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NEW RULES ISSUED FOR UNSOLICITED PROJECTS

The PPP Center, created in late 2018 pursuant to the Project Bank Notification, has finally issued its first notification on guidelines for unsolicited proposals, dated 2 October 2020 (the "**Guidelines**"), nearly two years after its inception. The Guidelines apply to unsolicited proposals, i.e., proposals made by the private sector directly to a government entity for a Public Private Partnership ("**PPP**") project, rather than following a request from the government itself. The Guidelines are conveniently issued at the same time that the request for Expression of Interests ("**EOI**") for the New Yangon City Project has been issued.

Generally speaking, the Guidelines mostly codify the government's current practice, with one or two welcome clarifications. They apply to any unsolicited proposal for a PPP with a value exceeding MMK2 billion (approximately US\$1.5 million), i.e., virtually any PPP project.

Project assessment

Upon receipt of a proposal, the relevant government agency will assess the project based on the proponent's financial standing, its business experience, the pre-feasibility proposal submitted, and its compliance with the Myanmar Sustainable Development Plan.

The Guidelines do not provide for a specific time frame for the assessment of the Project. In the past, many projects have been unofficially 'buried' by lengthy assessment of the proposal by the government.

After the initial assessment, the relevant government agency can either reject the proposal outright (in case the project proponent lacks experience or if the project is unsustainable) or decide to proceed further. For successful proposals, the next steps will include (i) the preparation of a detailed feasibility study and (ii) the execution of a Project Development Agreement with the project proponent.

A welcome clarification in the Guidelines is that it is now clear that the costs incurred by the project proponent for the preparation of the feasibility study will be reimbursed by either the government or the alternate developer selected in case the project ends up being awarded to another company.

Selection process

After a review of the feasibility study, the government has to choose between one of various options to

award the project to the private sector.

Direct award

The first option is the direct award of the project to the direct sector "as an exception" and if the project proponent "has a good reputation and is internationally well experienced in the relevant field." The Project Bank Notification already gave the government the right to award a project without a tender or Swiss challenge if "more favorable commercial and technical terms" (Section 28) could not be achieved via a tender.

The Guidelines do little to clarify in which actual circumstances a PPP project could be directly awarded, which leaves a number of companies that have been developing projects for a number of years – notably in the

power sector – with little clarity as to the likelihood of their project being put up for tender by the government.

Tender or Swiss challenge

In most cases, the government will either put the project up for a full tender (if the initial project proponent is deemed to be unsuitable) or organize a Swiss challenge, i.e., allow companies to provide better proposals than the initial project proponent. The Project Bank Notification allows the initial project proponent to match any better offer made during a period of 45 days. It does not, however, mention whether the original project proponent will be given any other advantage as is the case in other jurisdictions in the region, such as Vietnam.

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