

Newsletter

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Overview and Recent Developments in the Thailand PPP Framework

I. Overview of Infrastructure Development in Thailand

Although, in comparison with other Asian countries, there has been relatively advanced progress with regard to the enhancement of public infrastructure in Thailand,¹ there is further demand for more infrastructure development. For instance, according to the State Enterprise Policy Office (the "SEPO"), the total required volume of investment in the transport sector in Thailand from 2015 to 2022 is said to be THB2.4 trillion (about JPY8.8 trillion), 20 percent of which (THB480 billion (JPY1.7 trillion)) is expected to be covered by PPP. Although the PPP scheme in Thailand was overhauled to remedy certain issues in the previous system in April 2013, to date there have been no PPP infrastructure projects utilizing the new scheme, and the scheme is still far from achieving satisfactory results as planned. Under such circumstances, the further development of the PPP framework, in the form of circular notes and medium-to-long-term plans, is urgently required.

II. The PPP Framework in Thailand

1. Recent Developments in the PPP Legal Framework

(1) The PPP Act and Related Acts/Regulations

In Thailand, infrastructure businesses, mainly in the power and transport sectors, have been opened to the private sector since the 1980s. The Act of Private Participation in State Undertaking B. E .2535 (1992), which regulates infrastructure businesses in which the public sector and the private sector jointly invest (the "PPSU Act"), was enacted in 1992. The main purpose of the PPSU Act, however, was to prevent governmental corruption by granting permissions/licenses to private investors in connection with infrastructure projects. As such, it has been pointed out that the PPSU Act is insufficient as the fundamental law governing PPPs in Thailand. In response to this criticism, the Private Investments in State Undertakings Act B. E. 2556 (2013) was enacted in April 2013 (the "2013 PPP Act") as a new PPP fundamental law, clarifying the rules applicable to infrastructure businesses conducted jointly with the public and private sectors, and facilitating infrastructure projects in PPP form. In this regard, the SEPO was established under the 2013 PPP Act as a comprehensive government unit that establishes various guidelines and formulates plans to promote PPPs.

¹ Thailand was ranked #47 in the Global Competitiveness Index (Overall Index) in the Global Competitiveness Report 2013-2014 issued by the World Economic Forum positions. This rank positions the country at #3 among the ASEAN countries, following Singapore (#2) and Malaysia (#29).

In addition, after the enactment of the 2013 PPP Act, the government issued twelve secondary legislations including:

- (i) eight secondary legislations in relation to enforcement rules (in connection with the operation of the project development fund, as discussed below); and
- (ii) four secondary legislations (notifications of SEPO and PPP Committee) relating to the standard provisions that shall be included in PPP project agreements, guidelines in relation to information to be included in the invitation documents, rules and procedures for the valuation of PPP projects and guidelines in amending material provisions in PPP project agreements (came into effect on 26 February 2015).

Subsequently, on 6 March 2015, SEPO published a practical guideline which further explains the PPP projects valuation process. SEPO have also revealed that they are also considering other matters such as the shortening the selection time of business operators from approximately 2 years (usually required under the previous PPP scheme) to 7-12 months. Further developments include applying the 2013 PPP Act to projects with value of less than THB1,000 million² and categorizing PPP infrastructure projects according to its scale as either (i) small-scale projects (less than THB1,000 million), (ii) medium-scale projects (with a value between THB1,000 million and THB5,000 million), and (iii) large-scale projects (worth over THB5,000 million) in order to simplify the selection process for small-scale projects.

(2) Other Laws and Regulations

Infrastructure investment by a foreign company (including any local subsidiary where the majority of its shares are owned by a foreign company) requires a license under the Foreign Business Act B. E. 2542 (1999) and is also subject to sector-specific regulations, such as the Energy Industry Act B. E. 2550 (2007) and other related laws. For example, 100% foreign owned investment in a project in the electricity and sewage sectors is allowed with permission, but not in the transport sector, as it is depending on each regulation and only a Thai company is permitted to manage a project based on the Mass Rapid Transit Authority of Thailand Act B. E. 2543 (2000) for instance. Similarly, in the aviation sector, a 100% foreign capital company is not permitted to manage a project.

Moreover, PPP infrastructure projects in Thailand are subject to other laws and regulations such as the Civil and Commercial Code (B. E. 2551 (2008)) and the Bankruptcy Act (B. E. 2483 (1940)). It is also worth noting that these recent regulatory developments with respect to PPPs also included an amendment to those provisions relating to guarantees and mortgages in the Civil and Commercial Code. This amendment, which came into effect on 11 February 2015, abolished the old system of joint liability with respect to any guarantees and established a right of claim for auction by security providers. This amendment is intended to expand the protection of guarantors and security providers. A further amendment which would permit juristic persons to guarantee, as a primary obligor, jointly and severally with the debtor is currently being considered as well. For specific information on these amendments, please refer to the Client Alert issued by the Bangkok office of

² Please note that a project with the value of less than THB1,000 million can be promoted in accordance with the PPP scheme under the current rule based on the government decision on each project (Section 58, the 2013 PPP Act).

Baker & McKenzie.³ Although the impact that such an amendment may have on project financing in Thailand should be carefully reviewed, basically, the amendment would have no significant impact on sponsor support in project financing, as providing financial sponsor support to a project company does not constitute a guarantee to lenders whether or not joint liability on a guarantee for a corporation is to be permitted.

2. Overview of the Thailand PPP Framework

(1) Scope of Applicable Projects

The 2013 PPP Act provides that, as a general principle, applicable projects are "private investments" to be made in "public projects" with value of THB1,000 million.⁴ "Public project" here means a project that government agencies and other related bodies are obliged to conduct under laws and regulations, or which requires the use of government-related property or resources. In addition, "private investments" in this instance means co-investments with the public and private sectors in various forms, or private investments under the obtained licenses or concession agreements (excluding private investment under concession agreements relating to oil and minerals).⁵ Applicable sectors and business methods are not specified in the 2013 PPP Act.⁶

The 2013 PPP Act provides that there will be a five-year strategic plan (a "**Strategic Plan**"),⁷ although specific sectors and business methods will be determined per project. The Strategic Plan will present the types of PPP projects and the priorities for those projects, and government agencies will promote the projects in accordance with the Strategic Plan. The Strategic Plan is drafted by SEPO and the Private Investments in State Undertakings Policy Committee (the "**PPP Policy Committee**"), which was established by the Thai government and chaired by the prime minister, taking into account the opinions of relevant ministries, and enacted through the approval of the Council of Ministers. This Strategic Plan is currently being drafted by SEPO and is expected to be enacted in the near future. Special attention should be paid to the content of the enacted plan, as it will be an important standard for the promotion of PPP projects in Thailand.

(2) Selection of Projects and Operators

In the PPSU Act, it was pointed out that the burdensome involvement of an array of government agencies, including the National Economic and Social Development Board, the Ministry of Finance, the Legislative Affairs Committee and other related agencies, in the selection of an applicable project under the PPSU Act was an impediment to the efficient selection process of projects.

³ For the First Amendment please see:

http://f.datasrvr.com/fr1/415/92206/Amendments_to_the_Civil_and_Commercial_Code_on_Guarantees_and_Mortgages_-_Increased_Rights_and_Protections_for_Guarantors_and_Mortgagors.pdf?cbcachex=431783

For the Second Amendment please see:

http://f.datasrvr.com/fr1/115/46976/The_Draft_of_Additional_Amendment_to_the_Civil_and_Commercial_Code_on_Guarantees_and_Mortgages_2.pdf?cbcachex=103397

⁴ Section 7 and Section 23 of the 2013 PPP Act.

⁵ Section 7 of the 2013 PPP Act.

⁶ Section 4 of the 2013 PPP Act: A project that has adequate provisions with respect to a process of private investments and its monitoring procedure may be exempted from the restrictions by Royal Decree; however, such Royal Decree has not been issued at present (Section 7 of the 2013 PPP Act).

⁷ Section 16(1), Chapter 3 of the 2013 PPP Act.

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With respect to this point, the 2013 PPP Act simplified the project selection process by giving substantial decision-making power to SEPO and the PPP Policy Committee. In addition, the decision-making period for each related government agency is now specified as a concise 60-day period,⁸ and it is expected that the selection time for business operators, which usually takes about two years, will be shortened to between 7 to 12 months. Moreover, the 2013 PPP Act stipulates that the basis for the appraisal of "Value for Money" will be specified in the secondary legislation.⁹ In this regard, on 6 March 2015, SEPO published a practical guideline explaining such project valuation process.

An operator is selected by bidding¹⁰ and through a review conducted by the selection committee, which will consist of, among others, a representative of the host agency, a representative of the Bureau of the Budget, a representative of the SEPO, a representative of the Office of the Attorney-General, with the final decision being confirmed by the approval of the Council of Ministers. In addition, the 2013 PPP Act does not particularly provide any specific requirements for the submission of a support letter (i.e. Letters of Interest and other instruments) from financial institutions. The requirements for such support letters and the required contents will be specified in individual invitation documents.

For more information on the procedure for the selection of projects and operators please refer to Exhibit 1 and 2.

Please note that the selection of projects and operators under the 2013 PPP Act is based on projects proposed by the government (solicited), and not on projects proposed from the private sector (unsolicited).

(3) Project Agreement

In Thailand, currently there is no standard format for PPP project agreements. However, the 2013 PPP Act specifies the required provisions that should be included in any project agreement. In this regard, a secondary legislation relating to the standard provisions that shall be included in PPP project agreements was issued.

(4) Overview of Government Support

(a) The Project Development Fund

The 2013 PPP Act provides that the Ministry of Finance shall establish a fund for the purpose of contributing funds to cover expenses that will be used in preparing the project proposal and conducting the assessment of the project (including costs for the employment of consultants).¹¹ Preparations to establish this fund are underway, pursuant to the 2013 PPP Act. Further details with regard to the size and operational rules of the fund will be specified in circular notices or rules that will be issued in the near future.

⁸ Section 26 and other Sections of the 2013 PPP Act.

⁹ Section 30 of the 2013 PPP Act.

¹⁰ Section 38, Chapter 5 of the 2013 PPP Act.

¹¹ Chapter 8 of the 2013 PPP Act.

(b) Other Government Support

The 2013 PPP Act does not explicitly mention government support. However, such support is technically possible under the Thai legal system. There are investment incentives as established under the Investment Incentives Law (B. E. 2520 (1977)), such as tax reduction, which are mostly used in PPP infrastructure projects.¹²

Examples of government support include (i) government guarantees under the Public Debt Management Act (B. E. 2548 (2005)); (ii) government funding given to government agencies/entities implementing projects under the jurisdiction of that agency/entities;¹³ and (iii) the transport sector service payment regime (PPP Gross Cost Model). There is no specific rule on the framework to which government support should adhere, and the requirements and content are determined on an individual project basis. To date, there have been no actual examples of a government guarantee as set out above in (i) and such government guarantee is expected to be used in limited situation in future. The government funding set out above in (ii) may be performed on a discretionary basis by the government, which will decide when to cover the investment shortfalls of a government agency. However, it should be noted that this does not mean the government will always cover the investment shortfalls of private operators or financial institutions. Under the transport sector service payment regime (PPP Gross Cost Model), unlike the regime under which a private operator receives tolls from the users (PPP Net Cost Model), the public sector pays service payments agreed upon in advance to the private operator by bearing the risk of demand fluctuation (i.e. in effect, the public sector provides the private operator with a support with respect to risk of demand fluctuation.). For instance, such service payment regime (PPP Gross Cost Model) has been adopted in the Purple Line Project for the Mass Rapid Transit Authority of Thailand (MRTA),¹⁴ and is expected to be adopted in other projects.

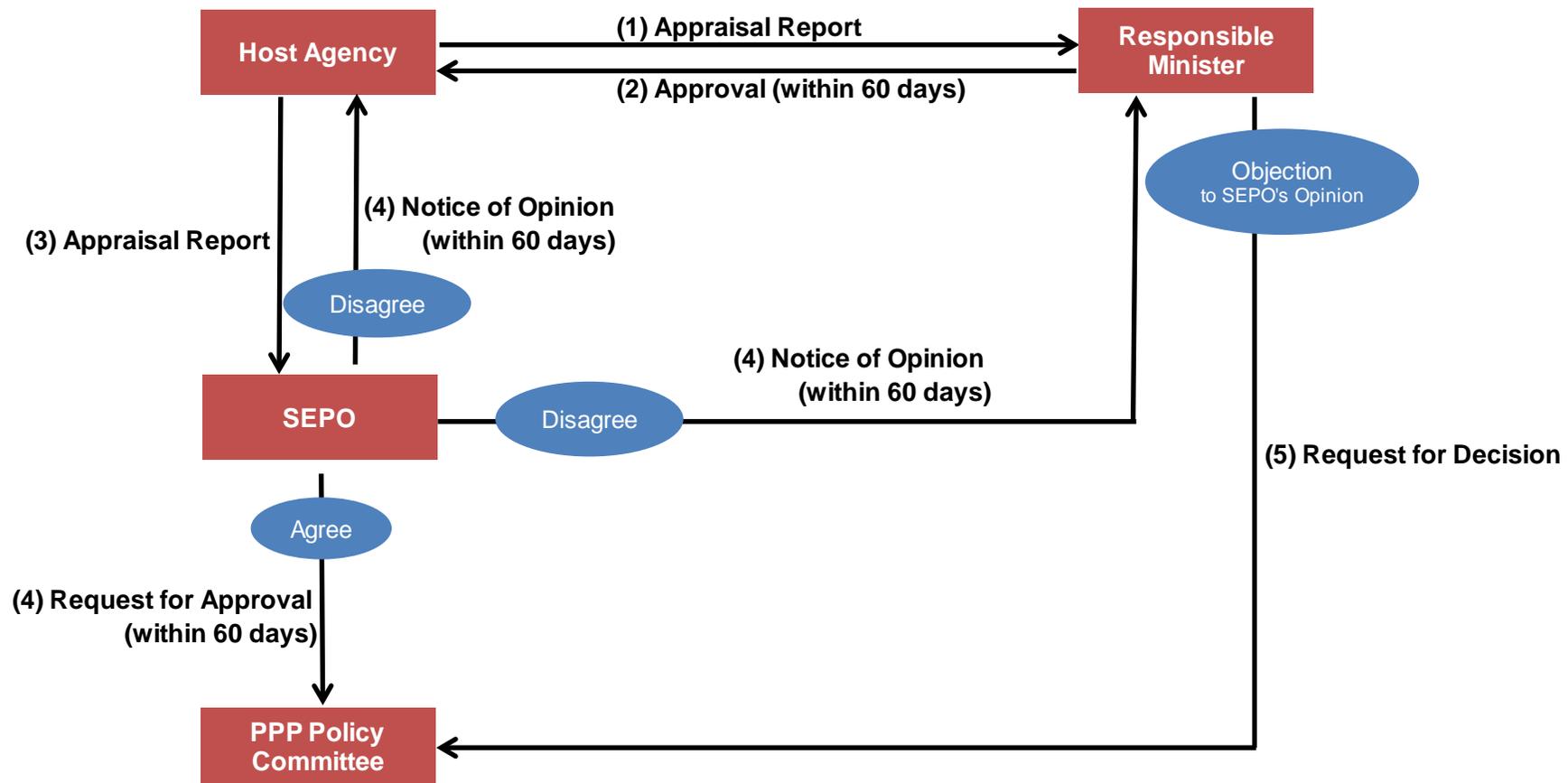
¹² <http://bmcl.listedcompany.com/news.html/id/373364>

¹³ For instance, the Governing Law of Incorporation of Government Agencies of the Electricity Generating Authority (EGAT) (Section 45 and other articles of the Electricity Generating Authority of Thailand Act B. E. 2548 (2005))

¹⁴ <http://bmcl.listedcompany.com/news.html/id/373364>

Appendix 1

Selection of Project



Appendix 2

