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ETHIOPIA PUSHES ON PRIVATE PUBLIC PARTNERSHIPS

With Proclamation 1076/2018 ("**Proclamation**"), Ethiopia has introduced a legal framework for public private partnerships ("**PPP**") to facilitate privately financed projects to support Ethiopia's economic growth.

The Council of Ministers is expected to issue the regulation to implement the Proclamation, and the Ministry of Finance and Economic Cooperation will issue directives to enable the achievement of the Proclamation's objectives.

What exactly is a PPP?
A PPP is a long-term agreement between a contracting authority (i.e., a public body or a public enterprise) and a private party, whereby the private party undertakes to provide a public service otherwise reserved to a public body, in exchange for consideration. The consideration consists of remuneration and/or tariffs or fees collected by the private party from users of the service.

According to the Proclamation, PPPs may engage in the following activities:

a) design, construction, financing, maintenance and operation of new infrastructure facilities;

b) rehabilitation, modernisation, financing, expansion, maintenance and operation of existing infrastructure facilities; and

c) administration, management, of new and existing infrastructure facilities.

Conversely, PPPs may not carry out activities such as oil, mines, minerals, right of air space and privatisation and divesture of public entitites or public infrastructure.

What <u>will be the process for implementing a PPP agreement?</u>

First step: selection of projects

1) Selection of projects

The first step entails the contracting authority, a public entity or the PPP directorate general (please see point 2 below) selecting potential PPP projects to promote. The contracting authority shall take into consideration the strategic and operational benefit for the country and shall conduct a feasibility study of the potential PPP project.

Second step: approval by the PPP board and promotion by the PPP directorate general

2) The PPP board, PPP directorate general, contracting authority and approvals

The Proclamation established a **PPP board** made up of representatives of ministries, the National Bank, the National Planning Commission and private-sector, who each have specific responsibilities. The PPP board is responsible for approving projects, including the structure, following a tender or negotiations.

A **PPP directorate general** has been established within the Ministry of Finance and Economic Cooperation, which is tasked with: (a) promoting PPPs; (b) conceptualising, identifying and categorising projects; (c) making recommendations; (d) establishing policy guidelines; and (e) coordinating activities.

The contracting authority shall be responsible for administering the contract of the project and, unless otherwise provided in the project agreements, for ensuring compliance of the private party with the terms of the project agreements.

Third step: selection of the private party

3) Selection of private parties

Following approval of a project, the private party may be selected by the PPP board through one of the following ways:

a) single or two-stage open tender with prequalification;

b) competitive dialogue;

c) direct negotiations when an urgent need exists and: (i) the former two processes are considered impractical; (ii) the project has a short term; or (iii) the project concerns national defence or national security.

In addition, private parties may submit unsolicited proposals for projects not already approved by the PPP board. In such events, after approval of such proposals by the Public Private Partnership Directorate and by the Public Private Partnership Board, the private party shall however be selected through one of the procedures outlined above.

4) Content and implementation of PPPs

Once awarded a project, the successful bidder will establish a project company (incorporated under Ethiopian law), which may (but is not obliged to) include a public entity as a minority shareholder. The sole purpose of the project company is to execute and implement the PPP agreement and any other agreements relating to the project.

Mandatory provisions

The PPP agreement and project related agreements **must contain provisions on the following aspects**:

a) term;

b) terms and conditions of the tariffs or fees for use of the facility, which the private party is entitled to collect from the end user/s;

c) disclosure and regulation of any funding granted by the Ministry of Finance and Economic Cooperation (direct payments as a substitute for, or in addition to, tariffs or fees, contributions in-kind, payment guarantees, securities, letters of comfort, and performance guarantees);

d) ownership of the assets (whether public or private);

e) obligations regarding the provision of the service;

f) compensation in the event of termination; and

g) circumstances in which the contracting authority has the right to temporarily take over the operation of the facility if the private party seriously breaches its obligations.

Optional provisions

PPP agreements and the related agreements **may** also contain provisions regarding the following:

a) the adjustment of the compensation in connection with the variations of the relevant costs following changes in legislation or regulations that apply to the infrastructure facility in question; requirements regarding the project company's share capital, approval of changes to the by-laws and shareholders' agreement, and restrictions on the transfer of stakes in the project company; and

b) guarantess and securities to be provided by the private party to guarantee the performance of its obligations.

5) Rights on the project site

The contracting authority or <u>other public entity</u> must make available to the private party the project site, including juridic title thereto, (or assist the private party to obtain the related rights) to allow the project to be implemented.

To generate funds for the project (i.e. loans from financial institution), the private party may mortgage the immovable property developed for the project.

6) Replacement of the private party upon material breach

The agreement between the contracting authority, the private party and the financing entities may stipulate that the public authority has the right to replace the private party if it seriously breaches its obligations.

CONCLUSION

The new legal framework for PPPs provides a solid legal basis for cooperation between the public and private sectors for the provision of public services.

Needless to say, carefully negotiating and drafting PPP agreements is paramount to ensure that the risks and responsibilities are clearly allocated and that projects are a success. Similarly, dealings with the local public authorities for the private party's acquisition of rights on the project site need to be managed with care.