

Towards Clarity and Precision

Thailand's new public-private partnership law

Thailand faces the need for new public infrastructure and expanded public services, for which substantial investment will be required. Investment by the government can have a major impact on public finances; thus, it is an attractive option to shift these costs to the private sector, in the form of public-private partnerships (PPPs).

Since 1992, PPPs have been governed primarily by the Private Participation in State Undertaking Act B.E. 2535 (1992). Its provisions were written in a way that offered room for a variety of legal interpretations, thus leading to uncertainty regarding which projects were covered within the scope of the law. Regulations were issued under the law to address the selection process. However, many investors perceived difficulties, which ultimately hindered the development of PPPs in Thailand.

Earlier this year, the Private Investment in State Undertaking Act B.E. 2556 (2013) was enacted, effective April 4, 2013, which also translated into a simultaneous repealing of the old PPP law. While the overall content and structure of the new law is quite similar to the old version, the new law provides greater specificity in definitions, procedures, and time frames. Moreover, it also resulted in the establishment of a new committee

– the PPP Committee – to take primary responsibility for PPPs in Thailand.

The new law has a broad scope. New PPP projects with a value of more than 1 billion baht, or as may be prescribed in ministerial regulations, will be subject to the new law. The new law lays down the basic rules and procedures applicable to new PPP projects, though they have yet to be fleshed out through ministerial regulations.

The PPP Committee will consist of members from the public and private sectors. On the government side, the members have been specified in the statute to include the Minister of Finance, the Prime Minister (Chair), the Permanent Secretary of the Ministry of Finance, the Secretary of the National Economic and Social Development Board, the Secretary General of the Council of State, the Director of the Bureau of the Budget, the Comptroller General, and the Director of the Public Debt Management Office of the Attorney General. The State Enterprise Planning Office (SEPO) will function as the secretariat of the PPP Committee.

Under the law, the consideration of PPPs should take into account the following:

- Performance and costs of operation and the use of state resources;
- Adherence to fiscal discipline;
- Social and economic benefits from each project;
- Transparency of the decision-making process;
- Appropriate risk allocations between public and private sector projects;
- Rights and interests of the client and the service provider; and
- Promotion of fair competition among private investors that wish to participate.

In terms of procedures, when a government agency wishes to pursue a PPP project, one of the project agency's first steps would be to hire a consultant to conduct a project study and analysis. The mandatory use of consultants is a significant change that has been incorporated into the new law. The law provides for SEPO to maintain a list of consultants who fulfil the requirements of the law.

Once completed, the report will be sent for consid-



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eration by the concerned minister of the agency, which must be finalised within 60 days. If the minister approves the project, SEPO will then subject it to further consideration and analysis – a process that should be completed within 60 days. Questions and additional documents can only be posed/ requested within the first 30 days after receipt. Finally, the PPP Committee, with SEPO's recommendation, will review the project in principle. If the project involves government expenditure, cabinet approval will be required.

The approval of the PPP project by the PPP Committee or the cabinet will then lead to the next step – the selection of the private partner in accordance with regulations that have yet to be issued. A selection committee is to be appointed by the project agency to select a private sector operator to join the PPP project. Once the selection committee takes its decision, the results and the joint venture agreement will be sent to SEPO and the Office of the Attorney General, respectively. The final decision will ultimately be taken by the cabinet. The forthcoming regulations will address the specific requirements for invitation letters and agreements, which need to be followed by agencies pursuing PPP projects.

The law has also put in place a mechanism for supervising and monitoring each PPP project: a committee will be appointed for each project to perform the aforementioned

functions. One of the committee's roles is to propose solutions to problems that may arise during the course of a project.

Finally, at the time of renewal, the law envisages a mechanism by which the project agency will decide whether to renew the agreement with the private operator, which is ultimately subject to cabinet approval. The law allows for amendments to be made at the time of renewal, which also require cabinet approval.

In addition to clarifications in the terminology and improvements to timelines, the law seeks to guide the development of PPPs in Thailand. The PPP Committee needs to work with SEPO to prepare a five-year strategic plan for PPPs for the cabinet's consideration. Among other matters, the strategic plan is meant to identify sectors and specific projects in which PPPs would be of benefit to the Kingdom; the priority of each; a target for private investment; and a time frame for implementation. Five-year strategic plans are to be prepared on a rolling basis to ensure continuous guidance. The law has also established a PPP Development Fund that is to be used for developing the PPP strategic plan, hiring consultants, and helping agencies to develop PPPs that are consistent with the plan.

In case there is confusion as to whether the old law or the new law is applicable to a pre-existing project, or a potential new

project, which is already undergoing review/ consideration, the law provides clarity in this space as well.

Overall, it is projected that the new law allows for the PPP approval timeline to be shortened from two years to only seven to eight months. Though based on the old law, the new law contains several technical improvements. Ultimately, however, the success of the new law, in terms of attracting new private investments in Thai infrastructure and public services, will depend on the ministerial regulations that have not yet been issued. So long as the ministerial regulations provide a solid framework for the development of PPPs, this new law should deliver a needed boost to private investment in infrastructure and public services. ■

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