

ARRANGEMENT OF SECTIONS

PART 1—PRELIMINARY

1. Short title and commencement
2. Interpretation
3. Act binds Government
4. Purposes

PART 2—AUTHORISATION AND IMPLEMENTATION REGULATIONS

5. Authorisation Regulations
6. Public process
7. Initial consultation requirements
8. Implementation Regulations
9. Content of Implementation Regulations
10. Harmonisation obligations
11. Public charges for PPP goods and services

PART 3—TENDER PROCESSES

12. Tender process management
13. Process
14. Functions and duties of tender evaluation team
15. Rejection of tenders
16. Award of tender

PART 4—RESTRICTIONS AND PROTECTIONS

17. PPP controlling company
18. Fiji Share
19. Attorney General may enforce control provision
20. Participation by owners of land
21. No depreciation of property
22. No State or municipal guarantees
23. Part 9 of Financial Management Act 2004 applies
24. Transfer of Assets and Liabilities
25. Local Government and Public Private Partnerships

ACT NO. 10 OF 2006

I assent.

[L.S.]

J. I. ULUIVUDA
President**AN ACT**

[22nd March 2006]

TO MAKE PROVISION FOR PUBLIC PRIVATE PARTNERSHIPS TO
ENHANCE INFRASTRUCTURE AND SERVICES DEVELOPMENT
AND RELATED MATTERS

[Commencement Date: 27th March 2006]

ENACTED by the Parliament of the Fiji Islands—

PART 1—PRELIMINARY*Short title and commencement*

1.—(1) This Act may be cited as the Public Private Partnerships Act 2006.

(2) This Act comes into force on the day appointed by the Minister by notice in the *Gazette*.*Interpretation*

2.—(1) In this Act, unless the context otherwise requires—

“Authorised Regulations” means any Authorised Regulations made under section 5;

“Chief Executive” means the Chief Executive Officer of the Ministry;

“Fiji interests” means—

(a) the State;

(b) any municipality within the meaning of the Local Government Act;

- (c) any citizen of Fiji; or
- (d) any company under the control of the State, any municipality, or citizen of Fiji or any combination of them; and for the purposes of this paragraph,

“control” means—

- (i) holding and being able to exercise 51% or more of the voting rights at a meeting of shareholders of the company; or
- (ii) the right to appoint more than 50% of the directors of the company;

and there being no instruments, agreements or understandings that would have the purpose or effect of negating, restricting, controlling or directing the rights referred to in subparagraph (i) or (ii);

“Fiji Share” means a share to which section 18 applies;

“Implementation Regulations” means any Implementation Regulations made under section 8;

“land” includes water and land covered by water;

“Minister” means the Minister who is assigned the responsibility of this Act by virtue of section 103 of the Constitution, and “Ministry” has a corresponding meaning;

“owner” of land means—

- (a) where the land has been granted or alienated in fee simple – the registered proprietor of the land;
- (b) where the land is native land –
 - (i) the Native Land Trust Board; and
 - (ii) the *mataqali* or other divisions of Fijians having customary rights to occupy and use the land;
- (c) where the land is owned in accordance with the Rotuma Lands Act (Cap. 138) – the person recognised as owner of that land;
- (d) where the land is owned in accordance with the Banaban Lands Act (Cap. 124) – the person recognised as owner of that land; or
- (e) where the land is State land – the Minister for Lands;

“PPP controlling company” has the meaning given in section 17;

“public private partnership” means an arrangement which, irrespective of its corporate or legal forms, brings together state assets or expertise and private sector assets or expertise to provide infrastructure or services within Fiji;

“relevant Minister” means the Minister who has responsibility for the sector relevant to the public private partnership;

“State assets” has the same meaning as in the Financial Management Act 2004, and includes assets of a municipality within the meaning of the Local Government Act.

Act binds Government

3. This Act binds the Government.

Purposes

4. The purposes of this Act are—

- (a) to improve the delivery of public infrastructure and services in Fiji;
- (b) to assist in the aim of achieving better value for money spent by the Government;
- (c) to recognise and encourage the role of the private sector in maximising of national growth and development;
- (d) to provide a robust framework for the development of public private partnerships;
- (e) to empower participation by resource owners and municipalities in public private partnerships and provide assurance for private interests in those partnerships;
- (f) to encourage competitive and efficient markets for the provision of infrastructure and services in Fiji;
- (g) to enable fair competition for the right to participate in public private partnerships;
- (h) to obtain value for State and municipality contributions to public private partnerships.

PART 2—AUTHORISATION AND IMPLEMENTATION REGULATIONS

Authorisation Regulations

- 5.—(1) The Minister may make Authorisation Regulations authorising the development of a public private partnership proposal which must include a general description of the process by which private sector partners may be selected.

(2) Authorisation Regulations may—

- (a) specify conditions, either precisely or within parameters, that must be met before the public private partnership may proceed;
- (b) set out a process by which the Minister will confirm whether the conditions have been met;
- (c) contain a commitment that, if the confirmation under **paragraph (b)** is given, and the consultation process conducted under **section 7** shows an acceptable level of support, the Minister will take all necessary steps to make appropriate Implementation Regulations for the public private partnership.

(3) Authorisation Regulations must contain provisions for consultation with the public, owners of affected land, affected communities and potential users of the infrastructure or services to be provided under the public private partnership.

(4) Authorisation regulations in respect of an unsolicited proposal for a public private partnership received from the private sector may provide that the proponents of the proposal may be given the right to match the highest ranked tender.

Public process

6. The Minister must ensure that a summary of the Authorisation Regulations in respect of any public private partnership is published within Fiji and elsewhere, as the Minister considers appropriate, so that there is an opportunity for those who may be interested in participating in a public private partnership to submit tenders.

Initial consultation requirements

7.—(1) Consultation on a proposed public private partnership must be supervised by the Chief Executive and carried out in accordance with the following principles, and otherwise as required in the relevant Authorisation Regulations—

- (a) that persons who, in the opinion of the Chief Executive, will or may be affected by, be users of, or have an interest in the proposed public private partnership be encouraged to present their views in a manner appropriate to the customary protocols of those persons; and
- (b) that those persons be given clear information about the proposed public private partnership, the options, and the proposed process, including notice of the consultation period; and
- (c) that recommendations of the Ministry, together with reasons, be given either publicly or by notice to those persons who presented their views.

(2) The Chief Executive may determine how consultation is to be carried out having regard to the particular circumstances of each proposed public private partnership; and must give effect to any requirements of the Authorisation Regulations as to the content and conduct of any consultation.

Implementation Regulations

8.—(1) The Minister must make Implementation Regulations if—

- (a) the confirmation under section 5(2)(b) is given; and
- (b) the Minister is satisfied that the consultation process conducted under section 7 shows an acceptable level of support for the proposed public private partnership.

(2) Implementation Regulations must be made before the tender process for private sector partners begins.

Content of Implementation Regulations

9.—(1) Implementation Regulations must prescribe the framework and parameters under which the public private partnership will operate and, without limitation, may prescribe—

- (a) the structure or general description of the structure of the partnership;
- (b) capitalisation requirements;
- (c) debt level limitations;
- (d) operating conditions;
- (e) conditions as to the standard of maintenance and performance standards during the operation of the public private partnership;
- (f) conditions as to the transfer of ownership of any assets or liabilities to the State or a municipality, including inspection and valuation processes;
- (g) conditions as to the transfer of risk to the private sector;
- (h) conditions as to fixed or variable subsidy levels;
- (i) conditions as to the need for performance bonds or guarantees from any party, its parent company or any other person;
- (j) the level or kind of local involvement that is expected or preferred, and whether any concessions might be made in return for local involvement;
- (k) conditions as to the step-in rights of the State or any lender, which may include service level requirements or standards;
- (l) dispute resolution processes;
- (m) circumstances in which the public private partnership may be terminated by the State, or a municipality and the consequences of that termination;
or

- (n) conditions that must be met before any part of the public private partnership may become operative, or before charges may be imposed for use of any infrastructure or services provided by the public private partnership.

(2) Implementation Regulations may state that matters listed in subsection (1), or other matters, may be left for negotiation with potential private sector partners, either generally or within specified parameters.

(3) The Minister must not make Implementation Regulations without giving the Minister for Finance, the Attorney General, and the relevant Minister 14 days to comment on the draft Implementation Regulations.

Harmonisation obligations

10.—(1) Nothing in this Act or any Implementation Regulations, and nothing properly done under the authority of this Act or those regulations, constitutes a breach of any provision of the Commerce Act 1998 or the Fair Trading Decree 1992.

(2) The Minister must be satisfied before making any Implementation Regulation that would authorise any act or omission that might otherwise be a breach of any provision of the Commerce Act 1998 or the Fair Trading Decree 1992 that the regulation is necessary for the proper operation of the public private partnership.

Public charges for PPP goods and services

11. Where any public private partnership involves a fee, toll, or charge (charges) on customers or users of any infrastructure, goods, or service, the Implementation Regulations may do all or any of the following—

- (a) set the charges;
- (b) authorise the PPP controlling company to set the charges, within limits or according to a method set out in the regulations;
- (c) grant exemptions, and authorise the PPP controlling company to grant exemptions;
- (d) provide for, or allow the PPP controlling company to provide for, different charges on any differential basis set out in the regulations or determined by the PPP controlling company;
- (e) provide a mechanism for variation of the charges if any financial or economic parameters are exceeded or are not met;
- (f) state how charges are to be collected or may be paid; and
- (g) state the circumstances (such as an emergency declared by a written law or civil emergencies such as forces of nature) in which charges must not be collected.

PART 3—TENDER PROCESSES

Tender process management

12.—(1) The Chief Executive is responsible for the management of tender processes for public private partnerships in accordance with this Part.

(2) The Chief Executive must determine the process for the conduct of the tender—

- (a) after consultation with the Chairperson of the Central Tender Board; and
- (b) in accordance with any requirements in the Authorisation Regulations or Implementation Regulations.

Process

13.—(1) Where Implementation Regulations have been made for a public private partnership proposal, the Chief Executive must appoint a tender evaluation team having regard to the nature of the proposal and the purposes of this Act.

(2) A tender evaluation team may comprise up to 6 members; and must include the Chairperson of the Central Tender Board, or that Chairperson's nominee.

(3) None of the following persons may be a member of a tender evaluation team—

- (a) any person who is, or within the previous 2 years has been, a member of the House of Representatives or the Senate; or
- (b) the Chief Executive.

(4) Not more than half of the number of members of a tender evaluation team may be public officers.

Functions and duties of tender evaluation team

14.—(1) The functions and duties of the tender evaluation team are —

- (a) to participate in any pre-qualification or shortlisting of tenderers;
- (b) to conduct a diligent and impartial appraisal of all tenders;
- (c) to rank the tenders;
- (d) to give notice to all the tenders of the highest ranked tender, the price, and a general description of the terms or features of that tender; and whether the tender evaluation team recommends that it be accepted;
- (e) to prepare a report to the Chief Executive on the conduct of the tender process and the appraisal of tenders for submission to the Minister;
- (f) to otherwise maintain absolute confidentiality in the tender appraisal and reporting.

(2) Ranking of tenders must be according to their suitability to implement the public private partnership, compliance with the Authorisation Regulations and Implementation Regulations, how they achieve the purposes of this Act; and the lowest priced tender need not be ranked the highest.

(3) The report to the Chief Executive under subsection (1)(e) may omit confidential information (except in respect of the highest ranked tender) to the extent that the tender evaluation team considers that confidentiality does not compromise the integrity of its report.

(4) If the tender evaluation team considers that none of the tenders should be accepted, it must recommend accordingly.

Rejection of tenders

15.—(1) If the tender evaluation team rejects any tender in the course of its evaluation because the tender does not comply with the Authorisation Regulations, the Implementation Regulations or the processes prescribed by the Chief Executive under section 12, the tender evaluation team—

- (a) must give notice of the rejection, and the reasons, to the tenderer concerned; and
- (b) may, but is not obliged to, give the tenderer an opportunity to rectify its tender.

(2) The tender evaluation team must not give an opportunity to rectify a tender under subsection (1)(b) unless it is satisfied that the integrity of the tender process will not be compromised.

Award of tender

16.—(1) The Chief Executive must, within 14 days, submit the report received under section 14(1)(e) to the Minister, together with any recommendation or comments of the Chief Executive.

(2) The Minister must give the Minister for Finance, the Attorney General, and the relevant Minister an opportunity to consult with the Minister on the report and any recommendation or comments, and then refer them to Cabinet which may—

- (a) direct that the recommended tender be accepted; or
 - (b) direct the Chief Executive to negotiate further with the highest ranked tenderer only or conduct a fresh tender round; or
 - (c) direct that the public private partnership proposal be abandoned.
- (3) For the avoidance of doubt, under subsection (2), Cabinet must not purport—
- (a) to amend the recommended tender; or
 - (b) to accept any tender other than the recommended tender.

PART 4—RESTRICTIONS AND PROTECTIONS

PPP controlling company

17.—(1) A public private partnership may consist of a company or companies and any combination of partnerships, trusts, joint ventures, individuals, municipalities, the State, or other entities (“entities”) (whether they are governed by Fiji law or not) as the circumstances may require; but must in all cases be controlled by a PPP controlling company to the extent anticipated by subsection (2)(b).

(2) A PPP controlling company —

- (a) must be a company registered under the Companies Act; and
- (b) must have direct or indirect control of such of the entities as are described either specifically or generally in the Implementation Regulations for this purpose.

(3) The memorandum of association of the PPP controlling company must provide that the company and its directors must ensure that it and the entities that it controls directly or indirectly operate the public private partnership in a manner consistent with the purposes of this Act and comply with any specific provisions of the Implementation Regulations.

(4) A PPP controlling company must be under Fiji control by reason of—

- (a) Fiji interests holding and able to exercise 51% or more of the voting rights at a meeting of shareholders of the PPP controlling company; or
- (b) Fiji interests having the right to appoint more than 50% of the directors of the PPP controlling company; or
- (c) a PPP controlling company having a Fiji Share,

and in each case there are no other instruments, agreements or understandings, that have the purpose or effect of negating, restricting, controlling or directing (formally or informally) the rights referred to in paragraphs (a) or (b).

Fiji Share

18.—(1) A Fiji Share is a share that is provided for in the articles of association of the PPP controlling company on the following terms—

- (a) the Fiji Share must be held by the Minister for Finance for the time being and is not otherwise transferable;
- (b) the articles of association may provide that —
 - (i) the Fiji Shareholder has the power to veto actions of specified kinds proposed by the PPP controlling company or entities that it controls directly or indirectly and the right to be consulted on specified kinds of matters; and

- (ii) specified kinds of conduct cannot be commenced or discontinued by the PPP controlling company or entities that it controls directly or indirectly unless the prior approval of the Fiji Shareholder in writing addressed to the PPP controlling company has first been obtained;
- (c) such other terms as are specified in or contemplated by the Implementation Regulations or agreed in the course of negotiation of the public private partnership.

(2) the articles of association of the PPP controlling company must contain an obligation on the company and its directors to operate the PPP controlling company and ensure that the entities that it controls directly or indirectly are operated in every case in a manner that does not cause any breach of the requirements of subsection (1);

(3) the articles of association of the PPP controlling company must give the Fiji Shareholder the right, but not the obligation, to bring proceedings to enforce performance of the obligations referred to in subsection (1).

(4) Nothing in this section, or the provisions in the articles of association to give effect to this section—

- (a) confer any rights on, or are enforceable by, anyone other than the Fiji Shareholder; and
- (b) empower or require the PPP controlling company or its directors to contravene any enactment or law.

(5) If the Fiji Shareholder brings proceedings to enforce the rights attached to the Fiji Share and judgment is awarded in favour of the Fiji Shareholder, the PPP controlling company must indemnify the Fiji Shareholder against all the costs of that action on a solicitor and own client basis.

Attorney General may enforce control provision

19.—(1) The Attorney General has the right under the State Proceedings Act (Cap.24) to bring proceedings for a declaration as to whether there is a breach of section 17(4)(a) and (b).

(2) No other person may bring any such proceedings.

(3) In any such proceeding, if the Court finds there is a breach of section 17(4)(a) and (b), the Court may order –

- (a) that any voting rights must be divested to Fiji interests within such period as the Court directs;
- (b) that the right to appoint a director or directors generally must be transferred to Fiji interests within such period as the Court directs;
- (c) that any instrument, agreement or understanding has no legal effect and must not be implemented;

- (d) costs and damages of such amount as is within the power of that Court to award in civil proceedings must be paid to the State by any party to the proceedings; or
- (e) such other orders as the Court considers appropriate.

Participation by owners of land

20.—(1) Any owner of land is entitled, in accordance with and subject to the terms on which the land is owned, to have that land included in any relevant public private partnership; but no owner can be compelled to do so.

- (2) This section does not limit the State Acquisition of Lands Act.

No deprivation of property

21. Implementation Regulations and public private partnership documentation must not provide for the deprivation of property of any person in breach of section 40 of the Constitution, whether or not that person is a member of the public private partnership; but nothing in this provision prevents provision being made for damages, penalties, or forfeiture or resumption of property for breach of any obligation freely entered into as part of a public private partnership.

No State or municipal guarantees

22.—(1) Implementation Regulations and public private partnership documentation must not contain provision for any financial guarantee from the State or any municipality to the public private partnership or any member of it; but may include provision for any undertaking or indemnity, within the power of the State or municipality, that would be given in the ordinary course of business.

- (2) This section does not limit section 62 of the Financial Management Act 2004.

Part 9 of Financial Management Act 2004 applies

23. This Act is not an Act that authorises any action to which Part 9 of the Financial Management Act 2004 applies.

Transfer of Assets and Liabilities

24. Nothing in Schedule 2 Part F of the Public Enterprise Act prevents the State or any government company, any of its subsidiaries or any other government entity from transferring any asset or liability of the State or the government company, subsidiary or other government entity to any PPP controlling company or other party to a public private partnership; nor does this Act extend the ability to transfer any assets under that Schedule to any party to whom that Schedule does not already apply.

Local Authorities and Public Private Partnerships

25. For the avoidance of doubt, a council may under section 88 of the Local Government Act enter into a public private partnership within or outside its boundaries, despite the limitations in section 90 of that Act; but in every case the approval of the Minister responsible for the administration of that Act is required.

174

Public Private Partnerships—10 of 2005

Passed by House of Representatives on 20th February 2006.

Passed by Senate on 13th March 2006.

Price: \$1.29

V. NAREKI, Government Printer, Suva, Fiji—2006
Official Printer Since 1883

10/A/2006—1,200