

GOVERNMENT OF ZAMBIA

ACT

No. 9 of 2018

Date of Assent: 28th July, 2018

An Act to amend the Public-Private Partnership Act, 2009.

[31st July, 2018

ENACTED by the Parliament of Zambia.

Enactment

1. This Act may be cited as the Public-Private Partnership (Amendment) Act, 2018, and shall be read as one with the Public-Private Partnership Act, 2009, in this Act referred to as the principal Act.

Short title
Act No. 14
of 2009

2. Section 3 of the principal Act is amended by the—

Amendment
of section 3

(a) deletion of the definitions “local authority” and “Unit”;
and

(b) insertion of the following definitions in the appropriate places:

“Consolidated Fund” means the consolidated fund established under the Constitution;

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“Department” means the department established under section 4 which performs the functions of a Public-Private Partnership Unit for the purposes of Public-Private Partnerships undertaken under this Act; and

“local authority” has the meaning assigned to the words in the Constitution.

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3. The principal Act is amended by the deletion of section 4 and the substitution therefor of the following:

Amendment
of section 4

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Establishment of Department	<p>4. (1) There is established the Public-Private Partnership Department, which is responsible for the implementation of the provisions of this Act.</p> <p>(2) The department shall be under the control and supervision of the Ministry responsible for finance.</p>
Repeal and replacement of section 5	<p>4. The principal Act is amended by the repeal of section 5 and the substitution therefor of the following:</p>
Functions of Department	<p>5. (1) The functions of the Department are to—</p> <ul style="list-style-type: none">(a) recommend to the Government on the use of public-private partnerships in the financing, construction, maintenance and operation of any project;(b) advise Government on administrative procedures in relation to project development and on matters of policy relating to public-private partnerships;(c) categorise projects for purposes of this Act and prepare a project register as may be prescribed;(d) coordinate with contracting authorities in respect of any project;(e) develop technical and best practice guidelines in relation to all aspects of public-private partnerships, standardised bidding documents and public-private partnership agreement provisions for purposes of this Act;(f) receive and make an assessment of any proposed project submitted to it and give its recommendations to the contracting authority as to whether the project or facility—<ul style="list-style-type: none">(i) is affordable to a contracting authority;(ii) provides value for money for the Republic; and(iii) presents optimum transfer of technical, operational and financial risks to the concessionaire;(g) examine the request for proposals to ensure conformity with the feasibility study and legal and regulatory requirements;

- (h) monitor the competitive selection process and provide for review of the process, if so required, under this Act;
- (i) in liaison with the ministry responsible for national planning and development, monitor progress of implementation of public-private partnership agreements in order to facilitate timely completion;
- (j) approve terms of reference for consultancy assignments for a project; and
- (k) facilitate training and provide advisory services to contracting authorities.

(2) The Department shall exercise and perform such other powers and functions as are conferred or imposed on it by, or under, this Act or any other law.

5. The principal Act is amended by the repeal of section 7 and the substitution therefor of the following:

Repeal and replacement of section 7

7. (1) The functions of the Council are to—
- (a) formulate policies relating to public-private partnerships for purposes of this Act;
 - (b) approve projects for purposes of this Act as prescribed;
 - (c) approve the award of agreements under this Act;
 - (d) ensure competition, transparency and equity in the selection process under this Act; and
 - (e) give directives to any contracting authority, or concessionaire regarding the implementation of any project.

Functions of Council

(2) The Council shall, on receipt of a recommendation from the Technical Committee, approve or reject a project or award of an agreement.

(3) The Council may, in the discharge of its functions under this Act—

- (a) commission any study relevant to the determination of the award of any agreement;
- (b) request any contracting authority, regulatory agency, concessionaire or any other body or person to furnish the Council with information, details, documents and particulars required in connection with or relating to any project;

(c) request any professional or technical assistance from any appropriate body or person in Zambia or elsewhere; and

(d) inspect, visit, review and monitor any project and its implementation, execution, operation and management.

Amendment of section 8

6. Section 8 of the principal Act is amended by the deletion of paragraph (b) and the substitution therefor of the following:

(b) five Ministers appointed by the President, one of whom shall be designated the Vice-Chairperson;.

Repeal and replacement of section 10

7. The principal Act is amended by the repeal of section 10 and the substitution therefor of the following:

Constitution of Public-Private Partnership Technical Committee

10. (1) There is constituted the Public-Private Partnership Technical Committee, which consists of the following part-time members:

(a) the Secretary to the Treasury, as Chairperson;

(b) a representative of the Attorney-General;

(c) the Permanent Secretary of the Ministry responsible for national planning and development;

(d) the Permanent Secretary of the Ministry responsible for industry;

(e) the Permanent Secretary of the Ministry responsible for infrastructure;

(f) the Permanent Secretary of the Ministry responsible for land;

(g) the Permanent Secretary of the Ministry responsible for local government;

(h) a representative of the Engineering Institution of Zambia;

(i) a representative of the National Council for Construction;

(j) a representative of the Zambia Environmental Management Agency;

(k) a representative of the Zambia Public Procurement Authority;

(l) a representative of the Zambia Institute of Chartered Accountants;

(m) a representative of the Economics Association of Zambia; and

(n) one person appointed by the Minister.

(2) The Minister shall appoint the members under subsection (1) (b), (h), (i), (j), (k), (l) and (m).

(3) The members shall elect the Vice-Chairperson from amongst themselves.

(4) Subject to subsection (2), the members of the Technical Committee appointed by the Minister under subsection (2) shall hold office for a period of three years from the date of appointment and are eligible for appointment for a further term of three years.

(5) The office of a member becomes vacant —

(a) if the member is absent, without reasonable excuse, from three consecutive meetings of the Technical Committee of which the member has had notice;

(b) upon the member's death;

(c) if the member is adjudged bankrupt;

(d) if the member ceases to hold the office by virtue of which the member was appointed;

(e) if the member becomes incapable of performing the duties of a member;

(f) if the member is removed by the Minister;

(g) if the member is convicted of an offence involving dishonesty or fraud under this Act or any other law; or

(h) upon the expiry of one month's notice of the member's intention to resign from office, given by the member to the Minister.

(6) A member may resign from office by giving one month's notice in writing to the Minister.

(7) Where a vacancy occurs in terms of subsection (4), the Minister shall appoint another person to replace the member who vacates office, but that person shall hold office for the remainder of the outgoing member's term.

(8) A member of the Technical Committee shall be paid allowances that the Minister may determine with the approval of the Emoluments Commission.

Repeal and replacement of section 14

8. The principal Act is amended by the repeal of section 14 and the substitution therefor of the following:

Director and other public officers

14. (1) There is a Director for the Department who is a public officer appointed by the Civil Service Commission.

(2) The Director shall, subject to the general or specific directions of the Council—

(a) be responsible for the administration of the Department;

(b) be an *ex-officio* member of the Technical Committee; and

(c) exercise the functions conferred on the Director by, or under, this Act.

(3) The Civil Service Commission shall appoint such other officers as are necessary for purposes of this Act.

Repeal and replacement of sections 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35

9. The principal Act is amended by the repeal of sections 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35 and the substitution therefor of the following:

Single stage and two stage procedures for requesting proposal

26. (1) After the evaluation of the pre-selection bids, the contracting authority shall submit a report for approval to the Department, demonstrating how the pre-selection criteria specified under section 23 has been met.

(2) The report shall contain the following statements:

(a) that the bids explain the capacity of the concessionaires and their proposed mechanisms and procedures to effectively implement, manage, enforce, monitor and report on the proposed infrastructure project and facility; and

(b) that a satisfactory due diligence including a legal due diligence has been completed by the Department and the selected concessionaires in relation to matters of their respective competence and capacity are qualified to enter into the public-private partnership agreement.

27. (1) A contracting authority shall provide a set of the request for proposals and related documents issued in accordance with section 28 to each pre-selected bidder that pays the fee, if any, charged for those bidding documents.

Content of
request for
proposals

(2) Despite subsection (1), a contracting authority may use a two stage procedure to request for a proposal from pre-selected bidders when the contracting authority does not consider it to be feasible to describe the characteristics of the project in the request for a proposal.

(3) Where a two stage procedure is used, the following shall apply:

- (a) the initial request for proposals shall call on the bidders to submit, in the first stage of the procedure, initial proposals relating to project specifications, performance indicators, financing requirements or other characteristics of the project as well as the main contractual terms proposed by the contracting authority or Department;
- (b) the contracting authority may convene meetings and hold discussions with any of the bidders to clarify questions concerning the initial request for proposals or the initial proposals and accompanying documents submitted by the bidders which shall be recorded in minutes of the meeting or discussion;
- (c) following evaluation of the proposals received, the contracting authority may review and, as appropriate, revise the initial request for proposals by removing, modifying or adding to any aspect of the initial project specifications, performance indicators, financing requirements or other characteristics of the project, including the main contractual terms and any criterion for evaluating proposals and ascertaining the preferred bidder, as set out in the initial request for the proposals;

Content of
request for
proposal
Act No. 12
of 2008

- (d) the contracting authority shall indicate in the record of the selection proceedings, to be kept pursuant to section 39, the justification for any revision to the request for proposals and which shall be communicated in the invitation to submit final proposals; and
- (e) at the second stage of the procedure, the contracting authority, shall invite the bidders to submit final proposals with respect to a single set of project specifications, performance indicators or contractual terms in accordance with sections 28 through to section 34.

28. To the extent not required by, or under, the Public Procurement Act, 2008, a request for proposals shall include the following:

- (a) general information as may be required by the bidders in order to prepare and submit their proposals;
- (b) project specifications and performance indicators, as appropriate, including the contracting authority's or Department's requirements regarding safety and security standards and environmental protection;
- (c) contractual terms proposed by the contracting authority or Department including an indication of which terms are considered to be non-negotiable; and
- (d) criteria for evaluating proposals, and the thresholds, if any, set by the contracting authority for identifying non-responsive proposals, the relative weight to be accorded to each evaluation criterion and the manner in which the criteria and thresholds are to be applied in the evaluation and rejection of proposals.

Bid securities

29. (1) A request for a proposal shall set out the requirements with respect to the issue of, and the nature, form, amount and other principal terms and conditions of the required bid security.

(2) A bidder shall not forfeit any bid security that it may have been required to provide, other than in cases of a—

- (a) withdrawal or modification of a proposal after the deadline for submission of proposals and, if so stipulated in the request for a proposal, before that deadline;
- (b) failure to enter into final negotiations with the contracting authority pursuant to section 34 (1);
- (c) failure to submit its best and final offer within the time limit prescribed by the contracting authority pursuant to section 34 (2);
- (d) failure to sign the agreement, if required by the contracting authority to do so, after the technical proposal has been accepted; or
- (e) failure to provide the required security for the fulfillment of the agreement after the proposal has been accepted or to comply with any other condition prior to signing the agreement as specified in the request for a proposal.

30. (1) A contracting authority may, whether on its own initiative or as a result of a request for clarification by a bidder, review and, as appropriate, revise any element of the request for a proposal as set out in section 28.

Clarifications
and
modifications

(2) A contracting authority shall indicate in the record of the selection proceedings, to be kept pursuant to section 39, the justification for any revision to the request for a proposal and which shall be communicated to the bidders, in the same manner as the request for a proposal, at a reasonable time prior to the deadline for submission of proposals.

31. (1) The criteria for evaluating technical proposals shall include the following:

Evaluation
criteria

- (a) technical soundness;
- (b) compliance with environmental standards under any law;
- (c) operational feasibility;
- (d) quality of services and measures to ensure their continuity; and
- (e) any other prescribed criteria.

- (2) The criteria for evaluating financial and commercial proposals shall include, as appropriate—
- (a) the present value of proposed user levies, unit prices and other charges over the agreement period;
 - (b) the present value of proposed direct payments by the contracting authority, if any;
 - (c) the costs for design and construction activities, annual operation and maintenance costs, present value of capital costs and operating and maintenance costs;
 - (d) the extent of financial support, if any, expected from a public authority in Zambia;
 - (e) the soundness of the proposed financial arrangements;
 - (f) the extent of acceptance of the negotiable contractual terms proposed by the contracting authority in the request for technical proposals;
 - (g) the social and economic development potential offered by the technical proposals; and
 - (h) any other prescribed criteria.

Evaluation of proposal

32. (1) A contracting authority shall evaluate each proposal in accordance with the evaluation criteria, the relative weight accorded to each such proposal criterion and the evaluation process set out in the request for proposals.

(2) For the purposes of subsection (1), a contracting authority may establish thresholds with respect to quality, technical, financial and commercial aspects of the proposal.

Further demonstration of fulfilment of qualification criteria

33. (1) A contracting authority may require any bidder that has been pre-selected to demonstrate again its qualifications in accordance with the same criteria used for pre-selection.

(2) A contracting authority shall disqualify any bidder that fails to demonstrate its qualifications again if requested to do so.

34. (1) A contracting authority shall rank all responsive proposals on the basis of the evaluation criteria and invite, for final negotiation of the agreement, the bidder that has attained the best rating, except that the final negotiations shall not include those contractual terms, if any, that were stated as non-negotiable in the final request for a proposal.

Final negotiations

(2) Where a bidder puts forward its best and final offer and the contracting authority does not find that offer acceptable, it shall terminate the negotiations with the bidder concerned.

(3) Where a contracting authority terminates negotiations under subsection (2), the contracting authority shall invite the other bidders for negotiations, in the order of their ranking, until the parties conclude an agreement or the contracting authority rejects all the remaining proposals.

(4) A contracting authority shall not resume negotiations with a bidder with whom negotiations have been terminated in accordance with this section.

35. A contracting authority may negotiate an agreement, subject to the approval of the Council, without using the procedure set out in this Part in the following cases:

Circumstances authorising award without competitive procedures

- (a) where the project is of short duration and the anticipated initial investment value does not exceed an amount prescribed;
- (b) where the project involves national defence or national security;
- (c) where there is only one source capable of providing the required service, such as, when the provision of the service requires the use of intellectual property, trade secrets or other exclusive rights owned or possessed by a certain person or persons;
- (d) where an invitation to the pre-selection proceedings or a request for a proposal has been issued but no proposals were submitted or all proposals failed to meet the evaluation criteria set out in the request for proposals

and if, in the opinion of the contracting authority, issuing a new invitation to the pre-selection proceedings and a new request for technical proposals is not likely to result in an infrastructure project or facility award within the required time frame; or

(e) in any other case where the Council authorises such an exception for compelling reasons of national or public interest.

Amendment of section 43

10. Section 43 of the principal Act is amended in paragraph (q) by the insertion of the words “including proceeds arising from the projects” immediately after the word “terms”.

Insertion of new section 65A
Remission of funds

11. The principal Act is amended by the insertion of the following section immediately after section 65:

65A. A contracting authority shall remit such percentage of the fees, as determined by the Council, collected under sections 27 (1) and 42 (9) to the Department to defray the costs of undertaking due diligence, reviewing, evaluating reports, processing recommendation or handling projects on behalf of the contracting authority.

Amendment of section 67

12. Section 67 is amended by the deletion of subsection (2).

Amendment of Second Schedule

13. Paragraph 2 of the Second Schedule is amended by the deletion of subparagraph (5) and the substitution therefor of the following:

“(5) Five members shall constitute a quorum at a meeting of the Council”.

General amendment

14. The principal Act is amended by the deletion of the—

- (a) word “Unit” wherever the word appears and the substitution therefor of the word “Department”;
- (b) words “Public Service Commission” wherever the words appear and the substitution therefor of the words “Civil Service Commission”; and
- (c) word “Notwithstanding” and the substitution therefor of the word “Despite”.
