

REPUBLIC OF VANUATU
BILL FOR THE
PUBLIC PRIVATE PARTNERSHIPS
ACT NO. OF 2024

Explanatory Note

This Bill gives effect to the Government's Public Private Partnership Policy.

A Public-Private Partnership (PPP) is a long-term contract between a private party and a government agency, for providing or managing a public asset and associated services, in which the private party bears significant risk and management responsibility. The public asset or service may be a new infrastructure or other investment, or may involve the management of existing infrastructure or other public assets and services. PPPs can be used by the Government as an instrument to implement priority investment and infrastructure projects that are aligned with the Government's development objectives. The PPP procurement process is different to the current Government procurement process for goods and services under the Government Contracts and Tenders Act [CAP 245], and PPPs provide an alternative pathway for the delivery of assets and services. The Bill will not affect existing utility concessions.

PPPs will enable more investment in infrastructure and services by increasing project financing options, and will aim to achieve value for money in the provision of infrastructure and public services. By harnessing private sector innovation and efficiency, PPPs will stimulate growth and development. A Government priority is to ensure that the long-term delivery and management of PPPs are sustainable.

PPPs could be used to develop new assets and services in the following sectors:

- (a) energy including the development of renewable energy sources; and
- (b) transport - ports (wharfs), airports and roads and bridges; and
- (c) information and Communications Technology; and
- (d) water supply and sanitation; and
- (e) social housing, health care and education facilities; and
- (f) agriculture.

Prime Minister



REPUBLIC OF VANUATU

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REPUBLIC OF VANUATU

BILL FOR THE PUBLIC PRIVATE PARTNERSHIPS ACT NO. OF 2024

An Act to provide for public infrastructure and services through public private partnerships between government agencies and private partners, and for related purposes.

Be it enacted by the President and Parliament as follows-

PART 1 PRELIMINARY MATTERS

1 Interpretation

In this Act, unless the contrary intention appears:

asset means any kind of real or personal property;

bid means an offer or proposal submitted in response to a request for proposal;

bidder means a private sector entity that submits a bid;

Director means the Director responsible for the public private partnership;

evaluation committee, in relation to a government agency, means an evaluation committee established by the government agency under section 14;

facility includes buildings, equipment and services;

feasibility study means a feasibility study prepared under section 10;

Fiscal Risk Management Unit means the Fiscal Risk Management Unit established under section 6;

government agency means:

- (a) a Ministry or Department of the Government; or
- (b) a Provincial Government Council; or

- (c) a Municipal Council; or
- (d) a state-owned enterprise; or
- (e) a Constitutional Entity; or
- (f) a Statutory Entity; or
- (g) any other body prescribed by the Regulations;

infrastructure means any asset or facility provided for the benefit of members of the public or any section of the public, and includes the delivery of services relating to the operation of the asset or facility;

Minister means the Minister responsible for Finance and Economic Management;

Municipal Council means a Municipal Council established under the Municipalities Act [CAP 126];

national public private partnership program means the national public private partnership program of approved public private partnership projects under paragraph 4(e);

potential public private partnership means a project for which a project concept note or a feasibility study has been prepared;

preferred bidder means the bidder ranked number one in accordance with the process and criteria set out in a request for proposal;

pre-qualification process means the pre-qualification process conducted under section 16;

private partner means a private sector entity that has concluded a public private partnership agreement with a government agency;

private sector entity means a partnership, trust, corporation, joint venture, syndicate, consortium, association or other body (whether or not incorporated);

project includes the design, construction, development, financing and operation of new infrastructure and the rehabilitation, modernisation, expansion and operation of existing infrastructure;

project concept note means a project concept note prepared under section 8;

project cost means the anticipated aggregated amount of capital and operating expenditures for the useful life of a project;

proposed public private partnership means a project for which procurement approval has been given by the Council of Ministers under subsection 12(1);

Provincial Government Council has the same meaning as in the Decentralization Act [CAP 230];

public private partnership means an arrangement:

- (a) between a government agency and a private partner to provide public infrastructure and services; and
- (b) in which the public infrastructure and services are provided in part or in whole through private sector financing, ownership or control; and
- (c) in which the private partner bears significant risk and management responsibility; and
- (d) in which the remuneration payable to the private partner under the arrangement is linked to performance or demand,

but does not include any arrangement excluded by the Regulations;

public private partnership agreement means the agreement concluded between a government agency and a private partner governing their obligations and rights under a public private partnership;

public private partnership project means a project carried out under a public private partnership;

Public Private Partnership Unit means the Public Private Partnership Unit established under section 5 ;

request for proposal means a request for proposal under section 17;

request for qualification means a request for qualification under subsection 16(2);

single-source appointment process means a process where a government agency engages in direct negotiations with one bidder for a project;

single stage tender process means a tender process for a project with no pre-qualification process under section 16, unless determined under subsection 16(6);

state owned enterprise means:

- (a) a statutory entity; or
- (b) any other body in relation to which the Government, a Provincial Government Council, a Municipal Council or another state-owned enterprise:
 - (i) controls the composition of the board of directors of the body or the body; or
 - (ii) controls more than 50% of the voting power in the body; or
 - (iii) holds more than 50% of the issued share capital of the body;

tender documents mean the tender documents under subsection 12(2);

tender process means:

- (a) a two-stage tender process; or
- (b) a single stage tender process; or
- (c) a single-source appointment process;

two-stage tender process means a tender process where:

- (a) interested bidders for a project in response to a request for qualification are selected through a pre-qualification process; and
- (b) the subsequent request for proposal is issued only to selected pre-qualified bidders;

unsolicited proposal means a proposal relating to a project that is:

- (a) proposed to be carried out under a public private partnership; and
- (b) not submitted in response to a request or solicitation issued by a government agency.

2 Application of the Act

This Act does not apply to a project if it:

- (a) has a project cost that is less than VT 500,000,000; or
- (b) involves a military or national security-related procurement.

3 Government Contracts and Tenders Act does not apply

The Government Contracts and Tenders Act [CAP 245] does not apply to a public private partnership project under this Act.

PART 2 INSTITUTIONAL ARRANGEMENTS FOR PUBLIC PRIVATE PARTNERSHIPS

4 Functions of the Council of Ministers

The Council of Ministers has the following functions:

- (a) to approve further development and application of the public private partnership policy; and
- (b) to approve projects to be carried out as public private partnerships, based on the appraisal by the relevant government agency, with the assistance from the Public Private Partnership Unit, as required; and
- (c) to approve tender documents and selection of the preferred bidder for public private partnerships; and
- (d) to approve public private partnership agreements and any amendments to them; and
- (e) to approve a national public private partnership program; and
- (f) to periodically authorise independent evaluations of particular public private partnerships as well as the national public private partnership program.
- (g) such other functions as may be conferred on the Council of Ministers under this Act.

5 Functions of the Public Private Partnership Unit

- (1) The Public Private Partnership Unit is established.
- (2) The Unit has the following functions:
 - (a) to control and oversee the public private partnership process, including to undertake reviews and grant approvals in accordance with this Act and the Regulations in the different stages of the public private partnership process; and
 - (b) to develop the public private partnership framework, including to develop Regulations and Guidelines for enhancing the efficiency

- and effectiveness of the development and implementation of public private partnerships; and
- (c) to ensure government agencies develop, implement and monitor public private partnerships in accordance with agreed processes and timelines set out in the public private partnership agreement; and
 - (d) to promote public private partnerships within Vanuatu; and
 - (e) to advise and support government agencies to implement public private partnerships; and
 - (f) to act as a reference centre, including to collate and disseminate relevant knowledge and information about public private partnerships; and
 - (g) to provide communication channels to investors, including information about the national public private partnership program and upcoming opportunities; and
 - (h) to establish and maintain a Public Private Partnership Register; and
 - (i) to report on and measure the performance of public private partnerships on a regular basis; and
 - (j) to build capacity, including the organising of training courses of various kinds for government agencies and other stakeholders; and
 - (k) such other functions as may be conferred on the Public Private Partnership Unit under this Act or any other Act.

6 Functions of the Fiscal Risk Management Unit

- (1) The Fiscal Risk Management Unit is established.
- (2) The Unit has the following functions:
 - (a) to analyse the fiscal aspects of potential public private partnerships; and
 - (b) to work in close collaboration with the Public Private Partnership Unit and government agencies to communicate, on a regular basis,

the Government's fiscal strategy relating to public private partnerships, including to ensure sound and prudent fiscal management of public private partnerships; and

- (c) to undertake reviews and grant approvals in the different stages of the public private partnership process in accordance with this Act and its Regulations;
- (d) to monitor and report to the Minister on the Government's fiscal exposure arising from public private partnerships on a quarterly basis; and
- (e) such other functions as may be conferred on the Fiscal Risk Management Unit under this Act or any other Act.

7 Functions of a government agency

- (1) A government agency is responsible for identifying, initiating, appraising, procuring, implementing, managing and monitoring public private partnership projects in accordance with this Act and its Regulations.
- (2) Without limiting subsection (1), the government agency has the following functions in relation to a public private partnership project:
 - (a) to prepare detailed annual assessments setting out the financial and economic feasibility and the potential impacts and risks of the project, including social, environmental and climate change impacts and risks; and
 - (b) to take primary responsibility for preparing the technical specifications for the project; and
 - (c) to engage and supervise suitably qualified external advisers, as required; and
 - (d) to prepare tender documents and managing the procurement process; and
 - (e) to enter into the public private partnership agreement and prepare related documentation; and

- (f) to manage the public private partnership and exercise its rights and fulfil its obligations under the public private partnership agreement; and
- (g) to prepare updated reports for the Public Private Partnership Unit, throughout the life of the project on a quarterly basis, in accordance with instructions from the Public Private Partnership Unit; and
- (h) to prepare updated reports for the Fiscal Risk Management Unit, throughout the life of the project on a quarterly basis, in accordance with instructions from the Fiscal Risk Management Unit; and
- (i) such other functions as may be conferred on the government agency under this Act.

PART 3 PUBLIC PRIVATE PARTNERSHIP PROCESS

Division 1 Project Preparation Stage

8 Identification of project and preparation of project concept note

- (1) A government agency or a private sector entity may identify a project as a potential public private partnership.
- (2) The government agency or private sector entity must prepare a project concept note on the project and submit it to the Public Private Partnership Unit.
- (3) The project concept note is a general description of the project that include details of the project's rationale and main features.
- (4) Without limiting subsection (3), the project concept note must include the following information:
 - (a) an outline of the problem identified and the technical solution proposed by the project; and
 - (b) details of the project's strategic relevance in terms of the public and national interest, and its consistency with:
 - (i) the Government's investment strategies, including national sustainable development plan, disaster resilience plan, sector plans and climate strategies and priorities; and
 - (ii) any relevant Provincial Government Council plans and strategies; and
 - (iii) any relevant Municipal Council plans and strategies; and
 - (c) the needs and benefits of the project and the suitability of the solution proposed; and
 - (d) the justification for the use of the public private partnership as a modality for the project; and
 - (e) an economic and financial pre-analysis of the project; and
 - (f) an advice from the Attorney General on legal and regulatory issues; and

- (g) an indication of the readiness of the project and its status, including stakeholder identification and availability of resources; and
 - (h) the availability of information about the project; and
 - (i) an outline of the project management plan; and
 - (j) any other information as may be prescribed by the Regulations.
- (5) The project concept note for an unsolicited proposal from a private sector entity must be endorsed by a government agency.
- (6) To avoid doubt, a project may be proposed under subsection (1) whether or not it is included in the Government Investment Program.

9 Selection as potential public private partnership

- (1) The Director must review the project concept note and decide whether or not the project is to be selected as a potential public private partnership.
- (2) In deciding whether a project is to be selected as a potential public private partnership, the Director must have regard to whether the project:
- (a) is of strategic relevance in terms of the public and national interest, and consistent with:
 - (i) the Government's investment strategies, including national sustainable development plan, disaster resilience plan, sector plans and climate strategies and priorities; and
 - (ii) any relevant Provincial Government Council plans and strategies; and
 - (iii) any relevant Municipal Council plans and strategies; and
 - (b) is economically viable in terms of the benefits to society accruing from the project outweighing the project costs; and
 - (c) is suitable for a public private partnership in terms of:
 - (i) the benefits to society from the use of a public private partnership in comparison with other implementation

modalities outweighing the incremental costs related to the development and implementation of the project; and

- (ii) value for money; and
- (d) satisfies any other criteria as may be prescribed by the Regulations.

10 Feasibility Study

- (1) If the Director selects a project as a potential public private partnership under section 9, the government agency must, with assistance from the Public Private Partnership Unit, undertake a feasibility study that provides an independent assessment of the technical, economic, financial, legal and environmental aspects of the project.
- (2) Without limiting subsection (1), the feasibility study must address the following factors:
 - (a) the stakeholder consultations on project needs and options; and
 - (b) a technical feasibility analysis, including identifying costs and significant risks; and
 - (c) the preparation of reference design and corresponding estimates for capital expenditure (if any) and operating expenditures duly adjusted for risks; and
 - (d) a financial and economic analysis of the project and of proposed public private partnership structures, including an estimate of revenues; and
 - (e) social and environmental impact assessments and management plans; and
 - (f) a legal advice from the Attorney General confirming no legal impediments hampering the implementation of the project; and
 - (g) the proposed preliminary structure for the public private partnership, including the contract type, risk allocation, payment mechanisms, procurement strategy and assessing its commercial attractiveness, including through an initial market sounding; and
 - (h) a value for money analysis in terms of assessing and articulating the rationale for implementing the project as a public private

partnership under the proposed structure, confirming that its benefits in comparison with other implementation schemes outweigh its incremental costs; and

- (i) a fiscal analysis in terms of identifying and assessing:
 - (i) the level of fiscal support required for the project, being both direct fiscal support and contingent through the risks to be accepted by government under the proposed structure; and
 - (ii) the affordability of such fiscal support given government fiscal priorities and constraints.
- (3) In undertaking the feasibility study, the government agency must consult with the Fiscal Risk Management Unit.

11 Submission of feasibility study to the Council of Ministers for in-principle approval

- (1) The government agency must submit the feasibility study to the Council of Ministers for in-principle approval to procure the project as a public private partnership if:
 - (a) the government agency is satisfied that the project has met the requirements for fiscal affordability as determined by the Director General of the Ministry of Finance and Economic Management; and
 - (b) the Public Private Partnership Unit and the Fiscal Risk Management Unit agree with those fiscal affordability requirements.
- (2) For the purposes of deciding whether to grant in-principle approval, the Council of Ministers must review the project having regard to the following factors:
 - (a) the strategic relevance of the project in terms of the public and national interest and its consistency with the government's investment, development and climate strategies, plans and priorities; and

- (b) the economic attractiveness of the project in terms of benefits to society accruing from the project outweighing the project costs; and
- (c) the affordability of the fiscal implications of implementing the project as a public private partnership; and
- (d) a legal advice from the Attorney General regarding the feasibility study of the project; and
- (e) the commercial attractiveness of the project as a public private partnership in terms of meeting the requirements from private investors and lenders; and
- (f) the benefits of implementing the project as a public private partnership; and
- (g) any other matter that the Council of Ministers considers relevant.

12 Preparation of tender documents and submission to the Council of Ministers for approval

- (1) If the Council of Ministers gives in-principle, approval to a project under section 11, the government agency must prepare tender documents for the project with assistance from the Public Private Partnership Unit and the Fiscal Risk Management Unit.
- (2) The tender documents must include:
 - (a) a notice of tender; and
 - (b) a request for qualification; and
 - (c) a request for proposal; and
 - (d) a draft public private partnership agreement.
- (3) The government agency must submit the full set of tender documents and a summary of the main terms of the tender documents to the Council of Ministers for approval in order to start the procurement process for the project.

- (4) For the purpose of deciding whether to grant approval under subsection (3), the Council of Ministers must review the tender documents and summary of the main terms of the tender documents having regard to the matters under subsection 11(2) and must obtain the legal advice of the Attorney General before making its decision.

Division 2 Project Procurement Process

13 Council of Ministers to approve project procurement process

- (1) The Council of Ministers must approve one of the following project procurement processes for a proposed public private partnership:
- (a) a two-stage tender process; or
 - (b) a single stage tender process; or
 - (c) a single-source appointment process.
- (2) A two-stage tender process is to be used for a proposed public private partnership project unless a single stage tender process or a single-source appointment process is used.
- (3) The first stage of a two-stage tender process is a pre-qualification process under section 16 and the second stage of a two-stage process is a request for proposal for the pre-qualified bidders under section 17.
- (4) A single stage tender process is to be used if the government agency and the Public Private Partnership Unit require an expedited process and are reasonably satisfied that:
- (a) there is no benefit in pre-qualifying bidders because there are only a limited number of capable bidders in the market; or
 - (b) competition is expected to be primarily determined by the commercial terms submitted because there is no or limited technical complexity to the project.
- (5) A single stage tender process does not require a pre-qualification process under section 16 unless there are special circumstances under subsection 16(6).

- (6) A single-source appointment process is to be used if the government agency and the Public Private Partnership Unit are reasonably satisfied that:
- (a) there is an urgent need to deliver the asset or service that will not be feasible to procure the project through a two-stage or single stage tender process; or
 - (b) there is only one prospective private partner in the market that is capable of delivering the project; or
 - (c) there are other compelling reasons of public interest.
- (7) A single-source appointment process does not require a pre-qualification process under section 16, however, the Regulations may prescribe basic qualifications that must be satisfied by the prospective private partner.
- (8) To avoid doubt, a consortium consisting of multiple local or international private sector entities, however comprised, may participate in a tender process.
- (9) A state- owned enterprise must not participate in a tender process as a bidder.

14 Evaluation Committee

- (1) A government agency must establish an evaluation committee for a proposed public private partnership project.
- (2) The evaluation committee is to supervise and determine the qualification and selection of bidders at each stage of the procurement process.
- (3) The evaluation committee is, on the legal advice of the Attorney General, responsible for confirming compliance with the procurement process for public private partnership projects provided for under this Act and its Regulations.
- (4) The evaluation committee consists of 3 members nominated by:
- (a) the government agency; and
 - (b) the Director; and

- (c) the Central Tenders Board.
- (5) The government agency is to determine the terms and conditions of appointment of members of the evaluation committee.
- (6) The government agency may engage advisors to support the evaluation committee, but advisors have no voting rights at the meeting of the evaluation committee.
- (7) The evaluation committee is to determine and regulate its own meeting and voting procedures.
- (8) A member of the evaluation committee is entitled to a sitting allowance as prescribed by the Regulations.

15 Information about public private partnership project to be made available to public

- (1) Subject to subsection (2), in order to maintain transparency and equality, a government agency must publish the following information about a proposed public private partnership:
 - (a) the tender documents for the proposed public private partnership; and
 - (b) a timeline of the anticipated procurement process for the proposed public private partnership and the qualification criteria for bidders and the bidder evaluation criteria; and
 - (c) a summary of all major decisions made under this Act relating to the proposed public private partnership and the procurement process; and
 - (d) the information about any modification or cancellation of the procurement process; and
 - (e) the information relating to the selection of the private partner or private partners, including:
 - (i) details of the preferred bidder; and
 - (ii) details of the award together with the grounds for selection and a summary of the essential terms of the public private

partnership agreement, including, at least, the price per unit, the term of the agreement and the project parties; and

- (f) the proposed public private partnership agreement and any subsequent amendments that were removed to be:
 - (i) commercially sensitive information; or
 - (ii) personal information as agreed by the parties to the relevant agreement.
- (2) The publication requirements under subsection (1) do not apply to a single-source appointment process.
- (3) During the procurement process for a proposed public private partnership project, the government agency must publish any additional information about the project that becomes available as soon as practicable and at the same time to all participating bidders.

16 Pre-qualification process

- (1) A government agency must conduct a pre-qualification process set out in subsections (2) to (5) prior to issuing a request for a proposal if:
 - (a) the procurement is a two-stage tender process; or
 - (b) a pre-qualification process is considered appropriate for a single stage tender process under subsection (6).
- (2) The government agency must publish a request for qualification as soon as practicable.
- (3) The request for qualification must set out the following in an approved form:
 - (a) the public private partnership project scope, timetable and general contractual risk allocation; and
 - (b) the bidder qualification requirements, including technical qualifications and experience, and evidence of legal and financial capacity; and

- (c) the deadline for responding to the request and how the response is to be made; and
 - (d) the qualification criteria for the selection of pre-qualified bidders; and
 - (e) how the qualifications are required to be submitted; and
 - (f) the rules in relation to issues such as conflict of interest, incompatibilities and changes in the composition of a qualified consortium in the bid submission stage; and
 - (g) a summary description of the project and the future contract structure.
- (4) If a potential bidder wants to be considered for pre-qualification, the bidder must submit a response in accordance with the terms of the request.
- (5) The evaluation committee must review and assess the responses submitted in accordance with the qualification criteria in paragraph (3)(d) and determine which bidders are pre-qualified to proceed to the next stage of the procurement process.
- (6) The Council of Ministers may, on the legal advice of the Attorney General, determine that in special circumstances pre-qualification is appropriate for a single stage tender process.

17 Request for proposal

- (1) After completing the pre-qualification process under section 16, the government agency must issue a request for proposal under subsection (2) to the pre-qualified bidders.
- (2) A request for proposal for a proposed public private partnership must set out the following in an approved form:
- (a) the general information about the project, including minimum project requirements, output specification, timing of key milestones, and environmental, climate resilience and social requirements; and
 - (b) the key terms as a minimum of the public private partnership agreement, or a full draft of the public private partnership

- agreement, with a clear statement about which terms are non-negotiable; and
- (c) a summary of the bid process and timeline specifying the deadline for submitting a bid and how to submit a bid, including the process for and availability of dialogue, clarifications and site visits before and after bid submission; and
 - (d) the evaluation rules and criteria, and methods to evaluate and select bidders; and
 - (e) the proposals for protection of the government such as the right to cancel or to negotiate; and
 - (f) the details of the tender process including:
 - (i) submitting questions; and
 - (ii) conducting one-on-one meetings and any interactive processes; and
 - (iii) the validity period of the proposal.
- (3) If a pre-qualification of bidders is not required under subsection 16(6) for a single stage tender process:
- (a) the government agency must issue a request for proposal to the persons that the government agency considers may be interested in carrying out a project; and
 - (b) the request for proposal must contain such matters as the government agency considers appropriate for a single stage tender process.
- (4) If a single-source appointment process has been followed:
- (a) the government agency must issue a request for proposal to the prospective private partner; and
 - (b) the request for proposal must contain such matters as the government agency considers appropriate for a single-source appointment process.

18 Request for clarification or additional information

- (1) Prior to the submission of a bid by a bidder, a government agency:
 - (a) must respond to a request for clarification or additional information received from the bidder as soon as practicable and in a transparent manner; and
 - (b) may invite the bidder to a meeting or site visit.
- (2) The government agency must share any clarification or additional information provided under paragraph (1)(a) with all other bidders, and all other bidders may attend any meeting or site visit held under paragraph (1)(b).
- (3) Any proposed change to the terms of the proposed public private partnership agreement resulting from interactions with one or more bidders has no effect unless it is approved by the Director and the Director of Finance.

19 Evaluation of bids

- (1) The evaluation committee must:
 - (a) determine which bids satisfy the requirements as set out in the request for proposal; and
 - (b) review and assess all aspects of the bids received, including compliance with technical, financial, legal and environmental, climate resilience and social requirements.
- (2) The evaluation committee must give each bid received an evaluation score in accordance with the evaluation criteria set out in the request for proposal and rank the bid based on its score.

20 Submission of evaluation of qualifying bids to government agency

The evaluation committee must submit to the government agency:

- (a) the results of an evaluation under section 19 including the proposed public private partnership agreement with amendments following any request for clarification or additional information; and
- (b) either:

- (i) if only one bid is received, a recommendation for the government agency to reject that bid, or accept that bid and approved the bidder as the preferred bidder; or
- (ii) if more than one bid is received, a recommendation identifying the highest ranked bidder as the preferred bidder for approval by the government agency and the second highest ranked bidder as the reserve bidder.

21 Further evaluation by government agency

Despite section 20, if:

- (a) only one bid is received, the government agency may request the bidder to submit its best final offer; or
- (b) more than one bid is received, the government agency may determine that it is in the best interests of a project to undertake a further evaluation of all bidders, including, but not limited to, requesting each bidder to submit a best and final offer.

22 Preferred bidder to be announced

- (1) After the approval of the preferred bidder by a government agency, the government agency must:
 - (a) publish details of the preferred bidder; and
 - (b) subject to subsection (2), invite the preferred bidder to finalize any aspects and terms of the proposed public private partnership agreement that are outstanding following the evaluation stage within a specified period after the announcement.
- (2) No material changes to the preferred bidder's bid or to the scope of the project are permitted and no changes are permitted to any terms of the proposed public private partnership agreement identified in the request for proposal as non-negotiable.

23 Cessation of discussions with preferred bidder and invitation to next highest ranked bidder

- (1) This section applies if the government agency is unable to finalize the terms of the public private partnership agreement with the preferred bidder because of material deviations by the preferred bidder from the requirements of the government agency.

- (2) Following expiry of a period of discussions at least equal to the period specified in the request for proposal, the government agency may cease discussions with the preferred bidder.
- (3) In addition to subsection (2), the government agency may invite the reserve bidder (if any) to finalize the terms of the public private partnership agreement, and, if unsuccessful, the next highest ranked bidder and this process may be repeated in turn with the remaining bidders (if any) in descending order of ranking.
- (4) The process under subsection (3) must be undertaken so as soon as practicable.

Division 3 Public private partnership agreement and post-agreement management stage

24 Formal award of public private partnership agreement to a preferred bidder

- (1) Subject to subsection (2), after the successful finalization of any outstanding terms of the public private partnership agreement, a government agency must, in writing, notify the Public Private Partnership Unit that the public private partnership agreement is ready for formal award to the preferred bidder.
- (2) Notification must not be given unless:
 - (a) the Director of Finance has confirmed the affordability of the fiscal implications; and
 - (b) the evaluation committee has confirmed compliance with the provisions of this Act and the request for proposal; and
 - (c) the preferred bidder has established a company incorporated in Vanuatu for the purposes of entering into the public private partnership agreement; and
 - (d) the Attorney-General has approved in writing the final public private partnership agreement; and
 - (e) on the legal advice of the Attorney-General, the Council of Ministers has approved the award to the preferred bidder.
- (3) If notification is given under subsection (2), the government agency must:

- (a) announce that the successful bidder will be awarded the public private partnership agreement after a standstill period of 10 working days; and
 - (b) give written notice to each bidder accordingly.
- (4) The notice under paragraph (3)(b) must specify the selected private partner and include:
 - (a) the grounds for selection and final approval of the Director of Finance, the evaluation committee and the Council of Ministers; and
 - (b) a summary of the essential terms of the public private partnership agreement, including as a minimum the price per unit (if applicable), the term of the public private partnership agreement and project parties.
- (5) On the expiry date of the standstill period, the public private partnership agreement must be awarded in accordance with the announcement under paragraph (3)(a).
- (6) An announcement under paragraph (3)(a) and the award of the public private partnership agreement must be published as soon as practicable.

25 Public private partnership agreement

- (1) A public private partnership agreement must include the following information and conditions:
 - (a) the parties to the public private partnership agreement; and
 - (b) the rights and obligations of the parties; and
 - (c) the risks of the public private partnership project and the allocation of those risks between a government agency and a private partner; and
 - (d) the subject matter of a public private partnership agreement, including the scope of activities to be carried out, the components and content of a public private partnership project and other requirements for public infrastructure or public services; and

- (e) the description of public infrastructure or other property that is to be transferred, constructed, improved, developed, operated or maintained, including technical and economic features, its significance and the time limits for its use (if available); and
 - (f) the distribution of rights of the parties over the relevant infrastructure or other property within the scope of the public private partnership project, as well as the procedure for the transfer of such infrastructure or property; and
 - (g) the conditions for allocating land parcels required for the implementation of a public private partnership project (if necessary), as well as the description of the condition of the land parcels; and
 - (h) the conditions for setting and changing the prices (tariffs) for the goods to be supplied, activities to be carried out or services to be supplied by a private partner; and
 - (i) the validity period of a public private partnership agreement or the procedure for its determination; and
 - (j) the types of security to be provided to a government agency by a private partner and the main conditions for such security; and
 - (k) information about result-based payments, availability payments or other payments to be made to a private partner, including remedies in case of underperformance (such as liquidated damages or penalties) and related grace periods; and
 - (l) the procedure for making amendments to a public private partnership agreement; and
 - (m) the nature of payments to be made to a government agency by a private partner; and
 - (n) the grounds, procedures for and circumstances of termination, including unilateral termination, of the public private partnership agreement, and the step-in rights of the lender and the procedure for calculation of reimbursement for early termination of the agreement.
- (2) The term of a public private partnership agreement must not be less than 3 years and must not exceed 49 years.

- (3) The parties to a public private partnership agreement may agree to extend or shorten its term within the time limits under subsection (2) in the circumstances and on the conditions set out in the public private partnership agreement.
- (4) A public private partnership agreement may stipulate that disputes are to be settled by:
 - (a) reference to the courts of Vanuatu or the competent courts of an agreed jurisdiction which must be stated in the public private partnership agreement; or
 - (b) an alternative dispute resolution mechanism, including mediation, arbitration, expert determination or any combination of these.
- (5) To avoid doubt, subsection (4) does not affect section 30.

26 Public private partnership agreement – step-in rights

- (1) A public private partnership agreement may prescribe that in certain special circumstances and pursuant to the conditions of a related direct agreement, a government agency or a lender may exercise the step-in rights provided for in the public private partnership agreement.
- (2) In such a case, the government agency or other person appointed by a lender may temporarily assume the operation of the relevant public infrastructure or the rendering of public services for the purposes of ensuring the effective operation of that infrastructure or effective rendering of those services and the continuity of the project.
- (3) The costs of such stepping-in must be borne by the relevant party specified in the public private partnership agreement or direct agreement.

27 Types of Government support

- (1) One or more of the following types of Government support may be provided to a private partner within the scope of a project as determined by the terms of the relevant public private partnership agreement:
 - (a) grants;
 - (b) subsidies;

- (c) the allocation of assets necessary for the implementation of a public private partnership project;
 - (d) guarantees for the minimum revenue or minimum number of end users or buyers or other types of guarantees and privileges, within the scope of a public private partnership project;
 - (e) guarantees that the public partner will consume or use a certain volume or share of goods produced, works performed or services rendered during the implementation of the public private partnership project;
 - (f) loans and other types of funding or investments;
 - (g) reimbursement for certain types of costs, and risks related to a project or direct responsibility for them;
 - (h) budgetary guarantees;
 - (i) value added tax, other tax and duty exemptions or concessions on imported or exported materials;
 - (j) a waiver of debt;
 - (k) any other means approved by the Council of Ministers.
- (2) The Government support under subsection (1) is subject to compliance with the requirements of any relevant Act relating to the support.

28 Amendments to a public private partnership agreement

An amendment to a public private partnership agreement has no effect unless it is approved by:

- (a) the Director by confirming sustainability of value for money; and
- (b) the Director of Finance by confirming sustainability of fiscal affordability; and
- (c) the Attorney General in writing; and
- (d) the Council of Ministers if the Government's fiscal exposure is increased by more than VT 100,000,000

Division 4 Other matters relating to the procurement process

29 Modification or cancellation of project or tender process

- (1) A government agency may modify or cancel a project or tender process at any time during the tender process.
- (2) The government agency must in writing notify and provide supporting information equally to all bidders of the modification or cancellation.
- (3) The notification must be provided within 14 days after the date of the modification or cancellation.

30 Review of decision of a government agency

- (1) If a person claims to have suffered, or that the person may suffer, loss or damage because of a decision by a government agency contrary to a provision of this Act in relation to a tender process, the person may seek a review of the decision in accordance with this section.
- (2) The person may submit a request to the evaluation committee to review the decision of the government agency.
- (3) The request to review the decision of the government agency must be in the approved form and be accompanied by the prescribed fee and be made within 30 days after the date of the relevant decision of the government agency.
- (4) The evaluation committee must undertake the review unless it considers the request for review is trivial, frivolous, or vexatious.
- (5) The evaluation committee may determine the review:
 - (a) on the basis of written material provided to it; or
 - (b) by way of a hearing involving oral submissions; or
 - (c) in reliance on both paragraphs (a) and (b).
- (6) In determining a review, the evaluation committee may:
 - (a) confirm the decision of the government agency; or
 - (b) vary the decision of the government agency; or

- (c) set aside the decision of the government agency and substitute a new decision.
- (7) The evaluation committee must give written notice of its decision to the person who sought the review and the government agency within 7 days after making its decision.
- (8) A person aggrieved by a decision of the evaluation committee may appeal on a question of law to the Supreme Court within 30 days after receiving the evaluation committee's decision.

31 Project initiated by private sector entity

- (1) This section applies if:
 - (a) a project is initiated by a private sector entity as an unsolicited proposal; and
 - (b) the project has been prepared and procured in accordance with this Act; and
 - (c) the preferred bidder is different from the private initiator.
- (2) In addition to the requirements under section 18, the request for proposal must also stipulate whether or not:
 - (a) the private partner must compensate the private initiator for any reasonable costs incurred by the private initiator in connection with the development and submission of the unsolicited proposal; or
 - (b) the private initiator has the right to match the commercial terms as proposed by the preferred bidder.

PART 4 MONITORING AND REPORTING

32 Monitoring and supervising

- (1) Subject to the terms of the relevant public private partnership agreement, a government agency is to monitor, supervise and inspect the public private partnership.
- (2) Without limiting subsection (1), a government agency may:
 - (a) prepare regular reports; and
 - (b) enter and inspect the site of the public private partnership during normal working hours; and
 - (c) inspect the physical assets of the public private partnership at any reasonable time; and
 - (d) take, test or analyse samples of any material, or from equipment or other things used in the public private partnership; and
 - (e) inspect and make a paper or electronic copy of any record or document of the public private partnership; and
 - (f) cause independent audits of the public private partnership to be undertaken.
- (3) The head of a government agency may require a person, by notice, to produce a record or document to the government agency.
- (4) The notice must be in writing and served on the person, and require the person to produce the record or document at a specified place within a specified period of at least 14 days.
- (5) If a person who is served with a notice to produce the record or document under subsection (3) fails to comply with the notice, the person commits an offence and is punishable on conviction to a fine not exceeding VT 1,000,000.
- (6) Subsection (5) does not apply if the person has a reasonable excuse.

33 Government agency reports

- (1) A government agency must prepare a quarterly report on the implementation of the public private partnerships for which it is responsible.
- (2) A government agency must, upon the expiry or termination of a public private partnership, prepare an impact assessment report.
- (3) A copy of each report must be made available to the Public Private Partnership Unit and the Fiscal Risk Management Unit within 30 days after preparing the report.

34 Public Private Partnership Unit annual report

- (1) The Public Private Partnership Unit must prepare a consolidated annual report on the activities of all public private partnerships.
- (2) The report must be submitted to the Minister within 3 months after the end of each financial year to which the report relates and the Minister must present the report to Parliament.
- (3) The Public Private Partnership Unit must publish the report on its website within 30 days after preparing the report.

35 Fiscal Risk Management Unit annual report

- (1) The Fiscal Risk Management Unit must prepare a consolidated annual report of the Government's fiscal exposure from all public private partnerships.
- (2) The report must be submitted to the Minister within 3 months after the end of each financial year to which the report relates and the Minister must present the report to Parliament.
- (3) The Fiscal Risk Management Unit must publish the report on its website within 30 days after preparing the report.

36 Register of public private partnerships

- (1) The Public Private Partnership Unit must establish and manage a register of all public private partnerships.
- (2) The Public Private Partnership Unit is to determine the content of the register.

- (3) The register is to be regularly updated and maintained in an electronic form.

PART 5 MISCELLANEOUS PROVISIONS

37 Delegation of functions and powers of the Director

- (1) The Director may, in writing, delegate to an employee of the Public Private Partnership Unit, any of his or her functions or powers under this Act or the Regulations, other than the power of delegation.
- (2) The delegation may be made generally, or in respect of a particular matter or class of matters.
- (3) The Director may at any time revoke or vary a delegation.
- (4) A delegation does not prevent the Director from performing the function or exercising the power that he or she has delegated.

38 Forms

The Director may approve forms for the purposes of this Act or its Regulations.

39 Offences

- (1) A person commits an offence if the person:
 - (a) obstructs or hinders a person carrying out a function or exercising a power under this Act; or
 - (b) knowingly lies to or misleads a person carrying out a function or exercising a power under this Act; or
 - (c) unduly influences or exerts pressure on any member of an evaluation committee, or employee or agent of a government agency; or
 - (d) divulges commercial in confidence information relating to any processes under this Act, except for the purpose of performing a function or exercising a power under this Act; or
 - (e) commits an act that is expressly prohibited under the terms of a tender document; or
 - (f) signs a public private partnership agreement in contravention of this Act or its Regulations; or

- (g) enters into any kind of agreement, arrangement or understanding with another person to the effect that a person will not respond to a tender; or
 - (h) aids or abets any breach of this Act.
- (2) A person who commits an offence under subsection (1) is punishable on conviction:
- (a) in the case of an individual person, to a fine not exceeding VT 10,000,000 or imprisonment for a term not exceeding 10 years, or to both; or
 - (b) in the case of a body corporate, to a fine not exceeding VT 50,000,000.
- (3) In this section, information is confidential information if the Director is satisfied that:
- (a) the release of the information would cause competitive detriment to a person; and
 - (b) the information is not in the public interest; and
 - (c) the information is not required to be disclosed under this Act or any other Act.

40 Regulations

- (1) The Minister may, on the advice of the Director, make Regulations not inconsistent with this Act for the better carrying out or giving effect to the provisions of this Act:
- (2) Without limiting subsection (1), the Regulations may prescribe matters relating to all or any of the following:
- (a) identifying, selecting, developing, procuring, implementing, monitoring and regulating public private partnerships;
 - (b) the tender process;
 - (c) unsolicited proposals or private sector led proposals;

- (d) a complaints procedure relating to public private partnerships;
- (e) the fees to be paid for the purposes of this Act or its Regulations.

41 Requirements for publication

- (1) This section applies to any requirement under this Act or its Regulations for an announcement, notice or other document to be published.
- (2) The announcement, notice or document may be published in all or any of the following ways:
 - (a) by making a copy of the announcement, notice or document available online:
 - (i) on the Public Private Partnership Unit’s web-based platform; or
 - (ii) via an evaluation committee portal; or
 - (iii) on another website approved by the Director;
 - (b) in the Gazette;
 - (c) in a newspaper circulating throughout Vanuatu;
 - (d) in a radio or television broadcast;
 - (e) in any other way the Director considers appropriate in the circumstances.

42 Repeal

The Privately Financed Airport Infrastructure Projects Act No. 20 of 2008 is repealed.

43 Commencement

This Act commences on the day on which it is published in the Gazette.