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# CLIENT NOTE

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## PPP SAGA - BETTER LATE THAN NEVER



The Government of Armenia (Government) has approved a Policy Statement on PPP in November of 2017<sup>1</sup> (Policy Statement). The Policy Statement, among others, outlined the scope of its application and provided for a definition of partnerships that it will apply to. It also described the essential characteristics of PPPs, PPP contract types, stages of PPP project implementation, appraisal of projects, institutional arrangements, as well as contract monitoring, oversight reporting, and evaluation.

In 2017 the Government of Armenia has initiated (once again after unsuccessful 2010-2011 attempt) an introduction of a brand-new public-private partnership framework, by re-affirming, as a matter of policy, the need to have a distinct law on Public Private Partnership (PPP). It would play a central role in establishing the legal base necessary to enact a framework allowing the Government and its agencies to use PPP for implementation of large infrastructure projects.

With the adoption of Policy Statement, the Government has effectively committed to developing a coherent, systematic approach to PPPs and created basis for implementing PPPs in Armenia.

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<sup>1</sup> Government protocol decree No. 47/38 on adoption of a Policy Statement on Public-Private Partnership, adopted on November 9, 2017

The Government's goal was for the private sector's strengths and resources to be mobilized in the most favourable way, consistent with the best international practices and to contribute to the economic and social development of Armenia. The Government committed to developing an enabling environment to encourage private sector participation in PPP projects in Armenia, both local and foreign.



A policy of having a separate PPP law was supported by both private sector and development institutions operating in Armenia. After almost 18 months of work (with certain interruptions) in June 2019, the Law of the Republic of Armenia on Public-Private Partnership (PPP Law) was adopted by the National Assembly and came into force on January 1<sup>st</sup>, 2020.

Initially, the PPP Law has been drafted based on the Model Law of Commonwealth of Independent States. Still, during the internal discussions, it has been changed and transformed into what it is now. In a nutshell, the major difference between the first and second drafts was that the first draft was focusing on the transactional aspects of PPPs, i.e., setting up regulatory framework for relations between the public and private parties. The first draft also addressed mechanisms related to unsolicited bids and direct negotiations. The second draft was more focusing on the fiscal aspect of PPPs, thus mandating additional process at the stage of initiation of PPPs (conducting of VfM tests etc.) and removed the concepts of unsolicited bids and direct negotiations. One big question that has remained open was related to the law governing private partner selection procedures. Despite the fact, that the PPP Law provides that the private partner selection procedures shall be governed by the Law of the Republic of Armenia on Procurement (Procurement Law), no amendments to the procurement legislation have been adopted until now. In addition, no secondary legislation has been adopted either.

After almost a year of existence of current text of the PPP Law, the Government has decided to introduce amendments to the legislation. The details of the proposed amendments are presented below.

Considering the complexity of the PPP's and regulatory framework surrounding it, we decided that this note is just first part of the series that we intend to publish in connection with the PPPs in Armenia. Additionally, as you will see below, if adopted, this new piece of legislation triggers development of a large volume of additional secondary legislation which would affect the successful implementation and use of the new rules.



### **DRAFT LAW ON AMENDMENTS TO THE LAW OF THE REPUBLIC OF ARMENIA ON PUBLIC-PRIVATE PARTNERSHIP**

On March 18<sup>th</sup>, the Government approved a Draft Law on Amendments to the Law of the Republic of Armenia on Public-Private Partnership (Draft). As mentioned in the supporting note to the text of the Draft: (i) the Procurement Law does not clearly define the procurement subject of the PPP process, (ii) the Procurement Law provides that an estimated cost should be provided in the budget for the implementation of the procurement, which is not applicable for PPP award procedures, and (iii) only public administration bodies and local self-governance bodies can be contracting authority.

It also refers that the current PPP system has been evaluated both from the institutional (independence) and applicability perspectives by experts from the World Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the Organization for Economic Co-operation and Development, the EU SIGMA program, and representatives of state government bodies and Armenian National Interests Fund. As a result of discussions, a joint position has been reached. The consensus is the need to introducing separate private partner's selection procedures within the framework of the PPP Law, instead of relying on existing procurement regimes.

There are two major policy changes (together with other amendments) that the Draft proposes:

- (a) separation of the private partner selection procedure under PPPs from the traditional procurement regime, and
- (b) introduction of unsolicited bids and direct negotiations.

As mentioned above, the current text of the PPP Law provides that the private partner selection shall be governed by the Procurement Law, however, the existing procurement legislation did not accommodate selection procedures for PPPs and, in fact, in many respects prevented the organization of a proper tender for selection of a private partner.<sup>2</sup> Apparently, after more than one year of negotiations consensus seems to have been reached by “extracting” PPP award procedures from traditional procurement framework.<sup>3</sup> This being said, the legislator seems to

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<sup>2</sup> Between 2018 and 2019 we have conducted a detailed analysis of the current procurement legislation and have identified more than 10 deficiencies in the current regime would disable organization of proper private partner selection for PPPs.

<sup>3</sup> Important is not whether the procurement processes shall be provided under the PPP Law or Procurement Law, but the mechanisms that shall be introduced.

remain committed to the main principles dominating the selection of private partners. Particularly, new Article 14 provides that the selection shall be organized (i) based on competitive, transparent, public and non-discriminatory principles, (ii) via ensuring equality between local and foreign private partners willing to participate in the selection procedure (with the exception of cases of national defense and security). At the same time, novelty has been introduced in the Draft, suggesting that together with these conventional principles, the principle of flexibility shall be taken into account when designing the PPP private partner selection procedures. The latter most likely has been introduced taking into account that conventional selection procedures known in Armenia are not flexible enough for conducting appropriate



selection process and one should expect larger number of models that could be used in the PPP context. This choice is also supported by a large number of cases where the draft expressly provides for the Government's discretion to determine specific aspects of selection procedure for each PPP project (unlike in a traditional "over-regulated" procurement regime, where the law leaves very little room for discretion).

Also, the Draft provides for a traditional two-stage procedure: pre-qualification stage and stage of submission of proposals by pre-qualified bidders. The selection at the pre-qualification stage shall be made based on the bidder's experience, technical capacity and experience and financial and economic capacity.

The selection can be organized either through an open (information on the project is made available to public) or closed tender (invitation to participate in the selection is directly submitted to a limited number of potential participants).

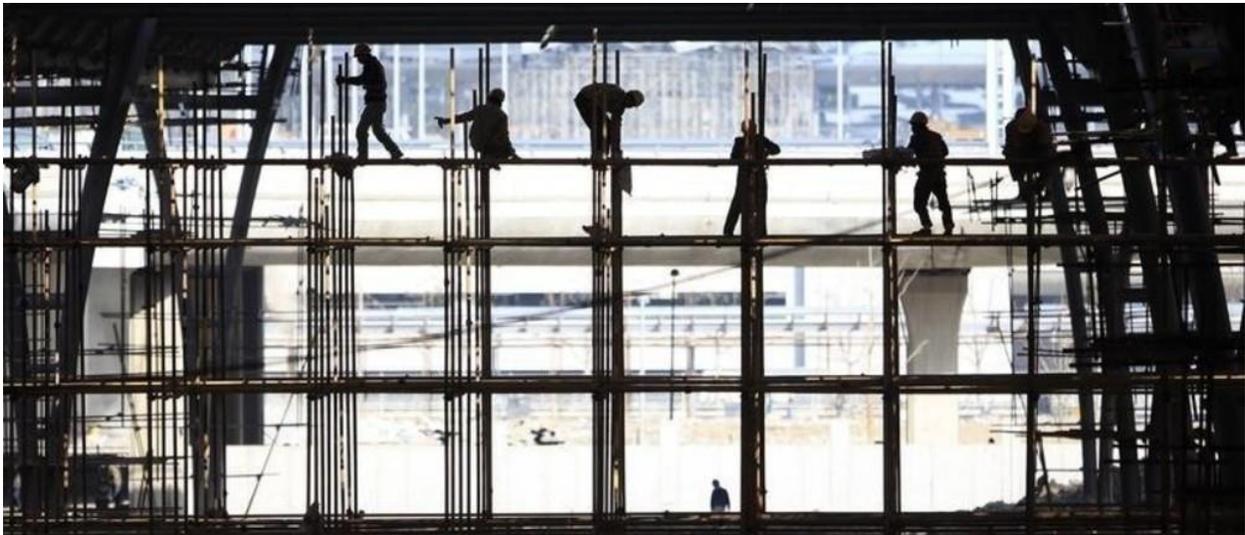
The Draft also provides for various criteria based on which the selection shall be completed: (i) selection based on the quality and price or (ii) selection based on price only. The Government shall have the discretion to decide which criteria shall be applied to each specific PPP project.

The Draft also provides for a modality of conducting selection via direct negotiations in exceptional circumstances (matters related to defense and national security). In this case as well, the discretion is provided to the private partner selection procedure.

Second notable amendment proposed under the Draft is the possibility to consider PPP projects through unsolicited proposals. Particularly, according to the proposed regime private entities (having relevant experience in the area) shall have the right to submit to the public entities proposals aiming at implementation of specific PPP projects. The proposal shall have to contain details of the proposed project, as well technical and financial justification and analysis and shall have to have a positive financial IRR independently from the direct involvement of public or municipal authorities, including contribution or discounted sale of public or municipal land.

According to the Draft, the details related to the proposal shall be elaborated in the secondary legislation. The assessment of the proposal shall have to include at least the following: (i) preliminary assessment of technical and financial components of the proposal, (ii) compliance of the proposal with the requirements provided under part 1 of Article 4, including, among others, the requirements provided under the procedure for identification, development, assessment, and prioritization of public investment projects. Relevant public authority shall reject the proposal if the proposal does not comply with the requirements of the law and secondary legislation. In the event the proposal complies with the requirements of the law, it shall be approved by the Government and the private partner selection procedure shall be organized in accordance with the law.

One important component of the proposed policy is that the law provides for mechanisms of compensation for both the private and public partner. Particularly, the winner of the bid (if different from the initiator) shall have to compensate the expenses of the initiator in an amount approved by the public authority or the initiator shall have the right to match the financial proposal of the other bidders, provided however that, for the latter to be applied (i) the proposed public service or infrastructure should not be available in the country or the size of the project exceeds the total size of similar services or infrastructure and (ii) the initiator shall have a high rating in the relevant industry. In addition, the second option (i.e. the right to match) shall not be available in cases when the proposal is only supported by technical and financial justification. Finally, the law provides that secondary legislation can provide for the mechanisms of compensation of the expenses of public authority related to the review and assessment of the proposed project.



One last piece of policy change is related to the removal of the reference to the public investment management policy in the criteria for compliance of the PPP projects. Instead, public investment management policy has been replaced with the procedure for identification, design, assessment and prioritization of the public investment projects, which should be developed after the adoption of the proposed amendments. The accompanying note to the draft does not elaborate on the difference between the two and in fact the reference to the former still remains in another article of the current text of the law.

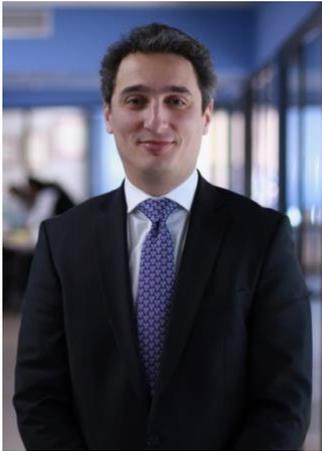
As already explored the new structures provided under the draft law suppose adoption of significant secondary legislation, which should unlock the details of application of relevant rules of the law. The draft provides for 180 days deadline for the Government to develop and adopt such legislation. It is therefore still unclear what exact mechanisms shall the Government propose.

Finally, the proposed draft introduces new transitional provisions providing that the law does not apply to the PPP projects approved by the Government prior to the entry into force of the law. One could only guess the reason for this transitional provision (in fact we do not believe it serves the purpose)!

**NOTE: This material is for general information only and is not intended to provide legal advice.**

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