



## **PUBLIC-PRIVATE PARTNERSHIP**

### **Key Documents**

*2 April 2024*

*A successful PPP project requires documents to be prepared with adamant consistency to ensure that both the rights and obligations of the parties are fully enforceable. It becomes more relevant when a PPP project needs financial support from a lender who, by law, is not directly a party in a PPP arrangement while ideally, the PPP documents must be prepared with the lender in mind so far as bankability and sustainability of the project are concerned.*

## 1. INTRODUCTION

The Law on Public-Private Partnership (the "**LPPP**") was promulgated on 18 November 2021, at a time when Cambodia set a clear goal to become an upper-middle-income country by 2030 and a high-income country by 2050. To achieve the goal, key infrastructure such as the transportation and logistics infrastructure needs to be gradually upgraded as reflected in recently adopted Comprehensive Master Plan on the Transportation and Logistic System (the "**Master Plan**") in the face of the increased demands in the movement of goods and persons. The required capital investment is estimated to be approximately 36 billion United States Dollar according to the Master Plan.

In the past, public infrastructure development primarily relied on financing from the State coffer and grant and/or loan offered at a concessionary interest rate by development partners. The 2007 Law on Concession (the "**LC**") was passed to alleviate the financial burden from the Government when it wishes to develop a public infrastructure. Some projects in the power sectors have been carried out in the form of Build-Operate-Transfer (BOT) under the LC which is now entirely repealed by the LPPP.

According to the Master Plan, the financing models will remain unchanged, meaning that the Government will rely on (1) the State budget, (2) loan or grant from development partners, and (3) the public-private partnership arrangement ("**PPP**"). The LPPP provides with detailed legal framework on the PPP, especially with clarity on how a project can be identified as a PPP project and different incentives that a private partner can benefit from when developing a PPP project.

While the Master Plan highlights the transportation infrastructure and logistics that need to be developed or upgraded, it has yet to determine which project will be developed under the PPP arrangement. To date, only the 2 billion dollars Phnom Penh-Sihanoukville Expressway is reportedly developed in the form of partnership between the public and private sectors, while many others are in the pipeline.

To encourage participation from the private sector in the development of key infrastructure, the LPPP proposes different incentive schemes and lays down certain documents that a private partner is expected to enter into with the Government as highlighted below.

## 2. PPP CONTRACT

### a. Nature

According to the LPPP, the PPP contract is by nature a commercial contract. In some other countries, when a public institution is a party to a contract or a contract is concluded to develop a public infrastructure or to provide public service, certain exorbitant clauses are generally expected or even required by law in favor of a party being the public institution. The requirement can be justified because the contract is

meant to deliver and improve public service by the private partner, meaning that the public interest is at play.

So far, in the Cambodian legal system, there might be circumstances where the term “civil contract”, “commercial contract” or even “administrative contract” is used, but no clear line has been drawn as to what makes a civil, commercial, or administrative contract and what the implications are. The LPPP itself fails to elaborate on the implications when it declares the PPP contract a commercial one. However, if one of the intentions of the LPPP is to attract investors to the projects to be carried out under the PPP, it has ample reasons to make the PPP contract a commercial contract. Aside from certain matters that the PPP contract must agree on (as elaborated below), the LPPP does not seem to impose any clause which favors the public entity that is a party to the PPP contract. On the other hand, according to the Standard Operating Procedure for the PPP adopted by the Sub-Decree No. 174 dated 31 August 2022 (the “**SOP Sub-Decree**”), the Government will prepare a template of PPP contract based on the nature and specificity of the project for negotiation with potential bidders. It can be understood that even though it is a template, certain aspects remain subject to negotiation.

#### **b. Content of the PPP contract**

While the LPPP does not seem to impose a PPP contract to stipulate in favor of the party being a public institution, certain matters are required to be provided in the PPP contract:

- i. Risk allocation: The goal is for the Government to benefit from the PPP the value for money, and for the private investor a reasonable profit. As for the Government, the value for money is defined as “*the potential gains that can be provided to the State through the implementation of any Project under the PPP mechanism rather than through public procurement. These gains may be evaluated through qualitative and/or quantitative analysis of benefits and costs over the project’s lifespan to demonstrate whether there are any positive benefits of the entire project life cycle. Guidelines for evaluating Value for Money shall be determined by the Royal Government.*” The definition of “value for money” is very broad and may open to different interpretations when it comes to determining the actual benefit that the Government may have in the PPP comparing to any other traditional way of financing a public infrastructure or the provision of public service. With such a broad definition, the PPP contract generally ends up having the Government representing that it has obtained the “value for money” when entering into the PPP contract;
- ii. The benefits that the investor may have in the PPP contract;
- iii. Form of PPP: According to the LPPP, the PPP may be in the form of (1) Build-Operate-Transfer, (2) Build-Own-Operate-Transfer, (3) Build-Own-Operate, (4) Management Agreement/Operation and Maintenance Agreement, (5)

Design-Build-Finance-Operate-Maintain, (6) Design-Build-Lease, and (7) **other PPP models**. The last item suggests that the form of a PPP can be flexible and generally depends on the nature of the project.

- iv. Fees: The PPP contract will determine the relevant fees and their calculation method (if any) collectible through the PPP project. As the PPP contract must be signed by the implementing agency (i.e. if the PPP is on a transportation infrastructure, the Ministry of Public Work and Transportation) and the Ministry of Economy and Finance, it is logical that any amendments to the PPP contract must be signed by both entities. To avoid multiple amendments to the PPP contract due to changes in fees, parties are encouraged to agree on a functional fee adjustment formula from the beginning.
- v. Amendment and termination Conditions; and
- vi. Term: The initial contract period shall not exceed 30 (thirty) years from the date of signing of the PPP contract. In case of necessity and based on the model of the PPP projects, the Government may determine the initial contract period longer than 30 (thirty) years.

#### c. Governing law

The PPP contract must be governed by Cambodian law. Any other project documents to which a public institution is not a party can be submitted to the law of any other jurisdiction.

#### d. Signing

On the Government side, the PPP contract must be signed by the implementing agency and the Ministry of Economy and Finance.

### 3. NOVATION AGREEMENT OR ASSIGNMENT AGREEMENT

A novation agreement is needed if a special purpose company (SPC) is assigned to become the private partner in a PPP project.

There appears to be a difference between the LPPP and the SOP Sub-Decree as to whether the establishment of an SPC is a requirement or an option. The language of the LPPP seems to make the establishment of an SPC an option, meaning that the parties will agree if an SPC is required to run a PPP project. However, the SOP Sub-Decree which approves the English version of the SOP, makes the SPC a requirement, meaning that the PPP project must be carried out by an SPC. In any case, while the law shall prevail, the discrepancy between the two legal provisions should be addressed during the negotiation of the PPP contract.

Particular attention should also be paid to the formality requirements applicable to the novation agreement. There is a mix-up in the use of terms describing the change of a party to a contract. Under the LPPP, a novation agreement is used when there is a change of party (i.e. the private partner) to the PPP contract. Under the Civil Code, when there is a change to a party of an agreement, there is an "assignment of contractual position" and not a novation which is merely an amendment to the existing obligations under an agreement between the same parties. In any case, name aside, it is the operation in a transaction that would play an important role.

The Civil Code which applies to contracts of a civil nature requires an assignment to be notified to or accepted by the obligor (i.e. the implementing agency in the case of the PPP contract in which all rights and obligations of the private partner are assigned to an SPC), or to be made in form of an instrument bearing a fixed date<sup>1</sup>, and their legal consequences are different depending on whether or not any of the formality is used for the assignment.

It is worth noting that past practice around novation to a concession agreement under the LC's framework was never fully submitted to the above formality requirement under the Civil Code. Even though the PPP contract is now made a commercial contract under the LPPP, it remains unclear as to what extent the novation to a PPP contract can depart from the Civil Code's requirement which currently constitutes general legal framework applicable to all contractual arrangements in the absence of a more specific commercial contract code or law.

It is therefore prudent that parties have proper review of the relevant novation or assignment agreement, especially in case of a further assignment as security in favor of any third party such as a project lender.

#### **4. STATE GUARANTEE**

The law also allows the Government to offer different guarantees to comfort the investors, including (1) a performance guarantee in case of failure to fulfill any obligation by the implementing agency, (2) a political risk guarantee, and (3) any other guarantee agreed by the Government. The third nature of the guarantee reflects openness and flexibility for investment in the form of public-private partnerships.

In the past, the State guarantee was a unilateral act where the State, represented by the Ministry of Economy and Finance, was the single party of the guarantee. The guarantee was also approved by law. Since the passing of the 2023 Law on Public Finance System, the State guarantee's threshold shall be provided in the annual budget law.

#### **5. DIRECT AGREEMENT**

Direct agreement is not a new concept. When the Government granted concession under the LC, direct agreements were generally entered into by the Government, notably in the

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<sup>1</sup> This requirement is viewed as "notarization process" by some.

power sector. The direct agreement aims to provide further assurance to stakeholders, especially the financiers who want to have a direct agreement with the Government in respect of the PPP project.

Under the LPPP, there are two important elements to be noted:

- a. A direct agreement is entered into between the implementing agency and the lenders. It is a bilateral agreement. No other person can be a party to the direct agreement.
- b. The direct agreement is made to re-affirm the obligations of the implementing agency in the PPP contract. This means that the direct agreement is not meant to amend or supplement the PPP contract or any other agreements.

## **6. LENDER'S STEP-IN RIGHT: ANOTHER TRIPARTITE AGREEMENT?**

To attract and provide comfort to lenders on the financing of a PPP project, the LPPP allows the PPP contract to provide for a step-in right of the lenders. By step-in right, lenders can assume the rights and obligations of the private partner under the PPP contract in case of default by the latter. However, the PPP contract is a binding agreement between the private partner and the implementing agency only. The lender is not a party to that contract. The question therefore is raised as to how the lender can enforce its step-in right since it is not a party to the PPP contract.

As highlighted above, a direct agreement is entered into between the implementing agency and the lender, not any other party. While the direct agreement can further affirm the lender's step-in right, its enforcement by the lender might remain questionable as the private partner is not a party to the direct agreement. There must be a connecting dot between the PPP contract and the direct agreement to ensure that the step-in right of the lender is enforceable.

A concept of 'stipulation for others' under the Civil Code may become relevant in connecting the dots between the two agreements. The concept allows parties to agree on benefits in favor of a third person who is not a party to the contract. The arrangement becomes binding when the beneficiary person accepts the benefits. However, the concept itself and such interpretation remain to be tested within Cambodian court.

The alternative effort includes a tripartite agreement between the implementing agency, the private partner, and the lender to be specifically entered into on the step-in right. Ideally, this option would solve the issue. However, based on the LPPP, it is the PPP contract to which the implementing agency and the private partner are parties that may provide for the step-in right without reference to any separate contract. If a strict approach to interpreting the law is taken, only the PPP contract can discuss the step-in right, not any other agreement including the tripartite agreement.

Otherwise, a strategic and thoughtful arrangement of all relevant security documents between the project company and the lender will be instrumental for having the connecting dot required through relevant drafting, referencing, and notification techniques at the appropriate document preparation stages.

## **7. CONCLUSION**

Overall, the LPPP together with its implementing procedures provides a solid foundation with greater details for the country's public infrastructure projects to further advance to another layer of implementation standards. Compared with the preceding regime, the LPPP's added focus on the project lenders' rights and interests makes its framework far more attractive and supportive to both project financiers and all stakeholders involved so far as the project's bankability and sustainability are concerned. Like any new piece of legislation of this nature and significance, certain loopholes and overlaps as elaborated can be seen as only inevitable and ongoing improvement necessary. It is equally crucial that proper documentation review and strategic structuring are in place when it comes to assurance and enforceability of relevant stakeholders' rights and duties.

*Nothing in this material constitutes or is intended to constitute legal advice. The material is for general informational purposes only.*





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