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THE PUBLIC-PRIVATE PARTNERSHIP ACT 2004

Act No. 37 of 2004

I assent

24th November 2004

SIR ANEROOD JUGNAUTH
President of the Republic

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An Act

To provide for the implementation of public-private partnership agreements between contracting authorities and private parties and to establish a set of rules governing public-private procurement

ENACTED by the Parliament of Mauritius, as follows –

1. Short Title

This Act may be cited as the Public-Private Partnership Act 2004.

2. Interpretation

In this Act-

“affordable”, in relation to an agreement, means that the contracting authority shall meet any financial commitment likely to be incurred in relation to that agreement, from its existing or future budgetary funds;

“agreement” means a public-private partnership agreement;

“asset” includes an existing asset of a relevant contracting authority or a new asset to be acquired for the purposes of entering into an agreement

“Board” has the same meaning as in the Central Tender Board Act;

“contingent liability” includes Government guarantee for loan and foreign currency transfer and step-in function in the event of default by the relevant contracting authority;

“contracting authority” means any Ministry or Government department, local authority or statutory corporation;

“local authority” has the same meaning as in the Local Government Act;

“Minister” means the Minister to whom responsibility for the subject of finance is assigned;

“Ministry” means the Ministry responsible for the subject of finance;

“private party”, in relation to an agreement, means a party to the agreement other than a contracting authority;

“project” means a project to be implemented under an agreement;

“public-private partnership agreement” means an agreement between a contracting authority and a private party, approved in terms of this Act, in terms of which -

- (a) the private party undertakes to perform a contracting authority's function on behalf of the contracting authority for a specified period;
- (b) the private party receives a benefit for performing the function by way of
 - (i) compensation from a revenue fund;
 - (ii) charges or fees collected by the private party from users or customers of a service provided by it; or
 - (iii) a combination of compensation and charges or fees;
- (c) the private party is liable for the risks arising from the performance of its function;
- (d) state facilities, equipment or other state resources may be transferred or made available to the private party;

“request for proposal” means the specific terms of the project requirements, the procedures for submission of bids, the criteria for the evaluation of bids and includes a model agreement

“unit” means the Public-Private Partnership Unit established under section 3;

“value for money” means the provision by which the contracting authority's functions under an agreement shall result in a net benefit to the consumers in terms of cost, delivery, price, quality, quantity or risk transfer, or a combination thereof.

3. Public-Private Partnership Unit

(1) There shall, for the purposes of this Act, be a unit within the Ministry to be known as the Public-Private Partnership Unit which shall deal with all matters relating to a public-private partnership project.

- (2) The unit shall —
 - (a) make an assessment of a project submitted to it and give its recommendations to the Financial Secretary, as to whether the project
 - (i) is affordable to the contracting authority;
 - (ii) provides value for money; and
 - (iii) presents optimum transfer of technical, operational and financial risks to the private party;
 - (b) examine the request for proposal to ensure conformity with the approved feasibility study;

- (c) advise Government on administrative procedures in relation to public-private partnership projects;
- (d) develop best practice guidelines in relation to all aspects of public-private partnership
- (e) formulate policy in relation to public-private partnership projects; and
- (f) develop public-private partnership awareness in the country.

4. Responsibilities of contracting authority

(1) Subject to subsection (2), a contracting authority shall for the purposes of this Act -

- (a) identify, appraise, develop and monitor a project to be implemented under this Act;
- (b) undertake or cause to be undertaken a feasibility study where it considers that a project may be implemented under an agreement;
- (c) submit the feasibility study to the unit for its approval;
- (d) prepare a request for proposal on the approval of the feasibility study and, where the terms of the model agreement impact on public finance, seek the approval of the Financial Secretary.

(2) Any project for which there is no financial or contingent liability for Government shall be exempt from the approval of the Financial Secretary.

5. Feasibility study

(1) Every contracting authority shall undertake or cause to be undertaken a feasibility study where it considers that a project may be implemented under an agreement, to assess whether the proposed project is feasible as a public-private partnership project.

(2) The feasibility study shall -

- (a) demonstrate comparative advantage in terms of strategic and operational benefits for implementation under a public-private partnership agreement; (
- (b) describe in specific terms –
 - (i) the nature of the contracting authority's functions, the specific functions to be considered in relation to the project, and the expected inputs and deliverables;

- (ii) the extent to which those functions can lawfully and effectively be performed by a private party in terms of an agreement; and
 - (iii) the most appropriate form by which the contracting authority may implement the project under an agreement;
- (c) demonstrate that the agreement shall –
- (i) be affordable to the contracting authority;
 - (ii) provide value for money; and
 - (iii) transfer appropriate technical, operational or financial risk to the private party;
- (d) explain the capacity of the contracting authority to effectively enforce the agreement, including the ability to monitor and regulate project implementation and the performance of the private party in terms of the agreement.

6. Public-private partnership agreement

(1) Notwithstanding any other enactment but subject to this Act, a contracting authority may enter into an agreement with a private party for the performance of one or more of the functions of that contracting authority.

- (2) Every agreement shall -
- (a) identify the responsibilities of the contracting authority and the private party;
 - (b) specify the relevant financial terms;
 - (c) ensure the management of performance of the private party;
 - (d) provide for the return of assets, if any, to the contracting authority, at the termination or expiry of the agreement, in such manner as may be provided for in the agreement;
 - (e) provide for the sharing of risks between the contracting authority and the private party;
 - (f) provide for the payment to the private party by way of compensation from a revenue fund or of charges or fees collected by the private party from users or customers of a service provided by it;
 - (g) provide for its duration; and
 - (h) contain such other information as maybe prescribed.

(3) Every agreement shall be governed by and construed in accordance with the laws of Mauritius.

(4) Every agreement shall provide for disputes between the private party and the contracting authority to be settled by arbitration, according to the rules defined in the agreement.

7. Referral to Central Tender Board

Where the Financial Secretary approves the terms of the model agreement pursuant to section 4(1)(d), the contracting authority shall submit a request for proposal to the Board to obtain its written authorisation to advertise, invite, solicit or call for bids.

8. Pre-selection of bidders

(1) The contracting authority shall consult the Board to obtain its written authorisation to conduct a pre-selection exercise.

(2) The pre-selection document shall be prepared by the contracting authority and shall include a public invitation for applicants to apply for pre-selection.

(3) Every pre-selection document shall be subject to the written approval of the Board before its issue and publication.

(4) The Board shall carry out a pre-selection exercise to select potential bidders or may delegate its powers under this subsection to the contracting authority where the Board considers that the contracting authority has the necessary expertise to undertake the pre-selection exercise.

(5) In the exercise of its powers under this section the Board shall strive for the highest standard of equity by ensuring that all bidders are afforded equal opportunity and are treated fairly.

9. Invitation to bid

(1) The contracting authority shall prepare and submit to the Board for its written approval, a request for proposal.

(2) No document pertaining to a request for proposal shall be issued to pre-selected bidders or bidders unless approved by the Board.

10. Powers of the Board

- (1) The Board-
 - (a) shall be responsible for ensuring transparency and equity in the bidding procedures;
 - (b) shall examine and evaluate the bids received;
 - (c) shall make recommendations to the contracting authority for entering into negotiations with the preferred bidder; and
 - (d) may approve the award of the project.

- (2) In the discharge of its functions under this Act, the Board may -
 - (a) commission any study relevant to the determination of the award of a project;
 - (b) request any professional or technical assistance from any appropriate body or person in Mauritius or elsewhere;
 - (c) in relation to the examination and evaluation of bids, refer the bids to the appropriate contracting authority for examination and evaluation provided that the Board is satisfied that the contracting authority has the necessary expertise to do so.

- (3) Where bids are referred to a contracting authority under subsection (2)(c), the contracting authority shall examine and evaluate the bids and submit to the Board its findings within such time as may be determined by the Board.

- (4) The Board may -
 - (a) request the Chairman, supervising officer or chief executive officer of a contracting authority -
 - (i) to furnish any information or produce any records or other documents relating to a project;
 - (ii) to answer all relevant questions;
 - (b) to examine such records or other documents and take copies or extracts therefrom.

- (5) Any person to whom a request is made under subsection (4) who -
 - (a) fails to comply with the request; or
 - (b) refuses to answer or wilfully gives any false or misleading answer to any question lawfully put by the Board,

shall commit an offence and shall, on conviction, be liable to a fine not exceeding 50,000 rupees and to imprisonment for a term not exceeding 8 years.

(6) Where the Board makes recommendations in terms of subsection (1)(c), any change in the terms of the agreement which impacts on the approved model agreement shall be submitted by the contracting authority to the Financial Secretary for the approval of the changes to be brought to the terms of the agreement.

(7) Where the Financial Secretary approves a change submitted under subsection (6), the contracting authority shall seek the final approval of the Board for the award of the project.

11. Award of project and signature of agreement

No contracting authority shall award a project or sign an agreement unless -

- (a) the award of the project has been approved by the Board; and
- (b) the agreement relating to the project has been approved by Cabinet.

12. Regulations

(1) The Minister may make such regulations as he thinks fit for the purposes of this Act.

(2) Any regulations made under subsection(1) may provide for the levying of fees and charges.

13. Consequential amendment

The Central Tender Board Act is amended by inserting immediately after section 6, the following new section -

6A Award of public-private partnership project

Notwithstanding the provisions of this Act, the Board -

- (a) shall approve all documents relating to the bid;
- (b) shall authorise, approve and carry out pre-selection exercises;
- (c) shall authorise the advertisement, invitation locally or internationally, as the case may be, and call for bids;
- (d) shall examine and evaluate bids; and
- (e) may approve the award,

of a public-private partnership project in the manner provided for under the Public-Private Partnership Act.

14. Act not applicable

This Act shall not apply where a contracting authority has, before the commencement of this Act, issued a request for proposal in respect of a project.

15. Commencement

(1) This Act shall come into operation on a date to be fixed by Proclamation.

(2) Different dates may be fixed for the coming into operation of different sections of this Act.

Passed by the National Assembly on the ninth day of November two thousand and four.

Ram Ranjit Dowlutta
Clerk of the National Assembly