

Newsletter

WHAT INVESTORS SHOULD KNOW ABOUT THE NEWLY ISSUED ANNOUNCEMENTS UNDER THE PUBLIC AND PRIVATE PARTNERSHIP ACT

On 12 June 2020, six announcements by the Public-Private Partnership Policy Commission relating to project proposals and procedures for selecting private parties under the Public and Private Partnership Act, B.E. 2562 (2019) (the “**PPP Act**”) were published in the Royal Gazette. These announcements became effective from 13 June 2020. These amendments include the following:

- (i) Announcement of the Public-Private Partnership Policy Commission Re: Required Details in the Procurement Announcement and Request for Proposal (RFP) and Material Provisions in the Public and Private Partnership Agreement, B.E. 2563 (2020);
- (ii) Announcement of the Public-Private Partnership Policy Commission Re: Criteria and Methods for the Timeframe of Project Proposals, B.E. 2563 (2020);
- (iii) Announcement of the Public-Private Partnership Policy Commission Re: Criteria and Methods for Public Hearings from the Private Sector, B.E. 2563 (2020);
- (iv) Announcement of the Public-Private Partnership Policy Commission Re: Required Details in the Feasibility Study and Project Analysis Report, Criteria and Methods for Combining Public and Private Opinions in Consideration for Preparation of the Feasibility Study and Project Analysis Report, B.E. 2563 (2020);
- (v) Criteria and Methods on the Selection of a Private Party, B.E. 2563 (2020); and
- (vi) Announcement of the Public-Private Partnership Policy Commission Re: Material Conditions in the Public and Private Partnership Agreement, B.E. 2563 (2020).

The key takeaways for investors are as follows:

1. More Efficient Public Hearing Procedures

Under the Private Investments in State Undertakings Act, B.E. 2556 (2013) (repealed by the PPP Act) (the “**Old Act**”), the procedures for conducting public hearings for public-private partnership investments had to be in accordance with the Regulations of the Office of the Prime Minister on Public Hearings, B.E. 2548 (2005). The public hearing procedures under this regulation, were applicable for government agency projects that did not have specific regulations for conducting public hearings.

Explicit procedures for conducting public hearings for public-private partnerships have been laid out under the Announcement of the Public-Private Partnership Policy Commission Re: Criteria and Methods for Public Hearings from the Private Sector, B.E. 2563 (2020) (the “**Public Hearing Announcement**”).

The Public Hearing Announcement stipulates that the project-owner’s government agency must notify the relevant embassies located in Thailand of the public hearing and requires that such notice provide a specific timeline for private parties to provide their opinions. The project-owner’s government agency may provide such notice by other, appropriate, means for public hearings. The requirements under this announcement have been designed to provide a more accessible method for foreign investors to conduct public hearings, in comparison with former regulations.

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2. Additional material provisions required to be included in Public and Private Partnership Agreements

The PPP Act provides that a public-private partnership agreement must contain certain material clauses, to be specified under subordinate announcements.

Under the Announcement of Public-Private Partnership Policy Commission Re: Required Details in the Procurement Announcement, Request for Proposal (RFP) and Material Provisions in the Public and Private Partnership Agreement, B.E. 2563 (2020) (the “**Required Details Announcement**”), additional material provisions for public-private partnership agreements have been added as follows:

- Background, objectives and scope of the project;
- Definitions and Interpretation;
- Priority of documents – stipulating the terms and conditions in the public-private partnership agreement that will prevail over terms and conditions in other agreements entered into;
- Transfer of Ownership – In an event that there is a transfer of ownership in assets to the project-owner’s agency at any time, an explicit method for calculating the value of such assets taking in an account the cost and value of the assets at the time of the transfer must be provided;
- Knowledge sharing – the sharing of knowledge, skill and know-how to government agencies and government officials;
- Monitoring and Inspection – monitoring and inspection of the project’s operation from both parties;
- Transfer of Rights – transfer of rights and obligations under a public and private partnership agreement when there is a substitution by another legal entity;
- Interest and Penalties; and
- Amendment – including an amendment of the terms and conditions of the project’s operations.

3. Clarification of Procurement Announcements and Request for Proposals (RFP)

Under the Old Act, procurement announcements had to contain certain clauses (e.g. financial and technical qualifications of the bidder, bid guarantees and selection criteria). This included a clause that the project-handling government agency could cancel the procurement announcement without considering any bidders or not selecting the bidder with the highest bid.

This right still exists in the Required Details Announcement, except that in addition to the above-mentioned clause, the project-owner government agency may change, amend or add to the Procurement Announcement and Request for Proposal (RFP). If a project-owner government agency does change, amend or add to the Procurement Announcement or RFP, bidders may not claim for any expenses or damages that may arise.

Although there are no major changes to the overall procedures in the tendering of public-private partnerships, these new announcements provide greater details for initiating the project and the selection of the bidder.

If you would like to discuss the issues raised in this article further or related issues, please contact the authors listed in the right-hand column.