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LEGAL PRACTITIONERS

PPP Bill – Direct Procurement



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Our last two articles examined solicited and unsolicited procurement processes under the PPP Bill. The procurement methods for PPP projects are designed to ensure not only the selection of a qualified developer, but also value for money, efficiency, public benefit, and competition, in general. However, in some circumstances, a competitive procurement is neither practicable nor efficient. We examine direct procurement as the third procurement option under the PPP Bill in this article.

According to the PPP Bill, contracting authorities may negotiate PPP agreements without utilising solicited or unsolicited procurement processes in the following circumstances:

- (a) where projects are of short duration and their value does not exceed an amount to be prescribed;
- (b) projects related to national defence or national security;
- (c) the engaged developer is the only source of the required service;
- (d) the contracting authority determines that there are operational and strategic advantages or reasons linked to a particular bidder on the basis of national interest, bilateral or international corporation or external trade. The PPP Bill does not define 'national interest' and is silent on what considerations should be taken into account in determining what amounts to 'national interest';
- (e) unforeseen urgent need for the service and using other procurement methods would be impractical. However, the urgency should not have been caused by the contracting authority's failure to act in a timely manner to procure the required service;
- (f) no proposals were received in response to an invitation for pre-selection by a contracting authority or the received

proposals did not meet the evaluation criteria and a contracting authority is of the view that issuing a new invitation is unlikely to result in successful PPP agreement negotiations within the required time; or

- (g) for standardisation or compatibility where services, technology, equipment, or other goods have been procured from a bidder and additional supplies are required. A contracting authority would be expected to take the following into account before resorting to direct procurement in such circumstances:
 - (i) effectiveness of the original procurement in meeting the needs of the contracting authority;
 - (ii) the limited size of the proposed procurement in relation to the original procurement; and
 - (iii) reasonableness of the price and unsuitability of alternatives to the goods or services in question.

If enacted into law, the PPP Bill will require contracting authorities to justify why direct procurement is being utilised. The PPP Council is required to approve all direct procurements before contracting authorities that seek to engage in direct procurement can proceed. If the PPP Council approves a direct procurement, the PPP Office and contracting authority are required to conduct a due diligence on the bidder before a PPP agreement can be negotiated. The negotiation procedures applicable to solicited and unsolicited procurement also apply to direct procurement.

Upon successful completion of negotiation of a PPP agreement, the contracting authority is required to submit the PPP agreement to the Attorney General for clearance before the bidder and contracting authority can execute it. The PPP Bill proposes that the Minister of Finance will also be a signatory to the PPP agreement, making it a tripartite agreement.

In the next article, we provide a detailed analysis of the PPP agreement; its contents and

implications and the risks allocated to each party.

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