REVIEW OF THE PUBLIC PRIVATE PARTNERSHIP (AMENDMENT) BILL 2023

The Public Private Partnership Act, (Cap. 103 R.E. 2018) ("PPP Act"), is the principal legislation regulating the implementation of public private partnership projects ("PPP Projects").

Government tabled in Parliament, proposed amendments to the PPP Act, with one stated objective- *"to address the challenges encountered in the implementation of the Act which has been causing lower participation of private sector in the implementation of development projects through partnership"*. In essence the proposed amendments are intended to improve the approval process with the aim of raising appetite of investors in PPP projects.

A summary of the proposed main amendments are found below.

1. The amendments have introduced a definition of the corporate entity or project company that will be used for the implementation of a PPP project called "**special purpose vehicle**" ("**SPV**"). The Bill also proposed to add a new section 18A stating that the SPV will be established by a successful private party to implement a specific PPP project prior to the signing of the PPP Agreement. A public entity may participate in a special purpose vehicle as a minority shareholder, but only under the following conditions: the public entity must hold shares that do not exceed 25 percent of the special purpose vehicle's equity contribution; the public entity must demonstrate financial capacity on the contribution of equity in the special purpose vehicle; and the public entity must demonstrate the capacity to bear and mitigate the risk associated with the implementation of the project.

2. The Bill proposes a new definition of "standard documents" that would include standard requests for qualification and proposal as well as standard PPP agreements. This definition applies to the definition of "request for proposal," as well, except in that case, the amendment replaces the terms "model agreement" with "standard documents.".

3. The bill proposes to provide clarification on the meaning of the term **"public sector"** so that it includes the regional secretariat as well as anyone acting on its behalf. This is intended to allow other public entities to promote PPP projects.

4. Notable proposed amendments concern the PPP projects approval process, which if enacted, the approval process will be fundamentally shortened and streamlined. Instead of the current procedure that requires a contracting authority to submit project proposals to the PPP Center at the beginning of each budget cycle the concept note and prefeasibility study of potential PPP projects, the new bill provides project proposals to be submitted to the Minister. This will substantially reduce the timeline for review and approval of PPP Projects cutting out the previous process where proposals would be made to the Permanent Secretary who would then submit the report to the PPP Centre followed by a further submission to the the Steering Committee for approval.

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5. In addition to shortening the approval process, the amendments propose to remove the requirement to submit along with the project proposals, a concept note and a prefeasibility study, as the current Act stipulates.

6. The new bill proposes to delete the current subsection 6A of Section 4 that required the PPP Center to examine the possible PPP project within 21 working days by transferring this responsibility to the Minister directly, providing that upon receiving a prefeasibility study of a potential PPP project from the contracting authority, the Minister shall transmit the study to the PPP Center for analysis within seven working days. According to the new proposed subsection 6B of Section 4, the PPP Center shall notify the Public Private Partnership Steering Committee of the same within twenty-one working days of receiving it from the Minister. Yet again, the proposal to delete subsection 6A of section 4 of the act now is more rational since the new subsection 6A makes the minister's responsibility explicit.

7. According to the current PPP Act, the PPP Center must review proposals filed by contracting authorities within thirty working days of the date of receipt. The new bill aims to provide additional clarification regarding the responsibilities of the PPP Center under Section 5 Subsection 2, where the new provision mandates that the PPP Center analyze potential public-private partnership prefeasibility studies, requests for proposals, evaluation reports for preferred bidder selection, and PPP agreements submitted by contracting authorities within thirty working days from the date of receipt. The proposed amendment is designed to make the provision more apparent to understand and reflect the intended meaning.

8. The new bill proposes to add a new subsection 4 to Section 7B providing that public funding means government financial assistance that constitutes a fiscal commitment or contingent liability concerning a PPP project and as such it cannot be direct Government funding as such.

9. It is proposed to amend section 9(1) of the PPP Act and to provide for better oversight of PPP projects by a contracting authority who is required to provide an implementation report of the recommendations given by the PPP Center once every three months to the PPP Center.

10. The tenure of an agreement must be specified in the agreement under section 13(1) of the PPP Act, and it cannot be extended unless, among other reasons, costs increased due to demands made either by the **Co-ordination Unit** or the contracting authority that were not anticipated or covered by the agreement. The proposed bill seeks to limit any cost increases caused by the Coordination Unit to the contracting authority exclusively. .

11. A proposed new paragraph 3 under Section 15 requires contracting authorities to work directly with private parties on projects that have been listed. The amendment aims to do away with the requirement for a private party to deposit money that is refundable up to 3% of the project's anticipated cost. These changes are intended to improve project preparation throughout the procurement process stage by facilitating private-party availability and encouraging private-sector participation.

12. Subsection (2) of Section 21 which prohibits granting of tax incentives to PPP projects is proposed to be deleted so that PPP investors who qualify for tax incentives will be able to enjoy such benefits as it is the case with any other investor.

13. It is proposed to repeal and replace Section 22 to allow the parties to make a choice of dispute resolution mechanism including access to international arbitral rules and procedures or the framework of any bilateral or multilateral agreement on investment protection entered into by the Government of the United Republic and the Government of the country where the investor originates. This new provision is aligned with the dispute resolution provisions under the new Investment Act, 2022, which is applicable to all investors.

14. It is proposed to introduce a new Section 28A giving the PPP Act, precedence over any other law, intended to resolve possible conflict with other prevailing legislation applicable.

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