.
- (7) The Agency shall not resume negotiations with a Bidder with which negotiations have been terminated pursuant to subsection 4 of this Section.

Award of Concession.

35. The Agency shall with the approval of the Governor, award the Concession to the successful Bidder after the conclusion of final negotiations in

accordance with Section 47 of this Law.

Notice of Award of Concession.

36. (1) The Agency shall cause a notice of the Concession award to be published in at least two national daily newspapers and the electronic website of the Agency.
- (2) The notice of the Concession award shall be published in the official gazette of the State.
- (3) The notice shall identify the Concessionaire and include a summary of the essential terms of the Concession Contract.

Record of Selection and Award Proceedings.

37. (1) The Agency shall keep an appropriate record of information pertaining to the procurement, selection and award proceedings of every Public Private Partnership Project that is procured.
- (2) The content of the record shall be sent to the Board and the Governor, on a yearly basis.

PART VI

CONTENTS AND IMPLEMENTATION OF THE CONCESSION CONTRACT.

Contents of the Concession Contract.

38. (1) The contents of the Concession Contract shall be as set out in the Third Schedule to this Law.
- (2) Notwithstanding subsection 1 of this Section, the parties to a Concession Contract may negotiate and agree on additional terms to be inserted in the Concession Contract.

Operation of the Infrastructure.

39. (1) The Concession Contract shall set out as appropriate, the extent of the Concessionaire's obligations to ensure the following:
- (a) the modification of the works carried out so as to meet the demand for the Project; and
- (b) the continuity of the works to be carried out by the Concessionaire.

- (2) The Concessionaire shall have the right to issue and enforce rules governing the use of the infrastructure, subject to approval and negotiations with the Agency.

Ownership of Assets.

40. (1) The Concession Contract shall specify the Project assets that shall form part of public property and the Project assets that shall be the private property of the Concessionaire.
- (2) In particular, the Concession Contract shall identify the Project assets that belong to the following categories:
 - (a) Project assets, if any, that the Concessionaire is required to return or transfer to the Agency upon the expiration or termination of the Concession;
 - (b) Project assets that the Agency may, subject to the terms of the Concession Contract, purchase from the Concessionaire; and
 - (c) Project assets that the Concessionaire may retain or dispose of upon expiry or termination of the Concession Contract.

Acquisition of Rights Related to the Project Site.

41. (1) The Agency shall assist the Concessionaire in acquiring rights related to the Project site, as may be necessary for the implementation of the Project.
- (2) Any compulsory acquisition of land that may be required for the implementation of the Project shall be carried out in accordance with the applicable Laws of the State.
- (3) Notwithstanding subsection 2 of this Section, the compulsory acquisition of land must be in the interest of the public or for public purposes.

Easements.

42. (1) The Concessionaire shall apply for, and be granted permits, approvals or consent, a right of way or easement, for the purpose of implementing the Project.
- (2) In accordance with the applicable permits, approvals or consent of the State, the Concessionaire shall have the right to enter upon, transit through or do work or fix installations upon property of third parties, as appropriate and required for the implementation of the Project.

- (3) Any easements that may be required for the implementation of the Project shall be created in accordance with the applicable Laws of the State.
- (4) The Agency shall assist and facilitate the procurement of such approvals, permits or consent from the relevant departments of the State.

Security Interests.

43. (1) Subject to any restriction that may be contained in the Concession Contract, the Concessionaire may create security interests over any of its assets, rights or interests, including those relating to the Project, as required to secure any financing needed for the Project, including, in particular, the following:
- (a) security over movable or immovable property owned by the Concessionaire or its interests in Project assets; and
 - (b) a pledge of the proceeds of, and receivables owed to the Concessionaire.
- (2) The shareholders of the Concessionaire shall have the right to pledge or create any security interest over their shares in the Concessionaire.
 - (3) No security under subsection 1 of this Section shall be created over public property or assets needed for the provision of a public infrastructure, where the creation of such security is prohibited by the Laws of the State.

Assignment of Concession Contracts.

44. (1) The rights and obligations of the Concessionaire under the Concession Contract may not be assigned to third parties without the written consent of the Agency.
- (2) The Concession Contract shall set forth the conditions under which the Agency shall give its consent to an assignment of the rights and obligations of the Concessionaire under the Concession Contract, including the acceptance by the new Concessionaire of all obligations thereunder and evidence of the new Concessionaire's technical and financial capability as necessary for implementing the Project.
 - (3) The State shall where applicable, enter into direct agreements with the Guarantor or lenders and the Concessionaire to provide for step-in rights, notice requirements, cure periods, and other issues intended to

maintain continuity of the Project where the Concessionaire or project company defaults and or falls away.

Transfer of Controlling Interests in the Concessionaire.

45. (1) Except as otherwise provided in the Concession Contract, a Controlling Interest in the Concessionaire may not be transferred to third parties without the consent of the Agency.
- (2) The Concession Contract shall set forth the conditions pursuant to the consent of the Agency shall be granted for the transfer of a Controlling Interest to a third party.

Revision of Concession Contracts.

46. (1) The Concession Contract shall set out the extent to which the Concessionaire shall be entitled to a review and revision of the Concession Contract with a view to providing compensation in the event that the cost of the Concessionaire's performance under the Project has substantially increased or that the value that the Concessionaire receives for such performance has substantially diminished, as compared with the costs and the value of performance originally foreseen, as a result of:
- (a) changes in economic or financial conditions of the State; or
 - (b) changes in legislation or regulations not specifically applicable to the Project.
- Provided that the economic, financial, or legislative changes occur after the conclusion and execution of the Concession Contract, are beyond the control of the Concessionaire, and are of such a nature that the Concessionaire could not reasonably be expected to have taken them into account at the time the Concession Contract was negotiated.
- (2) The Concession Contract shall establish procedures for reviewing and revising the terms of the Concession Contract in accordance with the provisions of subsection 1 of this Section.

PART VII
DURATION AND TERMINATION OF CONCESSION CONTRACTS.

Duration and Extension of Concession Contracts.

47. (1) The duration of the Concession shall be stated in the Concession Contract.
- (2) The parties to the Concession Contract may enter into negotiations to extend the duration of the Concession in the following circumstances:
- (a) a delay in the completion of the Project due to circumstances beyond the control of either party to the Concession Contract;
 - (b) project suspension brought about by acts of the State;
 - (c) an increase in costs arising from requirements set forth by the Agency not originally foreseen in the Concession Contract, if the Concessionaire would not be able to recover such costs without an extension of the Concession; or
 - (d) any other circumstances as may be agreed by the parties to the Concession Contract.

Substitution of the Concessionaire.

48. The Agency may agree with the entities extending financing for the Project and the Concessionaire to provide for the substitution of the Concessionaire by a new entity or person appointed to perform under the existing Concession Contract upon breach by the Concessionaire or other events that could otherwise justify the termination of the Concession Contract.

Compensation Upon Termination of Concession Contracts.

49. The Concession Contract shall stipulate how compensation due to either party is calculated in the event of termination, and shall provide for compensation for the fair value of works performed under the Concession Contract, costs incurred or losses sustained by either party including, as appropriate, lost profits.

Wind-up and Transfer Measures.

50. The Concession Contract shall provide for the following rules for the winding-up and transfer of assets upon the expiration of the Concession:
- (a) mechanisms and procedures for the transfer of the Project assets to the Agency, upon the expiration of the Concession;

- (b) the compensation to which the Concessionaire shall be entitled to with respect to the assets transferred to the Agency or to a new Concessionaire procured by the Agency;
- (c) the transfer of technology required for the operation of the Project;
- (d) the training of the Agency's personnel or of a successful Concessionaire, for the operation and maintenance of the Project; and
- (e) the provision by the Concessionaire of continuing support services and resources, for a reasonable period after the Project has been transferred to the Agency or a new Concessionaire.

PART VIII TARIFFS.

Authorisation to Collect Tariffs.

- 51.** The Concessionaire shall enjoy specific rights as may be stated in the Concession Contract, including the right to levy, collect and retain Tariffs with respect to the use of the infrastructure by the public.

Calculation of Tariffs.

- 52.** (1) The Tariffs which may be levied and collected by the Concessionaire pursuant to any Concession Contract, shall in every case be the Tariff specified or calculated in accordance with any index or formula or other provision stated in the Concession Contract as agreed with the Agency.
- (2) Each Concession Contract shall set out the procedures, circumstances and formulae by which the Tariff to be charged by the Concessionaire shall be calculated, varied or adjusted.
- (3) Where the Concession Contract does not set out the provisions for the adjustment or variation of the Tariff, or such provisions are declared invalid and void by a court of competent jurisdiction, the Concessionaire shall have the right to make an application to the Agency for an adjustment or variation of the Tariff.
- (4) The parties to the Concession Contract shall agree to vary or adjust any Tariff charged by a Concessionaire in respect of a Project, only in

accordance with the terms of the Concession Contract.

Payment of Tariffs.

53. (1) Tariffs shall be paid to the Concessionaire and adjusted in accordance with the Concession Contract.
- (2) Where there are no provisions for the payment of Tariffs in the Concession Contract, the Tariffs shall be paid in accordance with the regulations made by the Agency and published in the official gazette of the State.
- (3) A Tariff levied in respect of public infrastructure or public assets is valid only if it is charged by the Concessionaire in accordance with the provisions of this Law and the relevant Concession Contract.

Offences and Penalties.

54. (1) It shall be an offence for any person to fail or refuse to pay any Tariff that is charged or payable to the Concessionaire in accordance with the terms of any Concession Contract that is executed pursuant to this Law, and the offender shall be liable upon conviction to a fine of One Hundred Thousand Naira (N100,000.00).
- (2) If it appears to a person employed to collect Tariffs that a person has refused or failed to pay the applicable Tariff, the person so employed may:
- (a) lawfully refuse to permit the defaulter to use, or prevent him from using the infrastructure with respect to which Tariffs are payable; and
- (b) require the defaulter to vacate the infrastructure, or call, where necessary, the assistance of law enforcement agents in the State.

PART IX MISCELLANEOUS PROVISIONS.

Issuance of Notices.

55. (1) Any notice issued by the Agency under or for the purpose of this Law shall be given in writing, under seal of the Agency, and signed by the Director-General of the Agency or by any person purporting to act under the direction of the Agency, and witnessed by the Secretary/ Legal Adviser of the Agency .

- (2) All documents purporting to be signed by or on behalf of the Agency or to be sealed with the seal of the Agency shall, in all courts, be deemed to have been so signed or sealed with due authority unless the contrary is established.
- (3) Any notice or other document required or authorised to be served on or given to any person for the purpose of this Law, may be served or given by delivering it to that person or by leaving it at that person's usual or last known place of residence or business, or by posting it by registered mail to the person's place of residence or business.

Decisions of the Agency.

56. (1) Any decision given by the Agency under or for the purpose of this Law, shall be sufficiently given if the decision is in writing under the seal of the Agency and if signed by the Director-General of the Agency or an officer or employee of the Agency authorised for that purpose, and witnessed by the Secretary/Legal Adviser of the Agency.
- (2) A copy of any decision of the Agency certified to be a true copy by an officer or employee of the Agency authorised in that behalf, shall be received in all courts as evidence of the decision given by the Agency.

Delegation by the Agency.

57. (1) The Agency may delegate any of its powers subject to any conditions and restrictions imposed by it, and the delegation may be made either generally or in relation to any particular power vested on the Agency by virtue of this Law.
- (2) A person to whom the Agency delegates its power or functions may be either a member or an officer of the Agency, or a firm of professional consultants or advisors with requisite skills, expertise and capacity to exercise the powers and functions so delegated. Provided that in the case of a delegation to professional consultants, no decisions may be made or contracts executed except with the consent of the Agency or in accordance with the provisions of this Law.
- (3) Subject to any general or special direction given or restriction imposed by the Agency, any person to whom any power or function is delegated, may exercise the power or perform the function in the same manner with the same effect as if it had been conferred directly under this Law.

- (4) Any person purporting to act pursuant to any delegation under this Section, shall be presumed to be acting in accordance with the terms of the delegation, in the absence of any proof to the contrary.
- (5) The delegation of any power or function under this Section shall not prevent the exercise of that power or performance of that function by the Agency.

Repeal and Savings.

- 58.**
- (1) The Ekiti State Public Private Partnerships Law No.12 of 2011 is hereby repealed.
 - (2) Without prejudice to Section 6 of the Interpretation Act, the repeal of the Law specified in Subsection 1 of this Section, shall not affect anything done under or pursuant to that Law.
 - (3) There shall be vested in the PPP Office all assets, funds, resources and other immovable property which before the commencement of this Law, were vested in the office of public private partnerships established under the repealed Law.
 - (4) All rights, interests, obligations and liabilities of the office of public private partnerships under any contract or instrument or in law or equity in place before the commencement of this Law, shall by virtue of this Section, be assigned to and vested in the Agency .
 - (5) Any contract or instrument referred to in subsection 4 of this Section shall be of the same force and effect against or in favour of the Agency established under this Law and shall be enforceable as fully and effectively as if, instead of the office of public private partnerships under the repealed Law, the Agency had been named or had been a party.
 - (6) The Agency shall be subject to all obligations and liabilities to which the office of public private partnerships under the repealed Law was subject to, before the commencement of this Law.

PART X INTERPRETATION AND CITATION.

Interpretation.

- 59.** In this Law, except as the context otherwise requires:
“**Agency**” means the Ekiti State Development and Investment Promotion Agency established pursuant to the Ekiti State Development and

Investment Promotion Agency Law.

“**Annuity PPP**” has the meaning given to it in Section 13 of this Law

“**Approving Authority**” means the Governor of Ekiti State (referred to in this Law as the Governor) or any senior officer of the Ekiti State Government as authorised by the Governor.

“**Bid**” means a document submitted in response to a request for proposals.

“**Bidder**” or “**Bidders**” means persons, including groups thereof, that participate in selection proceedings in connection with a Project, and persons that have submitted Bids in response to request for proposals.

“**Bid Security**” means a form of security assuring that the bidder shall not withdraw a bid within the period specified for acceptance and shall execute a written contract within the time specified in the bid.

“**Concession**” means a contractual licence formalised by a Concession Contract, which may be linked to a separate interest or right over real property, entitling a person who is granted the licence to make use of the specified infrastructure or undertake a Project and to charge user fees or tolls, receive annuity or availability payments or both such fees and payments during the term of the Concession.

“**Concessionaire**” means the person that carries out a Project under a Concession Contract entered into with the Ekiti State Government.

“**Concession Contract**” means the mutually binding agreement or agreements between the Ekiti State Government and the Concessionaire that sets forth the terms and conditions for the implementation of a Concession granted pursuant to the provisions of this Law, to the Concessionaire.

“**Controlling Interest**” means at least 50% of the issued and paid-up capital of the Concessionaire, plus one.

“**Ekiti State Development and Investment Promotion Agency Law**” means the Ekiti State Development and Investment Promotion Agency Law (EKDIPA) No. 8 of 2019.

“**Guarantor**” means a specialised institution (excluding commercial banks) established for the purpose of providing credit enhancement in the form of guarantees and having a minimum rating of AA + or equivalent from a Rating Agency.

“**Institutional Investors**” means domestic pension funds, insurance companies and other long term institutional investors.

“**ISPO**” means an irrevocable standing payment order issued by the

Accountant-General of the State with respect to the financial obligations of the State to a Concessionaire.

“Original Project Proponent” means any person who develops and submits an Unsolicited Proposal.

“person” includes individuals, a limited liability company, a limited liability partnership or any organization duly incorporated under the Laws of the Federal Republic of Nigeria.

“Preferred Bidder” means the Bidder with the highest ratings after the Bids have been examined and evaluated against the criteria set out by the Agency.

“Procuring Entity” means the Ekiti State Development and Investment Promotion Agency.

“Project” includes the design, construction, development or operation of a new infrastructure, asset or facility or the rehabilitation, modernisation, expansion, operation or management of an existing infrastructure, asset or facility.

“Public Private Partnerships” means an arrangement whereby a private party and a government entity enters into a contract for the provision of a public asset or service by the private party, and the private party bears the significant risk and management responsibility, and remuneration is linked to performance.

“Public Private Partnership Arrangements” means the different types of models for Public Private Partnerships and include the following:- the Design, Build, Operate and Transfer (DBOT), Build, Own, Operate and Transfer (BOOT), Rehabilitate, Operate and Transfer (ROT), Joint Development (UD), Operation and Maintenance (OM), Design, Build, Finance, Operate and Maintain (DBFOM), Build, Lease and Transfer (BLT), Build, Transfer and Operate (BTO), Develop, Operate and Transfer (DOT), Rehabilitate, Own and Transfer (ROT), etc.

“Rating Agency” means any rating agency registered with the Securities and Exchange Commission of Nigeria.

“Reserved Bidder” means a Bidder that submits a second ranked Bid.

“State” means Ekiti State.

“Tariff” means service charge, fee, toll or other charges imposed by the Concessionaire pursuant to the Concession Contract for the use of the infrastructure that forms the basis of the Project by members of the public.

“Unsolicited Proposal” means any proposal relating to the implementation

of a Project that is not submitted in response to a request or solicitation issued by the Agency.

Citation.

60. This Law may be cited as the Public Private Partnerships (Repeal and Re-enactment) Law, 2020.

PUBLIC PRIVATE PARTNERSHIP (RE-ENACTMENT), LAW, 2020

SCHEDULES.
FIRST SCHEDULE
[Section 21]

Contents of a Request for Proposal.

1. The Request for proposal shall contain the following information:
 - (1) instructions for preparing the proposal;
 - (2) the criteria and procedures, in conformity with provisions of Section 28 of this Law, that will be applied in the ascertainment of the qualifications of Bidders and in any further demonstration of qualifications;
 - (3) the requirements as to documentary evidence or other information that must be presented by Bidders to demonstrate their qualifications;
 - (4) a detailed description of the subject matter of the procurement, the quantity of the goods; the services to be performed; the location where the goods are to be delivered, construction is to be effected or services are to be provided; and the desired or required time, if any, when goods are to be delivered, construction is to be effected or services are to be provided;
 - (5) the terms and conditions of the Concession Contract, to the extent that they are already known to the Agency, and the form of the contract, if any, to be signed by the parties;
 - (6) if alternatives to the characteristics of the subject matter of the procurement, the contractual terms and conditions or other requirements set out in the solicitation documents are permitted, a statement to that effect and a description of the manner in which alternative bids are to be evaluated;
 - (7) if Bidders are permitted to present Bids for only a portion of the subject matter of the procurement, a description of the portion or portions for which proposal may be presented;
 - (8) the manner in which the financial and commercial aspects of the Concession Contract are to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the subject matter of the procurement itself, such as any applicable transportation and insurance charges, customs duties and taxes;

- (9) any requirements of the Agency with respect to the issuer and the nature, form, amount and other principal terms and conditions of any Bid Security to be provided by Bidders presenting proposal in accordance with Section 24 of this Law, and any such requirements for any security for the performance of the concession contract to be provided by the supplier or contractor;
- (10) where a supplier or contractor may not modify or withdraw its proposal prior to the deadline for presenting Bids without forfeiting its Bid Security, a statement to that effect;
- (11) the manner, place and deadline for presenting Bids;
- (12) the means by which, Bidders may seek clarification on the request for proposals and a statement as to whether the Agency intends to convene a meeting of Bidders at this stage;
- (13) the period of time during which Bids shall be in effect;
- (14) the manner, place, date and time for the opening of Bids;
- (15) the criteria and procedure for evaluating Bids;
- (16) the name, functional title and address of one or more officers or employees of the Agency who are authorized to communicate directly with and to receive communications directly from Bidders in connection with the procurement proceedings without the intervention of an intermediary;
- (17) notice of the right to challenge or appeal decisions or actions taken by the Agency that are allegedly not in compliance with the provisions of this Law, together with information about the duration of the applicable standstill period and, if none will apply, a statement to that effect and the reasons; and
- (18) any other requirements established by the Agency in conformity with this Law relating to the preparation and presentation of Bids and to other aspects of the procurement proceedings.

SECOND SCHEDULE.

[Section 7]

Eligible Sectors.

Subject to subsection 2 of Section 7 of this Law, Concessions may be awarded by the Agency in the following sectors:

- (1) Transportation.
- (2) Energy.
- (3) Education.
- (4) Housing.
- (5) Healthcare.
- (6) Information technology.
- (7) Real estate.
- (8) Agriculture.
- (9) Infrastructure and construction.
- (10) Aviation.
- (11) Oil and gas
- (12) Environment.

THIRD SCHEDULE

[Section 38]

Contents of a Concession Contract.

The Concession Contract may provide for such matters as the parties deem appropriate, such as:

- (1) the nature and scope of works to be performed and services to be provided by the Concessionaire;
- (2) the conditions for the provision of those services and the extent of exclusivity, if any, of the Concessionaire's rights under the Concession Contract;
- (3) the assistance that the Agency may provide to the Concessionaire in obtaining licenses, approvals, and permits to the extent necessary for the implementation of the Project;
- (4) the ownership of assets related to the Project and the obligations of the parties, as appropriate, concerning the acquisition of the Project site and any necessary easements;
- (5) the remuneration of the Concessionaire, whether consisting of Tariffs or fees for the use of the infrastructure;
- (6) the issuance of any guarantees, letters of comfort, undertakings, or ISPOs by the State;
- (7) the methods and formulas for the establishment or adjustment of any such Tariffs or fees, and the payments that may be made by the Agency or any other public authority in the State;
- (8) procedures for the review and approval of engineering designs, construction plans and specifications by the Agency;
- (9) procedures for testing and final inspection, approval and acceptance of the infrastructure;
- (10) the powers of the Agency to monitor the works carried out by the Concessionaire;
- (11) the conditions and extent to which the Agency may take reasonable actions as appropriate, to ensure that the infrastructure is properly operated and maintained in accordance with the terms of the Concession Contract and this Law;
- (12) the extent of the Concessionaire's obligations to provide the Agency with reports and other information on its operations;
- (13) mechanisms to deal with additional costs and other consequences that might result from any order issued by the Agency or any regulatory

agency in the State, and any compensation to which the Concessionaire shall be entitled;

- (14) guarantees of performance to be provided by the Concessionaire in connection with the operation and maintenance of the infrastructure;
- (15) insurance policies to be taken out and maintained by the Concessionaire in connection with the implementation of the Project;
- (16) remedies available in the event of default by either party to the Concession Contract;
- (17) the extent to which any party may be exempt from liability for failure or delay in complying with any obligation under the Concession Contract, owing to circumstances beyond its reasonable control;
- (18) the duration of the Concession;
- (19) the rights and obligations of the parties upon the termination or expiration of the Concession Contract;
- (20) the manner for calculating compensation payable to the Concessionaire, upon the termination of the Concession Contract;
- (21) the governing law of the Concession Contract;
- (22) the mechanisms for the settlement of disputes that may arise between the parties to the Concession Contract;
- (23) the rights and obligations of the parties with respect to confidential information; and
- (24) any other terms, conditions, and information as agreed by the parties.

This printed impression has been carefully compared by me with the Bill, which has been passed by the Ekiti State House of Assembly and found by me to be a true copy of the said Bill.

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MR. TOLA ESAN
Clerk of the House of Assembly

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RT. HON. FUNMINIYI AFUYE
Speaker of the House

Governor's Assent

I hereby signify my assent to this Bill

DR. JOHN KAYODE FAYEMI
Executive Governor of Ekiti State

MADE AT ADO EKITI THIS DAY OF2020