

THAILAND

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I OVERVIEW

Public-private partnerships were formally introduced to the Thai legal framework by the promulgation of the Private Participation in State Undertakings Act BE 2535 (1992) (the PPSU Act). For two decades the PPSU Act served as the foundational piece of legislation administering PPPs in Thailand; however, it lacked clear-cut criteria addressing matters of scope, duration and authority with regard to initiating and implementing PPPs.

To remove such ambiguities, the Private Investments in State Undertakings Act BE 2556 (2013) (the PISU Act) was enacted. The PISU Act explicitly remarks that Thailand is in need of infrastructure constructions and various other forms of public services, an imperative that is echoed in many other state publications addressing state policy stated in the Constitution, development goals and plans.

PPPs are beginning to take a stronghold nationally as the government relies on PPPs as the main mechanism in developing the nation's infrastructure. They can be observed in two different regimes: under the PISU Act and under the Eastern Economic Corridor of Thailand (EEC). With such growth in the utilisation of PPPs came the official realisation that the framework laid out by the PISU Act needed to be further developed and improved.

In the current political climate, and with the need for the development of Thailand's infrastructure, there is a push for new legislation to repeal and replace the PISU Act with a new act (the New PPP Act) to allow PPPs to be conducted in Thailand in accordance with international standards. Notable objectives include attracting high-quality private participation, both locally and abroad, ensuring better consideration of the partnership aspect in the various facets of PPPs, and creating an infrastructure plan that will specify various details of PPP projects. The New PPP Act was approved by the cabinet in December 2018 and was passed by the National Legislative Assembly (NLA) in March 2019 and became effective from then.

II THE YEAR IN REVIEW

The PISU Act is composed in such 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 Public-Private Partnerships Policy Committee (the Committee), a Notification issued by the State Enterprise

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Policy Office (the Office), 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.

The above-mentioned improvements to the PISU Act have been based on principles that reflect international standards and touch upon the following points: the applicability criteria of PPP projects; the business case and the development thereof pursuant to guidelines drafted with the aim of ensuring fair risk sharing that does not overburden the state; full consideration of possible and befitting government support measures; transparent procurement procedures inclusive of negotiation; and opening up the option of authority step-in for cases that may be detrimental to national security. For the EEC, the Eastern Special Development Zone Act BE 2561 and a number of ancillary laws have been enacted to establish the rules and procedures in relation to PPPs:

- a* Notification of the EEC Policy Committee regarding Rules, Conditions and Procedures for Private Investments BE 2560 (2017);
- b* Notification of the EEC Office regarding the Structure and Details of the Study and Analysis Report of the Project BE 2560 (2017);
- c* Notification of the EEC Office regarding the Rules and Procedures in Market Sounding BE 2560 (2017);
- d* Notification of the EEC Office regarding Invitation for Bids, Procedures for Invitation for Bids, Rules regarding Selection Procedures, Details of the Documents in Selection Procedures, and Standards to the PPP Contract BE 2560 (2017);
- e* Notification of the EEC Office regarding the Qualifications of Consultants BE 2560 (2017); and
- f* Notification of the EEC Office regarding Non-bidding BE 2560 (2017).

To assist in the proper implementation of the above notifications governing PPPs in the EEC, the EEC Office is in the process of finalising guidelines that reflect best practice standards.

Current outstanding EEC projects include U-Tapao International Airport, with the projected capacity of 60 million passengers annually; a high-speed rail linking three airports, connecting Rayong province and Bangkok metropolitan city; Laem Chabang Port, Phase 3; and Map Ta Phut Industrial Port Development, Phase 3.

The total amount of investment for all of the projects in the EEC area exceeds 1.5 trillion baht. All aforementioned projects have obtained approvals from the relevant authorities, including the Cabinet, and are in the process of selecting private entities for the projects, which are expected to be completed by the first quarter of 2019. Further, there are other projects in the ECC currently under way, including Digital Park Thailand, which is expected to be acknowledged by the Cabinet within the second quarter of 2019. The project implementation period for these projects is considerably faster compared to the implementation of projects under the PISU Act, and public sector involvement in the development of these projects is increasing as the EEC ancillary laws require the collection and analysis of the private sector's opinion acquired through market-sounding procedures.

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 a state undertaking and a public-private joint investment will be eligible for PPP procurement.

However, the New PPP Act is projected to clarify the applicability criteria and focus and reserve the use of PPPs for infrastructure projects, such as hospitals, roads, schools and trains, to maximise the use of state assets. The use of state assets is being studied and reviewed for PPPs in the EEC, but such criteria is open to other projects that the government may want to encourage and support for the development of the national economy and its markets.

ii Types of public-private partnership and the transfer of the assets used in the project

PPPs in Thailand may 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 further defined by the functions under the responsibility of the private entity. The most common type of PPP for infrastructure projects are:

- a design–build–operate–maintain (DBOM): the private entity is in charge of the development and long-term operation and maintenance of the asset, as well as the arrangement of financing; and
- b operate and maintain (O&M): the private entity is in charge of the operation and maintenance, as well as the arrangement of financing.

For the transfer of the project's assets, most PPP projects in Thailand have used the following contractual structures: build–own–operate, where a private organisation builds, owns and operates some facility with some degree of encouragement from the government; build–transfer–operate, where a contract is signed between an authorised state agency and investors to build an infrastructure facility completely, and then the investors transfer the facilities to the authorised state agency and obtain the right to operate such facility commercially for a fixed term; and build–operate–transfer, whereby the investor transfers 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.

Although the type of PPPs are disencumbered, some caution must be made to the type of assets that are being transferred and owned by the private entity as the Constitution prohibits the private ownership of infrastructural public utility services that are essential for the nation's subsistence and security.

iii The authorities

Under the PISU Act, there are three main authorities involved in the PPP process: the Cabinet, the Committee and the Office.

The Cabinet plays an important role in administering the principles of the particular PPP project, and in budgeting the annual government statement of infrastructure for the PPP project. The Cabinet is the final approving authority when it comes to the private entity

selection and the draft PPP contract during the procurement stage. The role of the Cabinet during the procurement stage may be reduced in the upcoming New PPP Act to increase efficiency and flexibility in the PPP process.

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: prepare a strategic plan; give approval in principle to a project involving a private investment and the operation of a project; prescribe rules and regulations under the PISU Act; and give decisions on issues pertaining to the implementation of this Act.

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: prepare a draft strategic plan for submission to the Committee; study and analyse projects and submit opinions to the Committee for consideration and approval; 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 to promote and build an undertaking of private investments in state undertakings; and report problems and obstacles arising from the implementation of the PISU Act to the Committee.

As for the EEC region, there are three main authorities: the Cabinet, EEC Policy Committee, and the EEC Office. In comparison to the current PISU Act, the role of the Cabinet is confined to approving the principles of the PPP project and apportioning the state budget. The EEC Policy Committee plays a role similar to the Committee and has the authority to independently approve the private entity selected from the procurement process, without screening or approval of the Cabinet. Similarly, the EEC Office plays a role similar to the Office.

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;
- e* changes to a contracting party, contractor, subcontractor and the assignment of claims;
- f* *force majeure* events and actions in the case of a *force majeure* event, including payment of compensation;
- g* causes for termination of the contract, methods of termination, consequences of termination other than termination as a result of expiry, as well as information relating to actions to be undertaken to continue the provision of services if the suspension of the project, and payment of damages arising from the termination of the contract;
- h* step-in right and details thereof;

- i* 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 because of this being the general practice for that particular type of PPP contract; and
- j* the governing law of the PPP contract and the implementation of the project shall be Thai law.

Notably, the PISU Act and the PPP regime under the EEC allows the concept of a direct agreement, an agreement to be entered by and between the private entity, the bank and the procuring government agency in order to increase the bankability factor. The step-in right specified in such agreements protects the banks, and ultimately the project, with the recourse of a capable private entity ‘stepping in’ to preserve the continuity of a project under distress induced by the collapse of the former private entity. Under the EEC framework, the direct agreement is to be attached as an annex of the PPP contract signed between the host agency and the private entity.

Apart from 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. Legal provisions regulating all general PPPs and PPPs under the EEC framework reiterate the same principle and prohibit granting the private entity 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.

Language requirements in the Thai context means that 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 must be included in the contract indicating that, in the event of any conflict or discrepancy between the two, the parties will comply with the original Thai document.

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

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 Selection Committee, made up of the host agency as chairman, representatives of the Office and the Office of the Attorney-General as members, 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 under the EEC framework is a distinct entity, but similarly composed of the host agency as chairman, representatives of the EEC Office and the Office of the Attorney-General as its members.

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 this case, only the selected investors will receive the invitation for bids.

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

Once approved, the host agency must publish the invitation for bids at least 60 days before 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 that 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. The Selection Committee plays a significant role in the project implementation to evaluate and select the private investor.

After a negotiation with the selected party is concluded, the Office and the Office of the Attorney General will jointly submit their opinion to the responsible minister for consideration and approval. Under the PISU Act, 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. As mentioned above, however, this role will be shifted to a minister of a relevant

Ministry. As for the PPPs in the EEC, the EEC Policy Committee grants the final approval. The standard of the evaluation process developed is safeguarded via the incorporation of the one-stage, two-stage and multi-stage processes.

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 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.

Another is 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

As a general rule, PPP projects must 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, for both the New PPP Act and the current EEC framework, there are legal specifications made to the risk sharing measures between the state and the private entity that factors in the partnership concept.

The distribution of risk is due to be regulated by appropriate guidelines, which will be enacted for the proper conduct of the business case, and the drafting of the PPP contract.

iv Adjustment and revision

As a result of PPPs being eligible under two different regimes in Thailand, there are two different procedures involving adjustments and revisions of the PPP contract.

Under the PISU Act, the emphasis is on whether the adjustment is of a material nature. Depending on such determination, the proposed amendment will be passed through different authorities and require additional oversight. For instance, where the Supervisory Committee finds that the amendment of the contract is material in nature, the host agency will 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.

For amendments to the PPP Contract under the EEC framework, soon to be implemented in the new PPP Act, the process goes as follows.

If the alterations as mutually agreed by the parties do not affect the scope of the project, the reasons and necessity for such alteration; points to be amended; effects of such amendments; and other details shall be sent to the Supervisory Committee, then the comments will be sent back to the project owner agency, who will then send it to the Office of the Attorney General (after whose consideration will be sent back to the project owner agency). The project owner agency will then send comments of the Supervisory Committee; points to be amended; and the PPP contract that has been newly considered by the Office of the Attorney General to the EEC Office, who will then pass it on the EEC Policy Committee. The EEC Policy Committee will then be the final approving authority.

If these alterations do affect the scope of the project (the scope of the project that has been previously approved by the Cabinet), the process will be the same; however, after the EEC Policy Committee gives its approval, the EEC Office shall pass it to the Cabinet, which will be the final approving authority.

v Ownership of underlying assets

Under the PISU Act and the EEC framework, there is no provision stipulating clearly which contractual party has ownership of the underlying assets. Nevertheless, the PISU Act notes that a standard PPP contract must contain a clause indicating 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. As mentioned above, heed must be paid to private ownership of assets that relate to infrastructural public utility services that are essential for the nation's subsistence and security.

vi Early termination

Although the consequence for early termination is absent in the PISU Act, it is featured in the EEC framework and the New PPP Act. If the early termination is not the fault of the private entity, the government is to provide appropriate compensation that is fair and by which it applies a proper calculation mechanism. This reflects the partnership concept and ensures qualified private participation. For cases where the early termination is because of acts or deeds by the private entity, however, the state is entitled to recover its loss arising out of such breach from the private entity.

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 of 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.

Under both the EEC framework and the New PPP Act, there are specifications that instil the use of a direct agreement to promote bankability and confidence in the project coming to successful completion. Step-in and step-out rights are available for banks to opt for, which makes it possible for banks to retain steady inflow of compensation for the repayment of loans throughout the life cycle of the projects. The procedures are outlined in the guideline regarding the PPP contract.

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 a 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. 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.

Because the PISU Act is still in effect, relevant governmental agencies must operate PPPs to full completion under the PPP Strategic Plan 2017–2021. The total estimated investment cost of projects included in the Public Private Partnership Strategic Plan is 1.4 trillion baht, and currently there are 55 projects in the PPP project pipeline. The next novel piece of legislation of the New PPP Act will be coupled with a more detailed infrastructure plan, which will send rippling effects through infrastructural developments in Thailand where PPPs will be elected as the mechanism.

Apart from the projects currently under way in the EEC, the government is seeking to introduce and increase the number of available projects pursuant to state policies aimed at increasing the interest of foreign investors.

In light of the robust trend in public sector investment projects and the fact that a number of PPP undertakings are being rolled out along with the enactment of the New PPP Act, 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 coming years.