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# Guide to Procurement of Infrastructure Projects in Southeast Asia



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# Introduction



As the custodians of the country, Governments are entrusted with the responsibility to develop new public facilities and infrastructure, operate and maintain such public facilities and undertake significant upgrades to existing public facilities and infrastructure, to serve the needs of its people. Governments in developing and developed countries have sought participation from the private sector as an alternative additional source of development and funding. The Public-Private Partnership ("PPP") model provides Governments with the capacity to assess and manage fiscal impact whilst managing the risk transfer between the public and private partner to extract long-term value-for-money over the life of the project.

The advantages of adopting a PPP model to undertake infrastructure projects are:

1. increasing project financing options by way of the private partner providing capital and/or financing arrangements to undertake the project;
2. reducing the public sector's budget constraints, thereby making public funds available to be applied by the Government for the welfare of its people;
3. improving accountability in the provision of infrastructure and public services to deliver projects on time and within budget;
4. imposing budgetary certainty by setting present and future costs of infrastructure projects and provision of public services;
5. harnessing private sector innovation and efficiency; and
6. stimulating growth and development in the country.

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## Guide to Procurement of Infrastructure Projects in Southeast Asia

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This publication serves as a guide to highlight:

1. the similarities and differences of the reasons and motivations for implementing the PPP model by the Governments of countries in Southeast Asia ("**SEA**"). A deeper appreciation of these differences and similarities will be a valuable consideration in understanding the expectations of SEA Governments in implementing the PPP model, which will enable international private investors to plan properly when engaging in PPP arrangements in SEA; and
2. the framework and policies for government procurement adopted for infrastructure projects in SEA. To some extent, the system of public procurement adopted by SEA encourages open competition and accountability, but is also tailored to reflect the needs and values specific to each country, whereby government policies are used to accord protection to domestic suppliers of goods and services, and preference for local or native companies.

This publication is up to date as of May 2026.

## About Public-Private Partnerships

Within the countries in SEA, PPPs are accepted as a public sector procurement mechanism whereby Governments collaborate with the private sector in a contractual arrangement to deliver public infrastructure assets and public services. The PPP model offers Governments the opportunity to develop public infrastructure assets and services by accessing private capital, expertise, efficiency and quality service, and allows for shared risks between Government and the private sector.

The essential difference between PPP and the conventional procurement model is that the PPP procurement model transforms the role of Governments from the provider to acquirer of services.

Procurement Type	Details
Conventional Procurement	The Government provides funds and prepares the input specification by describing the design and manner of construction to be undertaken by the private party awarded the contract. Upon completion of the construction, the Government manages the operation and delivery of the public services. The Government bears the overall risk under the conventional procurement model.
PPP Procurement	The Government stipulates the output specification and describes the services required. The private partner provides the finances, determines the design and construction, and for certain PPP models, manages the operation and delivery of the public services in order to fulfil the output specification stipulated by the Government. The Government transfers the design, construction, operational and life-cycle cost risk to the private party under the PPP procurement model.

There are many different types of PPP contract models, varying in respect of (i) the involvement assumed by the private partner; (ii) the risks transferred to the private partner; and (iii) the control and ownership of the public infrastructure asset during or at the expiry of the PPP contract term. Amongst the most common forms of PPP adopted by the countries in SEA are:

PPP Contract Model	Main Features	Risk Transferred to Private Partner	Ownership
Build-Operate-Transfer ("BOT")	The private partner finances, builds, operates and maintains the public infrastructure asset. At the expiry of the PPP contract term, the private partner transfers ownership of the public infrastructure asset to the Government.	<ul style="list-style-type: none"> <li>• construction risk</li> <li>• completion risk</li> <li>• resources risk</li> <li>• revenue risk</li> <li>• lifecycle cost risk</li> <li>• financing risk</li> </ul>	Private partner until transferred to the Government
Build-Own-Operate ("BOO")	Similar to BOT, but at the expiry of the PPP contract term, the public infrastructure asset is not transferred to the Government.	<ul style="list-style-type: none"> <li>• construction risk</li> <li>• completion risk</li> <li>• resources risk</li> <li>• revenue risk</li> <li>• lifecycle cost risk</li> <li>• financing risk</li> </ul>	Private partner
Build-Transfer-Operate ("BTO")	Similar to BOT, but upon completing the construction, the private partner transfers ownership of the public infrastructure asset	<ul style="list-style-type: none"> <li>• construction risk</li> <li>• completion risk</li> <li>• resources risk</li> </ul>	Government

PPP Contract Model	Main Features	Risk Transferred to Private Partner	Ownership
	to the Government. After transferring the public infrastructure asset to the Government, the private partner is given the right to operate and maintain the public infrastructure asset for the duration of the PPP contract term.	<ul style="list-style-type: none"> <li>• performance &amp; price risk</li> <li>• lifecycle cost risk</li> <li>• financing risk</li> </ul>	
Build-Lease-Transfer ("BLT")	The private partner finances and builds the public infrastructure asset. Upon completing the construction, the public infrastructure asset is delivered to the Government on a lease arrangement for a fixed period in return for lease rental payable to the private partner. At the expiry of the PPP contract term, the private partner transfers ownership of the public infrastructure asset to the Government.	<ul style="list-style-type: none"> <li>• construction risk</li> <li>• completion risk</li> <li>• resources risk</li> <li>• financing risk</li> </ul>	Private partner until transferred to the Government
Build-Lease-Maintain-Transfer ("BLMT")	Similar to BLT, upon completion the public infrastructure asset is leased to and used by the Government. The private partner maintains the public infrastructure asset during the PPP contract term. The private partner will receive from the Government periodic fixed amounts as lease rentals, and availability payments contingent upon the private partner achieving the key performance indicators (KPIs) stipulated in the PPP contract. The public infrastructure asset is transferred to the Government at the expiry of the PPP contract term.	<ul style="list-style-type: none"> <li>• construction risk</li> <li>• completion risk</li> <li>• resources risk</li> <li>• performance &amp; price risk</li> <li>• lifecycle cost risk</li> <li>• financing risk</li> </ul>	Private partner until transferred to the Government

The two main payment mechanisms for PPPs are:

1. **User Payments:** Otherwise also known as concessions. The private partner receives revenue from users but bears the risk that users will generate sufficient revenue to meet its financing and operating costs. Concessions are usually adopted for economic infrastructure projects such as toll roads and public transport systems. The public infrastructure asset reverts to the Government at the end of the concession period.
2. **Availability Payments:** The Government makes payments for services delivered by the private partner based on key performance indicators. This PPP model is commonly adopted for social infrastructure projects such as delivery of waste management, management and maintenance of public buildings.

## Summary of PPP Policies in Southeast Asia

Jurisdiction	Policy Framework	Legal Framework	PPP Government Agency	Guidelines	Government Financial Support
<b>Cambodia</b>	Policy Paper On Public-Private Partnerships for Public Investment Project Management 2016-2020	<ul style="list-style-type: none"> <li>• Law on Public-Private Partnerships dated 18 November 2021</li> <li>• Sub-Decree No. 174 on the Implementation of the Standard Operating Procedures for Public-Private Partnership Projects dated 31 August 2022</li> </ul>	<ul style="list-style-type: none"> <li>• Ministry of Economy and Finance of Cambodia ("MEF")</li> <li>• General Department of Public-Private Partnership of MEF</li> </ul> <p>Implementing Agency -line ministries, equivalent public entities, public administration establishments, public enterprises, and sub-national administrations</p>	<ul style="list-style-type: none"> <li>• Standard Operating Procedures for PPP Projects, Volume I: Policies and Procedures</li> <li>• Standard Operating Procedures for PPP Projects, Volume II: Guidelines, including:                             <ul style="list-style-type: none"> <li>○ Guidelines on Project Identification and Selection of PPP Projects</li> <li>○ Guidelines on Project Development Facility for PPPs</li> <li>○ Guidelines on Government Support Measures</li> <li>○ Guidelines on Contract Management.</li> </ul> </li> <li>• Standard Operating Procedures for PPP Projects, Volume III: Procurement Manual</li> </ul>	<p>Government financial support may be available under:</p> <ul style="list-style-type: none"> <li>• Viability Gap Financing</li> <li>• Availability Payment</li> <li>• Government Contingent Liabilities:                             <ul style="list-style-type: none"> <li>- Performance guarantee</li> <li>- Sovereign or political risk guarantee</li> <li>- Other guarantees</li> </ul> </li> <li>• Investment Incentives</li> <li>• Asset Contributions</li> </ul>

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Jurisdiction	Policy Framework	Legal Framework	PPP Government Agency	Guidelines	Government Financial Support
<b>Indonesia</b>	No overarching policy framework	<ul style="list-style-type: none"> <li>• Presidential Regulation No. 38 of 2015 on Public-Private Partnerships for Infrastructure Procurement and its implementing regulations</li> <li>• Government Regulation No. 17 of 2022 on Funding and Budget Management for the Preparation, Development and Relocation of the State Capital City and the Implementation of the Regional Government of Nusantara Capital City and its implementing regulations for Nusantara Capital City (<i>Ibu Kota Nusantara</i> or "<b>IKN</b>") PPP projects</li> </ul>	<ul style="list-style-type: none"> <li>• Minister of National Development Plan/Head of National Development Planning Agency</li> <li>• Minister/Head of Institution/Head of Local Government/State-Owned Enterprise/Regional-Owned Enterprise (as applicable) as the government contracting agency ("<b>GCA</b>")</li> <li>• Minister of Finance</li> <li>• Indonesia Infrastructure Guarantee Fund ("<b>IIGF</b>") as a Ministry of Finance ring-fencing vehicle for providing government guarantees</li> </ul>	<ul style="list-style-type: none"> <li>• Minister of National Development Plan/Head of National Development Planning Agency Regulation No. 7 of 2023 on Implementation of PPPs for Infrastructure Development, as amended by Minister of National Development Plan/Head of National Development Planning Agency Regulation No. 9 of 2025</li> <li>• Minister of National Development Plan/Head of National Development Planning Agency Regulation No. 6 of 2022 on PPP Procedures in Nusantara Capital City for IKN PPP projects</li> </ul>	<ul style="list-style-type: none"> <li>• Tax incentives</li> <li>• Viability support provided for certain PPP projects</li> <li>• Government guarantee covering certain eligible financial obligations of the GCA (provided by IIGF, or jointly with the Minister of Finance in some cases)</li> </ul>
<b>Malaysia</b>	<ul style="list-style-type: none"> <li>• Privatisation Masterplan (1991)</li> <li>• Public-Private Partnership Guidelines (2009)</li> </ul>	No specific PPP laws	3PU (UKAS)	<ul style="list-style-type: none"> <li>• PPP Guideline (2009)</li> <li>• Public-Private Partnership Master Plan 2030 (PIKAS 2030)</li> </ul>	Limited Government support through the Facilitation Fund in the form of grants

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	<ul style="list-style-type: none"> <li>Facilitation Fund Guidelines (2015)</li> </ul>				
<b>Myanmar</b>	<ul style="list-style-type: none"> <li>Myanmar Sustainable Development Plan 2018-2030</li> <li>Myanmar Project Bank</li> <li>Sectoral notifications or directives issued by ministries</li> </ul>	<p>There is no over-arching legislation for procurement of all infrastructure projects in Myanmar.</p> <p>Infrastructure projects in the public sphere are generally governed by:</p> <ul style="list-style-type: none"> <li>Notification 2/2018 on the establishment of the Project Bank ("<b>Project Bank Notification</b>");</li> <li>Public Procurement Rules (Notification No. 1/2017);</li> <li>Guidelines for Contract-Based Development Businesses;</li> <li>Myanmar Investment Law 2016, and its subsidiary legislation, the Myanmar Investment Rules 2017.</li> </ul>	<p>There is no cross-sector governmental agency which is responsible for implementation of all PPP projects.</p>	N/A	<p>The Project Bank Notification provides that the PPP Centre (i.e. a specialised unit formed within the Ministry of Planning, Finance and Industry ("<b>MoPFI</b>") to facilitate the implementation of the Project Bank Notification), in cooperation with the Treasury Department and the Budget Department of MoPFI, shall develop a set of criteria on which the appropriate Government support (e.g. government guarantees, viability gap funds, etc.) may be provided for each PPP project.</p>
<b>Philippines</b>	No overarching policy framework	<ul style="list-style-type: none"> <li>Republic Act No. 11966 (Public-Private Partnership Code of the Philippines)</li> <li>Republic Act No. 12009 (New Government Procurement Act)</li> </ul>	<ul style="list-style-type: none"> <li>PPP Governing Board and the PPP Center</li> <li>Government Procurement Policy Board ("<b>GPPB</b>")</li> </ul>	From time to time, the PPP Governing Board and GPPB issue guidelines in the implementation of the PPP Code and the New	Under the PPP Code, the Government provides financial support for the implementation of PPP projects such as viability gap

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				Government Procurement Act, respectively.	<p>funding and other subsidies in certain circumstances.</p> <p>Fiscal incentives are also available under:</p> <ul style="list-style-type: none"> <li>• Executive Order No. 226 or the Omnibus Investment Code</li> <li>• Republic Act No. 7916 or the Special Economic Zone Act of 1995</li> <li>• Republic Act No. 12066 or the CREATE MORE Law when the PPP project is under the Strategic Investment Priority Plan</li> </ul>
<b>Singapore</b>	No overarching policy framework	<ul style="list-style-type: none"> <li>• No specific statute for PPP</li> </ul>	<ul style="list-style-type: none"> <li>• No specific government agency for PPP</li> <li>• The primary government agency for foreign investment is the Economic Development Board of Singapore</li> </ul>	No specific guideline for PPP	Wide range of tax incentives and government grants across different industries and for foreign investors
<b>Thailand</b>	No overarching policy framework	<ul style="list-style-type: none"> <li>• Public-Private Partnership Act (2019)</li> <li>• Government Procurement and Supplies Management Act (2017)</li> </ul>	<ul style="list-style-type: none"> <li>• The Ministry of Finance</li> <li>• The Ministry of Commerce</li> <li>• Comptroller General's Department</li> </ul>	Regulation of the Ministry of Finance on Public Procurement and Supplies Administration (2017)	Government financial support may be available pursuant to the Eastern Special Development Zone Act (2018) for projects located within designated economic

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					zones, namely the Eastern Economic Corridor.
<b>Vietnam</b>	No overarching policy framework	<ul style="list-style-type: none"> <li>• The Law on Bidding (2023)</li> <li>• The Law on Public Investment (2024)</li> <li>• The Law on Investment (2025)</li> <li>• The Law on Public-Private Partnership (2020)</li> <li>• Other relevant laws</li> </ul>	<ul style="list-style-type: none"> <li>• The Prime Minister</li> <li>• The Ministry of Planning and Investment</li> <li>• The provincial People's Committees</li> </ul>	<ul style="list-style-type: none"> <li>• Decree No. 115/2024/ND-CP on elaborating some articles of and introducing measures for implementing the Law on Bidding regarding the selection of investors executing investment projects involving land uses</li> <li>• Decree No. 214/2025/ND-CP on elaboration of and measures for implementation of the Law on Bidding regarding the selection of contractors</li> <li>• Decree No. 243/2025/ND-CP on elaboration of Law on Public-Private Partnership</li> <li>• Other relevant Decrees, Circulars, Decisions</li> </ul>	Government financial support may be available for PPP projects under the Law on Public-Private Partnership such as corporate income tax, import tax and land lease price.

# Cambodia



## 1. Legislation Regulating Procurement of Infrastructure Projects

### 1.1 What legislation regulates the procurement of infrastructure projects in your jurisdiction?

In Cambodia, from 2021, the procurement of infrastructure projects is governed under the Cambodian Law on Public-Private Partnerships ("**Cambodian Law on PPP**") and the corresponding Standard Operating Procedures ("**SOPs**").

#### **Law on Public-Private Partnerships dated 18 November 2021**

The Cambodian Law on PPP was enacted to replace the previous Law on Concession adopted in 2007, which had regulated the procurement of privately financed public infrastructure projects. The new law aims to modernise and strengthen the PPP framework in Cambodia and to promote greater use of PPP mechanisms.

The main objectives of the Cambodian Law on PPP are to:

- (a) identify and designate the competent institutions responsible for the systematic management of PPP projects;
- (b) establish a detailed framework for the management and implementation of PPP projects;
- (c) set out the procurement procedures applicable to PPP projects; and
- (d) determine the financial support mechanisms and investment incentives available for PPP projects.

#### **Standard Operating Procedures**

Following the adoption of the Cambodian Law on PPP, the following SOPs were issued under Sub-Decree No. 174 on the Implementation of the Standard Operating Procedures for Public-Private Partnership Projects dated 31 August 2022, promulgating the SOPs for PPP Projects as follows:

- (a) Standard Operating Procedures for PPP Projects, Volume I: Policies and Procedures;
- (b) Standard Operating Procedures for PPP Projects, Volume II: Guidelines, including:

- Guidelines on Project Identification and Selection of PPP Projects;
- Guidelines on Project Development Facility for PPPs;
- Guidelines on Government Support Measures;
- Guidelines on Contract Management; and

(c) Standard Operating Procedures for PPP Projects, Volume III: Procurement Manual.

## 1.2 Which entities and what types of contracts are subject to procurement regulation?

### Procurement Entities

Pursuant to Article 4 of the Cambodian Law on PPP, the Ministry of Economy and Finance ("**MEF**") is designated as the competent institution responsible for leading and managing the PPP mechanism. Among its roles and responsibilities, MEF acts as the secretariat and "One-Stop Service" of the Government to manage PPP projects throughout all phases of the project cycle, reviews and approves fiscal commitments under the Government Support Mechanism (GSM), and countersigns the PPP contract together with the Implementing Agency ("**IA**") on behalf of the Royal Government of Cambodia.

Under Article 5 of the Cambodian Law on PPP, the General Department of Public-Private Partnership (GDPPP) of MEF acts as the supporting central agency (secretariat) responsible for coordinating and managing PPP projects throughout the PPP project cycle, from project identification through to the implementation and monitoring of the PPP contract.

In addition, under Article 6 of the Cambodian Law on PPP, the IA, which includes line ministries, equivalent public entities, public administration establishments, public enterprises, and sub-national administrations, acts as the competent institution responsible for the development of the PPP project and as the representative of the State. The IA is responsible for the identification, preparation, procurement, implementation, and monitoring of the PPP project, and is empowered to sign the PPP contract with the private partner as the representative of the Royal Government of Cambodia.

### Types of Contracts

Under the Cambodian Law on PPP, PPP contracts must reflect the project's specific features identified in the feasibility study, ensure transparency and fairness in the contracting process, allocate risks appropriately to achieve value for money for the Government, and link the private partner's benefits to performance.

Each PPP contract is based on the PPP model selected jointly by the IA and MEF, according to the project's feasibility study. The law provides several PPP contract models (listed below).

### Types of Common PPP Models for Preparing PPP Contracts

The common PPP models used as the basis for preparing PPP contracts are set out in Annex II of the Cambodian Law on PPP as follows:

#### **(a) Build-Operate-Transfer ("BOT"):**

The IA grants the private partner the right to design, finance, construct, operate and maintain project assets and collect fees, tolls, rentals and other user charges from users of the project's facilities or services for an agreed contract period as stipulated in the PPP contract. After the expiry of the contract period, the private partner shall transfer all rights and benefits relating to the project and the project assets back to the IA, in accordance with the terms of the PPP contract. Variants of the BOT model include:

- **Build-Lease-Transfer (BLT)**, wherein the private partner designs, finances, and constructs the project assets and after which leases the project assets back to the IA for a lease fee as stipulated in the PPP contract. All other aspects of the BOT model remain the same under this variant.
- **Build-Transfer-Operate (BTO)**, wherein after the completion of construction of the project assets, the private partner shall transfer the title of the project assets to the IA. All other aspects of the BOT model remain the same under this variant.

## **(b) Build-Own-Operate-Transfer ("BOOT"):**

Similar to the BOT model, the IA grants the private partner the right to design, finance, construct, operate and maintain project assets and collect fees, tolls, rentals and user charges from users of the project assets or services for an agreed contract period as stipulated in the PPP contract. The BOOT model is distinct from the BOT model, in that the private partner owns the rights to the project assets during the contract period. After the expiry of the contract period, the private partner shall transfer all rights and benefits relating to the project and the project assets back to the IA in accordance with the terms and conditions of the PPP contract.

## **(c) Build-Own-Operate ("BOO"):**

The IA grants the private partner a right to design, finance, construct, own and operate project assets in perpetuity or for an indefinite period, in accordance with the terms and conditions of the PPP contract. The private partner shall be entitled to make commercial use of the project assets, including collecting fees and other income from users of the project's assets or services. Variants of the BOO model include:

- **Rehabilitate-Own-Operate (ROO):** This model has the same characteristics as the BOO model, but the private partner shall obtain ownership rights of the existing project assets for the rehabilitation of those project assets.
- **Modernise-Own-Operate (MOO):** This model has the same characteristics as the BOO model, but the private partner shall obtain ownership rights of the existing project assets for the modernisation of those project assets.

## **(d) Management Agreement / Operations and Maintenance Agreement (O&M):**

The private partner shall provide daily services relating to operations and maintenance of existing project assets or other state assets owned by the IA, in return for service charges payable by IA or other parties in accordance with the terms and conditions of the PPP contract. In general, this agreement does not require the private partner to invest its own capital and hold any rights to the project assets or other state assets. In the event that the project requires the private partner to

invest their own capital, the private partner can recover such investment via payments from the IA or other parties in accordance with the terms and conditions stipulated in the PPP contract.

## **(e) Design-Build-Finance-Operate-Maintain (DBFOM):**

The IA grants the private partner the right to design, build, finance and provide operations and maintenance services for the project assets in accordance with the terms and conditions of the PPP contract. The private partner shall have the right to collect revenue through the provision of services mentioned from the IA or other parties in accordance with the terms and conditions of the PPP contract. At the end of the contract period, the private partner shall transfer the project assets back to the IA.

## **(f) Design-Build-Lease (DBL):**

The IA grants the private partner the right to design, build and lease the project assets from the IA, operate, and provide maintenance in accordance with the terms and conditions of the PPP contract.

## **(g) Other PPP Models**

Other PPP structures not explicitly included in the categories above.

## **2 Foreign Investment**

### **2.1 Are infrastructure projects open to foreign investment?**

Cambodia has a very open policy toward foreign investment compared to neighbouring countries in the region. With respect to foreign investment in public infrastructure, there is no foreign equity restriction, and, as long as land ownership is not relevant or is structured in a way that complies with Cambodian land law, 100% foreign investment is allowed.

## **3 Procurement Process**

### **3.1 Outline the key steps and aspects of the procurement under the legislation.**

The procurement of PPP projects in Cambodia follows a structured process and may be initiated either through

solicited proposals by the government or unsolicited proposals submitted by private parties.

## **(a) Solicited Proposals**

For solicited proposals, the procurement process generally includes the following phases:

### **Phase I: Project Identification and Selection**

The IA identifies potential projects based on sector studies and the Government's Public Investment Program. Projects intended for PPP implementation are reviewed by MEF and may be selected by the Public Investment Committee for inclusion in the Priority PPP Project List.

### **Phase II: Project Preparation and Appraisal**

The IA conducts a feasibility study with the assistance of a transaction adviser to assess the project's technical, financial, and commercial viability and determine whether it provides value for money.

### **Phase III: Project Approval**

The feasibility study is reviewed by MEF and relevant authorities before being submitted for approval by the competent government authorities, including approval of any government support if required.

### **Phase IV: PPP Procurement and Contracting**

The IA conducts the procurement process to select a private partner. Following the selection, the parties negotiate and finalise the PPP contract, which is then signed by the IA with a countersignature from MEF.

### **Phase V: Implementation and Contract Management**

The private partner is responsible for implementing the project, including financing, construction, and operation, while the IA monitors and administers the PPP contract.

## **(b) Unsolicited Proposals**

For unsolicited proposals (USP), the procurement process generally includes the following phases:

### **Phase I: Identification and Selection of the Unsolicited Proposal**

A private party submits an unsolicited proposal to the relevant IA. The proposal is reviewed by the IA and MEF, which may grant an in-principle approval to allow further preparation of the proposed project.

### **Phase II: Project Preparation and Appraisal**

A Framework Agreement (FA) between the government and the project proponent is prepared, reviewed, and negotiated. The project proponent then prepares and submits the feasibility study for the proposed project.

### **Phase III: Project Approval**

The feasibility study is reviewed by the relevant authorities, including MEF, and is subject to approval by the competent authorities.

### **Phase IV: Contracting and Signing**

A draft PPP contract is prepared and negotiated between the IA and the private partner. Upon approval by the relevant authorities, the PPP contract is executed.

### **Phase V: Implementation and Management of the PPP Contract**

The PPP contract is implemented and monitored by the IA during the project lifecycle. Where applicable, the project assets are handed over to the Government upon expiry or termination of the PPP contract.

## **3.2 Does the legislation require the procurement to be tendered out? If yes:**

Procurement can be by way of solicited proposal which needs to be tendered out and an unsolicited proposal which is by way of direct negotiation with the private party.

### **a. What types of infrastructure projects must be tendered out?**

The law does not specify particular types of projects that must be procured through competitive bidding.

### **b. What type of tender process is run?**

The selection of the procurement method, either competitive bidding or direct negotiation/selection, depends on the outcome of the feasibility study and the due diligence conducted by the IA and MEF. Based on the outcome, the IA and MEF may request approval from the Royal Government for the appropriate method for selecting the private partner.

### **c. Are unsolicited proposals accepted?**

Yes. Unsolicited proposals are accepted under the Cambodian Law on PPP, subject to the procedures and processes provided.

### d. Are Swiss challenges permitted?

Yes. The Swiss Challenge procedure is permitted and may be applied under limited circumstances where direct negotiations with the original proponent cannot be concluded. Subject to government approval, the IA may invite competing bids from other interested parties based on the project proposed by the original proponent. The original proponent is then given the opportunity to match the best competing bid in order to secure the PPP contract. If the original proponent does not match the competing offer, the contract may be awarded to the highest-ranked bidder, subject to reimbursement of the project development costs incurred by the original proponent.

### 3.3 Does the awarding authority carry out preliminary market consultations before launching the tender procedure?

Yes, the IA may conduct preliminary market consultations as part of market interest assessment.

### 3.4 Does the legislation mandate the criteria that interested parties must meet in order to be eligible for participation in a procurement process? If so, what are these criteria?

Yes, and the criteria are typically set out in the pre-qualification documents or the request for proposals. These may include requirements such as technical experience in similar infrastructure projects, financial capacity and creditworthiness, relevant operational expertise, and legal compliance.

### 3.5 Does the procuring authority publish the tender documents online?

Yes, some tender announcements and procurement information are published by the General Department of Public-Private Partnership on its official website: [www.ppp.mef.gov.kh](http://www.ppp.mef.gov.kh).

### 3.6 Do the tender documents explain in detail the procurement procedure providing the same information to all bidders?

Yes. Tender documents typically provide detailed instructions regarding the procurement process, including submission requirements, evaluation procedures, timelines, and contractual conditions. All bidders will receive the same information.

### 3.7 Can potential bidders submit questions to clarify the tender documents and are the answers disclosed to all potential bidders?

Yes. Bidders are generally permitted to submit written questions to clarify aspects of the tender documents within a specified timeline. Some responses to these queries may be shared with all potential bidders.

### 3.8 Does the procuring authority conduct a pre-bid conference to further inform potential bidders and are the clarifications provided disclosed to all potential bidders?

Yes. The relevant procuring authorities will hold a pre-bid conference to explain the project and procurement requirements to all the potential bidders. The potential bidders may seek clarifications during the conference or submit a written request for clarifications prior to the conference. The questions raised and the corresponding responses will be recorded as minutes of clarification, which will be sent to all prequalified bidders, becoming an inseparable part of the bidding documents.

## 4 Evaluation Criteria

### 4.1 On the basis of what criteria are tenders evaluated and the winner of the contract determined?

Tenders for PPP projects are evaluated using the Quality- and Cost-Based Selection (QCBS) method, under which both the Technical Bid and the Price Bid are scored according to evaluation criteria that are prepared at the time of preparing the bidding documents of the projects.

The key criteria for evaluation of the Technical Bid and the Price Bid are as follows:

- (a) **Technical Bid:** evaluated on the bidder's design concept and its operational aspects, which include the layout and phasing plans, and other design elements.
- (b) **Price Bid:** evaluated based on key financial factors, which may include total capital cost, total operating cost, maintenance costs, cost per user, percentage of non-project revenue, percentage

of equity invested, rate of return on equity, and cost of capital.

The tender that scores the highest overall combined score, calculated from the technical evaluation criteria for the Technical Bid and the financial evaluation criteria for the Price Bid, is selected as the winning bidder.

#### 4.2 Is there an obligation to disclose the criteria or other elements of the evaluation methodology on the basis of which (i) bidders are selected, and (ii) tenders evaluated? If so, when must such disclosure take place?

Yes. For bidder selection, the criteria or other elements of the evaluation methodology are set out in the Instructions to Prequalify Bidders (ITPB) when issued to prospective bidders, and are further explained during the prequalification conference. For tender evaluation, the criteria or other elements of the evaluation methodology are set out in the Instructions to Bidders (ITB) when issued to all prequalified bidders, and are further clarified during the pre-bid conference, ensuring that bidders understand all requirements and can prepare responsive submissions.

## 5 The Contract

### 5.1 Is a form of contract provided with the tender documents?

Yes, a form of contract and draft contract with key terms and conditions will be provided with the tender documents.

### 5.2 To what extent is modification and negotiation on the contract permitted?

The first ranking bidder is free to negotiate the terms of the draft PPP contract. However, the minimum requirements under the law shall not be amended such as the initial contract term being no longer than 30 years except in case of necessity and based on the model of the PPP project where the government may determine the initial contract term beyond 30 years.

### 5.3 Does the contract deal with specific circumstances (*force majeure*, material adverse government action, change in the law, refinancing) that may arise during the life of the contract?

Yes, the Cambodian Law on PPP sets forth the contractual provisions to deal with specific circumstances such as changes in laws or legal provisions, changes in size or output specifications of the project construction, changes in service fee, changes in service demands, *force majeure*, or other circumstances as stipulated in the PPP contract.

### 5.4 Are dispute resolution mechanisms in place allowing the parties to resolve disputes in an efficient and satisfactory manner without adversely affecting the project?

Yes. PPP contracts typically include dispute-resolution mechanisms such as negotiation, mediation, and arbitration. If the PPP contract does not specify a mechanism, disputes must first be addressed through consultations between the IA and the private partner under the mediation of MEF, except for land disputes. If the parties cannot resolve the issue within two months of a written mediation request, they may refer the dispute to the Cambodian commercial arbitration or international commercial arbitration. If arbitration is not possible, either party may file the case with the courts of the Kingdom of Cambodia.

### 5.5 Are lenders given step-in rights for cases when the private partner is at risk of default or if the contract is under threat of termination for failure to meet obligations?

The lenders may be given step-in rights under the PPP contract, as agreed between the IA and the private partner. The receiver of the step-in rights may obtain and renew the rights and obligations as stipulated in the PPP contract to ensure continued performance for the private partner's obligations under the framework of the PPP contract and/or loan agreements relating to the project.

### 5.6 Are grounds for termination of the contract and its associated consequences well defined?

The law requires the PPP contract to set forth the grounds for terminations including but not limited to any *force majeure* event, event of default and/or early termination by the Government. The PPP contract shall specify the rights and obligations of both parties to be fulfilled, mechanisms and formulas for calculating compensation in the event of early termination of the PPP contract.

# Indonesia



## 1 Legislation Regulating Procurement of Infrastructure Projects

### 1.1 What legislation regulates the procurement of infrastructure projects in your jurisdiction?

Procurement of infrastructure projects in Indonesia may be implemented either through a public-private partnership ("**PPP**") structure or through conventional public procurement conducted by the relevant ministries, government institutions, state-owned enterprises, or regional governments.

The principal legislation regulating the procurement of infrastructure projects in Indonesia includes the following:

#### **PPP Procurement Framework**

For general PPP projects:

- (a) Presidential Regulation No. 38 of 2015 on Public-Private Partnerships for Infrastructure Procurement and its implementing regulations ("**PR 38/2015**");
- (b) Minister of National Development Plan/Head of National Development Planning Agency Regulation No. 7 of 2023 on Implementation of PPPs for Infrastructure Development, as amended by Minister of National Development Plan/Head of National Development Planning Agency Regulation No. 9 of 2025;
- (c) National Public Procurement Agency (*Lembaga Kebijakan Pengadaan Barang/Jasa Pemerintah* or "**LKPP**") Regulation No. 1 of 2025 on PPP Procedures in Infrastructure Development ("**Regulation 1/2025**"); and
- (d) Minister of Finance Regulation No. 68 of 2024 on the Government Support for Infrastructure Financing through PPP and/or Other Financing Schemes.

For PPP projects relating to Nusantara Capital City (*Ibu Kota Nusantara* or "**IKN**");

- (a) Law No. 3 of 2022 on State Capital City;
- (b) Government Regulation No. 17 of 2022 on Funding and Budget Management for the

Preparation, Development and Relocation of the State Capital City and the Implementation of the Regional Government of Nusantara Capital City and its implementing regulations for IKN PPP projects;

- (c) Minister of National Development Plan/Head of National Development Planning Agency Regulation No. 6 of 2022 on PPP Procedures in Nusantara Capital City for IKN PPP projects ("**Regulation 6/2022**");
- (d) LKPP Regulation No. 1 of 2023 on the Procedures for the Procurement of Business Entities through PPPs in Nusantara Capital City; and
- (e) Minister of Finance Regulation No. 220/PMK.08/2022 on Government Support for PPPs and Creative Financing for the Acceleration of the Infrastructure Development in Nusantara Capital City.

## **Conventional (Non-PPP) Procurement Framework**

- (a) Presidential Regulation No. 16 of 2018 on Government Procurement of Goods/Services, as last amended by Presidential Regulation No. 46 of 2025 ("**PR 16/2018**"); and
- (b) LKPP Regulation No. 12 of 2021 on the Guidelines on Procurement of Goods/Services through a Provider, as amended by LKPP Regulation No. 4 of 2024 ("**Regulation 12/2021**").

## 1.2 Which entities and what types of contracts are subject to procurement regulation?

### **Procurement Entities**

- (a) The PPP regulations apply to ministries, government institutions, regional governments, state-owned enterprises, and regional-owned enterprises that perform procurement of infrastructure projects through the PPP structure.
- (b) The Non-PPP procurement regulations apply to the procurement of goods and services by the ministries, government institutions, and regional-

government institutions that are funded by the state or regional budget.

### **Contract Types**

#### **(a) PPP structure**

Under the PPP structure, there are three types of contracts:

- (i) The Cooperation Agreement or the PPP Agreement between the implementing business entity ("**IBE**") and the GCA;
- (ii) The Guarantee Agreement between the IBE and the IIGF that provides guarantee for payment of financial obligations of the GCA, including the termination payment due to government *force majeure* events; and
- (iii) The Recourse Agreement between the IIGF and the GCA.

#### **(b) Non-PPP structure**

The types of contracts subject to the non-PPP regulations can generally be categorised as follows:

- (i) **Contracts for goods**  
Contracts for goods are contracts for the supply of objects, whether tangible or intangible, movable or immovable, which can be traded, used, exploited, or utilised by a user.
- (ii) **Contracts for construction works**  
Contracts for construction works are contracts governing all or part of activities relating to the construction, operation, maintenance, demolition, or reconstruction of buildings and other structures. These contracts include construction and engineering activities for infrastructure such as buildings, airports, roads or highways, dams, drainage systems, and similar works, including their mechanical and electrical components.
- (iii) **Contracts for other types of services**  
Contracts for other types of services are contracts that require the use of equipment, specialised methodology, and/or specific skill sets to perform the relevant services.

These include contracts for the provision of manpower, expertise, and other services such as repairs, maintenance, and cleaning services.

- (iv) **Contracts for consultancy services**  
Contracts for consultancy services are contracts for the provision of professional services that require specialised expertise or professional qualifications. These include contracts for legal services, accounting services, and consultancy services relating to feasibility studies, research, design, survey, and management, among others.

### Notes

#### (a) **Contract models for goods, construction works, and other services**

Contracts for goods, construction works, and other services may take the following contract models:

- (i) **Lump sum contracts**  
A lump sum contract is a contract with a definitive and fixed scope of work, total contract price, and term. Under this contract:
- all risks are borne entirely by the provider;
  - the contract is output-oriented; and
  - payment is made based on the stages of completion of the agreed products or outputs under the contract.
- (ii) **Unit price contracts**  
A unit price contract contains a fixed unit price for each unit or element of work with specified technical specifications. Similar to a lump sum contract, the work must be completed within the prescribed term. Under this contract:
- the volume or quantity of work can be predicted at the time the contract is signed;
  - payment is based on joint measurement of the actual volume of work performed; and
  - the final contract value is determined after completion of the entire work.

- (iii) **Mixture of lump sum and unit price contracts**  
A mixture of lump sum and unit price contracts combines elements of both a lump sum contract and a unit price contract within a single contracted work.
- (iv) **Turnkey contracts**  
Turnkey contracts are contracts for the procurement of construction works that must be completed within a specified term. Under this contract model, the contract price is definitive and fixed and covers the entire scope of work up to completion.
- (v) **Modified turnkey contracts**  
Modified turnkey contracts allow payment to be made in stages upon completion of the relevant works, as agreed by the parties under the contract.
- (vi) **Framework contracts**  
Framework contracts may take the form of unit price contracts with a prescribed term for the procurement of goods and/or services where the volume and/or time of delivery cannot be determined at the time the contract is signed.
- (vii) **Cost-plus-fee contracts**  
A cost-plus-fee contract provides for payment of the contractor's actual costs plus an agreed fee, calculated either as a fixed percentage of the costs or as a fixed sum.
- (viii) **Performance-based contracts**  
A performance-based contract is structured around the achievement of agreed performance outcomes or service levels, with payment contingent upon the extent to which such outcomes or service levels are achieved.
- (ix) **Multi-year contracts**  
A multi-year contract is a contract for the procurement of goods and/or services that is funded over more than one budget year and is implemented pursuant to approval by an authorised official in accordance with the prevailing laws and regulations. Under this

contract: (i) the completion of the work may exceed 12 months or span more than one budget year; or (ii) the work will provide greater benefits if contracted for a period exceeding one budget year but not exceeding three budget years.

## **(b) Contract models for consultancy services**

Contracts for consultancy services may take the form of a lump sum contract, a framework contract, a performance-based contract or a time-based contract.

## **(c) Time-based contracts**

A time-based contract is used where the scope of work has not been defined in detail or where the time required to complete the work cannot be determined at the time the contract is entered into.

## **2 Foreign Investment**

### **2.1 Are infrastructure projects open to foreign investment?**

Whether an infrastructure project is open to foreign investment depends on the relevant industry and sector. In general, the Government has lifted foreign equity restriction for most infrastructure projects.

Most infrastructure projects in Indonesia are now open to 100% foreign ownership, subject to limited restrictions in certain sectors, particularly specific transportation and construction activities. In the construction sector, foreign investment is permitted only for construction works involving high technology and/or high risk and/or having a contract value exceeding IDR 50 billion. In such cases, foreign ownership is capped at 70% for investors from ASEAN member countries and 67% for non-ASEAN member countries.

## **3 Procurement Process**

### **3.1 Outline the key steps and aspects of the procurement under the legislation.**

The main procurement methods under Indonesian law are as follows:

- (a) Electronic Purchasing (E-purchasing)**  
Electronic purchasing is conducted through an electronic catalogue system, whereby goods and/or services are procured directly via a government-approved electronic platform.
- (b) Tender**  
Under a tender process, the project user or owner publicly announces the procurement plan through mass media to invite providers of goods, consultancy services, or other services to participate. Public announcement is intended to ensure fair competition and equal opportunity for all qualified providers.
- (c) Selection**  
Selection is used to appoint consultancy service provider(s) for projects with a value of at least IDR 100 million.
- (d) International Tender or International Selection**  
An international tender or selection is used to appoint providers of goods or services where participation is open to both domestic and foreign business entities. This method may be applied for:
  - (i) construction works valued at least IDR 1 trillion;
  - (ii) procurement of goods and/or other services valued at least IDR 50 billion;
  - (iii) consultancy services valued at least IDR 25 billion; or
  - (iv) procurement of goods or services financed by export credit agencies or foreign private creditors.
- (e) Limited Tender or Limited Selection**  
Under a limited tender or selection, the project user or owner invites only a limited number of providers to participate in the procurement process. This method must result in at least two bids.
- (f) Direct Appointment**  
A direct appointment allows the project user or owner to appoint a provider of goods, construction works, or consultancy services without a competitive process. Appointment may be made directly to a single provider or through a so-called "beauty contest" process, provided

that a "certain circumstance" occurs as stipulated under Article 38(5) of PR 16/2018.

These circumstances include:

- (i) implementation of government priority programmes, government assistance, and/or Presidential assistance pursuant to Presidential directives;
- (ii) preparation of urgent activities attended by the President and/or the Vice President;
- (iii) procurement of goods and/or services of a confidential nature for state interests, including intelligence and witness protection, or otherwise classified under prevailing laws and regulations;
- (iv) procurement of construction works forming part of an integral construction system with integrated liability for risks of building failure that cannot be planned or calculated in advance;
- (v) procurement of goods, construction works, or other services requiring new and high-end technology that can only be provided by a single provider;
- (vi) procurement and distribution of superior seeds (including rice, corn, and soybean seeds) and fertilisers (including Urea, NPK, and ZA) to farmers for food security programmes;
- (vii) procurement of goods, construction works, and/or other services where a re-tender has failed;
- (viii) development of public utilities, facilities, and infrastructure for low-income citizens;
- (ix) development of infrastructure projects previously procured and operated by the same appointed business entity;
- (x) procurement of goods, construction works, or other services that can only be provided by a patent holder, a licensee, or a party entitled to a government-issued licence; or
- (xi) procurement of goods, construction works, or other services where a re-tendering process has failed due to lack of eligible bids.

### Direct Appointment under PPP schemes

For infrastructure projects implemented under a PPP scheme, direct appointment may be conducted where:

- (a) the prequalification process results in only one qualified bidder;
- (b) the project relates to development of infrastructure previously constructed and/or operated by the same IBE;
- (c) the project can only be implemented using new technology that can be applied by one capable service provider; or
- (d) the IBE has secured most or all of the land required for the PPP project.

### 3.2 Does the legislation require the procurement to be tendered out? If yes:

No. Indonesian procurement regulations allow for direct procurement and direct appointment in certain circumstances, including those described in Section 3.1(f) above.

#### a. What types of infrastructure projects must be tendered out?

Indonesian law does not mandate that procurement of a certain type of infrastructure project has to be tendered out. However, tenders are a common mode for procurement under the regulations for the procurement of infrastructure projects in Indonesia.

#### b. What type of tender process is run?

Procurement through tenders may take the following forms:

- (i) tender;
- (ii) selection;
- (iii) international tender or international selection;
- (iv) limited tender or limited selection; and
- (v) express tender.

With respect to items (i) to (iv) above, see Section 3.1 for further details. With respect to item (v), an express tender may be conducted where the work specifications and volume can be determined in detail in advance, and references to specific brands are permitted for spare parts or components of an existing system.

#### c. Are unsolicited proposals accepted?

Yes. Unsolicited proposals are permitted under the PPP regulations. A business entity may act

as the initiator of an unsolicited PPP project, provided that the proposed project:

- (i) is technically integrated with the relevant sector master plan;
- (ii) is economically and financially feasible; and
- (iii) is supported by adequate financial capacity of the initiator to fund implementation of the project.

The initiator of an unsolicited PPP project is required to submit a feasibility study and may be eligible for certain forms of compensation, such as a bid evaluation advantage, a right to match, or reimbursement of proposal preparation costs, subject to the applicable procurement process and governmental approval.

#### d. Are Swiss challenges permitted?

Yes. Swiss challenges are expressly permitted under Regulation 1/2025. The regulation provides a structured mechanism for unsolicited proposals to be competitively tested by allowing third parties to submit competing proposals, while granting the original initiator certain procedural advantages. Evaluation of competing bids is carried out using the best financial offer method.

### 3.3 Does the awarding authority carry out preliminary market consultations before launching the tender procedure?

While the legislation does not expressly require formal preliminary market consultations, the procuring agency must comply with procurement planning procedures prior to launching a tender. These procedures generally include:

- (a) preparing a list of planned procurements for the forthcoming financial year in accordance with the relevant state or regional budget;
- (b) conducting market surveys to assess the availability of the relevant goods or services in the domestic market and to estimate their market value; and
- (c) where necessary, carrying out a feasibility study.

### 3.4 Does the legislation mandate the criteria that interested parties must meet in order to be eligible for participation in a procurement process? If so, what are these criteria?

Yes. Regulation 1/2025 sets out minimum requirements for the pre-qualification of procurement participants. At a minimum, participants must:

- (a) comply with the applicable laws and regulations governing the conduct of their business activities;
- (b) possess the experience and capability to implement similar infrastructure provision projects;
- (c) demonstrate the financial capacity to fund infrastructure provision projects;
- (d) have fulfilled their tax obligations;
- (e) not be subject to insolvency proceedings, suspension or revocation of business licence, and/or ongoing litigation that may disrupt implementation of the PPP project;
- (f) have no conflict of interest; and
- (g) participate either as a single business entity or as part of a consortium.

Where the participant is a consortium, the following additional requirements apply:

- (a) at least one consortium member must have the experience and capability to implement similar infrastructure provision projects;
- (b) the consortium, as a whole, must have the financial capacity to fund infrastructure provision projects; and
- (c) the consortium members must enter into a consortium agreement, which at the minimum provides for:
  - the obligations and responsibilities of each consortium member;
  - the appointment of the consortium leader;
  - the obligations and responsibilities of the consortium leader;

- a requirement that the consortium leader hold more than 50% of the equity in the implementing business entity if the consortium is selected as the winning bidder;
- the possibility for the consortium leader to consist of more than one business entity; and
- where there is more than one consortium leader, the appointment of one leader as the authorised representative of the consortium.

In addition to the above, further requirements relating to administrative compliance, technical capability, and financial capacity may be determined by the relevant project owner. These requirements are assessed during the pre-qualification stage using either a pass/fail method or a scoring system with a prescribed minimum threshold. Only participants meeting the required standards may proceed to subsequent stages of the procurement process.

For public procurement of goods and services, a foreign business entity participating in an international tender or selection process is required to cooperate with a local business entity, whether through a consortium, subcontracting arrangement, or other forms of cooperation. In addition, where a foreign business entity participates in the procurement of goods or construction services, it is required to cooperate with a local business entity for the manufacture of spare parts and the provision of after-sales services.

### 3.5 Does the procuring authority publish the tender documents online?

Yes. For both PPP and non-PPP procurement, the procuring authority publishes tender documents online and, where required, through other widely accessible media to ensure transparency and open access to potential participants.

#### **PPP Structure**

For PPP projects, the procurement documents consist of a Request for Qualification ("**RFQ**") and a Request for Proposal ("**RFP**"). Prospective participants must first pass the qualification stage before being invited to submit an RFP.

#### **Pre-qualification announcement**

The Procurement Agency conducts the pre-qualification announcement through one or more of the following channels:

- (a) invitations published in national print media and on the official website of the GCA;
- (b) the national procurement portal; and
- (c) where the project is expected to attract foreign participants, print media with international circulation and websites providing international-level infrastructure project information.

The announcement must be published at least once in national print media, and remain available on the GCA's official website and/or the national procurement portal for a minimum of seven business days.

#### **Contents of the announcement**

The pre-qualification announcement must include at least:

- (a) the name and address of the GCA conducting the procurement;
- (b) a brief description of the PPP project, covering its:
  - (i) legal basis;
  - (ii) purposes and objectives;
  - (iii) scope; and
  - (iv) form;
- (c) the estimated investment value of the PPP project;
- (d) eligibility requirements for prospective participants; and
- (e) the place, date, and time for collection of the RFQ; and
- (f) a confidentiality letter requirement.

## Post-qualification and RFP stage

The Procurement Committee notifies all participants of the pre-qualification results by email and publishes the list of qualified participants in accordance with the prescribed schedule via the GCA's official website and/or print media. Then, LKPP invites qualified participants to submit proposals through the RFP process, together with a confidentiality undertaking.

## Non-PPP Structure

For non-PPP procurement, tender documents and procurement announcements are published through:

- (a) the Procurement General Plan Information System (*Sistem Informasi Rencana Umum Pengadaan* or SIRUP); and
- (b) the official website of the relevant ministry, institution, or regional government acting as the project owner.

### 3.6 Do the tender documents explain in detail the procurement procedure providing the same information to all bidders?

Yes. The tender documents set out the procurement procedure in detail, and the same information is disclosed to all bidders to ensure transparency and equal treatment throughout the procurement process.

### 3.7 Can potential bidders submit questions to clarify the tender documents and are the answers disclosed to all potential bidders?

Yes. Potential bidders are permitted to submit written clarification questions at both the qualification and tender stages.

During the qualification stage, prospective participants may submit written questions to clarify the RFQ from the time of RFQ collection until the deadline specified in the RFQ. During the tender stage, shortlisted participants may likewise submit written clarification questions regarding the RFP from the date of RFP collection until the applicable deadline set out in the RFP.

Responses to clarification questions are provided promptly by the procurement committee and are disclosed to all potential bidders or participants, as applicable. All clarification questions and responses at

the qualification stage are recorded in a List of Clarification Questions and Responses, which is attached to the minutes of the pre-qualification explanation meeting. Similarly, clarification questions and responses at the tender stage are recorded and attached to the minutes of the tender explanation meeting.

### 3.8 Does the procuring authority conduct a pre-bid conference to further inform potential bidders and are the clarifications provided disclosed to all potential bidders?

Yes. The procuring authority conducts a pre-bid conference to explain and clarify key aspects of the project to potential bidders.

The pre-bid conference is typically followed by the qualification process, during which the competencies, business capabilities, and compliance of potential participants are evaluated. The results of the qualification process will produce a shortlist of qualified bidders eligible to proceed to the tender or selection stage, and this shortlist is disclosed to all potential bidders.

## 4 Evaluation Criteria

### 4.1 On the basis of what criteria are tenders evaluated and the winner of the contract determined?

#### PPP Structure

The evaluation method for PPP procurement depends on the tender structure adopted:

- (a) **One-stage tender:** Bids are evaluated using either: (i) the best financial offer method; or (ii) a scoring method combining financial and non-financial criteria.
- (b) **Two-stage tender:** Evaluation is conducted through: (i) a pass/fail assessment to ensure compliance with minimum qualification and technical requirements; followed by (ii) a scoring method to assess additional technical, financial, and other evaluation criteria.

## **Non-PPP Structure**

For the procurement of goods, construction works, and other services, tenders may be evaluated using one of the following methods:

- (a) **Value-based evaluation:** Bids are assessed based on a combination of technical aspects and price.
- (b) **Life-cycle cost analysis evaluation:** Assesses the total economic cost over the life of the goods, construction works, or services, including acquisition cost, maintenance cost, and residual value over a defined operational period.
- (c) **Lowest price evaluation:** Applied where price is the primary determining factor among bids that meet the prescribed technical requirements.

For consultancy services, selection may be carried out using the following methods:

- (a) **Quality and cost-based evaluation:** Applied where the scope of work, required expertise, and implementation period can be clearly defined in the terms of reference.
- (b) **Quality-based evaluation:** Applied where the scope of work, type of experts, or completion period cannot be clearly defined in the terms of reference, or for individual consultancy service works.
- (c) **Budget ceiling evaluation:** Applied only for simple works with clearly defined scope and terms of reference, where bids must not exceed the approved budget ceiling.
- (d) **Lowest cost evaluation:** Applied for standard or routine consultancy services with established implementation practices and standards.

### **4.2 Is there an obligation to disclose the criteria or other elements of the evaluation methodology on the basis of which (i) bidders are selected, and (ii) tenders evaluated? If so, when must such disclosure take place?**

There is no separate obligation to disclose the evaluation criteria outside the tender documents.

However, the applicable criteria and evaluation methodology are set out in the tender documents provided to all bidders at the commencement of the procurement process.

## **5 The Contract**

### **5.1 Is a form of contract provided with the tender documents?**

Yes. In general, the key contractual terms to be entered into between the procuring agency and the bidder are included in the tender documents.

### **5.2 To what extent is modification and negotiation on the contract permitted?**

As a general rule, contract terms are issued on the basis that bidders are expected to fully comply with them. However, during the tender process, a bidder may propose amendments to certain contractual provisions as part of its bid. Any such proposed amendments may be reflected in amendments to the RFP and/or the final RFP, and the successful bidder may be invited to participate in further negotiations prior to contract execution.

Notwithstanding the above, during the contract finalisation stage, the winning bidder and the project owner are not permitted to amend any matters that have been finalised during the tender process.

Post-execution contract modification is permitted only where there is a discrepancy between the actual site conditions at the time of implementation and the conditions reflected in the contract documents, including drawings and/or technical specifications. For non-PPP procurement, such modifications are permitted only for lump sum contracts, unit price contracts, mixed lump sum and unit price contracts, and turnkey contracts, and are limited to the following:

- (a) increase or reduction in the volume of work;
- (b) increase or reduction in the type of activities;
- (c) modification of technical specifications to reflect site conditions; and/or
- (d) adjustment to the implementation schedule.

Any modification that results in an increase in the scope of work is capped at a maximum of 10% of the original contract price and must remain within the approved government budget.

### 5.3 Does the contract deal with specific circumstances (*force majeure*, material adverse government action, change in the law, refinancing) that may arise during the life of the contract?

Generally, yes. These matters are typically addressed in the contract.

### 5.4 Are dispute resolution mechanisms in place allowing the parties to resolve disputes in an efficient and satisfactory manner without adversely affecting the project?

Yes. Regulations allow contractual disputes to be resolved through dispute settlement services provided by the procurement authority or LKPP, arbitration, or litigation. For PPP projects, dispute resolution mechanisms are typically structured in stages, which may include discussion, mediation, and arbitration or litigation.

In practice, arbitration clauses are commonly adopted. In recent years, dispute resolution provisions have increasingly incorporated multi-tiered mechanisms, requiring parties to attempt alternative dispute resolution, such as mediation or expert determination, before escalating disputes to arbitration or court proceedings.

### 5.5 Are lenders given step-in rights for cases when the private partner is at risk of default or if the contract is under threat of termination for failure to meet obligations?

Yes, in PPP projects. PR 38/2015 and Regulation 6/2022 (for IKN PPP projects) require PPP contracts to include minimum provisions addressing lenders' step-in rights. However, the regulations do not prescribe specific trigger events for the exercise of such rights.

In practice, lenders' step-in rights are commonly triggered when the private partner fails to remedy a default within an agreed cure period. Non-PPP procurement regulations do not specifically regulate lenders' step-in rights.

### 5.6 Are grounds for termination of the contract and its associated consequences well defined?

Yes, for non-PPP procurement. Regulation 12/2021 sets out grounds for termination and the associated consequences, which may include, among others, enforcement of performance bonds, repayment or forfeiture of advance payments, enforcement of warranty bonds (if any), blacklisting of the provider, and appointment of a reserve winner or another capable provider.

For PPP projects, PR 38/2015 and Regulation 6/2022 (for IKN PPP projects) set out minimum contractual provisions relating to termination but do not exhaustively list termination grounds or consequences. The regulations expressly address termination upon expiry of the contract term, in which case the GCA's controller and supervisory committee must prepare for asset handover from the provider to the GCA, if such transfer is regulated in the contract, and ensure that the project meets the condition specified for handover at the end of the term.

## Malaysia



### 1 Legislation Regulating Procurement of Infrastructure Projects

#### 1.1 What legislation regulates the procurement of infrastructure projects in your jurisdiction?

Historically, Malaysia did not have a specific statute governing public procurement and the framework relied mainly on administrative instruments issued by the Ministry of Finance.

Recently, the Malaysian Parliament passed the Government Procurement Bill 2025 ("**Government Procurement Act**"), which establishes a statutory framework regulating government procurement and seeks to enhance transparency, accountability and enforcement mechanisms. The Government Procurement Act is expected to come into force in 2026, and once operational, it will represent the first comprehensive legislation governing public procurement in Malaysia. To date, the Government Procurement Act has yet to come into effect.

Until the Government Procurement Act is fully implemented, the legal framework for public procurement comprises several statutes and Government instruments, as follows:

#### (a) **Government Contract Act 1949**

The Government Contract Act 1949 empowers the respective Ministers in the relevant ministries to enter into contracts and also empowers the respective ministers to delegate powers to Government Officers to enter into contracts on behalf of the Government.

#### (b) **Treasury Instructions**

Treasury Instructions are issued by the Ministry of Finance, and they set out the financial and accounting procedures and regulations that need to be adhered to in the management of Government funds, including matters relating to public procurement.

#### (c) **Treasury Circulars**

Treasury Circulars are issued by the Ministry of Finance from time to time to inform, clarify,

implement, improve and amend certain policies, rules and procedures, including matters relating to public procurement, as and when they are required by the Government and financial authorities.

## (d) **Federal Central Contract Circulars**

Federal Central Contract Circulars are issued by the Ministry of Finance to inform the users on the availability of common user items which are centrally purchased. The Federal Central Contract Circulars normally contain details such as items, name of suppliers, areas of supply and time of delivery. The Federal Central Contract Circulars aim to promote local products and develop vendors, and also contain procurement principles and objectives.

Apart from the foregoing, where projects are procured as PPP projects, certain guidelines apply. The key guidelines are as follows:

- Malaysian Incorporated Policy 1983;
- Privatisation Policy 1983;
- Guidelines on Privatisation 1985;
- Privatisation Master Plan 1991;
- Private Finance Initiative under the Ninth Malaysia Plan;
- Public-Private Partnership Guidelines 2009;
- Private Finance Initiative under the Tenth Malaysia Plan;
- Facilitation Fund Guidelines (2015);
- Guide on the Public-Private Partnership 3.0 Implementation Framework;
- Guidelines for Changes in Shareholders, Shareholding Structures and Agreement Novation for Public-Private Partnership Projects 2025; and
- Public-Private Partnership Master Plan 2030 ("**PIKAS 2030**").

## 1.2 Which entities and what types of contracts are subject to procurement regulation?

### **Procurement Entities**

The statutes and Government instruments above apply to:

- (a) The Federal Government;
- (b) The State Governments;
- (c) Local Authorities; and
- (d) Statutory Bodies.

Once the Government Procurement Act comes into force, it is expected to apply broadly to any person administering, conducting or participating in government procurement funded by federal or state public funds. "Government procurement" is widely defined to mean any procurement for the supply of goods or services or for works funded by the allocation of funds by the Federal Government or any State Government, as the case may be, whether fully or partially, or through the use of any assets owned by the Federal Government or any State Government, as the case may be.

### **Types of Contracts**

The types of Malaysian Government public procurement contracts that are subject to the above statutes and Government instruments may be generally categorised as follows:

#### **(a) Works**

Works contracts include construction and engineering activities involving infrastructure and structures such as buildings, airports, roads/highways, dams, drainage, etc. They also include mechanical and electrical aspects of the works.

#### **(b) Supplies**

Supplies include the supply of raw, intermediate or finished goods and products for any activity of users. It also includes the supply of construction materials, food products, vehicles, equipment, spare parts, furniture, etc.

#### **(c) Services**

Services include engagement of manpower, expertise and consultants in the areas of feasibility studies, research, designing, surveying, management, etc. Other services such as repairs, maintenance and cleaning services are minor activities under the category.

Once the Government Procurement Act has come into force, it will be applicable to any government procurement with certain limited exceptions such as:

- (a) procurements or acquisitions of fiscal agency or depository services, liquidation and management services for regulated financial institutions or services related to the sale, redemption and distribution of public debt, including loans and Government bonds, notes and any other securities;
- (b) appointments on contract basis by the Federation or any State for the delivery of public services;
- (c) procurements conducted for the specific purpose of providing international assistance, including development aid;
- (d) procurements funded by an international organisation or foreign or international grants, loans or other assistance to which procurement procedures or conditions of the international organisation or donor apply; and
- (e) procurements conducted under the particular procedure or condition of an international agreement relating to the stationing of troops or relating to the joint implementation by the signatory.

## Types of contract model for PPP projects

The classification of PPP projects, according to appropriate models, is important to enable streamlining and planning of the implementation processes.

In September 2024, the Malaysian Government issued the PIKAS 2030 which is a strategic document aiming to drive future growth and development of PPP initiatives in Malaysia. Pursuant to PIKAS 2030, the reclassification of PPP models will be as follows:

- (a) **Concession:** Transfer of activities and functions to the private sector for an agreed concession period. PPP concessions can be further categorised into user-pays, government-pays or hybrid;

- (b) **Privatisation:** Transfer of activities and functions to the private sector in perpetuity; and
- (c) **Alternative Mode:** PPP modes other than Concession or Privatisation.

PIKAS 2030 provides the new PPP classification as follows:

### (a) Concession

Mode	Description
<b>User-pays</b>	
<b>Build-Operate-Transfer (BOT)</b>	The special purpose vehicle ("SPV") is granted a concession contract to finance, construct and operate a project for a designated period as stipulated in the concession agreement and allowed to collect charges from users. At the end of the concession period, the ownership of project is transferred to the Government.
<b>Redevelop/Regenerate-Operate-Transfer (ROT)</b>	The SPV is granted a concession contract to finance, redevelop/regenerate and operate a Government-owned asset for a designated period as stipulated in the concession agreement and allowed to collect charges from users. At the end of the concession period, the ownership of the asset is transferred to the Government in an improved condition.
<b>Build-Redevelop/Regenerate-Operate-Transfer (BROT)</b>	The SPV is granted a concession contract to finance, construct, redevelop/regenerate and operate a Government-owned asset as well as construct additional structures for a designated period as stipulated in the concession agreement, and allowed to collect charges from users. At the end of the concession period, the ownership of the asset is transferred to the Government in an improved condition.
<b>Management Contract (MC)</b>	The SPV is granted a concession contract to manage the Government-owned asset for a designated period as stipulated in the concession agreement. Value-add elements such

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	as adoption of technology and inclusion of sustainability elements will be included in the contract to distinguish MC for PPP with conventional MC. Although it is generally a Government-pays model, it can also be a user-pays model depending on project suitability.
<b>Government-pays/PFI</b>	
<b>Build-Lease-Maintain-Transfer (BLMT)</b>	The SPV is granted a concession contract to finance and construct public facilities. Upon construction completion, the SPV will lease the facility to the government to be operated by the government. The government will pay availability charges to the SPV. Apart from that, the SPV will maintain the facility and in return, the government will pay maintenance charges depending on compliance to the agreed key performance indicators ("KPIs"). At the end of the concession period, the ownership of facilities is transferred to the Government.
<b>Build-Lease-Maintain-Operate-Transfer (BLMOT)</b>	The SPV is granted a concession contract to finance and construct public facilities. Upon construction completion, the SPV will lease the facility to the Government and the SPV will operate the facility. The Government will pay availability charges to the SPV. Apart from that, the SPV will maintain the facility and in return, the Government will pay maintenance charges depending on compliance with the agreed KPIs. At the end of the concession period, the ownership of facilities is transferred to the Government.
<b>Build-Lease-Transfer (BLT)</b>	The SPV is granted a concession contract to finance and construct public facilities. Upon construction completion, the SPV will lease the facility to the Government. The government will pay availability charges to the SPV. At the end of the concession period, the ownership of facilities is transferred to the Government.
<b>Redevelop/Regenerate-</b>	The SPV is granted a concession contract to finance and

<b>Lease-Maintain-Transfer (RLMT)</b>	redevelop/regenerate public facilities. Upon construction completion, the SPV will lease the facility to the Government to be operated by the Government. The Government will pay availability charges to the SPV. Apart from that, the SPV will maintain the facility and in return, the government will pay maintenance charges depending on compliance with the agreed KPIs. At the end of the concession period, the ownership of facilities is transferred to the Government.
<b>Redevelop/Regenerate-Lease-Maintain-Operate-Transfer (RLMOT)</b>	The SPV is granted a concession contract to finance and redevelop/regenerate public facilities. Upon construction completion, the SPV will lease the facility to the Government and the SPV will operate the facility. The Government will pay availability charges to the SPV. Apart from that, the SPV will maintain the facility and in return, the Government will pay maintenance charges depending on compliance with the agreed KPIs. At the end of the concession period, the ownership of facilities is transferred to the Government.
<b>Redevelop/Regenerate-Lease-Transfer (RLT)</b>	The SPV is granted a concession contract to finance and redevelop/regenerate public facilities. Upon construction completion, the SPV will lease the facility to the Government. The Government will pay availability charges to the SPV. At the end of the concession period, the ownership of facilities is transferred to the Government.
<b>Build-Maintain-Transfer (BMT)</b>	The SPV is granted a concession contract to finance and develop public services delivery assets such as information and communication systems. Upon completion of development, the Government will operate the asset and pay charges to the SPV. At the end of the concession period, the ownership of assets will be transferred to the Government.

<b>Build-Operate-Own (BOO)</b>	The SPV is granted a concession contract to finance, build and operate a facility which provides services/infrastructure to the public sector. The SPV is not required to transfer the facility to the Government at the end of the concession period.
<b>Outsourcing</b>	The SPV is granted a concession contract to finance, develop and manage the services/functions that are traditionally delivered by the Government (e.g. equipment inspection, information technology services and medical supply). The Government oversees the SPV to ensure it meets public needs and standards. In return, the Government will pay for the services provided by the SPV depending on compliance with agreed KPIs.
<b>Hybrid-pays<sup>1</sup></b>	
<b>BLMT-hybrid</b>	The SPV is granted a concession contract to finance and construct public facilities. Upon construction completion, the SPV will lease the facility to the Government to be operated by the Government. The Government will pay availability charges to the SPV. Apart from that, the SPV will maintain the facility and in return, the Government will pay maintenance charges depending on compliance with the agreed KPIs. In addition, the Government will also include chargeable services with the aim to generate additional revenue streams to offset availability charges payment. At the end of the concession period, the ownership of facilities is transferred to the Government.
<b>RLMT-hybrid</b>	The SPV is granted a concession contract to finance and redevelop/regenerate public facilities. Upon construction completion, the SPV will lease the facility to the Government to be operated by the Government. The Government will pay availability charges to the SPV. Apart from that, the SPV will maintain the

	facility and in return, the Government will pay maintenance charges depending on compliance with the agreed KPIs. In addition, the Government will also include chargeable services with the aim to generate additional revenue streams to offset availability charges payment. At the end of the concession period, the ownership of facilities is transferred to the Government.
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## (b) Privatisation

Mode	Description
<b>Sale of Asset</b>	The sale of Government equity shares to the private sector. The sale can involve partial or full transfer of equity stake depending on the terms of the agreement and the strategic objectives of the Government.
<b>Sale of Equity</b>	The sale of Government assets to the private sector. The assets could include physical infrastructure (e.g. building or facility), intellectual property or other tangible and intangible assets belong to the Government.
<b>Corporatisation</b>	Corporatisation refers to the transformation process of a Government-owned entity or service into a corporate entity with a more commercial and autonomous structure. The transformation is aimed at improving efficiency, accountability and financial performance while maintaining public service obligation and reducing dependency on Government funding.

## (c) Alternative Mode

Mode	Description
<b>Land Swap</b>	The SPV is granted a contract to finance and construct public facilities or services (e.g. offices and Government quarters). In return, the Government will transfer ownership of

<sup>1</sup> Hybrid-pay refers to the incorporation of user-pays elements into the existing government-pays model to reduce the Government's burden from Availability Charges and Maintenance Charges payments.

Hybrid-pay can be considered for BLMT, BLT, BLMOT, RLMT, RLT, RLMOT, subject to the suitability of each project.

	specific Government land of commensurate value to the SPV.
<b>Offtake</b>	The SPV is granted a contract to produce output or provide services to the Government. In return, the Government will pay for the output or services provided by the SPV.
<b>Joint Venture</b>	The Government and private sector will form an agreement to undertake a development project, whereby the Government will provide the land and the private sector will finance and develop the project. The Government will receive a portion of the proceeds from the sale of the property on the development project.
<b>Leasing</b>	The Government leases the land to the private sector for the purpose of PPP project implementation; or the Government leases assets/equipment from the private sector for the purpose of PPP project implementation.

The PPP models listed above are not exhaustive and will be adopted based on the suitability for each project. While the Government aims to encourage more user-pays concession to reduce financial commitments, other forms of PPP models such as the Build & Manage model and Value-added Leasing model can be customised and expanded in view of its significant impact and spillover effect to the economy.

## 2 Foreign Investment

### 2.1 Are infrastructure projects open to foreign investment?

Through progressive liberalisation of various sectors in Malaysia over the years, foreign equity restrictions have been lifted to allow up to 100% foreign ownership of most projects. However, foreign equity restrictions are still in place to protect certain sectors of strategic importance, including energy, oil and gas, information technology and telecommunications.

For example, in the oil and gas sector, any foreign company that wishes to participate in upstream or downstream activities in Malaysia is required to submit a licensing or registration application to PETRONAS through a local company appointed to act as its

exclusive agent or through a joint venture company formed with a local company or individual. Such local company or joint venture company must also comply with minimum Bumiputera (indigenous) participation requirements. The percentage of participation required differs depending on the type of services to be provided. PETRONAS has issued a list of Standardised Work and Equipment Categories (SWEC) where the minimum Bumiputera participation percentage ranges from 0% to 100%.

## 3 Procurement Process

### 3.1 Outline the key steps and aspects of the procurement under the legislation.

The main types of procurement in Malaysia are as follows:

#### (a) Direct Purchase

This procedure allows procurement of supplies and services up to the value of RM50,000 directly through the issue of a Government Order to any known suppliers of goods or services consistently supplying goods at acceptable quality and reasonable price. At least three offers should be obtained from the local suppliers to ensure that the purchase price is reasonable. The requirement of registration with the Ministry of Finance is exempted for procurements up to the threshold of RM20,000 in a year.

For works, a direct appointment may be made for works not exceeding the value of RM50,000 to a local contractor which is registered with the Construction Industry Development Board ("CIDB") Malaysia at Grade G1.

#### (b) Quotation

Procurement of supplies and services above the value of RM50,000 and up to RM500,000 is done through calling of quotations and the minimum number of quotations to be invited is five. The quotation process is further divided as follows:

- For procurement above RM50,000 and up to RM100,000, quotations are to be invited from local manufacturers or suppliers in the relevant state with Bumiputera status which are registered with the Ministry of Finance and meet the eligibility criteria.
- For procurement above RM100,000 and up to RM500,000, quotations are open to all local manufacturers or suppliers in the relevant state which are registered with the Ministry of Finance and meet the eligibility criteria, with price preference given to Bumiputera suppliers.

Procurement of works above the value of RM50,000 and up to RM500,000 is done through calling of quotations and the minimum number of quotations to be invited is five. All contractors wishing to take part in quotations must be registered with the CIDB and must have obtained the Government Work Procurement Certificate (SPKK).

- Procurements valued at more than RM50,000 up to RM200,000 must be invited from local Grade G1 contractors.
- Procurements valued at more than RM200,000 up to RM500,000 must be invited from local Grade G2 contractors.
- All electrical work procurements valued at more than RM50,000 up to RM500,000 must be invited through quotations from local electrical contractors.

## (c) Tenders

Procurement of works, supplies and services above the value of RM500,000 must be done through tender processes. All contractors intending to participate in local tenders must be registered with the Government. International tenders will be invited for supplies and services if there are no locally produced supplies or services available. For specific works, if local contractors do not have the expertise and capability, tenders may be called on a joint venture basis between local and foreign contractors to encourage the transfer of technology. International tenders for works may

only be called when local contractors do not have the expertise and capability, and a joint venture is not possible.

## (d) Government Procurement Act

Once the Government Procurement Act comes into force, prior to participating in a Government procurement, all suppliers and contractors are required to be registered under the Government Procurement Act. All applications for registration of a supplier or contractor shall be made to the Registrar of Government Procurement.

The Government Procurement Act provides that any Government procurements will primarily be done in an open and competitive manner. The term "open and competitive procurement method" means a procurement method where all registered persons may participate.

However, the Finance Minister has the power to determine procurement methods other than open and competitive bidding, taking into consideration the objectives of the Government Procurement Act.

Approval for Government procurement under the Government Procurement Act will be based on a **tiered threshold system**. Depending on the value of the contract, the authority to approve may rest with procurement boards, controlling officers or, at the higher levels, the Minister, the *Menteri Besar* or the Chief Minister, as follows:

No.	Approving authority	Procurement for goods and services	Procurement for works
1.	Minister/ <i>Menteri Besar</i> or Chief Minister or authority determined by State Government	More than RM50 million	More than RM100 million
2.	Procurement board	More than RM500,000 up to RM50 million	More than RM500,000

No.	Approving authority	Procurement for goods and services	Procurement for works
			up to RM100 million
3.	Committee established by a controlling officer	More than RM50,000 up to RM500,000 value of a procurement contract or total value for a year	More than RM50,000 up to RM500,000
4.	Controlling officer	Below RM50,000 value of a procurement contract or total value for a year	Below RM50,000

### 3.2 Does the legislation require the procurement to be tendered out? If yes:

#### a. What types of infrastructure projects must be tendered out?

All procurement of works, supplies and services above the value of RM500,000 must be done through a tender process.

Under the Government Procurement Act, Government procurements are required to be done in an open and competitive manner, meaning all registered persons may participate. However, the Finance Minister has the power to determine procurement methods other than open and competitive bidding, taking into consideration the objectives of the Government Procurement Act.

#### b. What type of tender process is run?

Currently, the types of tenders may be divided into the following:

- (i) **International open tenders:** international companies may bid on their own alongside domestic companies, or in conjunction with domestic companies in a consortium or

joint venture. International open tenders are adopted if there is evidence that few Malaysian companies on their own have the capacity to meet the demands of the contract. This could apply to high value procurements of specialised products, services and works.

- (ii) **Domestic open tenders:** only domestic companies may bid. Domestic tenders are adopted if there is evidence that sufficient Malaysian companies are capable in terms of resources, expertise and experience to meet the demands of the contract.

- (iii) **Bumiputera reserved tenders:** only Bumiputera companies may bid as further discussed below.

- (iv) **Selective tenders:** they can be adopted in international, domestic, and Bumiputera tenders, in which bidders are required to be screened in a pre-qualification test, making only those who are pre-qualified eligible to bid. The pre-qualification attests to the track record of a bidding company (recent history of similar projects), its financial health (assets, liabilities, cash flow etc.), technical resources (especially in works procurement), current and impending work commitments, competence and qualifications of key management and technical staff, and occasionally testimonials from a third party to verify the suitability of the company to tender. Selective tendering is adopted in high value and complex procurements.

- (v) **Restricted tenders:** specific suppliers or contractors are specially invited to submit bids. Such tenders can be adopted if there are few suitable suppliers or contractors available to undertake the project, or if the products, services and works are required urgently given that selection in this type of tender is less time consuming.

The Government Procurement Act does not specify the types of tender process that may be

run for Government procurement. We expect these details to be contained in the secondary legislation to be published once the Government Procurement Act comes into force, and the types of process may be similar to the foregoing.

### c. Are unsolicited proposals accepted?

There are no restrictions to unsolicited proposals under the laws of Malaysia. However, the agency of procurement is not obliged to accept unsolicited proposals.

It should be noted that under the Government Procurement Act, Government procurements are to be done primarily in an open and competitive manner. One of the main purposes of the Government Procurement Act is to reduce the award of contracts through direct negotiations and to create a fair level playing field. Therefore, it is likely that the acceptance of unsolicited proposals will reduce significantly under the new framework.

### d. Are Swiss challenges permitted?

There are no restrictions to Swiss challenges under the laws of Malaysia. However, the agency of procurement is not obliged to allow a Swiss challenge if it proposes to accept an unsolicited proposal.

Under the Government Procurement Act, any person who is dissatisfied with any Government procurement in general may submit a complaint to the procuring entity. The term "procuring entity" in this context refers to the Federal Government or any State Government (as the case may be) that administers, conducts or implements a Government procurement under the Government Procurement Act. Any person who is dissatisfied with any Government procurement exceeding a certain approval threshold as determined by the Minister may submit an objection to the procuring entity. If such person is dissatisfied with the decision made by the procuring entity, he may then submit the decision for a review by the review panel of the procuring entity.

The decision by a review panel shall be submitted in writing to the person making the objection within a reasonable period. If the person making the objection is not satisfied with the decision made by the review panel, such person may, within the period of 14 days after the date of the decision, appeal to an Appeal Tribunal. All proceedings before the Appeal Tribunal shall generally be open to the public. Its decision shall be final and binding on the parties to the appeal. A decision given by the Appeal Tribunal may, by leave of the High Court, be enforced in the same manner as a judgment or an order of the High Court.

### 3.3 Does the awarding authority carry out preliminary market consultations before launching the tender procedure?

Prior to launching the tender procedure, the procuring agency must comply with the procurement planning procedures. Such procurement planning procedures include preparing a list of anticipated procurements for the forthcoming financial year, carrying out market surveys to determine if the relevant products are readily available in the local market, and to obtain estimates on the market value of such products. In determining the market value of products, the trends of purchase prices in procurement dealings by the procuring agency or other agencies may be used as a guide.

Under the Government Procurement Act, a controlling officer is required to administer, conduct or implement any Government procurement of which the planning and estimation for the allocated funds have been prepared and approved by the Federal Government or State Government, as the case may be.

### 3.4 Does the legislation mandate the criteria that interested parties must meet in order to be eligible for participation in a procurement process? If so, what are these criteria?

Interested parties must undergo a registration process with the relevant authorities in order to participate in the procurement process. The registration authorities are as set out below:

Category	Registration Authorities
Works (e.g. construction)	PKK, Ministry of Works and CIDB
Supplies (e.g. raw or finished goods)	Government Procurement Division, Ministry of Finance
Services (e.g. manpower, expertise and consultants)	Government Procurement Division, Ministry of Finance

Unlike the normal procurement process, a PPP proposal will only be considered if there is a need on the part of the Government for the project after taking into account the benefits/probity as a whole.

Under the Government Procurement Act, a new centralised registration regime has been introduced. Prior to participating in any Government procurement, all suppliers and contractors are required to be registered under the Government Procurement Act. All applications for registration shall be made to the Registrar of Government Procurement. The Registrar of Government Procurement may approve an application if the applicant: (i) is a fit and proper person; (ii) has fulfilled all the requirements under the Government Procurement Act and complied with any preconditions of the registration; and (iii) has made a disclosure of interest in accordance with the Government Procurement Act. Once the application is approved, the Registrar will issue a certificate of registration to the applicant. The Registrar may impose such conditions as the Registrar thinks fit to impose on any registration.

### 3.5 Does the procuring authority publish the tender documents online?

Advertisements for tenders are published online, for example, on the procuring agencies' websites and the Ministry of Finance procurement portal (<https://myprocurement.treasury.gov.my/>). All local tenders must be advertised in at least one local daily in the Malay language. On the other hand, international tenders must be advertised in at least two local dailies i.e. one in the Malay language and one in the English language.

All federal supply and service procurements must now be conducted via the ePerolehan electronic procurement system, and major works tenders are advertised through the CIDB's e-tender portal. All agencies are required to list procurement opportunities and outcomes on the MyProcurement portal to enhance transparency and accountability.

In respect of tender documents, these are made available upon purchase from the procuring authority at a minimum cost of RM50. Tender documents must be sold in hard copy form, although the procuring authority may prepare such tender documents in soft copy form as well.

It is unclear if any new platform will be established under the upcoming Government Procurement Act. In any event, given the need for Government procurement to be done in an open and competitive manner under the Government Procurement Act, it is likely that the tender documents will need to be published so that they are accessible to all registered persons.

### 3.6 Do the tender documents explain in detail the procurement procedure providing the same information to all bidders?

The detailed procurement procedure is not provided in the tender documents. However, the complete procurement procedure which will be updated from time to time is available on the Ministry of Finance website and can be extracted by the public (including all bidders), which can be found on <http://ppp.treasury.gov.my/>.

Tender documents are required to contain, amongst others, the following:

- (a) general and specific terms and conditions;
- (b) specifications required by the procuring agency;
- (c) tender form which must be completed and signed by the bidders for participation in the tender;
- (d) the terms of the contract which will apply to the successful bidder;
- (e) the completion or delivery period;
- (f) record of the bidder's experience in the relevant field.

Details of the procurement procedures are not currently contained in the Government Procurement Act. We expect such details to be contained in the secondary legislation to be published once the Government Procurement Act comes into force.

### 3.7 Can potential bidders submit questions to clarify the tender documents and are the answers disclosed to all potential bidders?

The potential bidders are allowed to submit questions to clarify the tender documents through phone calls or via emails, and they will receive responses or the answers to the questions personally. Some procuring authorities will issue tender documents which specifically provide the templates for how the queries should be submitted, and may issue clarifications to all bidders following questions submitted by some of the bidders. However, there is no absolute obligation imposed on the procuring authorities to disclose such queries and their clarifications to all potential bidders. Note that this may change under the Government Procurement Act which obliges Government procurement to be done in an open and competitive manner.

### 3.8 Does the procuring authority conduct a pre-bid conference to further inform potential bidders and are the clarifications provided disclosed to all potential bidders?

The procuring authority will conduct compulsory pre-bid conferences and non-compulsory pre-bid conferences. Technical requirements will usually be discussed or clarified during the compulsory pre-bid conferences. The procuring authorities will provide written clarifications to all potential bidders on a case-by-case basis.

## 4 Evaluation Criteria

### 4.1 On the basis of what criteria are tenders evaluated and the winner of the contract determined?

There is no specific set of criteria for the tenders to be evaluated. However, the following criteria are generally used:

- (a) the tenderer has met all of the requirements set out in the tender documents;

- (b) the technical capabilities of the tenderer such as professional and technical staff, and track record in respect of the projects undertaken by the tenderer that are in progress or completed;
- (c) the financial capability of the tenderer in terms of capital, credit facilities, value of the projects that are in progress or completed; and
- (d) the price of the tender taking into consideration the proposed completion or delivery period.

In respect of PPP projects, selection involves a 'filtering process' whereby the following general criteria should be met:

- (a) output specification can be clearly identified and quantified;
- (b) economic life of the asset or service should be at least 20 years;
- (c) projects with technological obsolescence risk will not be considered;
- (d) project sponsor must be financially strong, with the paid-up capital of the SPV to be at least 10% of the project value.

Under the Government Procurement Act, the Minister has the power to make regulations relating to the procedures for the approval of Government procurement, including the establishment and appointment of any committee for the purposes of evaluation, consideration and recommendation of any matter in Government procurement, including the administration and procedures for such committee. Therefore, we expect to see details of certain general evaluation criteria to be contained in the secondary legislation to be published once the Government Procurement Act comes into force. However, it is likely that any specific criteria will be provided in the relevant tender documents as the relevant criteria may differ from one procurement to another.

### 4.2 Is there an obligation to disclose the criteria or other elements of the evaluation methodology on the basis of which (i) bidders are selected, and (ii) tenders evaluated? If so, when must such disclosure take place?

There is no obligation to disclose such criteria or other elements of the evaluation methodology. Note that this may change under the Government Procurement Act which obliges Government procurement to be done in an open and competitive manner.

## 5 The Contract

### 5.1 Is a form of contract provided with the tender documents?

Generally, the terms of the contract that are to be entered between the procuring agency and the bidders are provided with the tender documents.

### 5.2 To what extent is modification and negotiation on the contract permitted?

The terms of the contract are generally issued on the basis that the tenderers are required to be in full compliance. However, as part of its bid, a bidder may propose amendments to such terms of the contract and, if successful, may be requested to negotiate further.

### 5.3 Does the contract deal with specific circumstances (*force majeure*, material adverse government action, change in the law, refinancing) that may arise during the life of the contract?

Generally, yes but this also depends on the nature of the works/ supplies/ services involved under the contract.

### 5.4 Are dispute resolution mechanisms in place allowing the parties to resolve disputes in an efficient and satisfactory manner without adversely affecting the project?

Arbitration clauses are fairly common in such contracts. In the recent years, the dispute mechanisms in these contracts have been developed to provide parties with multiple avenues to resolve disputes before they are referred to arbitration. Some contracts would require

amicable settlement discussions, mediation or expert determination before referring the dispute to arbitration.

### 5.5 Are lenders given step-in rights for cases when the private partner is at risk of default or if the contract is under threat of termination for failure to meet obligations?

Save for PPP contracts, step-in rights for lenders are not common.

### 5.6 Are grounds for termination of the contract and its associated consequences well defined?

Most of the contracts involving government procurement adopt to a certain extent the termination grounds found in the Public Works Department standard form of contract. Such termination grounds incline towards giving the government or the procuring authorities more favourable rights to terminate the contracts. For example, termination for convenience or on the ground of national interest are common features in such contracts, allowing the unilateral termination of contracts by procuring agencies.

Over the course of the years, especially for procurement contracts that are of high value or PPP contracts, the clauses on consequences of termination have been more elaborate. Some of the clauses do not only address payment obligations upon termination but also regulate the parties' obligations during the transition process.

## Myanmar



### 1 Legislation Regulating Procurement of Infrastructure Projects

#### 1.1 What legislation regulates the procurement of infrastructure projects in your jurisdiction?

The procurement of infrastructure projects in Myanmar is governed by a multi-layered legal framework rather than a single, unified code. The primary legislation is the Public Procurement Rules (Notification No. 1/2017) ("**PPR**"), issued by the President's Office on 10 April 2017, which remains the foundational regulation for procurement carried out by government departments and organisations using state funds.

This framework is supplemented by a series of presidential and ministerial directives, including: (i) Tender Procedures Directive No. 1/2017 ("**Directive No. 1/2017**"); (ii) Project Bank Directive No. 2/2018 ("**Directive No. 2/2018**"); (iii) Directive No. 3/2018 on leasing, transfer, and joint implementation of state-owned land and buildings ("**Directive No. 3/2018**"); and (iv) Directive No. 7/2020 on standard procedures for requesting Union Budget funds and tender procedures for construction works ("**Directive No. 7/2020**"). In addition, the Ministry of Planning, Finance and Industry issued Notification No. 1/2020, which sets out procedures for competitive tendering for unsolicited project proposals submitted without government invitation. These instruments continue to be relevant and are now reinforced under the State Administration Council Office Directive No. 1/2022, which consolidates and prescribes the procedures to be followed in Government procurement, disposal, and leasing of state-owned property.

#### 1.2 Which entities and what types of contracts are subject to procurement regulation?

The PPR applies to development projects and procurement activities undertaken by Government departments and organisations at the Union, State, and Regional levels. The Construction Sector Development Law 2026 applies to a broader range of entities, including all "Service Providers" such as builders (contractors and subcontractors), construction consultants, project management teams, quality control teams, and architectural and engineering service teams, as well as "Project Owners," which encompass government bodies, private companies, and even

private homeowners involved in construction activities covered by the PPR. In terms of contracts, the PPR covers contracts for development projects, procurement of goods and services, and the sale or lease of public assets. The Myanmar Investment Law ("**MIL**") governs investment contracts and agreements related to investments that have obtained a Myanmar Investment Commission ("**MIC**") Permit or Endorsement. The Construction Sector Development Law 2026 ("**CSDL**") now applies to a wide array of contracts related to construction-related service activities, including those for new construction, expansion, renovation, maintenance, preparation of design plans, quality inspection, construction project management, and the supply of construction materials.

## 2 Foreign Investment

### 2.1 Are infrastructure projects open to foreign investment?

Yes, infrastructure projects are open to foreign investment, but they are subject to regulation under the MIL and oversight by the MIC. Under the MIL, a foreign investor is defined as a person who is not a Myanmar citizen, including foreign companies established in Myanmar with more than 35% foreign shareholding. A MIC Permit is mandatory for strategic investments, including large-scale infrastructure in communications, transport, and energy where the investment exceeds US\$20 million, as well as for capital-intensive projects exceeding US\$100 million, environmentally significant projects requiring an Environmental Impact Assessment (EIA), and investments using state-owned land. However, foreign investment is restricted in certain areas under MIC Notification No. 15/2017, with some activities prohibited entirely, others allowed only as a joint venture with a Myanmar citizen (requiring minimum 20% Myanmar ownership), and some, like power projects over 30 MW, requiring approval from the relevant ministry. As an exception to the Transfer of Immovable Properties Restriction Act (TIPRA), the MIL allows foreign investors with MIC approval to obtain long-term leases of up to 70 years (an initial 50 years plus two 10-year extensions) and may also qualify for tax incentives including income tax holidays of up to seven years.

## 3 Procurement Process

### 3.1 Outline the key steps and aspects of the procurement under the legislation.

Based on the PPR and the new CSDL, the procurement process begins with project approval, where the procuring entity must secure necessary approvals from the relevant State or Regional Government or, for projects with significant national impact, from the Union Government. This is followed by pre-project procedures under the new law, which involve preparing plans, studying feasibility, developing design models, and evaluating costs and expected outcomes. The procuring authority must then form a tender committee to oversee the process before publishing the tender notice according to the value thresholds set by the PPR. Bidders, who under the new law must be registered Service Providers, submit their proposals along with a security deposit, after which the tender committee evaluates the bids based on criteria published in the tender documents. The contract is awarded to the successful bidder, who must then provide a performance guarantee, and throughout the construction process, the project is subject to quality inspection and oversight, including the mandatory use of materials with a Quality Assurance Certificate (QAC), as mandated by the CSDL.

### 3.2 Does the legislation require the procurement to be tendered out? If yes:

Yes, the PPR generally requires a procurement to be tendered out for projects exceeding a certain value.

#### a. What types of infrastructure projects must be tendered out?

The PPR mandates open tenders for development projects whose expected value exceeds MMK 10 million.

#### b. What type of tender process is run?

The default procedure is an open tender, where the tender notice is published publicly for any eligible bidder to participate. However, for complex or specialised projects, such as those in the oil, gas, or telecommunications sectors, a selective tender process may be used where

only pre-qualified candidates are invited to submit bids.

### c. Are unsolicited proposals accepted?

Regarding unsolicited proposals, the PPR does not explicitly address them, but in practice, while they may be considered, they are often subjected to a formal tender process to ensure transparency and fairness. Under the Project Bank Notification, unsolicited proposals for PPPs may be accepted if subjected to the Swiss Challenge Model to qualify for Government support, and this method, which is not expressly prohibited under the PPR, has been used in practice in Myanmar for some development projects.

### d. Are Swiss challenges permitted?

The Swiss Challenge Model is not expressly prohibited under the PPR. In practice, the Swiss challenge model has been considered for use in various projects across Myanmar.

### 3.3 Does the awarding authority carry out preliminary market consultations before launching the tender procedure?

Preliminary market consultations are not a mandatory requirement under the PPR. However, for large or complex projects, some procuring authorities may conduct them in practice to gauge market interest and assess feasibility. This practice, while not codified, is sometimes employed by authorities such as the Yangon Regional Government or certain Union Ministries for high-value or technically complex infrastructure projects to better understand the capabilities of the market and refine their procurement strategy before launching a formal tender.

### 3.4 Does the legislation mandate the criteria that interested parties must meet in order to be eligible for participation in a procurement process? If so, what are these criteria?

Yes, under paragraph 64 of the Directive No. 7/2020, the legislation mandates the criteria that interested parties must meet to be eligible for participation in a

procurement process. It is provided that interested parties must:

- (a) demonstrate experience in successfully completing construction works of a similar nature and magnitude;
- (b) possess adequate technical personnel, including site engineers, technicians, and skilled workers;
- (c) possess adequate construction equipment and machinery;
- (d) demonstrate financial capability, including sufficient capital, available credit, or bank guarantees necessary to perform the work; and
- (e) maintain a clean record, meaning no history of abandoning projects, defaulting on contracts, or being blacklisted by any Government ministry, department, or organisation.

### 3.5 Does the procuring authority publish the tender documents online?

Yes, under paragraph 83(3) of Directive No. 7/2020, the procuring authority publishes the tender documents online. It is provided that the tender announcement, along with the tender documents and their terms of reference, must be published on the procuring authority's website and on the National Tender Portal or any designated electronic system. Regarding language, the paragraph specifies that such publications shall be made in both the Myanmar language and the English language.

### 3.6 Do the tender documents explain in detail the procurement procedure providing the same information to all bidders?

Yes, based on paragraph 77 of the Directive No. 7/2020, the tender documents explain in detail the procurement procedure and provide the same information to all bidders. Paragraph 77 stipulates that the tender documents must contain all necessary information regarding the procurement process, including the instructions to bidders, the criteria for evaluation, the terms and conditions of the contract, and the technical specifications. Furthermore, the paragraph requires that

the same tender documents be provided equally to all prospective bidders to ensure transparency and equal access to information throughout the procurement process.

### 3.7 Can potential bidders submit questions to clarify the tender documents and are the answers disclosed to all potential bidders?

Yes, potential bidders can submit questions to clarify the tender documents, and the answers are disclosed to all potential bidders. At the pre-tender meeting, potential bidders are given the opportunity to seek clarifications regarding the tender documents. Any questions raised by bidders, along with the responses provided, must be documented. Importantly, paragraph 77 of the Directive No. 7/2020 requires that the minutes of the pre-tender meeting, including all questions and answers, be communicated in writing to all bidders who received the tender documents, ensuring that every participant has access to the same information.

### 3.8 Does the procuring authority conduct a pre-bid conference to further inform potential bidders and are the clarifications provided disclosed to all potential bidders?

Pre-bid conferences are not a mandatory requirement under the PPR. However, this practice is becoming increasingly common, particularly for large, complex, or high-value infrastructure projects undertaken by authorities such as the Yangon Regional Government or larger Union Ministries. When a pre-bid conference is conducted, the clarifications, discussions, and any additional information provided during the conference are usually recorded and subsequently shared with all prospective bidders who have expressed interest, ensuring that all parties have the same information and maintaining the integrity of the tender process.

## 4 Evaluation Criteria

### 4.1 On the basis of what criteria are tenders evaluated and the winner of the contract determined?

Tenders are evaluated through a two-stage process to determine the winner. First, a preliminary examination screens tenders for mandatory compliance with

submission requirements and eligibility criteria; non-compliant tenders are disqualified. Next, technically qualified tenders undergo a detailed technical evaluation against criteria such as experience, personnel qualifications, equipment, methodology, and technical specifications. Only those meeting the minimum technical threshold proceed to the price evaluation stage. Finally, the contract is awarded to the bidder with the lowest evaluated responsive tender among technically qualified bidders, provided the price is reasonable and within the approved budget. Thus, the winner is determined based on technical compliance combined with the lowest price.

### 4.2 Is there an obligation to disclose the criteria or other elements of the evaluation methodology on the basis of which (i) bidders are selected, and (ii) tenders evaluated? If so, when must such disclosure take place?

Yes, under Directive No. 7/2020, there is an obligation to disclose the criteria and other elements of the evaluation methodology on the basis of which bidders are selected and tenders evaluated. However, such disclosure takes place after the award decision, not prior to or during the bidding process. It is required that upon awarding the contract, the procuring authority must publicly announce the results, and this announcement must include the evaluation criteria and the methodology used to select the winning bidder, in addition to the name of the winning bidder and the contract price. Therefore, while the evaluation methodology is disclosed, it is disclosed at the time the winner is announced.

## 5 The Contract

### 5.1 Is a form of contract provided with the tender documents?

Yes, a form of contract is provided with the tender documents under Directive No. 7/2020. The tender documents must include the "draft contract" or the "conditions of contract" that will govern the agreement between the procuring authority and the successful bidder. This ensures that all prospective bidders are aware of the contractual terms and conditions before submitting their bids. Additionally, it is prescribed that the contract must be based on the standard contract form included in the tender documents, and that any

contract entered into must adhere to the conditions of contract as set out therein. Together, these provisions establish that a form of contract is an integral part of the tender documents provided to all bidders.

### 5.2 To what extent is modification and negotiation on the contract permitted?

Under Directive No. 7/2020, modification and negotiation on the contract are not permitted after the award, except under very limited and specific circumstances. Directive No. 7/2020 provides that once the contract is awarded, the contract must be executed strictly in accordance with the draft contract or conditions of contract included in the tender documents. It prohibits any renegotiation or modification of the terms and conditions that were already set forth in the tender documents, including price, scope of work, and contractual obligations. Any modifications are only permitted if they are expressly provided for in the contract itself, such as through variation clauses or change orders that were pre-established in the tender documents. Post-award negotiations aimed at altering the core terms of the contract are strictly prohibited to ensure transparency, fairness, and equal treatment among all bidders.

### 5.3 Does the contract deal with specific circumstances (*force majeure*, material adverse government action, change in the law, refinancing) that may arise during the life of the contract?

Yes, under Directive No. 7/2020, the contract deals with specific circumstances that may arise during the life of the contract, including *force majeure*. These paragraphs define *force majeure* as unforeseen and unavoidable events beyond the contractor's control, establish notification procedures, and provide that the contractor is entitled to an extension of time and relief from liability for delays caused by such events.

### 5.4 Are dispute resolution mechanisms in place allowing the parties to resolve disputes in an efficient and satisfactory manner without adversely affecting the project?

Yes, dispute resolution mechanisms are in place that allow the parties to resolve disputes in an efficient and satisfactory manner without adversely affecting the project. Directive No. 7/2020 provides that during the performance of the contract, any disputes or

disagreements arising between the procuring authority and the contractor shall first be referred to a dispute resolution committee or resolved through negotiation and mediation in accordance with the procedures set forth in the conditions of contract. It emphasises that the parties must continue to perform their obligations under the contract throughout the dispute resolution process, and that the mechanism is designed to prevent delays and ensure that the project is not adversely affected. If the dispute cannot be resolved through these means, referral is to be carried out through arbitration as the final method of settlement, ensuring a structured and efficient process for resolving conflicts.

### 5.5 Are lenders given step-in rights for cases when the private partner is at risk of default or if the contract is under threat of termination for failure to meet obligations?

Step-in rights for lenders are not explicitly provided for in the PPR or the MIL, but they are a contractual matter that is becoming increasingly common, particularly in large-scale infrastructure projects financed by international lenders. These rights are typically a subject of intensive negotiation between the private partner, the lenders, and the procuring authority, and their effectiveness often depends on ensuring that all necessary government approvals are obtained to allow for such a step-in, as project agreements such as Build-Operate-Transfer (BOT) contracts usually contain restrictions against assignment of any rights associated with the project to third parties.

### 5.6 Are grounds for termination of the contract and its associated consequences well defined?

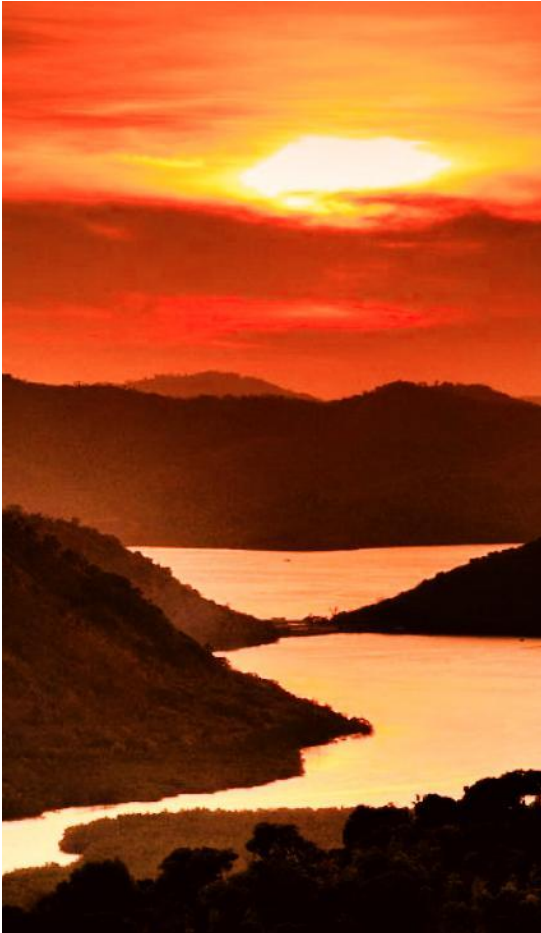
Yes, the grounds for termination of the contract and its associated consequences are well defined. Directive 7/2020 sets out the specific grounds for termination by the procuring authority, including:

- (a) the contractor's failure to commence or complete the work within the specified time;
- (b) failure to perform obligations under the contract;
- (c) assignment of the contract without prior approval;
- (d) bankruptcy or insolvency of the contractor; or

(e) any material breach of the terms.

Directive 7/2020 also defines the consequences of termination, providing that upon termination, the procuring authority may take over the works, complete them using other means, and recover any additional costs incurred from the contractor. It also addresses the settlement of payments, stating that the contractor is entitled to payment only for work satisfactorily completed prior to termination, less any damages or losses suffered by the procuring authority due to the contractor's default.

# Philippines



## 1 Legislation Regulating Procurement of Infrastructure Projects

### 1.1 What legislation regulates the procurement of infrastructure projects in your jurisdiction?

In the Philippines, two laws principally govern the procurement of infrastructure projects:

- (a) Republic Act No. 12009 or the New Government Procurement Act ("**NGPA**"); and
- (b) Republic Act No. 11966 or the Public-Private (PPP) Code of the Philippines ("**PPP Code**").

In general, the NGPA applies to the procurement of all infrastructure projects by the Government, while the PPP Code covers all contractual arrangements between a Government agency and a private partner to finance, design, construct, operate, and maintain, infrastructure or development projects and services which are typically provided by the public sector, where each party shares in the associated risks. The NGPA will not apply to any treaty or international or executive agreement of which the Philippine Government is a signatory. The PPP Code will not apply to infrastructure projects undertaken under the NGPA.

### 1.2 Which entities and what types of contracts are subject to procurement regulation?

The NGPA governs the procurement of infrastructure projects of all branches and instrumentalities of the national Government, its departments, bureaus, offices, and agencies, including state universities and colleges, Government-owned and/or controlled corporations, Government financial institutions, and local Government units, regardless of source of funds, whether local or foreign.<sup>2</sup>

The PPP Code applies to contractual agreements between the Government (implementing agency)<sup>3</sup>, including a department, bureau, office, instrumentality, commission, authority of the national Government, state university and college, local university and college, local government unit, and government and/or controlled corporations, and a private partner.<sup>4</sup>

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<sup>2</sup> RA 12009, Section 4.

<sup>3</sup> RA 11966 IRR, Section 4(aa).

<sup>4</sup> RA 11966 IRR, Section 4(rr).

## 2 Foreign Investment

### 2.1 Are infrastructure projects open to foreign investment?

Infrastructure projects are open to foreign investment subject to the limitations prescribed by applicable law.

Under the NGPA, foreign bidders are eligible to participate in the procurement of infrastructure projects when provided for under any treaty or international or executive agreement.<sup>5</sup>

Under the PPP Code, where there is a nationality requirement for the operation of a PPP project, foreign bidders may participate but its facility operator must be an entity that is at least 60% Filipino-owned.<sup>6</sup> When there is no nationality requirement, the prospective private partner and facility operator may be foreign-owned.<sup>7</sup>

## 3 Procurement Process

### 3.1 Outline the key steps and aspects of the procurement under the legislation.

Under the NGPA, the procurement process must be competitive, transparent, efficient, and proportionate.<sup>8</sup> As a general rule, procurement shall be done by competitive bidding wherein any eligible bidder is open to participate, and it shall involve the following stages: publication, pre-bid conference, eligibility screening of prospective bidders, receipt and opening of bids, evaluation of bids, post-qualification, and award of contract.<sup>9</sup> Apart from competitive bidding, the NGPA also provides for other modes of procurement when certain conditions are met.<sup>10</sup> The NGPA adopts a fit-for-purpose and proportional procurement approach.<sup>11</sup>

As with the NGPA, the PPP Code provides for competitive bidding, whether via solicited proposals or unsolicited proposals. In solicited proposals, the private party submits a bid in response to a public bidding launched by a government agency.<sup>12</sup> In unsolicited

proposals, the private party submits a proposal to undertake a project, and the implementing agency will decide whether to approve or reject the proposal. If approved, the unsolicited proposal will undergo a comparative challenge.<sup>13</sup>

### 3.2 Does the legislation require the procurement to be tendered out? If yes:

Yes, as a general rule, both the NGPA and the PPP Code require competitive bidding.

#### a. What types of infrastructure projects must be tendered out?

Under the NGPA, all infrastructure projects must be tendered out (competitive bidding) unless an alternative method of procurement applies.<sup>14</sup> For example, in a limited source bidding, the procuring entity sends direct invitations to bid to pre-selected suppliers. It can be resorted to when the infrastructure project is highly specialised and affects national security.<sup>15</sup> Another example is negotiated procurement, which is allowed in case of two failed biddings, emergency cases, take-over of contracts, and adjacent or contiguous projects, among others.<sup>16</sup>

Under the PPP Code, infrastructure projects must be tendered out. For solicited proposals, it will undergo public bidding to determine the bidder who has satisfied the pre-qualification and eligibility requirements and has submitted the most-responsive bid.<sup>17</sup> Unsolicited proposals which have been approved by the implementing agency will undergo a comparative challenge or Swiss challenge where there will be an invitation for the submission of comparative proposals. In unsolicited proposals, the original proponent has the right to match a submission made during the comparative challenge.<sup>18</sup>

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<sup>5</sup> RA 12009 IRR, Section 52.4.2.2.

<sup>6</sup> RA 11966 IRR, Section 72.1

<sup>7</sup> RA 11966, Section 72.1 (c).

<sup>8</sup> RA 11966 IRR, Section 72.1.

<sup>9</sup> RA 12009, Section 27.

<sup>10</sup> RA 12009, Section 26.

<sup>11</sup> RA 12009, Section 7.

<sup>12</sup> RA 11966, Section 9.

<sup>13</sup> RA 11966, Section 10.

<sup>14</sup> RA 12009, Section 27.

<sup>15</sup> RA 12009, Section 28.

<sup>16</sup> RA 12009, Section 35.

<sup>17</sup> RA 11966, Section 9.

<sup>18</sup> RA 11966, Section 10.

### b. What type of tender process is run?

As a general rule, the NGPA and the PPP Code both require competitive bidding.

### c. Are unsolicited proposals accepted?

Yes. Under the PPP Code, an unsolicited proposal may be accepted.

### d. Are Swiss challenges permitted?

In the PPP Code, a Swiss Challenge is required for unsolicited proposals. After an unsolicited proposal is accepted, a comparative challenge will follow wherein the implementing agency will publish an invitation for comparative proposals. The original proponent has the right to match the proposal by a challenger.<sup>19</sup>

### 3.3 Does the awarding authority carry out preliminary market consultations before launching the tender procedure?

Under the NGPA, the procuring entity shall conduct a market scoping as a preliminary undertaking for the preparation of its Project Procurement Management Plan which shall cover cost estimation, project design and specifications, and technical and selection criteria, among others. Market scoping may include activities such as consultation with contractors and professional associations or groups.<sup>20</sup>

- (a) Under the PPP Code, a feasibility study shall be developed following the identification and initial screening of PPP projects. A feasibility study would include market sounding feedback.<sup>21</sup>
- (b) For unsolicited proposals, a detailed evaluation shall be conducted which shall consider market sounding feedback.<sup>22</sup>

Market sounding refers to a feedback gathering exercise with the appropriate or relevant stakeholders and potential partners, such as but not limited to prospective investors, prospective bidders, financing groups, and

industry groups. It aims to (i) assess the appropriateness and attractiveness of the PPP scheme; (ii) solicit input on project requirements to achieve an optimal structure for the PPP Project; and (iii) identify potential issues that may affect the viability of the proposed PPP project.<sup>23</sup>

### 3.4 Does the legislation mandate the criteria that interested parties must meet in order to be eligible for participation in a procurement process? If so, what are these criteria?

The Implementing Rules and Regulations of the NGPA ("**NGPA IRR**") prescribe eligibility criteria for the procurement of infrastructure projects:

- (a) Prospective bidder may be: (i) Filipino citizens or sole proprietorships; (ii) partnerships duly organised under the laws of the Philippines and of which at least 60% of the interest belongs to citizens of the Philippines; (iii) corporations duly organised under the laws of the Philippines, and of which at least 60% of the outstanding capital stock belongs to citizens of the Philippines; (iv) cooperatives duly organised under the laws of the Philippines; or (v) joint ventures where Filipino ownership or interest is at least 60%.

Joint ventures with Filipino ownership or interest less than 60% may be eligible to participate if the Filipino ownership or interest is at least 25% and the structures to be built require the application of techniques or technologies which are not possessed by a person or entity meeting the 60% requirement.<sup>24</sup> Foreign bidders may be eligible to participate when provided for under any treaty or international or executive agreement;<sup>25</sup>

- (b) Prospective bidder has been issued a licence by the Philippine Contractors Accreditation Board ("**PCAB**") to engage or act as a contractor;<sup>26</sup>
- (c) Prospective bidder has completed a contract that is similar to the procurement project to be bid upon and whose value, adjusted to current

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<sup>19</sup> RA 11966, Section 11.

<sup>20</sup> RA 12009, Section 10.

<sup>21</sup> RA 11966 IRR, Section 19 (k).

<sup>22</sup> RA 11966 IRR, Section 55 (j).

<sup>23</sup> RA 11966, IRR, Section 4 (II).

<sup>24</sup> RA 12009 IRR, Section 52.4.2.1.

<sup>25</sup> RA 12009 IRR, Section 52.4.2.2.

<sup>26</sup> RA 12009 IRR, Section 52.4.2.3.

prices, must be at least 50% of the approved budget for the contract to be bid upon. For foreign-funded procurement, the Philippine government and the foreign government, or foreign or international financing institution, may agree on another track record requirement<sup>27</sup>; and

- (d) The computation of the bidder's net financial contracting capacity ("**NFCC**"), which current assets minus current liabilities, must be at least equal to the approved budget of the contract to be bid upon.<sup>28</sup>

For the PPP Code, it distinguishes between PPP Projects with a nationality requirement and the presence of a Private Partner and/or Facility Operator. A Private Partner refers to a private sector entity determined to be financially, legally, and technically capable to undertake obligations under an awarded PPP contract.<sup>29</sup> A Facility Operator refers to an entity allowed and duly registered under Philippine Laws, which may or may not be the Private Partner, that shall be responsible for operating and/or maintaining the facility.<sup>30</sup>

For PPP projects with a nationality requirement, where the Private Partner and Facility Operator are one and the same entity, the Private Partner must be: (i) Filipino; (ii) a corporation duly registered with the SEC and at least 60% owned by Filipinos, or if a consortium of local and foreign firms, Filipinos must have at least 60% interest; or (iii) cooperatives duly registered with the Cooperative Development Authority ("**CDA**").<sup>31</sup> For PPP Projects with a nationality requirement where the Private Partner and Facility Operator are two separate entities, the Facility Operator must be: (i) Filipino; (ii) a corporation duly registered with the SEC and at least 60% owned by Filipinos; or (iii) a cooperative registered with the CDA.<sup>32</sup> For PPP projects with no nationality requirement, the prospective Private Partner or Facility Operator may be Filipino or foreign-owned, subject to applicable laws, rules, and regulations.<sup>33</sup>

A construction contractor, whether Filipino or foreign, proposed to be engaged by the prospective Private Partner to undertake the construction of the PPP project must be duly licensed by the PCAB.<sup>34</sup> Additionally, the prospective Private Partner must possess adequate experience<sup>35</sup> and financial capability in the project to be undertaken.<sup>36</sup>

The members or participants of the consortium shall execute an undertaking in favour of the implementing agency that if awarded the PPP contract, they shall bind themselves to be jointly and severally liable for the obligations of the Private Partner under the PPP contract.<sup>37</sup>

### 3.5 Does the procuring authority publish the tender documents online?

Yes, under the NGPA, all invitations to bid shall be published by the procuring entity in the Philippine Government Electronic Procurement System ("**PhilGEPS**") website, on the website or social media platforms of the procuring entity, if available, and in such other channels as may be authorised by the Government Procurement Policy Board ("**GPPB**").<sup>38</sup>

Under the PPP Code, the invitation to bid for solicited proposals<sup>39</sup> and the invitation for comparative challenge for unsolicited proposals<sup>40</sup> shall be published on the website of the implementing agency and the PPP Center.

### 3.6 Do the tender documents explain in detail the procurement procedure providing the same information to all bidders?

The NGPA<sup>41</sup> and the PPP Code<sup>42</sup> provide that the publication and invitation to bid shall state the necessary information to the prospective bidders including details of the project, criteria, procedures, among others.

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<sup>27</sup> RA 12009 IRR, Section 52.4.2.4.

<sup>28</sup> RA 12009 IRR, Section 52.4.2.6.

<sup>29</sup> RA 11966 IRR, Section 4(ww).

<sup>30</sup> RA 11966 IRR, Section 4(m).

<sup>31</sup> RA 11966 IRR, Section 72.1 (a).

<sup>32</sup> RA 11966 IRR, Section 72.1 (b).

<sup>33</sup> RA 11966 IRR, Section 72.1 (c).

<sup>34</sup> RA 11966 IRR, Section 72.1.

<sup>35</sup> RA 11966 IRR, Section 72.2.

<sup>36</sup> RA 11966 IRR, Section 72.3.

<sup>37</sup> RA 11966 IRR, Section 72.1.

<sup>38</sup> RA 12009, Section 50.

<sup>39</sup> RA 12009, Section 9(b).

<sup>40</sup> RA 11966, Section 10(e).

<sup>41</sup> RA 12009 IRR, Section 50.1.

<sup>42</sup> RA 11966 IRR, Section 64.

### 3.7 Can potential bidders submit questions to clarify the tender documents and are the answers disclosed to all potential bidders?

Yes, under the NGPA IRR, a prospective bidder may request for clarifications on any part of the bidding documents or for an interpretation. A bid bulletin will be issued and made available to all parties who have properly secured the bidding documents.<sup>43</sup> Under the PPP Code Implementing Rules and Regulations ("**PPP Code IRR**"), a bid bulletin or supplemental notice shall be issued for the purposes of clarifying any provisions of the tender documents.<sup>44</sup>

### 3.8 Does the procuring authority conduct a pre-bid conference to further inform potential bidders and are the clarifications provided disclosed to all potential bidders?

Yes, in the NGPA IRR, a pre-bid conference is required for contracts with an approved budget of at least PHP 3 million. A pre-bid conference may be called for contracts with an approved budget less than PHP 3 million or upon a written request of any prospective bidder.<sup>45</sup>

In the PPP Code IRR, a pre-bid conference shall be conducted to clarify any provisions, requirements, terms and conditions of the tender documents, and/or any other matter that prospective bidders/challengers may raise.<sup>46</sup>

Under both the NGPA IRR and the PPP Code IRR<sup>47</sup>, a summary of the proceedings at the pre-bid conference will be given to all potential bidders through bid bulletins.

## 4 Evaluation Criteria

### 4.1 On the basis of what criteria are tenders evaluated and the winner of the contract determined?

The PPP Code IRR outlines the criteria for the evaluation of technical proposals and financial proposals.<sup>48</sup>

The evaluation of the technical proposal shall involve the assessment of the technical, operational, and environmental viability of the proposal vis-à-vis the prescribed requirements and criteria/minimum standards and basic parameters prescribed in the bidding documents.<sup>49</sup>

The evaluation of the financial proposal shall involve the assessment and comparison of the financial proposals of the bidders/challenger and parameters in Section 73 of the PPP Code IRR.<sup>50</sup>

Under the NGPA, bids are evaluated based also on eligibility, technical, and financial criteria.<sup>51</sup>

#### Eligibility Criteria

The NGPA IRR specifies the eligibility criteria that allow bidders to participate in the procurement of goods, infrastructure projects, and consulting services.<sup>52</sup> The eligibility criteria for PPP projects are usually provided in the bidding documents (e.g. Instructions to Bidders).

#### Technical Criteria

Prior to bid evaluation, the Bids and Awards Committee ("**BAC**") first examines the technical components of bids. Only bids determined to contain all bid requirements of the technical component are considered for opening and evaluation of their financial component.<sup>53</sup>

#### Financial Criteria

In the procurement of Goods and Infrastructure Projects, the bids that pass the preliminary examination shall be ranked from lowest to highest in terms of their corresponding calculated prices. The bid with the lowest calculated price shall be referred to as the Lowest Calculated Bid (LCB).<sup>54</sup>

The BAC may also evaluate bids using a predetermined quality-price ratio. The quality component is assessed on the basis of criteria that may include qualitative, environmental, and/or social aspects.<sup>55</sup>

The bidder with the best overall score using the quality-price ratio is considered the Most Economically Advantageous Bid ("**MEAB**").<sup>56</sup>

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<sup>43</sup> RA 12009 IRR, Section 51.5.1.

<sup>44</sup> RA 11966 IRR, Section 68.

<sup>45</sup> RA 12009 IRR, Section 51.1.

<sup>46</sup> RA 11966 IRR, Section 70.

<sup>47</sup> RA 11966 IRR, Section 70.

<sup>48</sup> RA 11966 IRR, Section 73.2, 73.4.

<sup>49</sup> RA 11966 IRR, Section 73.2.

<sup>50</sup> RA 11966 IRR, Section 73.4.

<sup>51</sup> RA 12009 IRR, Sections 59-62.

<sup>52</sup> RA 12009 IRR, Section 52.

<sup>53</sup> RA 12009 IRR, Section 59.

<sup>54</sup> RA 12009 IRR, Section 61.2.

<sup>55</sup> RA 12009 IRR, Section 61.3.

<sup>56</sup> RA 12009 IRR, Section 61.3.

In the procurement of Consulting Services, the evaluation of procurement services includes factors such as, but not limited to, experience, performance, quality of personnel, price, and methodology. The bids shall be ranked from highest to lowest in terms of their corresponding calculated ratings. The bidder with the highest calculated rating, or the Highest Rated Bid ("**HRB**"), shall be invited for negotiation and/or clarification by the BAC.<sup>57</sup>

## Award Criteria

For the procurement of Goods and Infrastructure Projects, contracts are awarded to either the Lowest Calculated Responsive Bid ("**LCRB**") or the Most Economically Advantageous Responsive Bid ("**MEARB**").<sup>58</sup>

## Other Criteria

The NGPA now includes a provision on Sustainable Public Procurement ("**SPP**"). It requires Procuring Entities to integrate sustainability considerations from procurement planning, budgeting to implementation, contract management, and disposal. This includes incorporating environmental, social, and economic criteria into procurement specifications, evaluations, and decisions.<sup>59</sup>

Green or environmental criteria refer to a set of standards and specifications that prioritises environmental sustainability and is designed to assess and select goods and services based on their environmental impact throughout their life cycle, as reflected in the procurement documents.<sup>60</sup>

Social criteria may be incorporated into bidding documents as part of the supplier selection criteria, technical specifications, award criteria, or contract performance clauses.<sup>61</sup>

### 4.2 Is there an obligation to disclose the criteria or other elements of the evaluation methodology on the basis of which (i) bidders are selected, and (ii) tenders evaluated? If so, when must such disclosure take place?

Yes. Under both the NGPA and the PPP Code, there is an obligation to disclose the criteria and other elements of the evaluation methodology.

Under the PPP Code IRR, the implementing agency may disclose the tender documents to the public for the entirety of the bidding process by posting such documents online on the websites of the implementing agency concerned, excluding bid submissions, records of deliberations of the PBAC, and confidential business information.<sup>62</sup>

Under the NGPA IRR, such disclosures are made during the preparation of bidding documents and through the release of invitations to bid. The Bidding Documents must include Instructions to Bidders, including criteria for eligibility, bid evaluation and post-qualification, the weight assigned to each criterion and the quality-price ratio if awarded to the MEARB, as well as the date, time and place of the pre-bid conference (where applicable), submission of bids and opening of bids.<sup>63</sup>

Furthermore, the NGPA requires that the procuring entity ensures equal access to information in all stages of the preparation of the bidding documents. No aspect of the bidding documents shall be disclosed to any prospective bidder or interested persons in the project prior to their official release, except those officially authorised in the handling of the documents.<sup>64</sup>

However, in procurements involving and affecting national security, disclosure shall be dependent upon the Head of the Procuring Entity ("**HoPE**").<sup>65</sup>

## 5 The Contract

### 5.1 Is a form of contract provided with the tender documents?

Yes, a form of contract is generally provided with the tender documents.

Under the NGPA IRR, the form of contract, together with general and special conditions of contract, are among the documents included in the bidding documents prepared by the procuring entity.<sup>66</sup>

Under the PPP Code IRR, implementing agencies shall issue tender documents which include the draft PPP contract, as approved in accordance with the PPP Code

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<sup>57</sup> RA 12009 IRR, Section 62.

<sup>58</sup> RA 12009 IRR, Section 63.

<sup>59</sup> RA 12009 IRR, Rule XII.

<sup>60</sup> RA 12009 IRR, Section 73.

<sup>61</sup> RA 12009 IRR, Section 75.3.

<sup>62</sup> RA 11966 IRR, Section 88(a) and 88(b).

<sup>63</sup> RA 12009 IRR, Section 47.

<sup>64</sup> RA 12009 IRR, Section 48.

<sup>65</sup> RA 12009 IRR, Section 48.

<sup>66</sup> RA 12009 IRR, Section 47.1.

IRR, reflecting the parameters, terms, and conditions approved by the appropriate Approving Body.<sup>67</sup>

The PPP Code IRR also enumerates mandatory provisions in PPP contracts which define the basic and legal relationship between the parties, their rights and responsibilities, and obligations relative to the PPP project. Its mandatory terms or conditions include specific contractual arrangement, term, scope of work, and minimum performance standards, among others.<sup>68</sup>

## 5.2 To what extent is modification and negotiation on the contract permitted?

In certain modes of procurement, the NGPA allows the procuring entity to negotiate terms of procurement of goods, infrastructure, and consulting services. In an unsolicited offer with bid matching, the procuring entity may consider unsolicited offers from the original offeror on a negotiated basis for goods and consulting services.<sup>69</sup>

Negotiated Procurement allows the procuring entity to directly negotiate a contract with a technically, legally, and financially capable supplier, contractor, or consultant. It is only allowed in specific circumstances enumerated in the NGPA IRR.<sup>70</sup>

In certain instances, the NGPA IRR also allows the extension of bid validity, contract time, or contract implementation.<sup>71</sup>

The PPP Code IRR permits the negotiation between the implementing agency and the private proponent in instances where there is only a Single Complying and Responsive Bid<sup>72</sup> and in the case of accepted unsolicited proposals.<sup>73</sup>

## 5.3 Does the contract deal with specific circumstances (*force majeure*, material adverse government action, change in the law, refinancing) that may arise during the life of the contract?

Yes. Under the NGPA, the draft contract will typically include provisions to address specific circumstances that may arise during contract implementation.

In contracts involving the procurement of goods, infrastructure projects<sup>74</sup>, and consulting services<sup>75</sup> the procuring entity may suspend work if the obligation cannot be performed due to *force majeure* or other circumstances beyond the control of either party.

PPP contracts typically contain provisions on *force majeure*, material adverse government action, change in law and refinancing, including provisions on variation.

## 5.4 Are dispute resolution mechanisms in place allowing the parties to resolve disputes in an efficient and satisfactory manner without adversely affecting the project?

Yes. Under the NGPA IRR, any dispute arising from the implementation of a contract shall first be resolved and settled amicably by mutual consultation or agreement.<sup>76</sup>

Parties are encouraged to select the most expeditious mode of dispute resolution and have it incorporated as a provision in the contract, provided that, by mutual agreement, the parties may agree in writing to resort to other alternative modes of dispute resolution.<sup>77</sup>

In case of disagreement or after exhausting remedies in the contract, the dispute may be submitted to arbitration or other forms of alternative dispute resolution (e.g. mediation, conciliation, early neutral evaluation, mini-trial, or any combination thereof).<sup>78</sup>

Disputes within the competence and jurisdiction of the Construction Industry Arbitration Commission ("**CIAC**"), such as construction-specific disputes, are referred to the CIAC for resolution.<sup>79</sup>

Under the PPP Code IRR, among the mandatory provisions in PPP contracts are provisions on the use of dispute avoidance and Alternative Dispute Resolution mechanisms pursuant to RA No. 9285 or the Alternative Dispute Resolution Act.<sup>80</sup>

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<sup>67</sup> RA 11966 IRR, Section 65.

<sup>68</sup> RA 11966 IRR, Section 84.

<sup>69</sup> RA 12009 IRR, Section 30.1.

<sup>70</sup> RA 12009 IRR, Section 35.

<sup>71</sup> RA 12009 IRR, Sections 57, 71.1.3, 71.2.3, 71.3.3.

<sup>72</sup> RA 11966 IRR, Section 90.

<sup>73</sup> RA 11966 IRR, Section 58.

<sup>74</sup> RA 12009 IRR, Section 71.2.2; Section 71.4.2.

<sup>75</sup> RA 12009 IRR, Section 71.3.2.

<sup>76</sup> RA 12009 IRR, Section 88.

<sup>77</sup> RA 12009 IRR, Section 88.2.

<sup>78</sup> RA 12009 IRR, Section 88.3.

<sup>79</sup> RA 12009 IRR, Section 88.3.

<sup>80</sup> RA 11966 IRR, Section 84(u).

### 5.5 Are lenders given step-in rights for cases when the private partner is at risk of default or if the contract is under threat of termination for failure to meet obligations?

Yes. The PPP Code IRR provides that for events that may lead to contract termination, the PPP Contract shall provide lender step-in rights agreed upon by both parties.<sup>81</sup> It also provides that mandatory provisions in PPP contracts must include conditions and procedures for lender step-in rights.<sup>82</sup>

### 5.6 Are grounds for termination of the contract and its associated consequences well defined?

Yes. Under the NGPA IRR, the grounds for termination of contracts for the procurement of goods, infrastructure projects, and consulting services and the associated consequences are defined.<sup>83</sup>

Policies relating to the whole or partial termination of procurement contracts are also established subject to the manuals issued by GPPB.<sup>84</sup>

The NGPA IRR also provides for procedures for the termination of contracts.<sup>85</sup>

Under the PPP Code IRR, the draft PPP contract is required to have mandatory terms or conditions involving minimum insurance coverage, such as *force majeure* or comprehensive general liability insurance, among others.<sup>86</sup>

Furthermore, all PPP contracts are mandated to define all events that may lead to termination, including *force majeure* and other no-fault termination events.<sup>87</sup>

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<sup>81</sup> RA 11966 IRR, Section 151.

<sup>82</sup> RA 11966 IRR, Section 84.

<sup>83</sup> RA 12009 IRR, Section 71.4.

<sup>84</sup> RA 12009 IRR, Section 71.4.

<sup>85</sup> RA 12009 IRR, Section 71.4.6.

<sup>86</sup> RA 11966 IRR, Section 84(i).

<sup>87</sup> RA 11966 IRR, Section 151(c).

# Singapore



## 1 Legislation Regulating Procurement of Infrastructure Projects

### 1.1 What legislation regulates the procurement of infrastructure projects in your jurisdiction?

The legislations regulating the procurement of infrastructure projects in Singapore are as follows:

**(a) Government Procurement Act 1997 ("GPA")**

The primary legislation is the GPA, which gives effect to the Agreement on Government Procurement and other international obligations of Singapore relating to procurements by the Government and public authorities. It sets out the power of the Minister to make regulations to govern procurements subject to the GPA, as well as the duty of contracting authorities to comply with such regulations.

**(b) Government Procurement Regulations 2014 ("GPR")**

The GPR is a subsidiary legislation under the GPA, and sets out the principles and procedures regulating the conduct and evaluation of the relevant government procurements.

**(c) Government Procurement (Application) Order 2002 ("GPO")**

The GPO sets out the contracting authorities and procurements which are subject to the GPA.

**(d) Government Procurement (Challenge Proceedings) Regulations 2002 ("GP(CP)R")**

The GP(CP)R outlines the procedure for the Government Procurement Adjudication Tribunal to hear and determine challenges brought by a bidder relating to non-compliance with the GPA.

There is no specific public-private partnership ("PPP") statute in Singapore.

## 1.2 Which entities and what types of contracts are subject to procurement regulation?

### Procurement Entities

Under section 4 of the GPA, the Minister of Finance may declare any ministry, government department, organ of State or statutory board as a contracting authority. The bodies which have been declared as contracting authorities are set out in the Second Schedule to the GPO.

### Types of Contracts

The GPA is applicable to procurement of specified goods and services by the contracting authorities, and these are also listed in the other Schedules to the GPO. The appointed goods and services include, but are not limited to:

- (a) auditing;
- (b) data processing;
- (c) architectural services;
- (d) engineering services;
- (e) installation work; and
- (f) construction work.

## 2 Foreign Investment

### 2.1 Are infrastructure projects open to foreign investment?

Yes, infrastructure projects are generally open to foreign investment. However, for infrastructure which concerns national security and interest, such as the electricity grid, the gas distribution network and telecommunications, there may be restrictions in place, depending on the project.

## 3 Procurement Process

### 3.1 Outline the key steps and aspects of the procurement under the legislation.

There are three principles which underpin the procurement regime:

- (a) **Open and Fair Competition:** All suppliers are treated fairly and there is a level playing field.
- (b) **Transparency:** There is an open and transparent system to enable suppliers to better understand the requirements and how their bids are evaluated.
- (c) **Value for Money:** Suppliers that meet the requirements and offer the best value, including factors such as quality, risks, time and reliability, are selected.

The general procedure for procurement, as set out in Part II, Division 1 of the GPR, includes the following steps:

- (a) The contracting authority will publish a notice of intended procurement in an approved medium.
- (b) At the same time, the contracting authority will publish a summary notice that is readily accessible.
- (c) The contracting authority will make available to suppliers tender documentation which contains such information as may be necessary to enable them to prepare and submit responsive tenders.
- (d) A sufficient time period will be provided for suppliers to prepare and submit requests for participations and tenders.

### 3.2 Does the legislation require the procurement to be tendered out? If yes:

For items of goods or services with an estimated value of up to S\$6,000, procurement may be carried out directly by the authority by buying off-the-shelf or purchasing directly from known sources.

For items of goods or services with an estimated value of more than S\$6,000 and up to S\$90,000, quotations will be invited via two methods, namely open quotation (where a quotation notice is published openly on the Government electronic business portal ("**GeBIZ**") (<https://www.gebiz.gov.sg>) inviting suppliers to quote) and limited quotation (where invitations to quote will be issued directly to one or a few selected suppliers).

For items of goods or services with an estimated value exceeding S\$90,000, procurement will be by tender, either open tendering or selective tendering, and in certain circumstances, limited tendering. Specifically for items of goods and services (including construction services) with an estimated value exceeding S\$90,000 but not exceeding S\$1 million, procurement may be carried out via Tender Lite – which stipulates fewer contract conditions compared to typical tenders. This streamlined set of contract conditions aims to moderate the progression from quotations to tenders, such that businesses which have difficulties in complying with the full tender requirements at their current stage (such as small and medium-sized enterprises) may first participate in Tender Lite, thereby gaining access to smaller value government tenders while building their capabilities to eventually compete for higher value tenders.

**a. What types of infrastructure projects must be tendered out?**

All government agencies are required to post their invitations for quotations and tenders openly on GeBIZ. This is mandatory for all procurements above S\$6,000.

**b. What type of tender process is run?**

The GPR provides for three types of processes: open tendering, selective tendering and limited tendering.

**Open Tendering**

For open tendering, all interested suppliers may submit a tender and there is open and public competition. However, this approach may not be selected due to value, risk, nature and complexity of the procurement.

**Selective Tendering**

For selective tendering, a qualification of interested suppliers, based on their capabilities, is carried out first so as to exclude suppliers who do not meet the minimum requirements.

Suppliers qualified through this process are then invited to submit tenders.

**Limited Tendering**

In a limited tendering procedure, tenders are invited from only a few suppliers, or from one pre-identified supplier. Limited tendering may only be used under specified instances under regulation 26(2) of the GPR, including when no responsive tender is received from an earlier open or selective tender, when it concerns national security, or when it is not feasible/practical to call for open tenders, e.g. because of intellectual property rights or for works of art.

**c. Are unsolicited proposals accepted?**

Unsolicited proposals are not regulated by the GPA and we are not aware of any express restrictions against unsolicited proposals. In practice, unsolicited proposals are uncommon.

**d. Are Swiss challenges permitted?**

We are not aware of Swiss challenges being utilised in Singapore, and this is not a mechanism expressly authorised under the GPA.

**3.3 Does the procuring authority carry out preliminary market consultations before launching the tender procedure?**

In practice, the procuring authority carries out preliminary market consultations to determine their desired outcome and assess the need for procurement of the goods or services.

**3.4 Does the legislation mandate the criteria that interested parties must meet in order to be eligible for participation in a procurement process? If so, what are these criteria?**

Regulation 13(1) of the GPR states that the procuring authority shall limit conditions for participation in procurement to those that are essential to ensure that a

supplier has the legal, financial, commercial and technical capabilities to undertake the procurement. Regulation 13(4) of the GPR also states that the procuring authority can exclude a supplier if the supplier is, among others, insolvent (or undergoing related processes), convicted of any offence involving fraud, dishonesty or moral turpitude, has failed to pay taxes or has committed material breaches in performance of any contract with any procuring authority.

### 3.5 Does the procuring authority publish the tender documents online?

Tender notices and quotation notices are posted on the GeBIZ website. GeBIZ also contains information on tender schedules (bids after a tender closes) and tender awards.

### 3.6 Do the tender documents explain in detail the procurement procedure providing the same information to all bidders?

The tender documents published on GeBIZ will set out in detail the procurement procedures, submission documents and timelines.

### 3.7 Can potential bidders submit questions to clarify the tender documents and are the answers disclosed to all potential bidders?

Potential bidders can seek clarifications from the procuring authority, and potential bidders are encouraged to adopt a proactive approach in seeking such clarification.

### 3.8 Does the procuring authority conduct a pre-bid conference to further inform potential bidders and are the clarifications provided disclosed to all potential bidders?

The procuring authority may invite interested suppliers to attend tender briefings or site show-rounds. These briefings are intended to give suppliers greater clarity on the requirements for the tender.

Certain tenders may call for interested suppliers to attend mandatory tender briefings or site show-rounds. If so, it will be indicated in the tender notice.

Even where tender briefings or site show-rounds are not mandatory, suppliers are strongly encouraged to attend these briefings to ensure that they have all the necessary information before preparation of bids. It also provides the opportunity to seek clarification with the procuring authority on the tender documents, requirements and evaluation criteria.

## 4 Evaluation Criteria

### 4.1 On the basis of what criteria are tenders evaluated and the winner of the contract determined?

Under regulation 29(2) of the GPR, the procuring authority shall only consider a tender for the award of the contract if the tender, at the time of its opening, conforms to the essential requirements of the notice of intended procurement and the summary notice and of the tender documentation, and the supplier that submitted the tender has satisfied the conditions of participation in the tendering procedure.

Under regulation 19(2)(c) of the GPR, in each procurement, the notice of intended procurement or the tender documentation must include all evaluation criteria which the contracting authority will apply in the awarding of the contract and the relative importance of such criteria. The evaluation criteria may include, but is not limited to (under regulation 19(4) of the GPR):

- (a) price and other cost factors;
- (b) quality;
- (c) technical merit;
- (d) environmental characteristics; and
- (e) terms of delivery.

### 4.2 Is there an obligation to disclose the criteria or other elements of the evaluation methodology on the basis of which (i) bidders are selected, and (ii) tenders evaluated? If so, when must such disclosure take place?

Under regulation 30 of the GPR, the contracting authority must publish a notice of award of contract in an approved medium no later than 72 days after the date of the award, with the notice covering, among others, the value of the contract awarded or the highest and lowest

offers taken into account in the award of the contract. Under regulation 31(1) of the GPR, the procuring authority shall, as soon as possible after the award of a contract in respect of a procurement using open tendering or selective tendering, inform all suppliers who had participated in the procedure of its decision on the award. The procuring authority shall, upon request by an applicable supplier, promptly provide any information necessary to determine whether a procurement was conducted fairly, impartially and in accordance with the GPR, including information on the characteristics and relative advantages of the successful tender (regulation 32 of the GPR).

However, a contracting authority may refuse to publish or provide any information if it is of the opinion that it may impede law enforcement, prejudice fair competition between suppliers or the legitimate commercial interests of particular persons, or otherwise be contrary to the public interest (regulation 34 of the GPR).

## 5 The Contract

### 5.1 Is a form of contract provided with the tender documents?

The tender documents will include the terms and conditions of the contract. However, whether this will include a form of contract will depend on the circumstances.

### 5.2 To what extent is modification and negotiation on the contract permitted?

Under regulation 25 of the GPR, the procuring authority may conduct negotiations with any supplier if the procuring authority has indicated its intent to conduct negotiations in the published notice of intended procurement, or if it appears to the procuring authority that no one tender is obviously the most advantageous in terms of the evaluation criteria set out in the notice of intended procurement or tender documentation.

The procuring authority shall ensure that any elimination of suppliers from participating in the negotiations is carried out in accordance with the evaluation criteria set out in the notice of intended procurement or tender documentation. When negotiations are concluded, the

procuring authority shall provide a common deadline for the remaining participating suppliers to submit any new or revised tenders.

### 5.3 Does the contract deal with specific circumstances (*force majeure*, material adverse government action, change in the law, refinancing) that may arise during the life of the contract?

The GPA and GPR do not expressly provide for a form of contract or what the contract will cover. In practice, most procuring authorities utilise their in-house contractual templates, which have been used for multiple deals and vetted by lawyers, and as such can be expected to cover the material circumstances that may arise during the life of the contract.

### 5.4 Are dispute resolution mechanisms in place allowing the parties to resolve disputes in an efficient and satisfactory manner without adversely affecting the project?

The GPA and GPR do not expressly provide for dispute resolution mechanisms. In practice, most procuring authorities utilise their in-house contractual templates, which have been used for multiple deals and vetted by lawyers, and as such can be expected to have dispute resolution mechanisms.

### 5.5 Are lenders given step-in rights for cases when the private partner is at risk of default or if the contract is under threat of termination for failure to meet obligations?

This issue is not expressly covered under the GPA. In our experience, to ensure bankability of large-scale infrastructure projects, step-in rights can be granted to lenders. However, the procuring authority can be expected to be conservative and will stipulate that (i) such step-in rights are limited, with suitable mitigation of the procuring authority's risks; and (ii) the procuring authority's statutory discretion will not be curtailed.

### 5.6 Are grounds for termination of the contract and its associated consequences well defined?

Based on our experience in Singapore, the grounds for termination of the contract and the associated consequences are well defined, although these tend to

be in favour of the procuring authority. The supplier's ability to negotiate for a better position will depend on the bargaining power, risk profile of the project and the risk appetite of the procuring authority.

# Thailand



## 1 Legislation Regulating Procurement of Infrastructure Projects

### 1.1 What legislation regulates the procurement of infrastructure projects in your jurisdiction?

The procurement of infrastructure projects in Thailand can be arranged through a public-private partnership or by the normal procurement process. A summary of the legislation regulating the procurement of infrastructure projects in Thailand is as follows:

#### (a) **Public-Private Partnership Act 2019 ("PPP Act 2019")**

The PPP Act 2019 was enacted in 2019 and supersedes its predecessor, the Public-Private Partnership Act 2013. The main purpose of enacting the PPP Act 2019 is to narrow down the types of PPP projects governed by the statute to cover only projects relating to infrastructure and public services. It sets out a framework for collaboration between government agencies and the private sector in Thailand to operate projects through a PPP model. The PPP projects under the PPP Act 2019 are:

- roads, highways, expressways or transport by road;
- trains, train operated by electricity or transport by rail;
- airports or transport by air;
- ports or transport by water;
- water management, irrigation, waterworks or water treatment;
- energy;
- telecommunications or communications;
- hospitals or public health;
- schools or education;
- residences or facilities for low-income or middle-income people, elderly, underprivileged people or disabled people;
- exhibition centres and conference centres; and
- any other operations prescribed in the Royal Decree.

It also includes other relevant businesses necessary for achieving the objectives of the projects listed above.

**(b) Government Procurement and Supplies Management Act 2017 ("GPSM Act")**

The GPSM Act sets out the rules and standards on procurement for government agencies for projects other than those provided under the PPP Act 2019. It encourages the disclosure of information to the public to ensure transparency and more opportunities for fair competition, with the aim of boosting the quality and effectiveness of procurement as well as good governance. It also aims to create more participation from the public in monitoring procurement programmes as a measure to prevent corruption in the public procurement process.

### 1.2 Which entities and what types of contracts are subject to procurement regulation?

#### **Procurement Entities**

- (a) The PPP Act 2019 applies to government bureaus, state enterprises, local administrative organisations and other government agencies, which participate in infrastructure projects or public services through a PPP arrangement.
- (b) The GPSM Act applies to central administration departments, provincial administration departments, local administration departments, state enterprises, public organisations, independent organisations, constitutional organisations, administrative units of the courts, universities under State supervision, agencies attached to the National Assembly or under the National Assembly's supervision, state independent agencies and other government agencies prescribed in the relevant ministerial regulation for any form of procurement other than a PPP arrangement.

#### **Types of Contracts**

##### **PPP Arrangement**

A PPP arrangement is one in which a government agency and a private sector entity enter into a cooperation agreement or a joint investment agreement. Such arrangements may take various forms, including joint investment by both the government and the private sector, or sole investment by the private entity under a concession granted by the government.

##### **Non-PPP Arrangement**

Non-PPP procurement contracts in Thailand are generally categorised as follows:

**(a) Contracts for sale and purchase**

Contracts for the sale and purchase of products are contracts for purchase of products whether tangible or intangible, movable or immovable, including for services integrated into such products where the value of the services must not exceed the value of the products.

**(b) Contracts for services**

Contracts for services are contracts for the provision of services, including service engagements, hire of work, and carriage. However, they exclude employment contracts, consultancy work, design or construction supervision work or the hire of services as specifically categorised elsewhere.

**(c) Contracts for construction work**

Contracts for construction work include those for the construction of buildings, public utilities or other structures and works involving repair, extension, improvement, demolition or other similar activities. These contracts may include services integrated into such construction work, provided that the value of the service must not exceed the value of such construction work.

## **(d) Contracts for rent/lease**

Contracts for rent/lease cover rent or lease of both movable and immovable properties.

## **(e) Contracts for consultancy works**

Contracts for consultancy works are contracts for engaging service providers as advisors or consultants to government agencies on several matters, such as engineering, architecture, town and country planning, law, economics, fiscal matters, finance, environment, science, technology, public health, arts and culture, studies and research or other areas falling within the mandate of government agencies.

## **(f) Contracts for design or construction supervision work**

Contracts for design or construction supervision work are contracts for engaging service providers to carry out design or supervise construction works.

feasibility study prepared by the procuring authority, and it has to be demonstrated that a competitive bidding process is not appropriate. The selection method (other than bidding) would be considered and reviewed by the procuring authority, the selection committee and the Ministry controlling the procuring authority before being submitted to the Cabinet for approval.

For other models of procurement, there are four main types recognised under the GPSM Act, namely:

### **(a) General invitation method (Open tender)**

Invitation is made by a procuring authority to qualified business operators in general to submit proposals. This method may be conducted in the following three forms:

- Electronic market (e-market) – used for the procurement of products or services which have standards, do not have a complicated specification, and have been specified in the e-catalog database of the government.
- Electronic Bidding (e-bidding) – used for the procurement of products or services with a value of more than THB 500,000 and which are not listed in the e-catalog database of the government.
- Pricing examination – used for the procurement of products or services with a value of more than THB 500,000 but not exceeding THB 5,000,000, where the procuring authority has limited access to internet systems, and is therefore unable to conduct procurement through the electronic market or e-bidding.

### **(b) Selection method**

Invitation is made by a procuring authority to at least three qualified business operators to submit proposals. This procurement method will be used in the following circumstances:

- where the open tender method has been used, but no person has submitted a proposal or no proposal has been selected;
- where the supplies to be procured have specialised or complex specifications, or must be produced, distributed, constructed or serviced by a business operator with

## **2 Foreign Investment**

### **2.1 Are infrastructure projects open to foreign investment?**

Yes. However, there might be some restrictions relating to foreign shareholding ratio and professional licences for specific types of projects, such as architectural services and engineering services. Some projects may be restricted to legal entities incorporated under the laws of Thailand, as may be prescribed in the applicable bidding requirements.

## **3 Procurement Process**

### **3.1 Outline the key steps and aspects of the procurement under the legislation.**

For a PPP arrangement, the PPP Act 2019 requires the selection of private parties for PPP projects to be made by way of bidding unless the Cabinet approves otherwise. The approval for the use of other selection methods has to be considered based on the project

- specific workmanship or exceptional expertise or specialised skills and the number of such operators is limited;
- where there is an urgent need for the use of supplies due to an unexpected event where procurement using the general notification method will not be in time for such necessity;
- where, due to the nature of the use or technical limitations, it is necessary to specify a particular brand;
- where the supplies are required to be purchased directly from overseas or through an international organisation;
- where the supplies are to be used in state secrecy or for work of government agencies required to be kept confidential or relating to national security;
- where repair services require disassembly for inspection before assessing the costs of repair (e.g., repair of machinery, mechanical equipment, engines, electrical devices or electronic devices);
- any other circumstances prescribed by a ministerial regulation.

### (c) Specific method

Invitation is made by a procuring authority to a particular qualified business to submit a proposal or for price bargaining negotiations, including the procurement of supplies made directly with a business operator for a small cost. This procurement method will be used in the following circumstances:

- where the open tender method and the selection method have been used, but no person has submitted a proposal or no proposal has been selected;
- where it is for the procurement of supplies produced, distributed, constructed or the provision of services generally where the budget for such procurement does not exceed the threshold prescribed in a ministerial regulation;
- where (i) only one business operator possesses the required qualifications; or (ii) the procurement must be made from a sole authorised distributor or service provider in

Thailand, and no reasonable alternatives are available;

- where there is a need to use such supplies in an emergency due to a disaster or natural disaster or severe infectious disease and the procurement by the general notification method and selection method may cause a delay and result in serious loss;
- where the supplies to be procured are related to those previously procured and additional procurement is needed for the completion or continuity of their use, provided that the value of the supplies to be procured must not exceed that of the original procurement;
- where the supplies are to be sold by auction by a state agency, an international organisation or a foreign agency;
- where the supplies are land plots or specific structures needed to be purchased; and
- any other circumstances prescribed by a ministerial regulation.

### (d) Design competition method

Design competition is only used for procurement of design or construction supervision work where solicitation is made by a procuring authority to a service provider which possesses qualifications determined by such procuring authority for tendering a proposal for design or construction work with special characteristics.

## 3.2 Does the legislation require the procurement to be tendered out? If yes:

### a. What types of infrastructure projects must be tendered out?

For a PPP arrangement, the PPP Act 2019 allows certain procurements to be made by the selection method (instead of bidding process) where certain circumstances exist and under the conditions provided in the PPP Act 2019. However, in most cases, the general tender method is preferred.

For a non-PPP arrangement, a procuring authority would normally proceed with the open tender method first before conducting an alternative selection method.

### b. What type of tender process is run?

The PPP Act 2019 provides that the tender process is required to be made by the selection of private entities method by way of bidding unless the Cabinet has concluded not to adopt the aforementioned method as it deems appropriate.

In respect of the tender process under the GPSM Act, please refer to question 3.1 above for a summary of the applicable procurement methods.

### c. Are unsolicited proposals accepted?

The PPP Act 2019 and the GPSM Act are silent on unsolicited proposals. Therefore, the procuring authorities would tend to comply with the procurement process available under the law.

### d. Are Swiss challenges permitted?

The PPP Act 2019 and the GPSM Act are silent on Swiss challenges. Therefore, the procuring authorities would tend to comply with the procurement process available under the law.

### 3.3 Does the procuring authority carry out preliminary market consultations before launching the tender procedure?

Under a PPP arrangement, the PPP Act 2019 requires a procuring authority to prepare a project feasibility study, which must include, among others, the results of market consultations with relevant private sector entities. During the stage of drafting a Request for Proposal, contracts and relevant documents for a PPP project, the PPP Act 2019 also requires the procuring authority to carry out further market consultations from relevant private sector entities.

In a Non-PPP arrangement, the GPSM Act allows the procuring authority to carry out market consultations, but these are not mandatory.

### 3.4 Does the legislation mandate the criteria that interested parties must meet in order to be eligible for participation in a procurement process? If so, what are these criteria?

The PPP Act 2019 and relevant regulations prohibit the following types of private entities from participating in PPP projects:

- (a) a person whose name is in a circulated list of persons abandoning works carried out for state entities pursuant to government procurement laws;
- (b) a person who has filed a petition for business reorganisation or against which an order for business reorganisation has been issued, or who has been ordered to be under receivership or bankruptcy or is or used to be a dishonest bankrupt;
- (c) a person who has been imprisoned by a final judgment except for an offence committed through negligence or a petty offence; and
- (d) a person whose PPP contract was terminated by a government authority pursuant to the public-private partnership laws due to a breach of contract.

It is worth noting that, if such private entities are juristic persons, the directors or authorised persons of such entities must also not fall within the abovementioned criteria. Additionally, each PPP project may set specific qualifications for participants.

The GPSM Act also stipulates that any persons who intend to submit a proposal in the procurement process must comply with at least the following criteria:

- (a) must be legally competent;
- (b) must not be bankrupt;
- (c) must not be a person whose business is undergoing dissolution;

- (d) must not be a person under suspension from tendering proposals or making contracts with state entities; and
- (e) must not be a person whose name is in a circulated list of persons abandoning works carried out for state entities.

### 3.5 Does the procuring authority publish the tender documents online?

Yes. Under the GPSM Act, tender documents and relevant notifications including invitations are required to be published online, on the information network systems of the Comptroller General's Department and the procuring authority respectively, via the Electronic Government Procurement system ("e-GP").

### 3.6 Do the tender documents explain in detail the procurement procedure providing the same information to all bidders?

Yes. The tender documents set out the procurement procedure in detail and are made available to all bidders. The procuring authority must prepare the tender documents and invitation notifications specifying the date and time for the quotation, the place for tendering proposals and other related conditions.

### 3.7 Can potential bidders submit questions to clarify the tender documents and are the answers disclosed to all potential bidders?

Yes. Potential bidders are generally allowed to submit their requests for clarification with respect to the tender documents via email. The procuring authority will disclose or publish the answers to potential bidders via the e-GP prior to the quotation date. However, there is no requirement to disclose the answers to all potential bidders. Therefore, the procuring authority may publish a clarification or answers to potential bidders as it deems appropriate.

### 3.8 Does the procuring authority conduct a pre-bid conference to further inform potential bidders and are the clarifications provided disclosed to all potential bidders?

There is no regulatory requirement for conducting a pre-bid conference. However, the procuring authority may

host such conference when it deems appropriate. Depending on types of projects, such pre-bid conferences may be hosted by procurement authorities to clarify the details of the project with potential bidders.

## 4 Evaluation Criteria

### 4.1 On the basis of what criteria are tenders evaluated and the winner of the contract determined?

In evaluating and selecting proposals the open tender method and the selection method, the procuring authority is required to consider the benefit to the procuring authority, and the purposes for which the goods or services are intended to be used. In doing so, both price and non-price factors are taken into account. Non-price criteria include:

- (a) the cost of supply throughout its life-cycle;
- (b) the standards of the goods or services;
- (c) after-sales services;
- (d) whether supplies are intended to be granted promotion or supported by the state entities;
- (e) the past performance and track record of the bidders; and
- (f) technical proposals or other proposals (in the case where such technical proposals or other proposals are required to be tendered first).

### 4.2 Is there an obligation to disclose the criteria or other elements of the evaluation methodology on the basis of which (i) bidders are selected, and (ii) tenders evaluated? If so, when must such disclosure take place?

Yes, the criteria or other elements of the evaluation methodology are specified in the tender documents. In addition, the procuring authority is required to disclose the reasons behind its selection decision after the decision is made in the e-GP.

## 5 The Contract

### 5.1 Is a form of contract provided with the tender documents?

Under the GPSM Act, the form of contract will be provided with the tender documents. Normally, the contract will be prepared in the form prescribed under the applicable procurement law.

### 5.2 To what extent is modification and negotiation on the contract permitted?

Under the PPP Act 2019, the selected entities are allowed to directly engage in contract negotiations with the relevant selection committee.

Under the GPSM Act, the procuring authority may agree to amend the terms of a contract from the prescribed standard form, provided that such amendments do not prejudice the interests of the procuring authority. However, in practice, bidders are generally not permitted to negotiate or deviate from the terms and conditions set out in the tender documents.

### 5.3 Does the contract deal with specific circumstances (*force majeure*, material adverse government action, change in the law, refinancing) that may arise during the life of the contract?

The PPP Act 2019 requires PPP contracts to allocate risks and address material circumstances that may arise during the life of the project. While the PPP Act 2019 does not expressly prescribe specific clauses by name, its framework contemplates matters such as *force majeure*, changes in law, and government actions through mandatory risk allocation, project analysis, and statutory mechanisms for contract amendment and compensation. The GPSM Act provides standard-form contracts, which generally contain provisions on *force majeure* events and sub-contracting.

### 5.4 Are dispute resolution mechanisms in place allowing the parties to resolve disputes in an efficient and satisfactory manner without adversely affecting the project?

Under the PPP Act 2019, the contract is required to have a dispute resolution clause. However, such clause must not bind the procuring authority to resolve the dispute by arbitration unless such procuring authority is able to demonstrate the rationale and necessity for

arbitration based upon normal practice in such types of contracts or any other compelling reason.

On the other hand, the GPSM Act does not require a procuring authority to provide dispute resolution mechanisms in the contract. In the absence of a dispute resolution mechanism in the contract, a dispute will be resolved by the Thai courts.

### 5.5 Are lenders given step-in rights for cases when the private partner is at risk of default or if the contract is under threat of termination for failure to meet obligations?

The PPP Act 2019 permits the procuring authority to step-in or undertake a PPP project or assign other persons to work on the PPP project temporarily for the purposes of maintaining order, the safety of lives and the property of the public, public danger prevention or national security or in the case of any event causing the operation of the project to be interrupted and having severe impact on the public or economy and social affairs of the country. The PPP Act 2019 also regulates the minimum provisions to be contained in the PPP contract, which, among others, include provisions relating to the change of contracting parties, contractors, sub-contractors, assignment of claims, assignment of rights and novation of obligations. Therefore, the parties to the PPP contract can agree on a lenders' step-in right and its implementation.

The GPSM Act is silent on a lenders' step-in right. This would have to be negotiated with the procuring authority on a case-by-case basis but it is rarely seen in practice.

### 5.6 Are grounds for termination of the contract and its associated consequences well defined?

In respect of infrastructure projects, the PPP Act 2019 and the GPSM Act normally require the contract to set out the grounds for termination, including but not limited to, *force majeure* events and events of default. A contract for an infrastructure project would usually provide termination clauses and the consequences following termination, including but not limited to, penalties and the calculation of damages and the obligations of the parties after the termination of the contract.

## Vietnam



### 1 Legislation Regulating Procurement of Infrastructure Projects

#### 1.1 What legislation regulates the procurement of infrastructure projects in your jurisdiction?

The legal framework for public procurement comprises of several statutes and Government instruments, as follows:

##### (a) Law on Bidding (2023)

The Law on Bidding (2023) ("**Law on Bidding**") regulates bidding activities, including:

- the selection of contractors for projects or procurement funded by the state budget or lawful revenues of state agencies and public service units, including for the implementation of investment projects, procurement estimates of such entities, or the provision of public products and services; and
- the selection of investors for investment business projects, including (i) land-use projects required to conduct investor selection through bidding under the laws on land; and (ii) projects required to conduct investor selection through bidding under sector-specific laws.

##### (b) Law on Public Investment (2024)

The Law on Public Investment (2024) ("**Law on Public Investment**") generally regulates the management and use of the capital budget for public investment; the state management of public investment; and the rights, obligations and responsibilities of agencies, organisations and individuals involved in public investment activities. The types of investment in public sectors that fall under the governing scope of the Law on Public Investment include:

- investment in socio-economic infrastructure programs and projects;
- investment in ancillary facilities for regulatory agencies, public service providers, political institutions and socio-political organisations;
- investment and assistance in public product and service supply activities;

- Government investment in projects to be executed in the form of a public-private partnership ("**PPP**");
- investment in performing planning tasks;
- investment in granting subsidies to offset preferential lending interest rates and management fees; making contribution to the charter capital of policy banks and state off-budget financial funds; providing investment support for other policy beneficiaries under decisions of the Government or the Prime Minister;
- allocation of local budget-derived funding for implementing preferential credit policies through branches of Vietnam Bank for Social Policies (VBSP) in provinces and central-affiliated cities; and
- other objects of public investment as prescribed in relevant laws.

### (c) Law on Public-Private Partnership (2020)

The Law on Public-Private Partnership (2020) ("**Law on Public-Private Partnership**") generally stipulates regulations on investment activities in the form of PPP, including, among others: (i) State management; (ii) rights and obligations of the competent authorities, related organisations and individuals; and (iii) preparation, investor selection, financing, and implementation of the PPP projects.

The revenue sharing mechanism between the State and the project company, applicable where the actual revenue of a PPP project significantly deviates from the revenue projected in the financial plan under the PPP contract, has been updated. Under this mechanism, where the actual revenue exceeds the projected revenue by between 110% to 125% (inclusive), the investor or the PPP project enterprise shall share with the State 50% of the difference between the actual revenue and the projected revenue. Conversely, where the actual revenue falls below the projected revenue by between 90% and 75%, the State shall share with the

investor or the PPP project enterprise 50% of the shortfall between the projected revenue and the actual revenue, subject to certain conditions, including that the project is implemented under a Build-Operate-Transfer ("**BOT**"), Build-Transfer-Operate ("**BTO**") or Build-Own-Operate ("**BOO**") contract and that the revenue reduction results from changes in relevant master plans, policies or laws

### (d) Guiding Legal Documents

The guiding legal documents would comprise of several types, such as Decrees (which are issued by the Government to guide the implementation of Articles of the Laws), and Circulars (which are issued by Ministries to guide the implementation of the Decrees), etc. For example:

- Decree No. 115/2024/ND-CP on elaborating some articles of and introducing measures for implementing the Law on Bidding regarding the selection of investors executing investment projects involving land use;
- Decree No. 214/2025/ND-CP on elaboration of and measures for implementation of the Law on Bidding regarding the selection of contractors;
- Decree No. 17/2025/ND-CP amending a number of decrees guiding the implementation of the Law on Bidding;
- Decree No. 225/2025/ND-CP amending certain decrees guiding the implementation of the Law on Bidding regarding investor selection;
- Decree No. 23/2024/ND-CP providing guidance on the selection of investors for projects required to conduct investor selection through bidding under sector-specific laws;
- Circular No. 69/2024/TT-BTC promulgating the list of goods and services subject to centralised procurement at the national level;
- Circular No. 79/2025/TT-BTC providing guidance on the provision and publication of bidding information and

- bidding document templates on the National E-Procurement System;
- Decree No. 243/2025/ND-CP on elaboration of Law on Public-Private Partnership;
  - Decree No. 257/2025/ND-CP providing guidance on the implementation of projects applying the Build-Transfer ("BT") contract model;
  - Decree No. 312/2025/ND-CP providing regulations on the financial management mechanism for public-private partnership investment projects and payment and settlement mechanisms for projects applying the BT contract model;
  - Decree No. 71/2025/ND-CP amending Decree No. 35/2021/ND-CP guiding the implementation of the Law on Public-Private Partnership;
  - Decree No. 85/2025/ND-CP on elaboration of the Law on Public Investment;
  - Decree No. 19/2026/ND-CP providing regulations on procedures for appraisal of nationally important projects and investment monitoring and evaluation;
  - Decree No. 254/2025/ND-CP providing regulations on the management, payment and settlement of projects funded by public investment capital;
  - Decree No. 275/2025/ND-CP amending Decree No. 85/2025/ND-CP guiding the implementation of the Law on Public Investment;
  - Circular No. 11/2016/TT-BKHDT providing guidelines on tender dossier for EPC (Engineering, Procurement, and Construction) services.

### (e) Other related laws and guiding documents

The public procurement would also need to comply with the relevant laws and regulations guiding the relevant matters that are not specifically stipulated under the specialised laws and regulations.

For example, the investment would also need to comply with the Law on Investment (2025) for the relevant investment forms used to implement the projects (such as the application for the investment projects). The approval procedure for enterprises with regard to a procurement project would also need to comply with the Law on Enterprises (2020).

## 1.2 Which entities and what types of contracts are subject to procurement regulation?

### Procurement Entities

- (a) State agencies, political organisations, socio-political organisations, professional-socio-political organisations, socio-professional organisations, social organisations, units of the People's armed forces, and public non-business units;
- (b) State-owned enterprises and enterprises wholly owned by state-owned enterprises;
- (c) Any other entities involved in the selection of investors for investment business projects, including projects involving land-use required to conduct investor selection under the land laws and projects subject to investor selection via bidding under sector-specific legislation.

### Types of Contracts

The types of Vietnamese public procurement contracts are generally categorised as follows:

#### (a) Contract with Contractors

- *Lump-sum contract*: The price paid for all work done under the contract during the entire period of performance is fixed. Payment for lump-sum contracts shall be conducted in multiple instalments or at one time upon the completion of the contract. The total amount paid to the contractor until the completion of its obligations under the contract shall be equal to the price stated in the contract.

- *Contract with fixed unit price:* The unit price for all work done under the contract is not changeable during the entire period of performance. The contractor shall be paid on the basis of the fixed unit price in the contract according to the quantities and volume of practical works performed which are tested and accepted.
  - *Contract with non-fixed unit price:* The unit price for work done under the contract may be subject to change upon the agreement of the parties. The contractor shall be paid on the basis of the modified unit price in the contract according to the quantities and volume of its practical works performed which are tested and accepted.
  - *Time-based contract:* This type of contract is generally applied to procurement of the provision of advisory services. The contract price shall be calculated on the basis of practical working time of the advisors and expenses other than remuneration.
  - *Cost-plus-fee contract:* Cost-plus-fee contracts are applied where the scope of work or required input costs cannot be sufficiently determined at the time of contractor selection. The contract price is determined based on the contractor's direct costs plus agreed management costs, overheads and profit.
  - *Performance-based contract:* Performance-based contracts apply where payment is determined based on verified outputs meeting the required quality and quantity. The contract must specify output requirements, evaluation methods, payment reductions, and any price adjustment provisions.
  - *Percentage-based contract:* Percentage-based contracts are used for construction insurance service packages where the contract price is exactly determined on the basis of the value of works actually accepted.
  - *Mixed contract:* A mixed contract means a contract whose scope comprises different types of contracts mentioned above. The mixed contract must clearly define the scope of tasks to be performed under each type of contract and relevant modifications made when different types of contract are applied to the same task or service. Provisions on payment for each type of contract shall apply to payment for the scope of tasks of the mixed contract.
- (b) **Contract with Investors (investment under PPP type)**
- *BOT Contract (Build – Operate – Transfer)* means a type of contract between a competent authority and an investor or special purpose entity to build an infrastructure project. After completion of the works, the investor or special purpose entity shall be entitled to operate the project for a specified period of time. Upon expiry, the investor or special purpose entity shall transfer the project to the competent authority.
  - *BTO Contract (Build – Transfer – Operate)* means a type of contract between a competent authority and an investor or special purpose entity to build an infrastructure project. After completion of the works, the investor or special purpose entity shall transfer the project to the competent authority, and shall be entitled to operate it for a specified period of time.
  - *BOO Contract (Build – Own – Operate)* means a type of contract to build an infrastructure project between a competent authority and an investor or special purpose entity. After completion of the works, the investor or special purpose entity shall take ownership of this project and have the right to operate it for a specified period of time. Upon expiry, the

investor or special purpose entity shall terminate the contract.

- **BT Contract (Build – Transfer)** means a type of contract between a competent authority and an investor or special purpose entity (if any) to build an infrastructure project. After completion of the works, the investor or special purpose entity shall transfer the project to the competent authority, whereupon the investor will be allotted a land parcel, headquarters, infrastructure or the right to operate and/or exploit the works or services to carry out other projects.

BT Contracts may be implemented under the following payment mechanisms: (i) payment by land funds recovered in accordance with the laws on land or land funds managed by State authorities or organisations to implement a reciprocal project; or (ii) payment from the State budget sourced from public investment capital or from State budget revenues derived from auctions of land use rights or public assets, which are accounted for as State budget revenues and expenditures.

- **BTL Contract (Build – Transfer – Lease)** means a type of contract between a competent authority and an investor to build an infrastructure project. After completion of the works, the investor or special purpose entity shall transfer the project to the competent authority and shall be entitled to provide services on the basis of the operation of such project for a specified period of time. The competent authority shall lease and make payment for the investor or special purpose entity's services.
- **BLT Contract (Build – Lease – Transfer)** means a type of contract between a competent authority and an investor or special purpose entity to build an infrastructure project. After completion of the works, the investor or special purpose

entity shall have the right to provide services on the basis of operation of such project for a specified period of time. The competent authority shall lease and make payment for the investor or special purpose entity's services. When the term of service provision expires, such project shall be transferred to the competent authority.

- **O&M Contract (Operate – Manage)** means a type of contract between a competent authority and an investor or special purpose entity to operate a project in whole or in part for a specified period of time. This contract shall be terminated upon expiry of the term.
- Other types of contract according to Vietnamese laws on investment.

## 2 Foreign Investment

### 2.1 Are infrastructure projects open to foreign investment?

Foreign equity restrictions have been lifted to allow up to 100% foreign ownership of most projects, such as energy projects (e.g. wind power, solar power, coal-fired power, etc.), real estate, production of petrol and oil, etc.

However, foreign equity restrictions are still in place to protect certain sectors of strategic importance, such as telecommunications. For example, for basic telecommunications services such as non-facilities-based services, foreign service providers may set up a joint venture company with any Vietnamese partner in which the foreign capital contribution shall not exceed 65% of legal capital of the joint venture company. For basic telecommunications services such as facilities-based services, foreign service providers may set up a joint venture company with a licensed Vietnamese telecommunication company in which the foreign capital contribution shall not exceed 49% of legal capital of the joint venture company.

## 3 Procurement Process

### 3.1 Outline the key steps and aspects of the procurement under the legislation.

The main types of procurement in Vietnam are as follows:

#### (a) Open procurement

"Open procurement" is a form in which selection of contractors shall not be restricted in quantity.

#### (b) Limited procurement

"Limited procurement" would be applied in cases where only a number of contractors that satisfy the requirements of the bidding package are invited to participate, including the following cases:

- The bidding package has specific technical requirements for which only a number of contractors satisfy the requirements of the bidding package; or
- The project sponsor or funding provider requires limited procurement in the relevant international treaties or foreign loan agreements.

#### (c) Direct appointment

The direct appointment of a contractor/investor is not widely applied in Vietnam.

"Direct appointment of a contractor" would be applied in cases where a contractor is appointed to perform a bidding package under a project or procurement estimate that satisfies one of the following conditions:

- Urgent or emergency need to perform tasks relating to national defence, security, foreign affairs, protection of national sovereignty; to prevent or remedy consequences caused by *force majeure* events; to protect property, health, and lives of the people; or for disease prevention and control;
- The procurement involves requirements regarding the protection of national secrets;

- The procurement belongs to a special public investment project, an urgent public investment project, or a nationally important project permitted to apply this form under a resolution of the National Assembly when approving the investment policy of the project;
- The procurement has specific requirements or conditions relating to professional expertise, operations, or technical matters; research and testing; authorship, copyright, or warranty; or where it is necessary to ensure compatibility in technology, copyright, or planning;
- There is only one contractor or manufacturer supplying the goods or services in the market;
- The procurement falls within the threshold for direct appointment as prescribed by the Government;
- The procurement falls under cases of direct appointment as regulated by the laws governing specific sectors or industries;
- The procurement relates to strategic sectors or projects, or to special scientific research, technology, innovation, or digital transformation tasks; or
- The bidding package requires an accelerated implementation schedule while ensuring quality and efficiency.

#### (d) Competitive quotation

"Competitive quotation" would be applied to procurement with a value of less than VND 10 billion that falls under one of following categories:

- Procurement for providing non-advisory services which are common and simple;
- Procurement for purchasing common goods which are readily available on the market with standardised technical features and equal quality;
- Procurement for construction and installation of simple works which have an approved construction drawing design; or

- Mixed procurement packages for the supply of goods and construction works, where the construction works are simple and have an approved construction drawing design.

### (e) Direct purchase

A form of "direct purchase" would be applied to procurements for purchasing similar goods under a project or procurement estimate of the same investor or another investor and satisfies conditions as required by laws. Notably, the following conditions must be satisfied:

- The contractor has been awarded the contract through open bidding or restricted bidding and has already signed a contract to perform the previous package;
- The procuring entity may apply direct procurement only once for the types of goods under the package, and the quantity of each work item must be less than 130% of the corresponding item quantity under the previously signed contract, excluding any optional additional purchase volume (if any);
- The unit prices of the work items under the direct procurement package must not exceed the unit prices of the corresponding items under a similar package previously contracted, and must be consistent with market prices at the time of contract finalisation; and
- The period from the signing date of the previous contract to the date of approval of the direct procurement results must not exceed 12 months.

### (f) Self-implementation

"Self-implementation" would be applied where the investor directly manages and performs the bidding package under a project or procurement estimate, provided that the following conditions are satisfied:

- The investor has functions, duties, fields of operation, or business lines that are consistent with the requirements of the bidding package;

- The investor has technical capacity, financial capacity, and experience satisfying the requirements of the bidding package;
- The investor has a feasible plan for mobilising personnel, machinery, and equipment to meet the schedule requirements of the bidding package.

### (g) Community participation

"Community participation" would be applied where local communities or groups of workers with sufficient capacity at the location of the bidding package are assigned to perform all or part of the bidding package under national target programmes or public investment programmes implemented jointly by the State and the people, where the package price does not exceed VND 5 billion.

### (h) Price negotiation

"Price negotiation" would be applied to the following bidding packages:

- Procurement of original brand-name drugs or reference biological products; or
- Procurement of medicines, medical equipment, or testing materials where there are only one or two manufacturers.

### (i) Ordering

"Ordering" would be applied as a form of direct assignment to an organisation, enterprise, or individual to provide goods or services in the following cases:

- Products and services of public utilities or public non-business services;
- Goods and services in strategic sectors; key or nationally important scientific research projects and tasks; foundational industries, spearhead industries, energy infrastructure, digital infrastructure, green transport, national defence and security, and human resource training associated with technology transfer; or key digital technologies;

- Products or goods derived from the results of special scientific, technological, and innovation tasks in accordance with the laws on science, technology, and innovation;
- Goods or services ordered in accordance with the laws governing specific sectors or industries.

### (j) Selection of contractor in special cases

This form would only be applied to procurements under projects or procurement estimates which have one or several specific conditions relating to procedures, processes, contractor selection criteria, or conditions for the signing and performance of contracts; or specific conditions relating to the development of science and technology, innovation and digital transformation; or which require the assurance of national defence, security, foreign affairs, territorial borders, national interests, or the performance of national political tasks, where the application of any of the contractor selection methods mentioned above would not satisfy the requirements for the implementation of the project or bidding package.

### 3.2 Does the legislation require the procurement to be tendered out? If yes:

#### a. What types of infrastructure projects must be tendered out?

Procurement applies to agencies, organisations, and individuals participating in or related to bidding activities, including the following:

- (a) Contractor selection activities conducted by agencies, organisations, or individuals using state budget capital in accordance with the Law on State Budget, or capital derived from lawful revenues under the law of state agencies and public non-business units, except for certain specific cases where agencies, organisations, or enterprises are allowed to decide on procurement by themselves under the Law on Bidding, for the purposes of:

- Implementing investment projects or procurement estimates of state agencies, political organisations, socio-political organisations, socio-political-professional organisations, socio-professional organisations, social organisations, units of the People's armed forces, public non-business units, and other organisations or individuals;
- Providing public products and services; procuring medicines, chemicals, testing materials, and medical equipment; purchasing national reserve goods or hiring services for the preservation of national reserve goods, except for direct purchases widely available to all subjects in accordance with the law on national reserves; or
- Performing other activities that must be tendered in accordance with relevant laws;

#### (b) Investor selection activities for the implementation of investment and business projects, including:

- Investment projects with land use that are required to conduct tendering under the laws on land;
- Investment projects that must conduct tendering for the selection of investors in accordance with the laws governing specific sectors or industries; and

#### (c) Organisations and individuals whose bidding activities do not fall within the cases above may decide on whether to conduct tendering in accordance with the Law on Bidding.

#### b. What type of tender process is run?

**"Open international procurement"** is a procurement that domestic and foreign contractors/investors are allowed to participate in. An open international procurement for selection of foreign contractors/investors shall be allowed if at least one of these following conditions is satisfied:

- The capital sponsor of the project or procurement package requires the organisation of international procurement

- in the relevant international treaties or loan agreements;
- The procurement is for providing advisory services, non-advisory services, construction and installation works, or mixed packages where domestic contractors are unable to satisfy the requirements for performing the bidding package, or where the bidding package has previously undergone prequalification, expressions of interest, or open domestic procurement but no contractor participated;
  - The procurement is for providing advisory services where the investor considers that the participation of foreign contractors is necessary to improve the quality of the bidding package or project, and the investor shall decide and take responsibility for the decision to organise international procurement; or
  - The procurement is for purchasing goods that cannot be manufactured domestically, or can be manufactured domestically but fail to satisfy one of the requirements relating to technical specifications, quality, or price. In the case of common goods which have already been imported and offered for sale in Vietnam, international procurement shall not be conducted.

**"Open domestic procurement"** is an open procurement in which only domestic contractors/investors are allowed to participate in.

**"Limited procurement"** shall be applied as set out in question 3.1 above.

**"Direct appointment":**

Direct appointment of a contractor/investor is not widely applied in Vietnam.

Direct appointment of a contractor would be applied as set out in question 3.1 above.

**c. Are unsolicited proposals accepted?**

Private investors are generally allowed to make an unsolicited proposal for PPP investment projects which do not fall under the list of projects approved by the competent authorities. An unsolicited proposal must satisfy the required conditions (e.g. corresponds to approved masterplan, does not duplicate projects which have principal approval on investment, etc.).

**d. Are Swiss challenges permitted?**

There are no restrictions to Swiss challenges under the laws of Vietnam. However, the procuring authorities are not obliged to allow a Swiss challenge if it proposes to accept an unsolicited proposal.

**3.3 Does the awarding authority carry out preliminary market consultations before launching the tender procedure?**

The Vietnamese laws do not provide specific regulations on preliminary market consultations. However, for PPP projects, the procuring authorities are generally required to conduct a pre-feasibility report for obtaining principal approval for investment projects from the competent authority, and then a feasibility report for approval to issue tender documents.

**3.4 Does the legislation mandate the criteria that interested parties must meet in order to be eligible for participation in a procurement process? If so, what are these criteria?**

The contractors/investors which are organisations would be allowed to participate in the bidding process for a procurement if they satisfy the following conditions:

- (a) For domestic contractors/investors: enterprises, cooperatives, unions of cooperatives, cooperative groups, public non-business units, foreign-invested economic organisations, and other organisations established and operating in accordance with the laws of Vietnam. For foreign contractors or investors: organisations established and operating in accordance with the laws of its country;

- (b) It is an independent financial accounting entity;
- (c) It is not undergoing procedures for dissolution or subject to revocation of its enterprise registration certificate, cooperative registration certificate, union of cooperatives registration certificate, or cooperative group registration certificate; and it is not in a state of insolvency in accordance with the laws on rehabilitation and bankruptcy;
- (d) It has its name registered on the Vietnamese National Bidding Network System prior to the approval of the contractor or investor selection results;
- (e) It can ensure competitiveness in its bid;
- (f) It is not within the period of prohibition from participating in bidding under a decision issued by a competent authority, a Minister, the Head of a ministerial-level agency, an agency under the Government, another central authority, or the Chairman of the provincial People's Committee;
- (g) It is not subject to criminal prosecution;
- (h) In cases where a shortlist has been selected, its name must be included in the shortlist; and
- (i) For international bidding, a foreign contractor must form a partnership with domestic contractors or use domestic subcontractors, unless otherwise provided by the Government.

### 3.5 Does the procuring authority publish the tender documents online?

Yes. All information related to the procurement would be published on a portal of the Vietnam National Procurement Network (<http://muasamcong.mpi.gov.vn/>).

### 3.6 Do the tender documents explain in detail the procurement procedure providing the same information to all bidders?

All tender documents would be publicised on the National Procurement Network. In particular, for an international procurement, the tender documents shall be publicised in (i) both Vietnamese and English; or (ii)

English only, subject to the nature of the tender documents. All bidders which are already registered on this portal would be able to access tender documents with the same content, regardless of whether they are domestic or foreign bidders.

Tender documents shall generally contain the evaluation criteria of the procurement envelopes including: (i) evaluation criteria on the bidder's competence and experience; (ii) evaluation criteria on technical capability; (iii) the determination of the lowest bid (in case the lowest bid method is applied); (iv) criteria for determining the evaluated price (in case the evaluated price method is applied); and (v) overall evaluation criteria (in case the combined method between technical and price is applied). The tender documents are not allowed to mention any terms and conditions that aim to restrict the participation of the bidders or give priority to one or several bidders, which can cause unfair competition among the bidders.

### 3.7 Can potential bidders submit questions to clarify the tender documents and are the answers disclosed to all potential bidders?

For contractor selection not conducted via the electronic system, in order to clarify the tender documents, the bidder can submit a request through the National Procurement Network no later than three working days (for domestic procurement) or five working days (for international procurement) prior to the bid closing time for consideration and handling.

For contractor selection conducted via the electronic system, in order to clarify the tender documents or terms of reference, the bidder can submit a request through the National Procurement Network no later than three working days prior to the bid closing time for consideration and handling.

The procuring authority would consider and answer/clarify the issues as requested and publish such clarification on the National Procurement Network no later than two working days before the date of closing of the procurement.

### 3.8 Does the procuring authority conduct a pre-bid conference to further inform potential bidders and are the clarifications provided disclosed to all potential bidders?

Where necessary, the procuring authority would also set up a pre-bid conference for clarifying and answering potential questions of the potential bidders. The invitation notice and content of discussion of this conference would be published on the National Procurement Network within a maximum of two working days from the completion date of the pre-bid conference.

## 4 Evaluation Criteria

### 4.1 On the basis of what criteria are tenders evaluated and the winner of the contract determined?

The Vietnamese laws provide certain methods and evaluation criteria for evaluating bid dossiers as follows:

#### (a) "Method of lowest price":

- For non-consulting service, procurement, construction or mixed packages: applies to packages in which technical, financial and commercial proposals are regarded to be on the same level if they meet the requirements of the bidding documents.
- For consulting service packages: applies to simple consulting service packages or consulting service packages where consulting process has been well defined according to existing standards; or packages in which technical, financial and commercial proposals are regarded to be on the same level if they meet the requirements of the bidding documents.

The bidder shall be ranked first if they meet all technical requirements and provide the lowest bid price, inclusive of any necessary error corrections, deviation adjustments, and discount deductions.

#### (b) "Method of evaluated-price"

This applies to packages where costs can be converted to the same level in terms of technical, financial and

commercial factors for the entire life cycle of goods, works or non-consulting services.

Factors that may be converted into the same level for determining the evaluated price include: operating and maintenance costs, and other costs associated with loan interests, supply schedule and quality of goods, services or works of the package; capacity or output; statistical and assessment reports on performance of previous contracts, including consideration of origin of goods; and sustainable bidding and other factors.

The bidder that has a bid meeting the base requirements (on technical, finance, commerce) and the lowest bid price after error correction and deviation adjustment (if any), and deducting the value of discounts (if any), shall be ranked first.

#### (c) "Method of fixed-price"

This applies to simple consulting service packages where the exact scope of tasks is defined and the rational, specific and fixed costs for executing the package are specified in the bidding documents.

The bidder whose bid meets technical requirements, has a bid price (after error correction and deviation adjustment, if any, and after deduction of any discounts, if any) not exceeding the package price, and achieves the highest technical score shall be ranked first.

#### (d) "Method of combined technique and price-based"

This applies to IT, telecommunications or insurance packages; procurement and/or construction packages with specific or high technical requirements to which the evaluated-price method cannot apply; packages where technical and price factors should be taken into consideration; and consulting service packages where both quality and costs for executing the package are critical.

The final ranking is based on a combined score, where the technical score is weighted at 70%–80% and the price score at 20%–30%, totalling 100%. The bidder achieving the highest combined score shall be ranked first.

## (e) "Method of technique-based"

This applies to consulting service packages with specific or high technical requirements, and is conducted via either a pass/fail or a scoring method, focusing on a bidder's ability to meet rigorous standards for quality, delivery, and long-term performance. Under the pass/fail approach, a "pass" requires meeting all basic criteria, though a small margin (up to 30%) of non-basic criteria may be deemed "acceptable" rather than a strict pass. Alternatively, the scoring method requires bidders to hit a high technical threshold—typically at least 70%, rising to 80%–90% for complex or high-tech projects. Beyond core technical specifications and production standards, the evaluation scrutinizes the feasibility of the proposed solutions, environmental impact, and the bidder's proven track record in previous contract performances.

The bidder that has a bid meeting technical requirements and the highest technical score shall be ranked first, and invited to the opening of financial proposal as the basis for contract negotiation.

### 4.2 Is there an obligation to disclose the criteria or other elements of the evaluation methodology on the basis of which (i) bidders are selected, and (ii) tenders evaluated? If so, when must such disclosure take place?

Tender documents shall generally provide for the evaluation criteria of the procurement envelopes including the bidder's competence and experience; technical capability; the definition of lowest bid (in the application of the lowest bid method); and the identification of evaluated price (in the application of evaluated price method). Bidding documents are issued simultaneously with the notice of expression of interest, notice of prequalification, and notice of invitation for the bidding.

## 5 The Contract

### 5.1 Is a form of contract provided with the tender documents?

Yes. Generally, the terms of the contract that is to be entered between the procuring agency and the bidders are provided with the tender documents.

### 5.2 To what extent is modification and negotiation on the contract permitted?

The terms of the contract are generally issued on the basis that the tenderers are required to be in full compliance. However, as part of its bid, a bidder may propose amendments to such terms of the contract and, if successful, may be requested to negotiate further.

### 5.3 Does the contract deal with specific circumstances (*force majeure*, material adverse government action, change in the law, refinancing) that may arise during the life of the contract?

Generally, yes.

### 5.4 Are dispute resolution mechanisms in place allowing the parties to resolve disputes in an efficient and satisfactory manner without adversely affecting the project?

The disputes arising from the implementation or procurement of projects may be settled by the competent court or by an appointed arbitral tribunal. Nowadays, arbitration clauses are fairly common in such contracts. In the recent years, the dispute mechanisms in these contracts have been developed to provide parties with multiple avenues to resolve disputes, before they are referred to arbitration. Some contracts would require mediation or expert determination before referring the dispute to arbitration.

### 5.5 Are lenders given step-in rights for cases when the private partner is at risk of default or if the contract is under threat of termination for failure to meet obligations?

The laws are silent on the step-in rights of the lenders for cases where the private partner is at risk of default or if the contract is under threat of termination for failure to meet obligations. The laws only generally regulate that:

- (a) When the PPP contract is terminated early (e.g. due to serious violation of a party), the authority would cooperate with the lender to select a substitute contractor/investor to sign a new PPP contract; and

- (b) The lender would have rights in compliance with the credit extension agreement, PPP contract and other regulations.

In light of the above, it can be interpreted that the lender may have step-in rights in case they are clearly agreed in the credit extension agreement, and PPP contract signed between parties.

### 5.6 Are grounds for termination of the contract and its associated consequences well defined?

Most of the contracts involving Government procurement adopt to a certain extent the termination grounds found in the standard form of contract. Such termination grounds incline towards giving the Government or the procuring authorities more favourable rights to terminate the contracts.

For instance, regarding investments under the PPP type, the contract might be terminated before the due date by following cases: (i) one party violated the contract without any efficient remedy or solution; (ii) *force majeure*; or (iii) other cases which are stipulated in the project contract.

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## Guide to Procurement of Infrastructure Projects in Southeast Asia

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