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New law on public – private partnership

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NEW LAW ON PUBLIC-PRIVATE PARTNERSHIP

I. General understanding

The Parliament of Mongolia enacted the Public-Private Partnership Law (“PPP Law”) based on the research of model law on Public-Private Partnership and its handbook replacing the previous Law on Concession (2010) on 9th December, 2022 and coming into effect on 31st December, 2023.

The new law clarifies the purpose, scope, principles, terms and understanding of public-private partnership and distinctly defines the legal framework for implementation of major infrastructure, social and economic goals of the country and the plenary powers and functions of public institutions in public-private partnerships by implementing public infrastructure and public service functions through private investment on mutually beneficial terms. Also creates a legal environment for implementing financial and budget control by improving coordination between these organizations related to the implementation of partnership projects.

Scope of the PPP Law

Public-Private Partnerships will be implemented on **public infrastructure** (public service buildings, highways, railways, cableways, underground and above-ground road facilities, all types of engineering networks, simple and engineering designs and structures for the prevention of disasters and accidents) and **public services** (services provided by the government in infrastructure, energy, roads, transportation, health, education, culture and other related fields to create a comfortable living environment for citizens in an equal, accredited and efficient manner in accordance with laws and standards).

Public-private partnership does not apply to defense, banking sector and financial market services, and the activities of exploration, mining, and exploitation of minerals for for-profit purpose, other than providing services to the public through the infrastructure of the mining industry.

II. The types of Partnership Agreements

The PPP Law states following partnership agreement types depending on varying characteristics of the projects:

1. Design and budget, build, operate and transfer
2. Build, operate and transfer
3. Build, transfer and operate
4. Build, lease, operate and transfer
5. Build, own, operate and transfer
6. Lease and let for public service provision
7. Operation and maintenance
8. Renovate, possess, operate and transfer
9. Implement management
10. Other types of partnership agreements defined through thorough analysis in accordance with the project requirements.

Short term agreements such as “Build-transfer” outlined in the previous law (Concession Law) is deemed unbeneficial, therefore investing on such project thorough public-private partnership is prohibited under the PPP Law.

The Partnership Agreements’ terms stated in the PPP Law may vary depending on the agreement type, sector of implementation and main characteristics of the project and to be determined by negotiation of the parties for up to 30 years. The parties may extend the term of the partnership agreement once for up to 10 years with the approval of the Government.

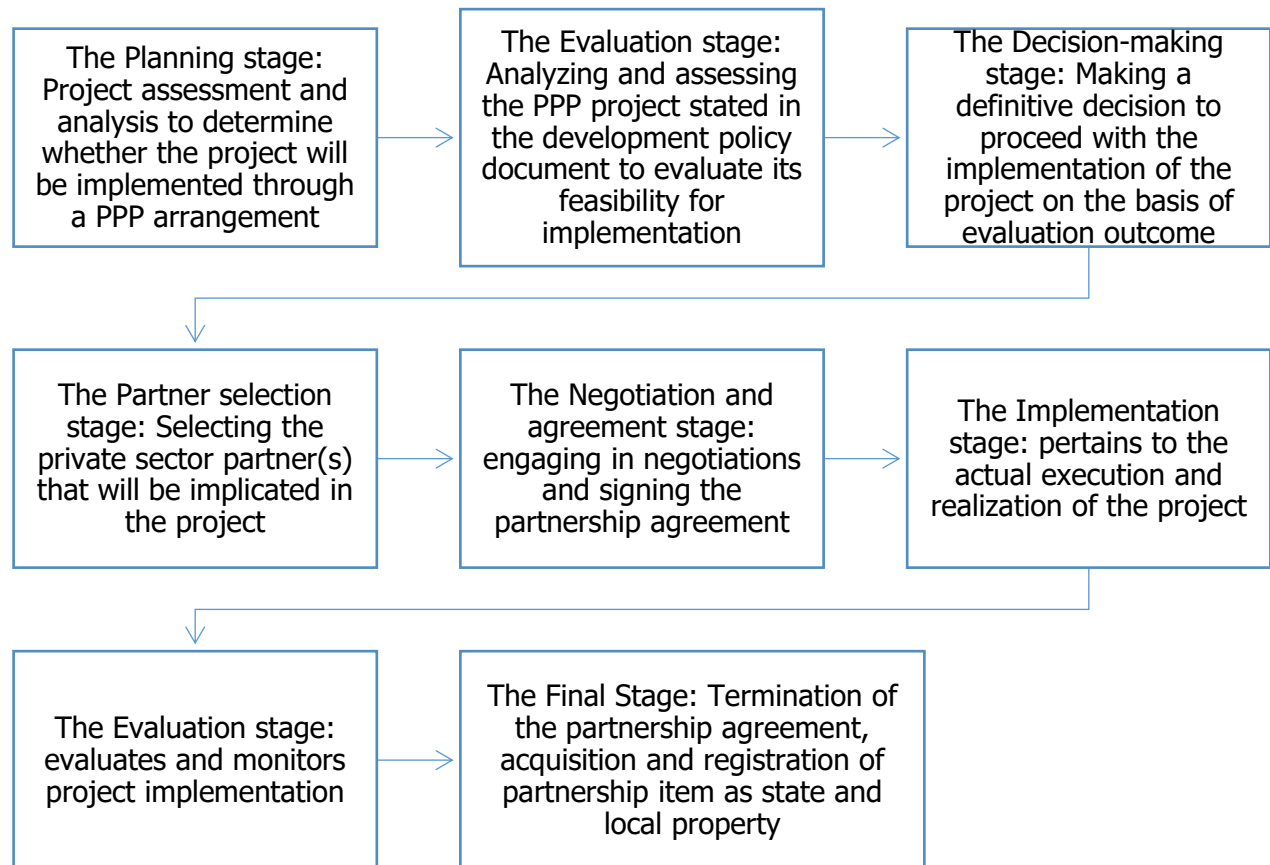
Partnership parties

State partner – (a) Ministries of Mongolia, (b) Provincial and Capital Mayor, and (c) state or local ownership, state or local ownership dominated entity

Private partner – A legal entity and a union of legal entities with foreign or domestic investment established in accordance with the Laws and Regulations of Mongolia, specifically Company Law and Investment Law, which has the function of concluding a partnership agreement with the above-mentioned state partner and implementing the partnership project specified in this Law.

III. Partnership project stages

Partnership projects are to be executed through following stages:



Selection process of Private Partner (s)

The selection process for private partners comprises two stages: (a) preliminary selection; and (b) competitive selection.

In the preliminary selection stage, project proposals submitted by private sector participants will be evaluated. Participants that meet the requirements will be shortlisted and eligible to proceed to the competitive stage.

In the competitive stage, a model partnership agreement will be prepared, subject to approval by the Ministry of Economy and Development. Following the approval, the selected participants will engage in negotiations to finalize the terms of the partnership agreement. Further, necessary approvals for the conclusion of the partnership agreement will be obtained from the Ministry of Finance and the Government.

Main requirements for participants in the selection process:

1. The participant must have the financial capacity, management, professional human resources, technical and technological skills, and work experience to implement the project;
2. In accordance with the Law on Permits, the participant must be qualified to obtain the ordinary and special permit;
3. Liquidation and bankruptcy of the legal entity has not been initiated and has not ceased operations or its assets have not been frozen according to the Laws and Regulations of Mongolia;
4. There must be no valid court decision due to breach contract on company's account in the last 3 years;
5. Shareholder or authorized officer of the company must have no records of conviction and must have no common interest or relation with the executive officer of state partner and have no conflict of interest;
6. The ultimate owner of the company participating in the selection process must have no relations with its subordinate or subsidiary companies;
7. The participant must not be the "related person" defined in article 27 of the General Tax Law.

IV. Role of PPP partners

In the partnership, the **state partner** has the following general functions:

1. monitor the activities of private sector partners related to project implementation, involve audit organizations in accordance with the partnership agreement and relevant legislation;
2. obtain necessary documents within the framework of the partnership agreement and have unobstructed access to the property;
3. ensure, monitor, evaluate and conclude the implementation of partnership projects, agreements, laws and regulations;
4. create conditions for possession and operation of infrastructure facilities by private sector partners in accordance with the partnership agreement;
5. grant rights of the partnership items to private sector partners on the basis of terms and conditions specified in the partnership agreement;
6. finance project expenses from the budget according to the partnership agreement;
7. implementation of government support measures necessary for the implementation of the project in cases specified in the partnership agreement;
8. set criteria for the quality and level of services provided by the partnership project and monitor, evaluate and report accordingly;
9. other functions that are stated in the agreement and relevant Laws and regulations.

In the partnership, the **private sector partner** has the following general functions:

1. meet their contractual obligations in a performance-based, high-quality and efficient manner;
2. investment and financing of partnership projects must be self-funded or through other financial means;
3. introduce the best practices, innovation and know-how of operations and management in the field;
4. strengthen the capacity of own and participating partner organizations;
5. exercise the rights applied to partnership items in accordance with the conditions specified in the partnership agreement;
6. provide the state partner with reports and information in time for implementation of the functions specified in this law regarding the quality and availability of the project and ensure its accuracy and reliability;
7. other functions stipulated by partnership agreement and law;

V. Types of Financing

The private sector partners will have following three types of financing source depending on the type of partnership project according to the law:

1. through user fees, charges and project income;
2. from the budget as specified in the partnership agreement; and
3. combination of the above mentioned ways.

Public-Private Partnership is the duty of the state administrative organization in charge of partnership or the Ministry of Economic and Development. The budget, financial management and control of the public and private sectors fall within the scope of the Ministry of Finance.

Government guarantees

The Government shall provide following guarantees for projects that are being implemented through partnership based on results of thorough analysis:

1. a guarantee to fund the PPP project from the state budget in the event of a violation of the main terms of the partnership agreement or its related agreements;
2. a guarantee to purchase and use goods, works, and services created during the implementation of the PPP project;
3. a debt guarantees for loans necessary to facilitate the implementation of the PPP project.

Support measures from the state

The Government, based on its decision and within the framework of the partnership agreement, can offer various forms of support to private sector partners, which may include:

1. granting rights to possess or use land in accordance with the Land Law of Mongolia
2. provide conditions for the provision of public services, grant the right to use state and local properties
3. providing tax benefits and exemptions as stipulated by relevant laws
4. allocating a portion of project financing from the budget, as outlined in the partnership agreement
5. if necessary, insure the subject of the partnership
6. providing necessary public infrastructure and public services required for the implementation of projects beyond those created through the PPP project; and
7. provide support in other forms prescribed by law.

VI. Termination of Partnership Agreement

The partnership agreement shall terminate upon the following cases:

1. Term of the partnership agreement is expired and the parties have not requested for extension;
2. One of the parties to the partnership agreement has violated its contractual obligation and failed to take effective measures to eliminate such violation;
3. Force majeure event has occurred and it has become unable to eliminate the situation;
4. Unless otherwise stipulated in the law and the partnership agreement, the private partner has gone insolvent or been liquidated;
5. The agreement has been terminated in accordance with the law and the partnership agreement.

The partnership agreement shall be unilaterally terminated by the state in the following cases:

1. The private partner has seriously breached the agreement, failed to fulfill contractual obligations, or failed to properly fulfill them which are specified as grounds for termination of the agreement;
2. The partnership project cannot be implemented due to the liquidation of the private partner, and it will harm public interest; and
3. It has been found that the partnership agreement was made in violation of the PPP law and other relevant legislation.

The partnership agreement may be unilaterally terminated by the private partner in the following cases:

1. The partnership project has been suspended temporarily due to wrongful actions of the state partner;
2. The state partner has intervened the business operation of the private partner and taken an unlawful decision or prohibition measure that makes the private partner unable to fulfill its contractual obligation;
3. It has been found that there is an outstanding debt for the land, other movable and immovable property owned and used by the private partner for the implementation of the partnership project prior to conclusion of the agreement, or that there are breaches not reported to the private partner at the time of conclusion of the agreement which makes it unable to continue the agreement normally.

The Agreement shall specify how to calculate the compensation to be paid to the parties upon termination of the partnership agreement, and may include the appropriate value of the work performed under the partnership agreement, expenses incurred, and actual damages suffered by the party.

VII. Procedure for filing and resolution of complaints, and dispute resolution

If the state partner violates the PPP Law and other relevant regulations regarding preliminary stage of the selection process, the participant of a private sector partner may file a complaint with Dispute Settlement Body within 5 working days. At the request of the participant, a national or international expert may be involved in the dispute resolution process and the cost should be handled by the participant.

Any dispute in connection with the partnership agreement or the partnership project between parties shall be resolved through mutual agreement, and in the absence of mutual agreement, the dispute shall be resolved by the courts of Mongolia or national or international arbitration according to the partnership agreement.

Sources:

1. Law of Mongolia on Public-Private Partnership (2022)
2. Law of Mongolia on Concession (2010)
3. Resolution No. 64 of the Parliament approval on policy documents to be followed by the government regarding Public-Private Partnership Law of Mongolia (2009)
4. Concession Law Implementation Impact Assessment Report from the Ministry of Economy (2021)
5. Technical Note series published by ADB East Asia Department on Public-Private Partnership Law (2016)

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