



Ministry of Finance, Trade and Economic Planning
Liberty House, P.O Box 313/ Victoria/ Mahé, Seychelles

EXPLANATORY MEMORANDUM TO THE DRAFT PUBLIC-PRIVATE PARTNERSHIP BILL, 2017

I INTRODUCTION

The purpose of developing a Public-Private Partnerships Act is to create a stable regulatory environment within the Republic of the Seychelles which demonstrates the commitment of the Government of Seychelles to attracting private investment in infrastructure.

The precursor to this legislation is the PPP Policy, which recognises the policy context in which PPPs arise in Seychelles. The Seychelles National Development Strategy is the policy document which drives infrastructure development in Seychelles, and recognises various types of public investment projects, including PPPs. PPPs are located within the overall planning and budgetary paradigm of the National Development Strategy, and as such are not prioritised separately.

PPPs there are one form of public investment projects, however owing to the fact that these projects are funded by way of private sector investment, a regulatory framework specifically regulating the manner in which PPPs are procured and implemented is required in order to attract the necessary investment.

Importantly, PPPs as contemplated under the PPP Act does not include projects where the Government of Seychelles (through a public body or a public enterprise) enters into a joint venture with a private party in order to commercialise a particular government function. Rather, PPPs as defined in the Act relate to concession-type projects where a public function (the infrastructure and the service) is transferred to the private sector for a long period generally in excess of 10 years, and in return for which the private party has the right to generate income, and if operated correctly, a profit.

Another defining feature of this PPP Act is that it includes public enterprises insofar as they engage in PPPs, but not other commercial activities that do not fall within the definition of a PPP

The custodian of the PPP Act is the Ministry of Finance, Trade and Economic Planning, and in addition to recognising the role of existing institutional structures such as the Procurement Oversight Unit and the National Tender Board (insofar as the procurement of a PPP is concerned), the Act also establishes or formalises existing structures in the Ministry, namely the Public Investment Management Unit and the

National Development Committee which together act as a facilitator and regulator of PPP projects as they pass through the PPP project cycle.

II APPROACH TO DRAFTING

In preparing the draft PPP Act, PPP laws in other Southern and East African jurisdictions demonstrating a variety of approaches were considered, namely the PPP laws in the Republic of Mauritius, the Republic of South Africa, and the Republic of Kenya. This was coupled with a review of applicable existing laws in the Seychelles and stakeholder consultations with various parties in the Government of Seychelles regarding the existing legal framework and policy regarding PPPs and the integration of a new PPP law. The goal was to draft a law that both accorded with international best practice but was also build on the foundation of the existing law and requirements of the Seychelles.

The PPP Act is not a self-standing law, but draws on existing institutional structures and processes formalised in legislation . For example, Part IV of the Act which regulates Project Procurement must be read with the applicable provisions of the Public Procurement Act as they apply to the procurement of PPP projects . Secondly, the draft also recognises the role of PPPs within the overall process for the identification, appraisal and selection of priority infrastructure projects within the Seychelles, as well as the budgeting process, and is drafted to fit within this scheme. Finally, The Public Investment Management Manual (PIMM) has been drawn on to guide the system of institutional structures utilised in the Act.

The PPP Act caters for all necessary legal interventions across the PPP cycle. This includes project identification, selection and appraisal, the procurement process, and the award and subsequent management of projects. The structure of the PPP Act is aligned with the phases of the PPP project cycle as defined in the Act.

III CLAUSE-BY-CLAUSE DISCUSSION

Part I – Application (section 3)

The Act applies to all public bodies as well as public enterprises insofar as they procure PPPs. To ensure that there is consistency between the PPP Act and the Public Procurement Act, section 19 of the PPP Act amends the Public Procurement Act so as to apply to public bodies as well as public enterprises.

Excluded from the application of the Act are PPPs that were concluded prior to the date of commencement including any PPP for which requests for proposals have been released into the market prior to the commencement date.

Part II – Institutional Structures (sections 4, 5 and 6)

In addition to existing institutions under the Public Procurement Act, the PPP Act establishes two institutions (situated in the Ministry of Finance, Trade and Economic Planning) which regulate all public investment projects, including PPPs.

Briefly, the Project Investment Management Unit (PIMU) is the facilitator of PPPs and the "intermediary" between the contracting authority (who is responsible for initiating projects) and the decision-making body, the Development Committee and

ultimately the Minister of Finance. The PIMU therefore renders assistance to a contracting authority to progress a PPP along the PPP project cycle. Its functions are listed in section 6.

The Development Committee take the role of "regulator" of the financial implications of public investment projects including PPPs, and ultimately reports to the Minister of Finance. The Development Committee also recommends policy in relation to PPP projects to the Minister and provides recommendations to the Minister and the Cabinet on any PPP.

The promotor and manager of all projects is the contracting authority under whose portfolio a particular public function falls. It is required under the Public Procurement Act to arrange itself internally so that it can support the passage of a PPP through the project cycles described in the PPP Act.

Part III – Initial Screening and Project Development (sections 7 - 10)

Part III of the PPP Act is the start of the PPP project cycle. The provisions are based on the processes outlined in the PIMM insofar as they relate to the initial screening of a project and then, if the following stage of project development.

Once a public investment project is identified, including a PPP, the contracting authority is required to engage in project proposal documentation and where applicable a pre-feasibility study. This process requires the approval of line ministries (from a planning and budgeting perspective) and the support of PIMU.

It is only at the end of the project development stage that the Development Committee will make a determination on whether or not a project may advance to the next stage i.e. advanced feasibility study stage.

If a project is not approved by the Development Committee, it will not advance to the next stage, procurement.

Prior to the commencement of the feasibility study stage of project, the contracting authority must appoint a PPP officer, and where approved, a transaction advisor.

A feasibility study undertaken in terms of the PPP Act must comply with substantive criteria. The overarching requirement is for the feasibility study to show that the PPP is in the best interests of the contracting authority. A feasibility study must include an appropriate procurement plan for the PPP

If later during the procurement process any assumptions in the feasibility study are materially revised after PPP Approval: I but before PPP Approval: II, approvals are required.

When a feasibility study has been completed the contracting authority must submit the feasibility study report together with all other relevant project documentation to the line ministry for review and a recommendation on whether the contracting authority should continue with the proposed PPP, followed by the PIMU, then the Development Committee and ultimately the Minister.

The Minister's approval is referred to as "PPP: Approval I" and the contracting authority may not proceed with the project procurement phase of a PPP without first having obtained PPP Approval I.

Part IV – Project Procurement (sections 11 – 13)

Stage 3 of the PPP project Cycle regulates the procurement of PPPs. This Part of the PPP Act must be read with the applicable provisions of the Public Procurement Act (2008).

Institutionally, while the PIMU continues to advise and support contracting authorities in respect of procurement of the PPP, the key institutional structures during the procurement of a PPP are the National Tender Board and the Procurement Oversight Unit.

The role of the Procurement Oversight Unit is one of "quality assurance" manager in that it must approve the PPP procurement documentation prior to the contracting authority issuing to any pre-qualified bidders. The draft PPP agreement must be approved both by the Procurement Oversight Unit from a procurement perspective and the Development Committee from a public finance and liability perspective.

The National Tender Board is the procurement regulatory body responsible for approving the list of pre-qualified bidders selected by the contracting authority, as well as the preferred bidder and the contract award.

After the PPP procurement has been concluded but before the accounting officer of a contracting authority concludes a PPP agreement, the contracting authority must prepare the PPP Approval II report for obtaining PPP Approval II from the Minister.

The contracting authority may not proceed with the signature of the PPP Agreement without having received the PPP Approval II. In terms of section 12 only the accounting officer of the contracting authority can conclude the PPP Agreement.

The PPP Act contains in section 12 criteria or minimum requirements which are to be drafted into and regulated by the PPP agreement.

Part V – Management and Amendment of PPP Agreement (section 14 and 15)

Provisions have been added to the PPP Act specifying the manner in which PPP agreements are to be managed by the contracting authority.

A section has also been included to outline the process to be followed (both substantively and procedurally) for material amendments to a PPP agreement.

Part VI – Miscellaneous Provisions (section 16 to 18)

Section 16 recognises that to attract private finance it may be necessary for the Government to provide financial support in the form of a guarantee in respect of its obligations under the PPP agreement.

This section confirms that any such financial support is only provided in accordance with the Public Debt Management Act, 2008.

Provisions are contained for the Minister and the Development Committee to issue PPP guidelines and best practices to aid contracting authorities in conducting their PPP projects. The Ministry intends issuing a PPP manual to guide contracting authorities. The Procurement Oversight Unit is expected to issues draft procurement documentation or PPPs including a draft PPP agreement.

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