

PUBLIC-PRIVATE PARTNERSHIP ACT

Act 37 of 2004 — 1 March 2005

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PUBLIC-PRIVATE PARTNERSHIP ACT

1. Short title

This Act may be cited as the Public-Private Partnership Act.

2. Interpretation

In this Act—

“affordable”, in relation to an agreement, means that the contracting authority shall meet any financial commitment likely to be incurred in relation to that agreement, from its existing or future budgetary funds;

“agreement” means a public-private partnership agreement;

“asset” includes an existing asset of a relevant contracting authority or a new asset to be acquired for the purposes of entering into an agreement;

“Board” has the same meaning as in the Public Procurement Act;

“Committee” means the Public-Private Partnership Committee set up under section 3;

“contingent liability” includes Government guarantee for loan and foreign currency transfer and step-in function in the event of default by the relevant contracting authority;

“contracting authority” means any Ministry or Government Department, local authority or statutory corporation;

“local authority” has the same meaning as in the Local Government Act;

“Minister” means the Minister to whom responsibility for the subject of finance is assigned;

“private party”, in relation to an agreement, means a party to the agreement other than a contracting authority;

“project” means a project to be implemented under an agreement;

“public-private partnership agreement” means an agreement between a contracting authority and a private party, approved under this Act, in terms of which—

- (a) the private party undertakes to perform a contracting authority’s function on behalf of the contracting authority for a specified period;
- (b) the private party receives a benefit for performing the function by way of—
 - (i) compensation from a revenue fund;
 - (ii) charges or fees collected by the private party from users or customers of a service provided by it; or
 - (iii) a combination of compensation and charges or fees;
- (c) the private party is liable for the risks arising from the performance of its function;
- (d) State facilities, equipment or other State resources may be transferred or made available to the private party;

“request for proposal” means the specific terms of the project requirements, the procedures for submission of bids, the criteria for the evaluation of bids and includes a model agreement;

“value for money” means the provision by which the contracting authority’s functions under an agreement shall result in a net benefit to the consumers in terms of cost, delivery, price, quality, quantity or risk transfer, or a combination thereof.

[S. 2 amended by s. 63 (1) of Act 33 of 2006; s. 28 (a) of Act 18 of 2008 w.e.f. 19 July 2008.]

3. Public-Private Partnership Unit

There is set up for the purposes of this Act, a unit within the Ministry to be known as the Public-Private Partnership Unit which shall deal with matters relating to a public-private partnership project referred to it by the Committee.

[S. 3 repealed and replaced by s. 28 (b) of Act 18 of 2008 w.e.f. 19 July 2008.]

3A. Public-Private Partnership Committee

(1) There shall be a Committee to be known as the Public-Private Partnership Committee which shall deal with all matters relating to a public-private partnership project.

(2) The Committee shall consist of—

- (a) the Director of the Procurement Policy Office, who shall be the Chairperson;
- (b) a representative of the Ministry;
- (c) a representative of the Ministry responsible for the subject of public infrastructure; and
- (d) a representative of the Attorney-General's Office.

(3) The Committee may co-opt such other persons as may be of assistance in relation to any matter before the Committee.

(4) The Committee shall meet as often as is necessary at such time and place as the Chairperson thinks fit.

(5) The Committee shall regulate its meetings and proceedings in such manner as it thinks fit.

[S. 3A inserted by s. 28 (b) of Act 18 of 2008 w.e.f. 19 July 2008.]

3B. Functions of the Committee

The Committee shall—

- (a) make an assessment of a project submitted to it and give its recommendations to the relevant contracting authority;
- (b) develop best practice guidelines in relation to all aspects of public-private partnership;
- (c) formulate policy in relation to public-private partnership projects; and
- (d) develop public-private partnership awareness in the country.

[S. 3B inserted by s. 28 (b) of Act 18 of 2008 w.e.f. 19 July 2008.]

3C. Unsolicited Proposal

(1) Any person may, notwithstanding section 4 (1) (a), but subject to this Act, identify a project to be implemented under an agreement and submit to the contracting authority—

- (a) a description thereof; and
- (b) an estimated cost of the feasibility study of the project.

(2) The estimated costs referred to in subsection (1) (b) shall not exceed 3 per cent of the project value and shall be subject to the approval of the Committee.

(3) On receipt of a project under subsection (1), the contracting authority shall, within 15 working days, refer the project to the Committee together with its recommendations.

(4) Where, pursuant to section 3B (a), the Committee recommends the retention of the project, the contracting authority shall, within 5 working days, request the person to submit a proposal in relation thereof, containing—

- (a) details of his technical, commercial, managerial and financial capabilities;

- (b) a feasibility study containing the technical and commercial details of the project; and
- (c) the nature of information which is proprietary.

(5) On receipt of the proposal referred to in subsection (4), the contracting authority shall proceed in accordance with section 4 (1) (d).

(6) The person making the proposal shall be requested in the request for proposal under section 4 (1) (d) to submit only its financial proposal.

(7) The contracting authority shall specify in the request for proposal referred to in section 4 (1) (d) that in case the price quoted by the person making the proposal is within the range of 10 per cent when compared with the price quoted by a preferred bidder, the person making the proposal shall be the preferred bidder.

(8) The contracting authority shall follow the procedures relating to the invitation for request for proposal in accordance with this Act.

(9) Where the person making the proposal under this section—

- (a) is not the successful bidder, the contracting authority shall—
 - (i) compensate the person for the costs of the feasibility study referred to in subsections (1) and (2); and
 - (ii) claim such costs from the successful bidder;
- (b) is the successful bidder, the costs of the feasibility study referred to in subsections (1) and (2) shall be borne by the person.

[S. 3C inserted by s. 28 (b) of Act 18 of 2008 w.e.f. 19 July 2008.]

4. Responsibilities of contracting authority

(1) Subject to subsection (2), a contracting authority shall for the purposes of this Act—

- (a) identify, appraise, develop and monitor a project to be implemented under this Act;
- (b) undertake or cause to be undertaken a feasibility study where it considers that a project may be implemented under an agreement;
- (c) submit the feasibility study to the Committee for its approval;
- (d) prepare a request for proposal on the approval of the feasibility study and, where the terms of the model agreement impact on public finance, seek the approval of the Committee.

(2) Any project for which there is no financial or contingent liability for Government shall be exempt from the approval of the Committee.

[S. 4 amended by s. 28 (c) of Act 18 of 2008 w.e.f. 19 July 2008.]

5. Feasibility study

(1) Every contracting authority shall undertake or cause to be undertaken a feasibility study where it considers that a project may be implemented

under an agreement, to assess whether the proposed project is feasible as a public-private partnership project.

(2) The feasibility study shall—

- (a) demonstrate comparative advantage in terms of strategic and operational benefits for implementation under a public-private partnership agreement;
- (b) describe in specific terms—
 - (i) the nature of the contracting authority's functions, the specific functions to be considered in relation to the project, and the expected inputs and deliverables;
 - (ii) the extent to which those functions can lawfully and effectively be performed by a private party in terms of an agreement; and
 - (iii) the most appropriate form by which the contracting authority may implement the project under an agreement;
- (c) demonstrate that the agreement shall—
 - (i) be affordable to the contracting authority;
 - (ii) provide value for money; and
 - (iii) transfer appropriate technical, operational or financial risk to the private party;
- (d) explain the capacity of the contracting authority to effectively enforce the agreement, including the ability to monitor and regulate project implementation and the performance of the private party in terms of the agreement.

6. Public-private partnership agreement

(1) Notwithstanding any other enactment but subject to this Act, a contracting authority may enter into an agreement with a private party for the performance of one or more of the functions of that contracting authority.

(2) Every agreement shall—

- (a) identify the responsibilities of the contracting authority and the private party;
- (b) specify the relevant financial terms;
- (c) ensure the management of performance of the private party;
- (d) provide for the return of assets, if any, to the contracting authority, at the termination or expiry of the agreement, in such manner as may be provided for in the agreement;
- (e) provide for the sharing of risks between the contracting authority and the private party;
- (f) provide for the payment to the private party by way of compensation from a revenue fund or of charges or fees collected by the private party from users or customers of a service provided by it;

- (g) provide for its duration; and
- (h) contain such other information as may be prescribed.

(3) Every agreement shall be governed by and construed in accordance with the laws of Mauritius.

(4) Every agreement shall provide for disputes between the private party and the contracting authority to be settled by arbitration, according to the rules defined in the agreement.

7. Referral to Central Tender Board

Where the Financial Secretary approves the terms of the model agreement pursuant to section 4 (1) (d), the contracting authority shall submit a request for proposal to the Board to obtain its written authorisation to advertise, invite, solicit or call for bids.

8. Pre-selection of bidders

(1) The contracting authority shall consult the Board to obtain its written authorisation to conduct a pre-selection exercise.

(2) The pre-selection document shall be prepared by the contracting authority and shall include a public invitation for applicants to apply for pre-selection.

(3) Every pre-selection document shall be subject to the written approval of the Board before its issue and publication.

(4) The Board shall carry out a pre-selection exercise to select potential bidders or may delegate its powers under this subsection to the contracting authority where the Board considers that the contracting authority has the necessary expertise to undertake the pre-selection exercise.

(5) In the exercise of its powers under this section, the Board shall strive for the highest standard of equity by ensuring that all bidders are afforded equal opportunity and are treated fairly.

(6) Notwithstanding subsection (1), a proposal referred to in section 3C (4) shall not be subject to a pre-selection exercise under this section.

[S. 8 amended by s. 28 (d) of Act 18 of 2008 w.e.f. 19 July 2008.]

9. Invitation to bid

(1) The contracting authority shall prepare and submit to the Board for its written approval, a request for proposal.

(2) No document pertaining to a request for proposal shall be issued to pre-selected bidders or bidders unless approved by the Board.

10. Powers of Board

(1) The Board—

- (a) shall be responsible for ensuring transparency and equity in the bidding procedures;

- (b) shall examine and evaluate the bids received;
- (c) shall make recommendations to the contracting authority for entering into negotiations with the preferred bidder; and
- (d) may approve the award of the project.

(2) In the discharge of its functions under this Act, the Board may—

- (a) commission any study relevant to the determination of the award of a project;
- (b) request any professional or technical assistance from any appropriate body or person in Mauritius or elsewhere;
- (c) in relation to the examination and evaluation of bids, refer the bids to the appropriate contracting authority for examination and evaluation provided that the Board is satisfied that the contracting authority has the necessary expertise to do so.

(3) Where bids are referred to a contracting authority under subsection (2) (c), the contracting authority shall examine and evaluate the bids and submit to the Board its findings within such time as may be determined by the Board.

(4) The Board may—

- (a) request the Chairperson, supervising officer or Chief Executive Officer of a contracting authority—
 - (i) to furnish any information or produce any records or other documents relating to a project;
 - (ii) to answer all relevant questions;
- (b) examine such records or other documents and take copies or extracts therefrom.

(5) Any person to whom a request is made under subsection (4) who—

- (a) fails to comply with the request; or
- (b) refuses to answer or wilfully gives any false or misleading answer to any question lawfully put by the Board,

shall commit an offence and shall, on conviction, be liable to a fine not exceeding 50,000 rupees and to imprisonment for a term not exceeding 8 years.

(6) Where the Board makes recommendations in terms of subsection (1) (c), any change in the terms of the agreement which impacts on the approved model agreement shall be submitted by the contracting authority to the Committee for the approval of the changes to be brought to the terms of the agreement.

(7) Where the Committee approves a change submitted under subsection (6), the contracting authority shall seek the final approval of the Board for the award of the project.

[S. 10 amended by s. 28 (e) of Act 18 of 2008 w.e.f. 19 July 2008.]

11. Award of project and signature of agreement

No contracting authority shall award a project or sign an agreement unless—

- (a) the award of the project has been approved by the Board; and
- (b) the agreement relating to the project has been approved by Cabinet.

12. Regulations

(1) The Minister may make such regulations as he thinks fit for the purposes of this Act.

(2) Regulations made under subsection (1) may provide for the levying of fees and charges.

13. —

14. Act not applicable

This Act shall not apply where a contracting authority has, before the commencement of this Act, issued a request for proposal in respect of a project.

15. —
