



Regulation of public and private partnership

<https://gratanet.com/regions/mongolia>

Regulation of Public-Private Partnership

The State Great Khural approved a government policy on Public-Private Partnership by Resolution No.64 in 2009, and the Law on Concession was approved in 2010 in accordance with the provisions of Article 6.1.1 of this policy. Due to the absence of specific regulations on public-private partnerships in the Law on Concessions, an update was deemed necessary. Consequently, the Government of Mongolia submitted the draft Law on Public-Private Partnerships to the State Great Khural on April 5, 2022. Following discussions, it was approved during the general session of the State Great Khural on December 9, 2022, and came into effect on December 31, 2023. This law consists of 9 chapters and 60 articles. This legal alert provides a summary of the regulation of the Law on Public-Private Partnership.

This law applies to the planning, development, evaluation and analysis of partnership projects to be jointly implemented by the public and private sector in the field of public infrastructure and public services, the selection of projects, the selection of private sector partners, and the conclusion and implementation of partnership agreements.

Definitions:

- Public-Private Partnership means the private sector partner collaborates with the state partner to provide public infrastructure and services in accordance with the partnership agreement over the long term, aiming for optimal risk distribution and funding tailored to the type of partnership for sustainable and efficient project implementation.
- Public infrastructure means public service buildings, highways, railways, cableways, above-ground and underground road structures, all types of engineering networks, simple and engineering structures for disaster and accident prevention, facilities with structure.
- Public services mean equal, qualitative, efficient public services provided by the Government to citizens in infrastructure, energy, roads, transportation, health, education, culture and other related fields in order to create a comfortable living environment for citizens according to legislations and standards.

Power of State Authorities related to partnership:

Public-private partnerships (hereinafter referred to as the "Partnership") are under the purview of the state central administrative body responsible for partnerships, which is the Ministry of Economic Development. The Ministry of Finance oversees budgeting, financial management, and control for both public and private sectors. In the context of partnership issues, government bodies shall exercise the following powers:

№	State authorities	Rights
1.	The State Great Khural or the Parliament	<ul style="list-style-type: none"> - To discuss and jointly approve partnership goals and measures when approving development policy of Mongolia and planning documents, medium-term budget framework statements, and the current year's budget draft; - To discuss a report on implementation and results of a

		partnership project together with an integrated budget performance report, to supervise an implementation and give directions.
2.	The Government of Mongolia	<ul style="list-style-type: none"> – To approve and supervise an implementation of a partnership project that has been fully analyzed; – To grant a right to enter into a partnership agreement; – To discuss partnership laws, partnership implementation, results, and reports on project risks and impact on the budget during an implementation of agreement, and submit it to the State Great Khural together with a consolidated budget performance report.
3.	State central administrative body in charge of partnership matters	<ul style="list-style-type: none"> – Proposals for projects to be implemented through partnership are received from the state central administrative body in charge of the sector, preliminary evaluation and full analysis are reviewed, submitted to the state central administrative body in charge of finance and budget matters, and permission is obtained for consideration by the Government; – Organization of partnership agreement, etc.
4.	State central administrative body in charge of financial and budget matters	<ul style="list-style-type: none"> – Controlling the budget risk assessment of the project to be implemented through partnership, making conclusions about the sources of funds to finance the project and the impact on the budget and risks; – Depending on the type of partnership agreement, the budget financing according to the agreement should be included in the budget project based on the implementation and performance evaluation, project financing should be coordinated with the budget, etc.
5.	State central administrative body in charge of the sector matters	<ul style="list-style-type: none"> – Making a proposal for a project to be implemented through partnership; – Preliminary evaluation of projects to be implemented through partnership; – Submit the preliminary evaluation report to the state central administrative body in charge of partnership matters; – To conclude a partnership agreement with a private sector partner on behalf of the state partner etc.
6.	Citizens' Representative Khural of Provinces and the capital city and the Governors	<p>Powers of the Citizens' Representatives' Khural of Provinces and the capitals:</p> <ul style="list-style-type: none"> – Supervise the implementation of the partnership agreement of the project to be implemented by partnership in that locality; – To discuss proposals for partnership projects submitted by the governor, to support and cooperate with the implementation of ongoing projects.

		<p>Governors' power of provinces and capitals:</p> <ul style="list-style-type: none"> – Development of proposals for partnership projects and discussion at the Citizen's Representatives Khural; – Participate in the negotiation of the partnership agreement and conclude the partnership agreement jointly with the state administrative body in charge of partnership and industry matters on behalf of the partner party; – Any assets created by the partnership or belonging to the partnership shall be transferred to the local property, registered in accordance with the partnership agreement and the law, etc.
--	--	--

Partnership center:

A Partnership Center will be established for the purpose of researching whether the partnership project proposal can be implemented through partnership, developing expertise, full analysis, preliminary and detailed technical and economic feasibility, risk analysis and evaluation of the partner parties in cooperation with the state partner and professional advisors and the project team. According to the decision of the Government, the center is under the jurisdiction of the state central administrative body in charge of partnership matters.

Sectors implementing partnership:

The partnership does not apply to activities within the defense sector, all types of banking and financial market services, and the exploration, mining, and exploitation of minerals for-profit purposes, except for providing services to the public through the infrastructure of the mining industry.

The Government will approve public infrastructure and service sectors and provide guidance for implementation in other sectors.

Forms of partnership financing:

Depending on the form of financing, the partnership may involve:

1. Financing the partnership project costs through user fees and project income;
2. Funding the partnership project costs from the budget as stipulated in the partnership agreement;
3. Implementation as a combination of the above two types.

Partnership project:

Partnership project means activities such as private sector's partner investment, design development, construction, financing, reconstruction, improvement, repair and maintenance of infrastructure buildings and facilities, provision of public services, and management of public services refers to a public project in order to meet public needs and requirements in the field of public infrastructure and public services. Partnership projects can be initiated by the public

sector and by the private sector.

Announcement of partnership project: The state central administrative body in charge of partnership matters may pre-announce partnership projects for up to 12 months after a preliminary assessment has been conducted and included in the development policy document in order to conduct market research, attract investment, and identify private sector partners.

Initiating partnership project by private sector: The private sector may submit a proposal for the implementation of a project with the purpose of providing public infrastructure and public services in partnership, and the project proposal shall be submitted to the state central administrative body in charge of the sector. The body shall conduct a preliminary assessment of the project proposal submitted by the private sector and then submit it to the state central administrative body in charge of partnership matters.

Stages of partnership project:

1. Planning stage of the project or analysis to determine feasibility through partnership;
2. Full analysis and evaluation stage of the partnership project, as outlined in the development policy document for partnership implementation;
3. Define and implement a partnership project;
4. Selection of private sector partners;
5. Negotiate and conclude a partnership agreement;
6. Implementation stage of the partnership project and agreement management.;
7. Control, evaluation, and monitoring of partnership project implementation;
8. Termination of the partnership agreement, acquisition and registration of partnership assets in state or local property.

Partnership agreement:

The International Federation of Consulting Engineers (FIDIC) is an organization that develops international experience in the field of construction and development. Briefly explain the main 5 standard contracts developed by FIDIC and the regulated resources¹:

1. Red Book: Conditions of Contract for Building Construction and Engineering Works Designed by the Employer;
2. Yellow Book: Conditions of Contract for Plant and Design Build for Electrical and Mechanical Plant, and for Building and Engineering Works, Designed by the Contractor;
3. Silver Book: Conditions of Contract for EPC/Turnkey Projects;
4. Green Book: Short form of Contract, primarily used for smaller projects;
5. Gold Book: Conditions of Contract for Design, Build, and Operate Projects;
6. Blue Book: Form of Contract for Dredging and Reclamation Works.

In the case of Mongolia, when implementing concession projects, turnkey contracts, construction contracts, and consulting services contracts were established based on FIDIC contract terms.

Since the adoption of the Law on Concessions, 60 project contracts with a total cost of 25.5 trillion MNT or 8.9 billion U.S. dollars have been signed under the "build-transfer" and "build-operate-transfer" types of state-owned concessions. Among these, 40 projects fall under the "build-transfer" concession type, while 20 projects are categorized as "build-operate-transfer"

¹ <https://fidic.org/>

contracts. The "build-transfer" type is not a type of public or private sector that conforms to international standards².

The Law on Public-Private Partnership has legalized 9 types of partnership agreements for the implementation of partnership projects, and contains clear and understandable regulations on the process of concluding the agreement, the main terms and conditions of the agreement, confidentiality, and control over the implementation of the agreement. The template of the partnership agreement will be developed by the state central administrative body in charge of partnership matters and approved by the Government.

The partnership agreement and ancillary agreements shall be civil law agreements based on the principle of equal rights and shall not be subject to provisions of the General Administrative Law.

Type of partnership agreement: Depending on characteristics of the project to be implemented through partnership, the partnership agreement has the following types:

1. Development, construction, use and transfer of designs and budgets;
2. Construction, use, transfer;
3. Construction, transfer, use;
4. Build, lease, use, transfer;
5. Construction, ownership, use, transfer;
6. Rent and provide public services by renting;
7. Implementation of operation and maintenance;
8. Restoration, possession, use, transfer;
9. Implementing management; and
10. Other types of partnership agreements determined by complete analysis of the project.

Within the framework of this law, entering into a "build-transfer" type of agreement with conditions such as direct transfer, short implementation periods, resembling budget investment, and implementation through partnership is prohibited.

Partnership parties: The parties to the partnership agreement are public and private sector partners. The state partner is the state central administrative body in charge of the sector in which the partnership agreement is to be implemented, the state central administrative body in charge of partnership, and the entities specified in the partnership agreement. The following entities are state partners:

- Ministry of Mongolia;
- Governors of provinces and the capital;
- State or local ownership, state or local ownership dominates legal entities.

Private sector partner means a legal entity with foreign or domestic investment and an association of legal entities established in accordance with the Law on Company and the Law on Investment, which has entered into a partnership agreement with a state partner and is responsible for implementing a partnership project.

Term of partnership agreement: The duration of the partnership agreement shall be determined by mutual agreement of the parties, taking into account factors such as the project's sector of implementation, the primary nature of the project, and the type of agreement. However, the term of the partnership agreement shall not exceed 30 years.

² <https://www.parliament.mn/nn/29631/>

Partnership project development fund, its management:

The partnership project development fund (hereinafter referred as to the “Fund”) was established by the Government’s decision for implementing the partnership, making a decision on financing, conducting project preparation, doing research and selection, financing costs of consulting services and costs of operation of the partnership center. The Fund shall be formed from the following sources:

1. Funding provided by the state budget;
2. Concessional loans, aid, donations and other financing provided by international organizations;
3. Facility investment and partnership project preparation fees, as well as income from partnership center activities;
4. Government guarantee fee;
5. Other sources compliant with the law.

Filing complaint:

A dispute resolution council shall be established by the Government's decision to regulate an issue of complaints and dispute resolution related to the selection of private sector partners, as well as to resolve the dispute.

Compared to the previous Concession Law, the Law on Public-Private Partnerships has the significance of implementing public infrastructure and public service sector projects with private sector investment, expanding business market of the private sector, reducing the budget burden in the long term, and creating financial instruments.

Used sources:

1. Төр, хувийн хэвшлийн түншлэлийн тухай хууль, 2022
2. <https://www.parliament.mn/nn/29631/>
3. <https://fidic.org/>

For further information, please contact V. Bolormaa, GRATA International Law Firm Partner at bvolodya@gratanet.com, and Junior Associate G. Enkhzaya at eganbaatar@gratanet.com or +976 70155031.

GRATA International in Mongolia is part of the global law firm, which has offices in 22 other nations. This legal material is not a thorough examination of any particular problems; rather, it is meant to provide general knowledge. Before making any decisions, the reader should consult a professional for advice that is suitable to their situation (s). Any consequences or damages resulting from the use of this legal information are not our responsibility.