

THAILAND

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I OVERVIEW

Variations of public-private partnerships (PPPs) have been customarily practised in Thailand for many decades prior to any official promulgations detailing such ventures. As early as the 1900s, engagements between the sovereign and individuals emulating the underlying principles of PPPs can be observed.

A contract awarded to construct the Second Stage Highway in late 1988 marked the very first documented instance of a state enterprise, the Express and Rapid Transit Authority of Thailand, granting a concessionary right to a private juristic entity. A few more projects concentrated in rudimentary infrastructural developments were launched up until the promulgation of the Private Participation in State Undertakings Act BE 2535 (1992) (the PPSU Act). The same is seen in the current PPP projects seen today: sectors such as transportation, telecommunications and other public utilities dominate the percentage of PPP investments in Thailand.

Although for two decades the PPSU Act served as the foundational piece of legislation administering PPPs in Thailand, the increasing demand and need for socioeconomic growth pushed for renewed legislation that could remove certain ambiguities that arose when applying the PPSU Act. Because the PPSU Act was mainly drafted to facilitate these types of concessionary projects that were already under way in Thailand in the early 1990s, it lacked clear-cut criteria addressing matters of scope, duration and authority with regard to initiating and implementing PPPs.

Through what could be interpreted as an official recognition of this need, the government enacted the Private Investments in State Undertakings Act BE 2556 (2013) (the PISU Act). The PISU Act explicitly remarks that Thailand is in need of infrastructure constructions and various other forms of public services. The same imperative is echoed in many other state publications addressing the state policy stated in the Constitution, development goals and plans. The state definitively intends to rely on PPP as the main mechanism in achieving these objectives and maximising state resources. Drafted from this vantage point, the PISU Act promotes private participation and attracts private investors by offering transparent, streamlined accountable procedures in relation to PPPs to be taken into account in any risk-benefit analyses.

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II THE YEAR IN REVIEW

The PISU Act is composed in a way that a series of ancillary laws could ensue after its enactment. These can manifest in the form of a Notification issued by the State Enterprise Policy Office (the Office), a Notification issued by the Public-Private Partnerships Policy Committee (the Committee), or a Ministerial Regulation. When prescribed to applicable areas of the PISU Act, these notifications and regulations serve to clarify some of the rules governing certain procedures in relation to PPPs.

Since the PISU Act's enactment, there have been a number of significant ancillary laws to this effect. These include, but are not limited to:

- a* Notification of the Office regarding Standard Contract Terms for Public-Private Partnership BE 2558 (2015);
- b* Notification of the Office regarding Information for Invitation for Bids, Requests for Proposals, Procedures for Invitation for Bids, Selection Procedures of the Selection Committee, Determination of Bid Security and Performance Security BE 2558 (2015) (the Selection Procedures Notification);
- c* Notification of the Committee regarding Material Amendments to Public-Private Partnership Contracts BE 2558 (2015);
- d* Notification of the Committee regarding Rules and Procedures for Calculating the Value of Investment Projects; and
- e* Notification of the Committee regarding Rules and Procedures for Private Investment in Projects with a Value of less than the Amount Prescribed in Section 23 of the Private Investments in State Undertakings Act BE 2556 (2013), BE 2559 (2016) (the Notification regarding Projects with a Value of less than the Amount Prescribed in Section 23).

In addition, related to the above, the Cabinet issued a resolution on 3 November 2015 approving a means to fast-track PPPs. Termed the 'PPP Fast Track', once implemented, the system would expedite the project introduction phase from two years to a mere nine months. Many PPPs, particularly in the transportation sector, have experienced acceleration this way and have since been completed.

Perhaps most notably, pursuant to Chapter 3 of the PISU Act the first Strategic Plan for the years 2015–2019 was published by the Committee (the PPP Strategic Plan). The total private investment value is projected at 1.41 trillion baht (approximately US\$40.2 billion). The systematic, five-year plan titled 'Project Pipeline' comprehensively identifies all development focus areas and the respective state agencies responsible for its implementation, otherwise known as host agencies. PPP projects under the newly developed Fast Track regime enable the government to productively use innovative PPP instruments as mechanisms in carrying out various infrastructural projects in Thailand.

III GENERAL FRAMEWORK

i Public-private partnership applicability criteria

The PISU Act very loosely defines projects that fall under the PPP purview as the state intends for PPPs to serve as a mechanism to develop infrastructure in Thailand indefinitely. According to the PISU Act, any project that falls under the criteria of being both (1) a state undertaking and (2) a public-private joint investment will be eligible for PPP procurement.

State undertakings can take the form of (1) an undertaking which a government agency, state enterprise, other state agency or local administrative organisation, either individually or collectively, has a legal obligation to perform; or (2) an undertaking which requires the utilisation of natural resources or properties of one or several government agencies, state enterprises, other state agency or local administrative organisation, either individually or collectively.

In addition, the approved PPP project will be implemented by virtue of a public-private joint investment or designation of a unilateral private investment through the granting of a licence, concession or any kind of rights. However, the definition of a public-private joint investment still remains unclear as to what business activities it consists of since the PISU Act defines investment as a public-private joint investment undertaken by any means. Despite this, the PISU Act explicitly excludes the granting of concessions for petroleum and mining as they are regulated and governed by respective statutes.

As mentioned above, projects for PPP procurement shall be state undertakings that are implemented through a public-private joint investment. Nevertheless, the approval process of the project proposal is different depending on whether the project's value is small, medium-sized or large.

A project with a total investment value of 1 billion baht will be classified as a small project. The detailed approval procedure of a small project is specified in the Notification regarding Projects with a Value of less than the Amount Prescribed in Section 23. The authority to approve the project lies with the minister of the respective host agency, or other state agencies as specified for different circumstances.

A project with a total investment value that is not lower than 1 billion baht but does not exceed 5 billion baht will be classified as a medium-sized project. The detailed approval procedure for a medium-sized project is specified in the Notification regarding Projects with a Value of less than the Amount Prescribed in Section 23. The approval authority depends on whether the medium-sized project adheres to the conditions set out in the Notification or the PISU Act. The authority to approve the former lies with the ministry of the host agency, and the latter, with the Cabinet.

Lastly, a project with a total investment value exceeding 5 billion baht will be classified as a large project. The approval procedure for a large project is prescribed in the PISU Act, and the Cabinet is the final approving authority.

ii Types of public-private partnership

As mentioned above, PPPs in Thailand can take many forms, because under the PISU Act there is no classification for the types of investment undertakings. The type of PPP project is chosen based on the specific conditions of each project and the business or political requirements of the parties.

Nevertheless, most PPP projects in Thailand have used the following contractual structures: (1) build-own-operate (BOO), where a private organisation builds, owns and operates some facility with some degree of encouragement from the government; (2) build-transfer-operate (BTO), where a contract is signed between an authorised state agency and investors to build an infrastructure facility completely, and then the investors shall transfer such facilities to the authorised state agency and obtain the right to operate such facility commercially for a fixed term; and (3) build-operate-transfer (BOT), whereby the investor shall transfer the facilities at the end of the concession. As such, the investors are able to finance, design, construct and operate a facility stated in the concession contract and this

enables the project proponent to recover its investment, operating and maintenance expenses in the project.

iii The authorities

There are two main authorities involved in the PPP process: the Committee and the Office. According to Section 8 of the PISU Act, the Committee is composed of the Prime Minister as chairman, the Minister of Finance as vice-chairman and the Director-General of the Office as a member and secretary. The Committee has powers and duties mainly to: (1) prepare a strategic plan; (2) give approval in principle to a project involving a private investment and the operation of a project; (3) prescribe rules and regulations under the PISU Act; and (4) give decisions on issues pertaining to the implementation of this Act.

In addition, the Office serves as an ancillary body to the Committee, responsible for carrying out secretarial tasks (i.e., supporting the Committee in the implementation of PPP projects). According to Section 18 of the Act, the Office shall have the following powers and duties to: (1) prepare a draft strategic plan for submission to the Committee; (2) study and analyse projects and submit opinions to the Committee for consideration and approval; (3) study, research and prepare a database relating to private investment in state enterprises for dissemination, provision of education and advice to state agencies and the general public in order to promote and build an undertaking of private investments in state undertakings; and (4) report problems and obstacles arising from the implementation of the PISU Act to the Committee.

iv General requirements for PPP contracts

In general, PPP contracts must conform to the framework of the 2013 PISU Act and the requirements of the Notification of the Office regarding Standard Contract Terms for Public-Private Partnership Contracts BE 2558 (2015) (the SC Notification). A draft PPP contract must contain the standard contract terms for investment contracts as prescribed by the SC Notification with the approval of the Committee. Generally, PPP contracts must at least contain the following clauses:

- a* duration, provision of services and the implementation of the project;
- b* rights and duties of each party;
- c* the ownership of the project assets and their valuation. If state assets are utilised in implementing the project, the right and duty of each party in relation to the utilisation and maintenance of the aforementioned assets shall also be specified;
- d* changes to the nature of the provision of services under the project; changes to a contracting party, contractor, subcontractor, and the assignment of claims;
- e* force majeure events and actions in the case of a force majeure event, including payment of compensation;
- f* causes for termination of the contract, methods of termination, consequences of termination other than termination due to expiry, as well as information relating to actions to be undertaken in order to continue the provision of services in the case of the suspension of the project, and payment of damages arising from the termination of the contract;
- g* the host agency shall not be bound to settle a dispute by arbitration unless the host agency demonstrates the reasons and necessity for doing so due to this being the general practice for that particular type of PPP contract; and

- b* the governing law of the PPP contract and the implementation of the project shall be Thai law.

Besides the main requirements listed above, it is prohibited for the PPP contract to contain any provisions allowing a unilateral renewal or extension of the duration of the project under the PPP. The SC Notification reiterates the same principle and prohibits granting the private party the unilateral right to adjust or amend any contractual conditions in a manner that will have an impact on the provision of public services or the benefits to the public sector.

Furthermore, PPP contracts and other documents integral to the implementation of a PPP must be prepared in Thai. If any part of a PPP contract is prepared in English, a provision indicating that in the event of any conflict or discrepancy between the two, the parties will comply with the original Thai document, must be included in the PPP contract.

In terms of the procedure of contract approval, there are three main authorities plying a significant role: the Selection Committee, the Office and the Cabinet. Pursuant to Section 35 together with Section 36 of the PISU Act, the Selection Committee is made up of the host state agency as chairman, representatives of the Office and the Office of the Attorney-General as members. The Selection Committee plays a significant role in the project implementation to negotiate and select the private investor.

Once the private entity selection and negotiation results have been obtained, and a draft investment contract has been prepared, the Selection Committee will submit the draft to the Office and the Office of the Attorney-General for their review of those submissions. Those reviews are then submitted to the responsible minister for his or her review, who will then submit them to the Cabinet for its consideration and approval.

IV BIDDING AND AWARD PROCEDURE

There are two main regulations governing the bidding and award procedure in Thailand: the PISU Act and the Selection Procedures Notification. Generally speaking, the procedure is jointly conducted by the host agency and the Selection Committee with the oversight of the Office and the Committee.

i Expressions of interest

In Thailand, the selection of the private investor commences at the level of the host agency, who plays a key role in publishing relevant notices. Thus, virtually all expressions of interest are implied by the submission of a proposal by the bidder, and all proposals must be solicited by these notices.

The process begins with the host agency's drafting of the invitation for bids. The document must contain, among others, the terms of reference detailing the background, objectives, scope of work and commitment duration of the project, a statement declaring that the bidder must have not been granted privileges or immunities from the courts, the required qualifications of the private investor, information related to the request for proposal and its fee, and the selection criteria.

The host agency then establishes a Selection Committee and appoints its members in accordance with Section 35 of the PISU Act. The Selection Committee is granted the authority to approve the draft invitation for bids as well as the discretion in selecting the private investors. Once the Selection Committee is established the actual bidding and award procedure begins.

The Selection Committee may also, when it deems appropriate to narrow down the number of applicants, shortlist a pool of qualified bidders before publishing the invitation for bids. In such a case, only the selected investors will receive the invitation for bids.

It is important to note that the Selection Committee and the host agency can jointly decide to opt out of the bidding procedure in selecting the pool of private investors. If the Office concurs, the Office may petition the Committee for its approval. Where there are disagreements between the Selection Committee and the host agency, the Office will petition the Committee for its approval only when the Office also deems opting out to be more appropriate to the case at hand. If the Committee approves, the host agency has to provide the rationale behind such decision, and disclose the names of the chosen investor or investors along with supporting justifications.

ii Requests for proposals and unsolicited proposals

Pursuant to Clause 6 of the Selection Procedures Notification, once approved, the host agency must publish the invitation for bids at least 60 days prior to the submission deadline of the proposals in three different mediums. Thereafter, it is the responsibility of the interested party to purchase the request for proposals at the designated place, time and date as specified in the invitation for bids.

The request for proposals solicits the following information to be provided by the interested party: the qualifications of the bidder related to the nature of work, a business plan which also details financial aspects, and an implementation plan stating its benefits proposed to the state.

The submitted proposals must contain all the information requested in both the invitation for bids and the request for proposals at a minimum. Any foreign entities and foreign individuals who wish to participate in the bid may submit their proposals in the same manner.

As mentioned above, there are no procedures that would allow private investors to submit unsolicited bids.

iii Evaluation and grant

Once all of the proposals have been collected, all bidders or their representatives gather for the opening of the proposal envelopes. Strict evaluations of the submitted proposals are then conducted, at which stage the Selection Committee may request additional information from the bidders, but any bidder who wishes to amend or provide any unsolicited content is prohibited from doing so.

After a negotiation with the selected party is concluded, the Office and the Office of the Attorney General jointly will submit their opinion to the responsible minister for consideration and approval. The final grant is approved by the Cabinet. Therefore, although the Selection Committee is allowed to enter into negotiations with the bidders having passed the evaluation, the project implementation must be approved by the Cabinet.

V THE CONTRACT

i Payment

No specific regulations impose restrictions or limitations on the way in which private parties in PPP contracts are remunerated in Thailand. As such, the parties are free to determine all

variables, such as the frequency of payment and rates of payment, through the PPP contract. In general, however, two forms are prevalent.

The first is PPP net cost, where the private investor collects and allocates the revenue according to the agreed terms in the contract. Any increase in the amount of profit will be reflected in the amount of remuneration. Because of the nature of the payment, it is most frequently paired with PPPs that involve commercial development projects.

The second is PPP gross cost, where the state assumes the responsibility for collecting revenue, and makes a fixed payment to the private investor. Because of the nature of the payment, it is most frequently paired with PPPs that involve social development projects.

ii State guarantees

No separate regulation regarding state guarantees exists in Thailand. Nonetheless, the PISU Act stipulates that private investments in state undertakings must be granted with consideration to financial and monetary discipline. Thus, state guarantees are considered in the same manner.

There have been no clear state policies regarding state guarantees in the past, but since the enactment of the PISU Act, policies have leaned favourably towards state guarantees to private entities of PPPs. For instance, the state issued a policy granting state guarantees to private investors of PPPs in the form of aid to be used in the project.

iii Distribution of risk

Section 6(5) of the PISU Act stipulates, as a general rule, that a private investment in a state undertaking shall have regard to suitable risk allocation in the project between the state and private entity. However, the PISU Act does not incorporate the detailed risk-allocation rules and regulatory provisions for the PPP projects. Hence, there is no allocation of risk principles or a risk-mitigation mechanism specified in the laws regarding PPPs. Typically, the distribution of the risks associated with a project is determined on a case-by-case basis and the parties usually provide details of the risk allocation in the PPP contract.

Various types of risk are found in carrying out a PPP project. In practice, the risks related to expropriation or assistance in securing land necessary for the execution of PPPs customarily rests with the contracting authority. Although force majeure risks are shared by both parties, other risks associated with the project are, in almost all cases, borne by the private entity.

iv Adjustment and revision

The PPP regulatory framework sets out specific rules concerning adjustments and revisions of the PPP contract. Therefore, any amendments to the PPP contract can only be made through following the procedure for amendments stipulated in the PPP Act.

Pursuant to Section 47 of the PISU Act, in the event a contract amendment is necessary, the host agency shall submit the rationale and necessity for requesting the amendment to the Supervisory Committee for consideration. According to Section 43 of the PISU Act, the Supervisory Committee is composed of a representative of the responsible ministry who is an official of the responsible ministry holding a higher level executive office.

Where the Supervisory Committee finds that the amendment is insubstantial, the Supervisory Committee shall consider the proposed amendment and notify the responsible minister. On the other hand, where the Supervisory Committee finds that the amendment of an investment contract is material in nature, the host agency shall also submit the proposed

amendment issues, the impact of the investment contract amendment and other relevant details to the Supervisory Committee for consideration. If the Supervisory Committee agrees to the amendment, the host agency shall submit the draft amendment to the Office of the Attorney-General for review before forwarding the Supervisory Committee's opinion along with the amendment as reviewed by the Office of the Attorney-General to the responsible minister for submission to the Cabinet for approval.

In determining whether an amendment to the PPP contract is a material amendment in nature, Clause 3 of the Notification of the Committee regarding Material Amendments to Public-Private Partnership Contracts BE 2558 (2015) provides that material amendments to PPP contracts mean changes to any of the following characteristics:

- a* amendments to the nature of a project, scope of work, provision of services or implementation of a project;
- b* amendments relating to the benefits that the state will receive, of any kind, including amendments to benefits in monetary form or in the form of revenue sharing, amendments to the ownership of project assets, and amendments relating to dispute resolution;
- c* changes to a contractual party or a change in corporate structure that renders the implementation of a project impossible;
- d* amendments to the term of the PPP contract;
- e* amendments to the performance security; and
- f* amendments to the rate of the service fee or quality of services provided.

v Ownership of underlying assets

Under the PISU Act, there is no provision stipulating clearly which contractual party has ownership of the underlying assets. Nevertheless, the PISU Act rules that a standard PPP contract must contain a clause indicating the content of the transferring and holding of ownership of the project. The transfer of ownership of the underlying assets depends on the type of PPP contract used. In practice, ownership of project assets is usually provisioned under the PPP contract to be transferred to the public sector. If state assets are utilised in implementing the project, the rights and duties of each party in relation to the utilisation and maintenance of the aforementioned assets will also be specified.

vi Early termination

The PISU Act does not specify any consequences for early termination, but rather, together with applicable ancillary regulation, mandates that the standard PPP contract contain a clause that specifies a mechanism for early termination. Therefore, the PPP contract will typically contain provisions for early termination. The result of early termination is different in the following three main situations: (1) in a contract breached by the host agency; if by the state's non-fulfilment the private entity incurs damages, such private entity can claim compensation in the amount of actual damages; (2) in a contract breached by the private entity; in the case of his or her non-fulfilment the state must provide appropriate compensation (i.e., the state will make a payment proportional to the actual contracted income calculated up until the date of termination). However, the state is entitled to recover its loss arising out of such breach from the private entity; and (3) in the case of force majeure, the state and the private party as contractual parties must mutually absorb the risk; both parties cannot refer to force majeure in order not to make a payment in accordance with their contractual obligations.

Regardless, the state will make a payment proportional to the actual contracted income calculated up until the date of termination.

VI FINANCE

In Thailand, PPPs are generally financed via capital markets or financial institutions. One option is for the concessionaire to list its company with the Stock Exchange of Thailand and to offer its shares to the general public as a means of raising capital (initial public offering). Second, it could be privately financed by setting up an infrastructure fund and offering its fund units to the general public. To mention a few examples of infrastructure funds established in the past, the BTS Rail Mass Transit Growth Infrastructure Fund (BTSGIF) and Jasmine Broadband Internet Infrastructure Fund (JASIF) were established in 2013 and 2015, respectively, to finance their respective PPP projects. These options do pose some limitations to PPP transactions in that the concessionaires must receive the prior approval of the grantor to be listed on the stock exchange. In addition, any transfer of concessionary rights must also receive the prior approval of the grantor even when it becomes inevitable as a result of changes to the company's shareholding structure.

Project financing via financial institutions also imposes similar limitations to those mentioned above. Generally, project funding requirements must contain a step-in clause; in case of critical situations the financial institution, as a creditor of the project, shall have rights to step in and take control the PPP project granted in favour of the financial institution. Thus, the possibility of the financial institution exercising its step-in rights remains open at all times throughout the venture, which, if petitioned, must receive prior approval from the relevant state authority.

There is no restriction under Thai law for seeking cross-border financing; therefore, so far it has been freely employed. BTSGIF and JASIF were open for sale indiscriminate of borders.

VII RECENT DECISIONS

A look at recent court judgments indicates a strict adherence to the rules and regulations governing PPPs and suggests a failure to do so would warrant legal and binding consequences.

An example is the judgment of the Highest Administrative Court No. Aor. 349/2549, where the Court ruled that the latest amendment to a PPP contract made by the relevant state agency and ITV Public Company Limited was non-binding as it failed to comply with the PPSU Act in relation to the procedure of amendment to the PPP contract. The legal consequences of the court judgment in relation to non-binding PPP contracts remain unclear, meaning that unlawful amendments to a PPP contract should be void or voidable or automatically terminated or still valid until it is terminated by the relevant state agency.

VIII OUTLOOK

As a growing nation, Thailand has tremendous need for investments in infrastructure development and public services to promote the nation's economy, support the fast-paced urbanisation and enhance the quality of life of the general public. Thailand's latest development plans, the 12th National Economic and Social Development Plan (2017–2021) and Thailand 4.0 Policy explicitly place an emphasis on infrastructure development and logistics systems.

However, the capacity of the government to provide funds directly to infrastructure and public services projects is limited. Therefore, the government recognises the innovative PPP mechanism as a prominent instrument in the implementation of projects in Thailand, as evidenced by the amount of PPP projects successfully implemented or currently undergoing bidding and procurement procedures. According to the PPP Strategic Plan, the total estimated investment cost of projects included in the Public Private Partnership Strategic Plan is 1.4 trillion baht, and, currently, there are 66 projects in the PPP Project Pipeline. In light of the robust trend in public sector investment projects and the fact that a number of PPP undertakings are being rolled out, it is anticipated that the implementation of PPP projects in Thailand will continue to be in significant demand. Accordingly, the PPP market in Thailand will continue to grow in the subsequent years.