

JOINT VENTURES

JOINT VENTURES BILL, 2015

EXPLANATORY MEMORANDUM

The Bill seeks to provide for the implementation of joint venture agreements between contracting authorities and counterparties and to establish a set of rules governing public-private procurement. It also seeks to establish a Joint Venture Unit within the Ministry of Finance and Economic Development.

The Individual clauses of the Bill are explained below:

Clause 1

This clause sets out the short title of the Bill.

Clause 2

This clause provides for certain definitions of terms used in the Bill.

Clause 3

This clause provides for the establishment of the Joint Venture Unit and its functions.

Clause 4

This clause provides for the Joint Venture Committee, its composition and persons that may attend the Joint Venture Committee's meetings.

Clause 5

This clause provides for the staff of the Joint Venture Unit.

Clause 6

This clause provides for the functions of the Joint Venture Committee.

Clause 7

This clause provides for the reports to be produced by the Joint venture Unit.

Clause 8

This clause provides for the responsibilities of contracting authorities and the approval process to be followed for projects.

Clause 9

This clause provides for the execution of feasibility studies. Of particular note is the need for feasibility studies to show value for money.

Clause 10

This clause provides for standard provisions to be contained in a joint venture agreement.

Clause 11

This clause provides for the powers of the Joint Venture Unit.

Clause 12

This clause provides for the receipt and processing of unsolicited bids.

Clause 13

This clause provides for the award of a project and conclusion of a joint venture agreement.

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Clause 14

This clause provides for the types of joint venture projects and joint venture agreements as set out in the schedule, which may be entered into.

Clauses 15 and 16

These clauses provide for regulations that can be made as well as where the provisions shall not apply.

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ARRANGEMENT OF SECTIONS

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PRELIMINARY

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PART VI

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SCHEDULE: Types of Joint venture Projects and Types of Joint venture Agreements.

BILL

To provide for the implementation of joint venture agreements between contracting authorities and counterparties; and to provide for matters connected with or incidental to the foregoing.

5 ENACTED by the Parliament and the President of Zimbabwe.

PART I

PRELIMINARY

1 Short title and date of commencement

(1) This Act may be cited as the Joint Ventures Act [*Chapter 22:22*].

10 (2) This Act shall come into operation on a date to be fixed by the President by statutory instrument.

2 Interpretation

(1) In this Act—

15 “affordable”, in relation to a joint venture project, means that the project complies with both of the following criteria, namely that—

- (a) any financial commitment likely to be incurred in connection with the project will result in the least possible impact upon the contracting authority’s existing or future budgetary funds; and

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- (b) the cost of delivering a facility or service resulting from the project by the contracting authority does not impose an unreasonable burden on users or consumers of the facility or service;
- “asset” includes an existing asset of a contracting authority or a new asset to be acquired for the purposes of entering into an agreement; 5
- “Committee” means the Joint Venture Committee established in terms of section 4(1);
- “contingent liability” includes any liability assumed by the Government, such as a Government guarantee for a loan or similar advance, in the event of default by a contracting authority in the performance of its obligations under a joint venture agreement; 10
- “contracting authority” means any Ministry, Government department or public entity which has entered into or is considering entering into a joint venture agreement;
- “counterparty”, in relation to an agreement, means a party to the agreement other than a contracting authority; 15
- “joint venture agreement” or “agreement” has the meaning given to it in subsection (2);
- “joint venture project” or “project” means a project to be implemented under a joint venture agreement, and includes any of the types of project specified, but not limited to, those specified in Part I of the Schedule; 20
- “Minister” means the Minister responsible for finance and “Ministry” shall be construed accordingly;
- “public entity” means—
- (a) any corporate body established by or in terms of an Act of Parliament for special purposes; or 25
 - (b) any company in which the State has a substantial or controlling interest, whether by virtue of holding or controlling shares therein or by virtue of a right of appointment of members to the controlling body thereof or otherwise, and includes any company which is a subsidiary of the first aforementioned company, as determined in accordance with section 143 of the Companies Act [*Chapter 24:03*]; 30
 - (c) a local authority; or
 - (d) any partnership or joint venture between the State and any person, which is prescribed by the Minister for the purposes of the application of this Act to be a public entity; 35
- “project” means the design, construction, development, operation or delivery of a new infrastructure, asset, facility or service or the rehabilitation, modernisation, expansion, operation, delivery or management of an existing infrastructure, asset, facility or service. 40
- “public resources” has the same meaning as in the Public Finance Management Act [*Chapter 22:19*] (No. 11 of 2009);
- “Secretary” means the head of the Ministry;
- “Unit” means the Joint Venture Unit established under section 3;
- “user levy” means any toll, fee, tariff, charge or other benefit whatsoever called that is collected by a counterparty or by the contracting authority on behalf of the project from users or customers of a service provided 45

by it to enable the counterparty to recover its investment together with a fair return thereon;

“value for money” in relation to a joint venture agreement, means that the agreement will result in a net benefit to users or consumers of the facility or service availed by the completion of the agreed project in terms of cost, delivery, price, quality, quantity or risk transfer, or any combination thereof.

(2) In this Act, “joint venture agreement” means an agreement between a contracting authority and a counterparty, approved under this Act, in terms of which—

- (a) the counterparty undertakes to perform a contracting authority’s function on behalf of the contracting authority for a specified period; and
 - (b) the counterparty receives a benefit for performing the function by way of—
 - (i) compensation from funds appropriated by Parliament; or
 - (ii) funds obtained by way of loan by the contracting authority; or
 - (iii) user levies; or
 - (iv) revenue generated from the project; or
 - (v) any combination of the foregoing;
 and
 - (c) the counterparty is liable for the risks arising from the performance of its function; and
 - (d) public resources may be transferred or made available to the counterparty;
- and includes any of the types of agreement specified in Part II of the Schedule.

PART II

JOINT VENTURE UNIT

3 Joint Venture Unit

(1) There is hereby established for the purpose of this Act, a unit to be known as the Joint Venture Unit, which shall be a department of the Ministry and shall be under the control and supervision of the Secretary.

- (2) The functions of the Unit shall be—
- (a) to consider project proposals submitted to it and assess whether or not they—
 - (i) are affordable to the contracting authority; and
 - (ii) provide value for money; and
 - (iii) provide for the optimum transfer of technical, operational and financial risks to the counterparty; and
 - (iv) are competitive;
 and to make recommendations on such proposals to the Committee;
 - (b) to examine requests for project proposals to ensure they conform with the approved feasibility studies; and
 - (c) to advise Government on joint venture projects generally; and
 - (d) to develop best practice guidelines in relation to all aspects of joint ventures; and
 - (e) to assist the Committee to formulate policy in relation to joint venture projects; and

- (f) to develop awareness of joint ventures in Zimbabwe as a vehicle for economic development and delivery of public services; and
- (g) to make recommendations on project proposals submitted by contracting authorities to the Committee as to whether to approve or reject project proposals.

5

4 Joint Venture Committee

(1) Subject to this Act, the Unit shall report to a committee, to be known as the Joint Venture Committee, consisting of—

- (a) the Secretary, who shall chair the Committee; and
- (b) the Secretary of the ministry responsible for industry and commerce; and 10
- (c) the Secretary of the ministry responsible for transport and infrastructural development; and
- (d) the Secretary of the ministry responsible for energy and power development; and
- (e) the Secretary of the ministry responsible for local government; and 15
- (f) the Secretary of the ministry responsible for justice; and
- (g) the Secretary of the ministry responsible for economic planning; and
- (h) a representative of the Attorney-General, at Director level; and
- (i) the Director of the Unit.

(2) The following persons have the right to attend meetings of the Committee and take part in its deliberations, but not to vote on any matter put to the vote by the Chairperson— 20

- (a) a person invited by the Minister to attend a particular meeting or series of meetings by reason of that person having expertise which the Committee may require; 25
- (b) a representative of a contracting authority whose project proposal is on the agenda of a meeting of the Committee, for as long as that item of the agenda is under consideration by the Committee.

5 Staff of Unit

Subject to the law relating to the Civil Service Commission and to such terms and conditions of service as are fixed by the Civil Service Commission, there shall be a Director of the Unit and such members of staff as will enable the Unit to carry out its functions in terms of this Act. 30

6 Functions of Committee

The functions of the Committee shall be—

35

- (a) to assist the Minister to formulate policy guidelines on joint ventures; and
- (b) to ensure that all projects are consistent with the national priorities specified in the relevant policy on joint ventures; and
- (c) to make recommendations to Cabinet as to whether to approve or reject project proposals submitted to it by the Unit; and 40
- (d) to perform any other function as may be conferred on it by the Minister in terms of this Act or any other law.

7 Reports of Unit

(1) The Unit—

- (a) shall, within forty five days after the 31st December in each year, submit to the Minister an annual report upon matters the Unit has dealt with during the previous year;
- (b) may at any time submit to the Minister a special report on any matter upon which the Unit considers it desirable to report; and
- (c) shall submit to the Minister any other report as the Minister may require.

(2) The Minister shall lay before Parliament the annual report submitted to him or her in terms of subsection (1)(a).

PART III

PROCEDURES PRELIMINARY TO CONCLUSION OF JOINT VENTURE AGREEMENTS

8 Responsibilities of contracting authority and approval of projects by Cabinet

(1) Subject to this Act, whenever a contracting authority wishes to enter into a joint venture agreement in relation to the exercise of any of its functions or responsibilities, it shall—

- (a) identify, appraise, develop and monitor a project to be implemented under this Act; and
- (b) invite expressions of interest in a project where appropriate by means of a public advertisement in the print, electronic or broadcast media or in any other transparent manner:

Provided that it may dispense with this requirement where it has already identified a proposed project with an identified counterparty and has disclosed that fact to the Unit;

and

- (c) undertake or cause to be undertaken a feasibility study where it considers that a project may be implemented under an agreement; and
- (d) submit the feasibility study to the Unit for its approval; and
- (e) where the Unit approves the feasibility study, prepare a request for the project proposal and a model agreement on the basis of the approved feasibility study.

(2) The Unit shall refer the project proposal to the Committee which shall make recommendations thereon to the Cabinet for the Cabinet's determination.

(3) Upon receipt of the project proposal together with the recommendations of the Committee thereon, the Cabinet may—

- (a) approve the project proposal, or
- (b) reject the project proposal and give its reasons for rejection, or
- (c) provisionally approve the project proposal on fulfilment of certain conditions specified by the Cabinet; or
- (d) where it approves or provisionally approves the project proposal but—
 - (i) no counterparty or satisfactory counterparty has been identified, direct the contracting authority to receive tenders for the project

from proposed counterparties in accordance with the law relating to public procurement;

(ii) two or more proposed counterparties have been identified—

A. select one of the proposed counterparties as the counterparty in the joint venture agreement; or 5

B. direct the contracting authority to receive tenders for the project from proposed counterparties in accordance with the law relating to public procurement.

(4) Notwithstanding anything in the Act a contracting authority may, subject to prior approval by the Minister, invite special formal tenders, in accordance with regulations made under section 15, only in the following cases— 10

(a) the requirements are of a proprietary nature and the names of likely suppliers are known;

(b) projects which in the opinion of the Minister are of specialist nature;

(c) projects which in the opinion of the Minister concern national security. 15

9 Feasibility study

(1) Where a contracting authority considers that a project may be implemented under a joint venture agreement, it shall undertake or cause to be undertaken a feasibility study, to assess whether the proposed project is feasible as a joint venture project.

(2) A feasibility study shall— 20

(a) demonstrate the advantages of implementing the project under a joint venture agreement; and

(b) describe in specific terms—

(i) the nature of the contracting authority's functions, the specific functions to be considered in relation to the project, and the expected inputs and deliverables; and 25

(ii) the extent to which those functions can lawfully and effectively be performed by a counterparty in terms of an agreement; and

(iii) the most appropriate form by which the contracting authority may implement the project under an agreement; 30
and

(c) demonstrate that the project will—

(i) be affordable to the contracting authority; and

(ii) provide value for money; and

(iii) optimally transfer technical, operational or financial risk to the counterparty; 35
and

(d) explain the capacity of the contracting authority to effectively enforce the agreement, including the ability to monitor and regulate project implementation and the performance of the counterparty in terms of the agreement. 40

10 Joint venture agreement

(1) Notwithstanding any other enactment but subject to this Act, a contracting authority may enter into an agreement with a counterparty for the performance of one or more of the functions of that contracting authority. 45

(2) Every joint venture agreement shall—

- (a) identify the responsibilities of the contracting authority and the counterparty; and
- (b) specify the relevant financial terms; and
- 5 (c) ensure the management of performance of the counterparty; and
- (d) provide for the return of the assets, if any, to the contracting authority, at the termination or expiry of the agreement, in such manner as may be provided for in the agreement; and
- 10 (e) provide for the sharing of risks between the contracting authority and the counterparty; and
- (f) provide for the payment to the counterparty for performing the contracted function or services by way of—
 - (i) compensation from funds appropriated by Parliament; or
 - (ii) funds obtained by way of loan by the contracting authority; or
 - 15 (iii) user levies; or
 - (iv) a combination of such funds and user levies; and
 - (g) provide for its duration; and
 - 20 (h) provide for the respective shareholdings of the contracting authority and the counterparty, if any; and
 - (i) contain such other provisions as may be necessary or expedient or as may be prescribed.

(3) Every joint venture agreement shall be governed by and construed in accordance with the laws of Zimbabwe.

25 (4) Every joint venture agreement shall provide for disputes between the counterparty and the contracting authority to be settled by arbitration, according to—

- (a) the Arbitration Act [Chapter 7:15] (No. 6 of 1996); or
- (b) rules defined in the agreement.

11 Powers of Unit

30 (1) The Unit may—

- (a) retain consultants to assist it on an *ad hoc*, part time or full time basis;
- (b) request the chairperson, accounting officer or chief executive officer of a contracting authority—
 - 35 (i) to furnish any information or produce any records or other documents relating to a project;
 - (ii) to answer all questions relating to a project;
- (c) examine such records or other documents as are availed to it and make copies thereof or take extracts therefrom.

40 (2) Any person to whom a reasonable request is made under subsection (1)(b) or (c) who—

- (a) without just cause, fails to comply with the request; or
- (b) refuses without just cause to answer or wilfully gives any false or misleading answer to any question lawfully put by the Unit or by any employee or agent of the Unit;

shall be guilty of an offence and liable to a fine not exceeding level eight or to imprisonment for a period not exceeding three years, or to both such fine and such imprisonment.

12 Unsolicited bids or expressions of interest

(1) In this section—

“unsolicited bid for or expression of interest” means a proposal that is made and prepared without the invitation, solicitation, supervision or otherwise than at the initiative of any contracting authority, and “unsolicited bidder” shall be construed accordingly.

(2) Any unsolicited bid for expression of interest in a joint venture by a prospective counterparty with an identified contracting authority must be referred by the contracting authority to the Unit.

(3) Once the Unit receives the unsolicited bid or expression of interest it shall consult with the relevant contracting authority for a preliminary assessment, within a period of fourteen days, as to whether the joint venture of the type proposed is acceptable or not.

(4) If the assessment and consultation in terms of subsection (3) determines that the joint venture proposed by the unsolicited bid or expression of interest is of a type that is acceptable, the Unit shall seek the approval of the Committee for the unsolicited bidder to conduct a feasibility study.

(5) If however the assessment and consultation determines that the joint venture being proposed is unacceptable, the Unit shall advise the unsolicited bidder and contracting authority accordingly.

PART V

CONCLUSION OF JOINT VENTURE AGREEMENTS

13 Award of project and signature of agreement

(1) Subject to subsection (2) and section 8(4), no contracting authority shall award a project or sign a joint venture agreement relating to the project unless the joint venture agreement has been approved by the Cabinet in accordance with this Act, and any agreement required to be so approved that is purported to be concluded without such approval shall be null and void.

(2) A joint venture agreement relating to a project referred to in section 8(3)(d)(i) or 8(3)(d)(ii)A (that is to say a project in respect of which the Cabinet has directed that the contracting authority concerned must receive tenders for the project from proposed counterparties in accordance with the law relating to public procurement) may be concluded upon award of the tender without Cabinet approval:

Provided that the Cabinet may nullify—

- (i) the award; or
- (ii) the agreement concluded as the result of the award at any time before the execution of the project;

if the Cabinet deems it to be in the national interest to do so.

(3) Any employee of a contracting authority who knowingly concludes a joint venture agreement in contravention of this Act shall be guilty of an offence and be liable to a fine not exceeding level eight or to imprisonment for a term not exceeding three years, or to both such fine and such imprisonment.

PART VI

GENERAL

14 Effect and amendment of Schedule

5 (1) The types of joint venture projects and joint venture agreements enumerated in Parts I and II of the Schedule, or any variation or combination thereof, that may be undertaken by a contracting authority, are indicative in nature, and the Unit or contracting authorities may evolve and arrive at such types of agreement incorporating any other arrangements as are necessary or expedient for any specific project.

10 (2) The Minister may, for the sake of public information, and after consulting the Unit, by notice in a statutory instrument amend the Schedule by adding, deleting or substituting any items therein, or may replace the Schedule entirely.

15 Regulations

15 (1) The Minister may, after consultation with the Committee, make regulations providing for all matters which by this Act are required or permitted to be prescribed or which, in his or her opinion, are necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) Regulations in terms of subsection (1) may provide for—

- 20 (a) the imposition, revision and collection of user levies, whether generally or in relation to any particular project or agreement;
- (b) fees and charges for anything done or provided by the Unit in terms of this Act;
- (c) best practice guidelines in relation to all aspects of joint ventures;
- 25 (d) the maximum periods within which the Unit and the Committee must complete the making of recommendations and conclude other specified tasks in terms of this Act.

(3) Regulations may provide penalties for contraventions thereof:

Provided that no such penalty shall exceed a fine of level seven or imprisonment for a period of six months or both such fine and such imprisonment.

16 Savings

30 This Act shall not apply where a contracting authority has, before the commencement of this Act, either identified a counterparty or concluded any joint venture agreement.

SCHEDULE (Section 2(2))

PART I

TYPES OF JOINT VENTURE PROJECT

1. Power generation plants and power transmission and distribution networks.
2. Roads and bridges.
3. Inland ports and harbours.
4. Inland container depots and logistics hubs.
5. Gas and petroleum infrastructure such as refineries, storage depots and distribution pipelines.
6. Water supply, treatment and distribution systems.
7. Solid waste management works.
8. Renewable energy works.
9. Educational and health care facilities.

10. Urban transport systems.
11. Housing.
12. Information communication technology projects.
13. Agriculture and irrigation development.

PART II

TYPES OF JOINT VENTURE AGREEMENTS

Build and Transfer (BT)

1. A contractual arrangement whereby a counterparty undertakes the financing and construction of a given project and after its completion hands it over to the Government or a contracting authority. The Government or the contracting authority reimburses the total project investment, on the basis of an agreed schedule. This arrangement may be employed in the construction of any project, including critical facilities, which for security or strategic reasons must be operated directly by the contracting authority.

Build, Lease and Transfer (BLT)

2. A contractual arrangement whereby a counterparty undertakes to finance and construct any project and upon its completion hands it over to the Government or a contracting authority concerned on a lease arrangement for a fixed period, after which ownership of the project is automatically transferred to the Government or the contracting authority concerned.

Build, Operate and Transfer (BOT)

3. A contractual arrangement whereby a counterparty undertakes the construction, including financing, of a given infrastructure facility, and the operation and maintenance thereof. The counterparty operates the facility over a fixed term during which the counterparty is allowed to collect user levies fees, rentals and other charges not exceeding those proposed in the bid or as negotiated and incorporated in the agreement or regulations to enable the recovery of the investment in the project. The counterparty transfers the project to the Government or the contracting authority concerned at the end of the fixed term that shall be specified in the agreement. This includes a supply and operate situation which is a contractual arrangement whereby the supplier of equipment and machinery for a given project, if the interest of the Government or the contracting authority so requires, operates the facility providing in the process technology transfer and training to Government, a regulatory agency, the contracting authority or nominated individuals.

Build, Own and Operate (BOO)

4. A contractual arrangement whereby a counterparty is authorised to finance, construct, own, operate and maintain a project from which the counterparty is allowed to recover its total investment by collecting user levies. Under the project, the counterparty owns the assets of the project and may choose to assign its operation and maintenance to a project operator. The transfer of the project to the Government or the contracting authority is not envisaged in this structure. However, the Government or contracting authority may terminate its obligations after a specified time period.

Build, Own, Operate and Transfer (BOOT)

5. A contractual arrangement whereby a counterparty is authorised to finance, construct, maintain and operate a project and whereby the project is to vest in the counterparty for a specific period. During the operation period, the counterparty will be permitted to charge user levies specified in the agreement, to recover the investment made in the project. The counterparty is liable to transfer the project to the Government or the contracting authority after the expiry of the specified period of operation.

Build, Transfer and Operate (BTO)

6. A contractual arrangement whereby the Government or a contracting authority contracts out a project to a counterparty to construct the facility on a turn key basis, assuming costs overruns, delays and specified performance risks. Once the facility is commissioned satisfactorily, the counterparty is given the right to operate the project and collect user levies under an agreement. The title of the project always vests with the Government or the contracting authority in this arrangement.

Contract, Add and Operate (CAO)

7. A contractual arrangement whereby the counterparty adds to an existing project which it rents from the Government or a contracting authority and operates the expanded project and collects user levies, to recover the investment over an agreed franchise period. There may or may not be a transfer arrangement with regard to the added facility provided by the counterparty.

Develop, Operate and Transfer (DOT)

8. A contractual arrangement whereby favourable conditions external to a new project which is to be built by a counterparty are integrated into the BOT arrangement by giving that entity the right to develop adjoining property and thus enjoy some of the benefits the investment creates such as higher property or rent values.

Rehabilitate, Operate and Transfer (ROT)

9. A contractual arrangement whereby any existing facility is handed over to a counterparty to refurbish, operate and collect user levies in the operation period to recover the investment and maintain for a franchise period, at the expiry of which the facility is turned over to the Government or a contracting authority. The term is also used to describe the purchase of an existing facility from abroad, and importing, refurbishing, erecting and consuming it within the host country.

Rehabilitate, Own and Operate

10. A contractual arrangement whereby an existing facility is handed over to the counterparty to refurbish and operate with no time limitation imposed on ownership. As long as the counterparty is not in violation of its franchise, it can continue to operate the facility and collect user levies in perpetuity.

Build, Own, Operate and Maintain Contract

11. A contractual arrangement whereby a counterparty undertakes to finance, construct, operate and maintain a project and whereby such project is to vest in the counterparty for a specified period. During the period of operation of the project, the counterparty may be permitted to charge user levies as specified.

Lease Management Contract

12. A contractual arrangement whereby the Government or a contracting authority leases a project owned by the Government to the person who is permitted to operate and maintain the project for the period specified in the agreement and to charge user levies therefor.

Management Contract

13. A contractual arrangement whereby the Government or a contracting authority entrusts the operation and management of a project to a person for the period specified in the agreement on payment of specified consideration. In such agreement, the Government or the contracting authority may charge the user levies and collect the same either itself or entrust the collection, for consideration, to any person who shall after collecting the user levies pay the same to the Government or the contracting authority.

Service Contract

14. A contractual arrangement whereby an existing project is vested in a counterparty to renovate, operate and maintain. The counterparty shall be permitted to charge levies as specified in the agreement.

Contract for Services

15. A contractual arrangement whereby a counterparty undertakes to provide services to the Government or contracting authority for a period. The Government or the contracting authority shall pay the counterparty an amount according to the agreed schedule.

Supply, Operate and Transfer

16. A contractual arrangement whereby a counterparty supplies to the Government or a contracting authority the equipment and machinery for a project and undertakes to operate the project for a period and consideration specified in the agreement. During the operation of the project, the counterparty shall undertake to train employees of the Government or contracting authority to operate the project.