

## New Act on Public Private Partnership Projects Enacted in Thailand

19 April 2019

On 31 January 2019, the National Legislative Assembly (“NLA”) approved Governing Joint Investment between the State and Private Sector Act (“New PPP Act”), which governs joint investment between the state and private sector. Private Public Partnership Projects (“PPP Projects”) had previously been governed by the Act Governing Private Sector Participation in the State undertakings, B.E. 2556 (2013) (the “Old PPP Act”). The New PPP Act replaces the Old PPP Act in its entirety, and was published in the Royal Gazette on 10 March 2019 becoming effective on 11 March 2019.

The New PPP Act aims to exclude certain types of projects from being regulated by the Old PPP Act and streamline the process of investment partnerships between the public sector and the private sector.

### Key changes in the New PPP Act

While the New PPP Act still retains the same basic concepts and procedures for investment from the private sector as in the Old PPP Act, it has introduced some key changes, which are summarized as follows:

#### 1. Narrowing the nature of projects controlled under the New PPP Act

PPP Projects subject to provisions under the New PPP Act have been narrowed down under Section 7, as compared to the Old PPP Act. The list of infrastructure and public services listed in Section 7 of the New PPP Act include the following:

- 1.1 roads, highways, special way and land-transportation;
- 1.2 trains, electric train and rail-transportation;
- 1.3 airports and air-transportation;
- 1.4 ports and water-transportation;
- 1.5 water management, irrigation, waterworks and wastewater treatment;
- 1.6 energy works;
- 1.7 telecommunications and communications;
- 1.8 hospitals and public health;
- 1.9 schools and education;
- 1.10 housing and facilities for low or medium wage earners, the elderly, underprivileged or disabled;
- 1.11 exhibition centers and conference centers; and
- 1.12 other activities as to be announced by Royal Decree.

The New PPP Act applies to PPP Projects with a value of THB 5 billion or more. This amount reflects an increase that had been implemented under the Old PPP Act, which initially applied to PPP Projects of THB 1 billion or more, but was then increased to THB 5 billion through Ministerial Regulations made by the

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Ministry of Finance.

## **2. Key amendment to the process of project proposals and project implementation**

The process of project proposals and the project implementation has been amended under the New PPP Act, with the key changes as follows:

- 2.1 The 60-day timeframe for the Minister of the project-owner agency to approve the Project study report from the project-owner agency and the 60-day timeframe for the State Enterprise Policy Office ("SEPO") to consider on Project study report have been removed. The new timeframe for the process is to be announced in a Notification from the Committee promoting the joint investment between the state and public sector (the "PPP Board") at a later date;
- 2.2 In the Old PPP Act, only PPP Projects that involve usage of government budgets or loans by Ministry of Commerce required approval from the Council of Ministers; however, in the New PPP Act, any PPP Projects which are subject to the New PPP Act require approval from the Council of Ministers;
- 2.3 During the project proposal phase, the PPP Board can propose the establishment of a working group from different government sectors to streamline the process of commenting on the project study report and the timeframe for the project proposal stage;
- 2.4 A public hearing is now required during the process of drafting the project study report, Terms of Reference ("TOR"), Request for Proposal ("RFP"), and the investment partnership contracts. The details required to be included in public hearings for a PPP Project are to be announced in the Notification of the PPP Board at a later date; and
- 2.5 In the process of selecting the private sector party, no additional comments from the SEPO are required, which shortens the process of selecting a private sector party.

## **3. Key amendment to contractual amendments and new contracts**

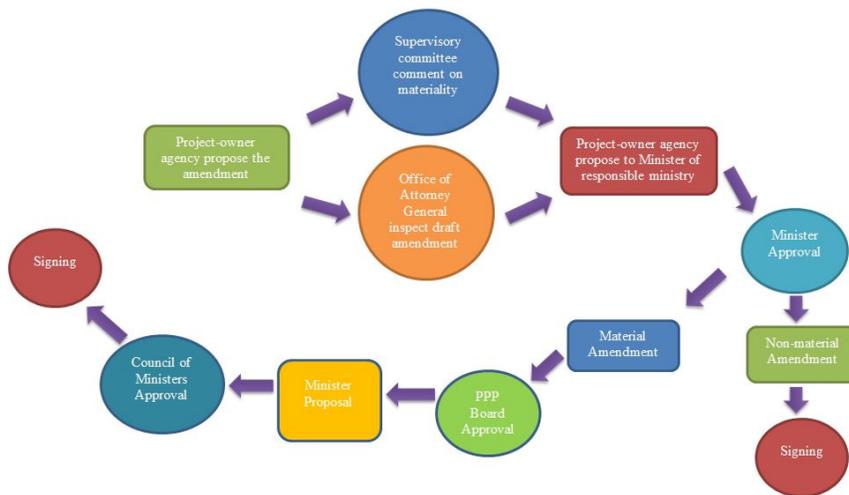
In the Old PPP Act, the process of amending investment partnership contracts included the project-owner agency proposing the amendments to the Supervisory Committee (created by virtue of the Old PPP Act). If amendments were not material, the Supervisory Committee could notify the Minister of the responsible ministry of the amendment before the signing. However, if the amendment was material, the project-owner agency was required to propose the amendments to the Supervisory Committee, including the consequences that such amendments may have and draft an amended agreement to the Office of the Attorney General. Finally, the project-owner agency had to send the opinions of the Supervisory Committee and the draft amended agreement approved by the Office of the Attorney General for the Council of Ministers' approval.

Under the New PPP Act, any amendment to an investment partnership agreement is to be reviewed by the Supervisory Committee and the Office of the Attorney General, with a limit of 45 days for the Office of Attorney General to review the draft. After receiving the opinion of the Supervisory Committee and approval of the draft amended agreement from the Office of Attorney General, the project-owner agency can propose both the Supervisory Committee's opinion, and the amended agreement to the Minister of the relevant ministry for approval.

After approval of an amendment to an agreement is made by the Minister of the relevant ministry of a PPP Project, if the Supervisory Committee has previously determined that such amendment to an agreement deviates from the principals of joint investment between the state and the private sector, or alters any material condition of such agreement previously approved by the Council of Ministers, such amendment requires approval of the PPP Board, followed by the Council of Ministers for final approval.

The New PPP Act requires more extensive measures in order to amend an agreement, as described above. Proposals for amendments must be reviewed by the Office of the Attorney General and approval from the Minister of the relevant ministry. The material amendments require the approval of the PPP Board, and the Council of Ministers.

The process of amending investment partnership contracts under the New PPP Act



**4. Introduction of expanded authority on Public sector side**

Under the New PPP Act, the project-owner agency is empowered to facilitate the project. Examples are as follows:

- 1) In a case of emergency or for public safety the project-owner agency, with permission from the Council of Ministers, is empowered to enter into new temporary investment partnership contracts, amend the existing investment partnership contracts, or terminate the investment partnership contracts. If the grounds for

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intervention are not caused by the private party, the private party shall be entitled to fair compensation.

- 2) In a case where there is delay or an obstacle in project implementation, the project-owner agency is to propose a solution to the problem or timeframe for facilitation to the Council of Ministers for command.

#### **5. Supportive measures for investment partnership projects**

Introduced in the New PPP Act, in the process of preparing the project study report, the project-owner agency is permitted to include supportive measures for the investment partnership project, which include the following:

- 1) incentives under the investment promotion law;
- 2) the right to lease land or real estate in the joint investment project with a lease period of no more than 50 years; and
- 3) other permitted financial and non-financial assistance as announced by the PPP Board.

#### **Effectiveness**

While the New PPP Act became effective starting on 11 March 2019, the transitory provisions provide that all Ministerial Regulations, Notifications or rules issued under the Old PPP Act that were effective before the date the New PPP Act comes into force will continue to be effective to the extent that they are neither contrary to, nor inconsistent with the New PPP Act. The New PPP Act specifies that related regulations are to be issued within 180 days from its effective date.

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This publication is intended to highlight an overview of key issues for ease of understanding, and not for the provision of legal advice. If you have any questions about this publication, please contact your regular contact person(s) at Mori Hamada & Matsumoto or Chandler MHM Limited, or any of the Key Contacts listed in the far-right column.