



Chapter 7

PUBLIC PRIVATE
PARTNERSHIP

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In recent years, some infrastructure development projects in Thailand have taken the form of public private partnerships (“**PPPs**”), with the participation of the private sector. To the extent that these projects follow the framework of the Act on Public Private Partnerships, B.E. 2562 (2019) (the “**PPP Act**”), an understanding of PPPs in Thailand is useful.

(1) Background of the Legislation and Competent Authorities

PPP projects in Thailand were previously governed by the Private Participation in State Undertakings Act, B.E. 2535 (1992) (the “**1992 PPP Act**”) and the Act on Private Investment in State Undertakings, B.E. 2556 (2013) (the “**2013 PPP Act**”). The 1992 PPP Act had, as its primary objective, the prevention of corruption rather than promotion of PPP projects and was perceived as being inadequate in substance, with defects such as vagueness of the text and ambiguity in defining the scope of the subject projects. Accordingly, the 2013 PPP Act was enacted and aimed at clarifying and streamlining procedures for the selection and approval of PPP projects. The 2013 PPP Act came into force in April 2013. A new Strategic Plan for Public-Private Partnership in State Undertakings was issued in December 2017.

The PPP Act came into force on 11 March 2019 and repealed the 2013 PPP Act in its entirety; nonetheless, the PPP Act is based on similar principles to the 2013 PPP Act and was largely an attempt to improve on existing legislation, which was already seen as effective.

The PPP Act sets up the Public Private Partnership Policy Board (the “**Board**”), chaired by the Prime Minister, as well as the State Enterprise Policy Office (the “**SEPO**”), which functions as its secretarial office. Responsibilities of the Board include approving basic policies for PPP projects and issuing related notifications, while SEPO is responsible for administration of procedures, including screening and evaluation of projects, and submission of opinions to the Board. In principle, it is assumed that SEPO will take the lead in project approval and the private entity selection processes.

(2) Projects under the PPP Act

Projects governed by the PPP Act are, in principle, investments in state undertakings of Baht 5 billion or more¹. However, projects with a value below the above amount may proceed under the PPP Act if the Board finds them to be important and if implementation under the PPP Act is appropriate. Otherwise, projects with a value below Baht 5 billion which fall under the scope of PPP Act should proceed according to supplementary notifications issued under the PPP Act.

A “project” is defined in the PPP Act as “a state-owned investment project in an undertaking that any one or several state agencies altogether have the power and duty to operate under the law or regulations or have the power and duty to operate under the purposes of their establishment.” The PPP Act, compared with the previous Acts regulating PPP projects, is clearer in its scope of its application. In addition to the general definition provided in 2013 PPP Act, the PPP Act further narrows down the scope of projects which must comply with the PPP Act by listing out the following project types as projects related to infrastructures and public services:

¹ The 2013 PPP Act stipulated that projects must have a value of at least Baht one billion, but it also provided that a higher value may be prescribed by Ministerial Regulation. The minimum value was set at Baht 5 billion under the “Determining Increase of Value of the Project Required to Comply with the Act Government Private Sector Participation in Investment in State Business, B.E. 2559 (2016) of 1 April 2016”. Under the PPP Act, the minimum value of Baht 5 billion is enshrined in the Act.

- (i) roads, highways, expressways, road transport;
- (ii) trains, electric trains, rail transport;
- (iii) airports, air transport;
- (iv) ports, water transport;
- (v) water management, irrigation, water supply, water treatment;
- (vi) energy;
- (vii) telecommunication, communication;
- (viii) hospitals, public health;
- (ix) schools, education;
- (x) residences or facilities for low or medium-income earners, elderly, underprivileged, or disabled;
- (xi) exhibition centers and conference centers; and
- (xii) other businesses as prescribed in the royal decree.

In addition to the above, the scope of the PPP Act also includes projects for related businesses necessary for achieving the purposes of undertaking the abovementioned businesses as announced and prescribed by the Board. As of the end of 2020, the Board had announced several businesses that are deemed to be related with the abovementioned businesses including, without limitation: (i) roads, highways, expressways, and road transport; (ii) trains, electric trains, and rail transport; and (iv) ports, and water transport. For example, inventory services, security services, or airplane cleaning services are deemed as businesses necessary for item (iii) airports and air transport.

The PPP Act also stipulates that SEPO will prepare a PPP Project Preparation Plan consistent to the country's master plan on infrastructure and social development prepared by the Office of the National Economic and Social Development Board. However, as of the date of this chapter, SEPO had not issued a new PPP Project Preparation Plan under the PPP Act. Thus, the latest PPP plan is a Strategic Plan for the years 2017 to 2021 issued under the 2013 PPP Act, which was approved by the Cabinet on 24 October 2017.

(3) Project Approval Process

For a PPP project to be launched, and prior to the selection of private entities, the project itself must be approved. The approval process is outlined below.

- (i) The "project-owner agency", which implements the relevant project, must conduct research and analysis of the project in accordance with the rules and regulations set forth by the Board. In conducting such research and analysis, a consultant must be hired to prepare a report of the results of the research and analysis;
- (ii) The project-owner agency must submit this report to the responsible ministry of the project owner agency, along with other pertinent information relating to the project. If the ministry of the project owner agency approves the project, it will forward the report to the SEPO for proposal to the Board. The SEPO may request an amendment or submission of additional relevant materials on the project. Once the SEPO determines that the report is complete, it will propose the project to the Board;
- (iii) Following completion of the examination by SEPO, the basic policies of the relevant project will be submitted to the Board, which will decide on whether to approve the project; and
- (iv) If the Board approves the project, it will inform the responsible ministry of the project owner agency to propose the project to the Cabinet for its final approval.

As outlined above, the approval process alone involves some cumbersome procedures, but compared to the 1992 PPP Act that required several additional government approvals, the PPP Act has

dramatically streamlined the approval requirements.

(4) Private Entities Selection Process

Once the project approval process has been completed, the next step is the selection of private entities and subsequent processes.

First, the project-owner agency sets up a “Selection Committee” consisting of representatives from the Bureau of the Budget, SEPO, and the Office of the Attorney-General, as well as a few experts, to be chaired by a representative of the project-owner agency. The Selection Committee has the power and duty to approve the draft guidelines of the tender, negotiate matters related to contracts with private entities for the joint development, and to select the private entities, thereby effectively playing a central role in the selection and other examination processes with respect to the private entities participating in the project.

The default rule for the selection of private entities is that selection is to be conducted through a bidding process, unless otherwise approved by the Cabinet. The Request for Proposal (an “**RFP**”) will also be approved by the Selection Committee and announced to the public to initiate the bidding process. The Selection Committee then, after obtaining the selection result of the winning bidder and completing negotiations with the winning bidder on an investment partnership contract, submits the selection results, negotiation issues, and the draft investment contract to SEPO and further submits the draft investment contract to the Office of the Attorney-General. Within 45 days from the receipt of the report, the SEPO forms its opinion on the winning bidder and the fiscal obligations of the government and submits this opinion as well as the relevant documents, to the project-owner agency. The Office of Attorney-General must review and submit the reviewed draft investment contract to the project-owner agency within 45 days of receipt.

Within 30 days from the receipt of all reports and documents mentioned above (including the draft partnership investment contract), the responsible minister of the project-owner agency presents its opinion to the Cabinet on the selection result and investment contract. If the Cabinet approves the selection result and the draft investment contract, the project-owner agency proceeds to sign the investment contract with the selected private entity.

After completion of the entire process described above, a private entity can enter into an investment partnership contract with the project-owner agency.

Selection of private entities not using a bidding process must be in accordance with the Notification Re: Criteria for the Selection of Private Entities Not Using Bidding Process, which came into force on 1 December 2020. This notification requires that the selection of private entities not using a bidding process may proceed if: (i) there is an urgent need for the private sector to invest in the project due to unexpected events not caused by the project-owner agency and the selection by means of a bidding process may cause damage in any material respect to the public interest; (ii) private entities selection by means of a bidding process will affect the success of the project or will result in other projects not being successful in accordance with the plan; and (iii) the project is under the Strategic Plan that requires investments from the private sector pursuant to government policies and the selection of private entities by means of a bidding process may cause a delay that eventually will affect the objectives or the achievements of such policies.

In December 2021, SEPO issued a notification on guidelines for the “Integrity Pact” to increase transparency in the selection process. An Integrity Pact is an agreement between a project-owner agency and a bidder who agree that corruption will not be undertaken in the selection process. An

observer who has the expertise or experience necessary for a project must observe and monitor the selection process. In early 2022, SEPO issued a form of an Integrity Pact that must be signed by the project-owner agency, bidder, and observer.

(5) Eastern Economic Corridor

As part of the government's overall plan to promote investment in the provinces immediately east of Bangkok, the Eastern Special Development Zone Act, B.E. 2561 (2018) (the "**EEC Act**") was enacted. The EEC Act creates an expedited process for the approval of PPP projects within Eastern Economic Corridor (the "**EEC area**"), which mainly consists of Chachoengsao, Chonburi, and Rayong provinces.

The main authorities under the EEC Act consist of the Cabinet, the Policy Commission of the Eastern Economic Corridor (the "**EEC Policy Commission**") and the Office of the Policy Commission of the Eastern Economic Corridor (the "**EEC Office of Policy Commission**"). The EEC Policy Commission is charged with considering and approving tenders for PPP projects and selecting private parties for PPP projects under the EEC Act. This differs from PPP projects under the PPP Act because the EEC Policy Commission is entitled to decide over matters that would usually be made by the Cabinet under PPP Act. Under the EEC Act, the Cabinet will only approve projects tendered if the project uses the state budget or the requires approval from the Cabinet. The Office of Policy Commission is an entity working under the EEC Policy Commission and is mainly responsible for secretarial work.

The process of a project's approval under the EEC Act is similar to the PPP Act where the project-owner agency must conduct research and produce an analysis report of the project in accordance with the rules and regulations set forth by the Office of Policy of Commission. After the report is completed, it must be submitted to the Office of the Policy of Commission, which will then be tendered to the EEC Policy Commission for approval.

The project-owner agency will prepare the RFP and obtain an approval of the RFP from a Selection Committee appointed by the EEC Policy Commission. After the project has been approved by the Office of the Policy of Commission, the project-owner agency will announce the approved RFP to the public. The default rule for the selection of a private entity under the EEC Act is the same as the default rule under the PPP Act; that is, selection is conducted through a bidding process, unless otherwise approved by the EEC Policy Commission.

Once a private party has been selected, the draft investment contract will be submitted to the Office of Attorney-General by the project-owner agency. The approved draft investment contract along with the selection and negotiation results will be submitted to the Office of the EEC Policy Commission to be further tendered to the EEC Policy Commission for approval. Once approved, the project-owner agency may enter into the investment contract with a selected private party.

In addition, there are many incentives in investing within the Eastern Economic Corridor such as corporate income tax exemptions, land ownership and land leases of up to 99 years for foreign entities, and a one-stop service center access for investors to apply for necessary permits and licenses.

The initial six PPP projects in the EEC are as follows:

- (i) U-Tapao Airport and Eastern Aviation City;
- (ii) High-Speed Railway Connection to Three Major Airports;
- (iii) Map Ta Phut Industrial Port Phase III;
- (iv) Laem Chabang Port Phase III;
- (v) U-Tapao Maintenance, Repair and Overhaul Centre (MRO); and

(vi) Digital Industry and Innovation Promotion Zone (Digital Park Thailand).

After the development of the initial six PPP projects, clean energy and smart city projects will be open for the bidding process. The clean energy project in the EEC area aims to promote solar farms in Thailand, and distribution and storage of energy in the EEC area. The smart city project aims to integrate Chachoengsao province with public transportation, telecommunications, and power generation technology while establishing a tech and financial hub. Phase 1 of the first smart city has been launched at Ban Chang, Rayong province. These potential projects under the EEC Act open several opportunities for investors.

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