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Myanmar: Publication of the Bill of the Law on Public Procurement and Asset Disposal — Implications for Public Works and Public-Private-Partnership (“PPP”) Projects

(1) The current regulatory framework for Public Procurement in Myanmar

There is currently no statutory framework governing the conduct of public works or the disposal of government assets in Myanmar.

On 10 April 2017, the Office of the President of Myanmar issued Directive No. 1/2017 (the “Directive”), which prescribes certain rules for Myanmar government agencies with respect to public procurement, including requiring open tenders for public procurement, or sales or lease of government assets, valued above a certain threshold. However, Myanmar government agencies are currently not complying with the Directive. For example, Myanmar government agencies have continued to negotiate and execute lease agreements above the prescribed threshold without first going through a tender process. In addition, since the Directive’s requirements for open tenders are framed broadly and intended to apply uniformly irrespective the circumstances of the particular proposed public procurement, there are likely to be difficulties in implementing the Directive.

As a result, Myanmar does not yet have the benefit of a transparent, predictable, and effective regulatory framework for public procurement or the disposal of government assets.

(2) Publication of the Bill of the Law on Public Procurement and Asset Disposal

As described above, the Union Parliament published a bill of the Law on Public Procurement and Asset Disposal on 6 July 2018 (the “Bill”). The framework of the Bill is similar to that of the Directive. That is, the Bill provides for a mandatory open tender process for public procurement and asset disposals in certain circumstances, and prescribes the method for conducting such tenders.

However in comparison to the Directive, the Bill as a whole appears to be more flexible and practicable. For example, while the Directive sets a rigid threshold for the requirement for an open bid process for government procurement, of 100 million kyats (approximately 7.12 million JPY as of the date of publication), the Bill provides greater flexibility by permitting the threshold to be prescribed in the regulations rather than the primary legislation. It also provides greater flexibility for the way in which tenders may be

MHM Yangon Newsletter

conducted based on the circumstances of the particular public procurement.

In addition, the Directive does not take into account the need for greater examination of, for example, the technical qualification of parties submitting tenders and their proposals required for certain projects such as PPP projects. On the other hand, the Bill prescribes the “Request for Proposal” method for “large-scale projects involving design, procurement, construction, management, etc.” Please note however that the Bill does not clearly outline what the “Request for Proposal method” specifically entails. Stakeholders should monitor developments in this regard to assess whether the Bill improves transparency in the selection of tenders for large-scale PPP projects.

Finally, while under the Directive an open tender is mandatory for the sale or lease of any government assets based on the prescribed criteria, the Bill provides greater flexibility. It provides flexibility for the relevant government agency to determine the manner of sale or lease of such assets to a certain extent.

As a whole, the Bill provides a more workable and pragmatic framework for public procurement and the disposal of government assets. As the framework set out in the Bill is in the form of legislation rather than an administrative directive, there is likely to be a greater level of compliance once it enters into force. On the other hand, further consideration is required of how this law is developed and implemented to assess whether it improves the transparency and predictability of the procurement process in Myanmar.

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