

Notification of the Office for the Development of the Eastern Economic Corridor

Re: Invitation to Tender, Methods of Invitation to Tender, Selection Procedures of the Selection Committee, Criteria for Selecting Private Partnership, Details of Request for Proposal Document and Standard Requirements of a Draft of Joint Investment Contract
B.E. 2560

Whereas it is expedient to prescribe the invitation to tender, methods of invitation to tender, selection procedures of the selection committee, criteria for selecting private partnership, details of request for proposal document and standard requirements of a draft of joint investment contract for public-private partnership or investment by private entities projects in the Eastern Economic Corridor.

By virtue of the provision of Clause 10 of the Notification of the Eastern Economic Corridor Policy Committee Re: Criteria, Methods, Conditions and Procedures for Public-Private Partnership or Investment by Private Entities B.E. 2560 (2017), the Office for the Development of the Eastern Economic Corridor, hereby, issues the Notification as follows:

Clause 1 This Notification is called “Notification of the Office for the Development of the Eastern Economic Corridor Re: Invitation to Tender, Methods of Invitation to Tender, Selection Procedures of the Selection Committee, Criteria for Selecting Private Partnership, Details of Request for Proposal Document and Standard Requirements of a Draft of Joint Investment Contract B.E. 2560.”

Clause 2 In this Notification:

“Tenderer” means a private entity which is a juristic person submitting a tender. It shall include all private entities who have submitted a tender as a group of juristic person;

Section 1

Invitation to Tender Drafting

Clause 3 The Project Owner Agency shall prepare a draft of invitation to tender that comprises at least the following:

- (1) Summary of project overview according to the request for proposal document;
- (2) Details of qualifications of the tender according to the request for proposal document;
- (3) Summary of the tender preparation according to the request for proposal document;
- (4) Selection criteria and procedures according to the request for proposal document;
- (5) Venue, date, time for selling the request for proposal document. In this case, the venue shall be convenient and the selling time of the proposal document should be reasonable;

(6) Venue, date, time, and method for submitting comments, suggestions, or questions regarding the request for proposal document, as well as the clarification of the request for proposal document (if any). The clarification of the request for proposal document shall be within a reasonable time before the closing date of tender submission and all parties shall be informed thoroughly and fairly;

(7) Venue, date, time and method for examining project-related information or details;

(8) Venue, date, time for tender submission and opening;

(9) Price of the request for proposal document;

(10) Tender security, specifying the binding time and conditions for returning or forfeiting the tender security;

(11) Tender evaluation fee;

(12) Public-private partnership contract signing fee;

(13) Performance security, specifying conditions for returning or forfeiting the performance security;

(14) Rights reserved to cancel the tender process or not to accept the Tenderer with the highest net present value of compensation. In any case, the Tenderer shall not claim any expenses or damages incurred thereby. This includes any other reservation of rights that the Project Owner Agency and the Selection Committee has stipulated. However, the rights reserved shall take into account the principles of Public-Private Partnership and fairness with all private entities;

(15) Miscellaneous matters as specified by the Project Owner Agency and the Selection Committee.

Section 2

Request for Proposal Drafting

Clause 4 The Project Owner Agency shall prepare a draft of request for proposal that comprises at least a summary of project overview, qualifications of the Tenderer, tender preparation, selection criteria and methods, a draft of joint investment contract, timeline of tender process, fee, tender security, reservation of rights, and miscellaneous matters as the Project Owner Agency and the Selection Committee deem appropriate.

In preparing a draft of request for proposal under Paragraph One, the Project Owner Agency shall arrange the market sounding on important requirements of such document according to the criteria and procedures prescribed in the notification of market sounding of private entities.

Clause 5 A project overview shall comprise at least the following:

(1) Project background;

(2) Overview of project details sufficient for private entities to use as supporting information for tender preparation;

- (3) Project readiness;
- (4) A summary of project feasibility according to the feasibility study report;
- (5) Public and private entities' obligations and responsibilities in project operation from designing, location supply, construction, financing, maintenance, further investment through the term of a joint investment contract, and ownership of the project's assets during the term of a joint investment contract;
- (6) Output specification and level of service to be delivered by private entities;
- (7) Project duration from approval to expiration of a joint investment contract and term of a joint investment contract;
- (8) Public-private profit-sharing, financial and non-financial supporting measures, including the financial amount in supporting (if any);
- (9) Capital budgeting and expenditures for the public entities' project operation and funding sources, consisting of government expenditure budget, budget of the state agency, and loan for project operation, or other sources of funding;
- (10) Privileges entitled to the project or private entities under the law, e.g. obtaining one or more incentives together, including tax exemption or tax reduction under the law on investment promotion or use of land in the custody of the state agency or the Ratchaphatsadu land;
- (11) Approval, permission, rights, concession, license, consent, or registration or declaration to the state agencies or the committee as required by law, or any other important conditions under the laws relating to a project which has received and shall require in the future;

Clause 6 The qualifications of the Tenderer shall comprise at least the following:

- (1) The Tenderer's legal status. In the case that the Tenderer is a group of juristic person, the legal status of the group of juristic person and the legal of each Tenderer shall be identified;
- (2) Aspects of qualifications, e.g. general qualifications, technical qualifications, and financial qualifications. In the case allowing a group of juristic person to be the Tenderer, there shall be a method for evaluating qualifications of each Tenderer;
- (3) Experience of the Tenderer and personnel involved in the project. It may identify the field of expertise and experience e.g. project development, construction contractor, or project operation, number of years, number of projects, and financial amount of completed projects. In the case of determining various fields the Tenderer's expertise and experience and allowing a group of juristic person as the Tenderer, there shall be a method for evaluating experiences of individual Tenderer. At least each Tenderer

shall have complete experience in such field by not combining the same aspects of experience of other Tenderers;

(4) The Tenderer shall not be a person with special privilege or immunity with which to refuse being taken to Thai court, unless the Tenderer's government having such privilege or immunity shall have a letter of intent to waive for the privilege or immunity from the power of Thai court.

(5) Other qualifications as required by the Project Owner Agency and the Selection Committee.

Clause 7 Preparation of tender shall at least comprise the specified details in the invitation to tender, the request for proposal document and the following list:

(1) Tenderer's general information;

(2) Evidence justifying that the Tenderer and its personnel have complete qualifications as specified;

(3) Project operation details and public-private cooperation in the project, including project operation standards, the Tenderer's eligibility and readiness, and output specification and level of service to be delivered by a private entity. In the case that the Tenderer is a group of juristic person, the obligations and responsibilities of each Tenderer shall be segregated, as well as in any part hiring the contractor to implement. The Tenderer's eligibility and readiness for providing the contractor shall also be clearly identified and demonstrated;

(4) In the case that any project has established a special purpose vehicle for the operation of the project after the Policy Committee has agreed to participate in investments under Clause 18 of the Notification of the Eastern Economic Corridor Policy Committee Re: Criteria, Methods, Conditions and Procedures for Public-Private Partnership or Investment by Private Entities B.E. 2560 (2017), it shall specify that the Tenderer shall certify a guarantee or guarantee for the project performance of such special purpose vehicle;

(5) Project operation plan demonstrating that the project will provide services for its intended purposes, goals within the period of the joint investment contract;

(6) Assets used for the project operation and their ownership;

(7) Project business plan showing that the project will succeed the goal;

(8) Financial plan including the financial forecast of revenue and expenses, investment, and cash flows throughout the period of the joint investment contract;

(9) Financing for project operation and letter of intent from financial supporters to ensure that the successful Tenderer will be able to find project financing, including requirements and conditions of financial supporters;

- (10) Project financial returns throughout the period of the joint investment contract;
- (11) Benefits offered to public sector and the project financial and non-financial support measures application (If any);
- (12) Suggestions for enhancing the project efficiency;
- (13) The Tenderer's list of consultants;
- (14) Miscellaneous matters as specified by the Project Owner Agency and the Selection Committee.

In this case, the Tenderer shall certify that the proposal is true in all respects. If later it is found that any of the proposals is incorrect, such Tenderer will be deprived of the rights to be selected and cannot be a party in this project.

Clause 8 The Project Owner Agency shall clearly prescribe criteria and procedures for selecting private entities.

In prescribing the criteria and procedures for selecting private entities under Paragraph One, the Project Owner Agency, at least, shall take into account the following issues:

- (1) Compatibility and completeness of tender compared to the invitation to tender, the request for proposal, and this Notification;
- (2) Reliability of evidence justifying qualifications of the Tenderer;
- (3) Tender evaluation that the Tenderer is eligible to operate the project to succeed objectives, goal, and within the period of the joint investment contract;
- (4) Readiness and eligibility of the Tenderer to operate the project according to the tender for the success of objectives, goals, and within the period of the joint investment contract;
- (5) Benefits offered to public sector and the project financial and non-financial support measures application (If any);
- (6) Other criteria as determined by the Project Owner Agency and the Selection Committee.

Clause 9 The Project owner Agency shall prepare a draft of joint investment contract following the standard requirements of the draft of joint investment contract.

Clause 10 Tender schedule relating to private entity selection shall comprise at least the following:

- (1) Venue, date, time, and method for sending comments, suggestions, or questions regarding the request for proposal document, and request for proposal clarification (If any). The clarification shall be within a reasonable time prior to the end of tender submission date and shall be informed thoroughly and fairly;
- (2) Venue, date, time, and method for examining project-related information or details;
- (3) Venue, date, time of tender submission and opening;

(4) Any other schedule relating to private entity selection as specified by the Project Owner Agency and the Selection Committee.

Clause 11 Fees shall include at least the following:

- (1) Tender evaluation fee;
- (2) Joint investment contract signing fee;
- (3) Any other fees specified by the Project Owner Agency and the Selection Committee.

Clause 12 The Project Owner Agency with approval from the Selection Committee shall determine the appropriate value and forms of reliable tender security. They shall be a bank guarantee issued by Thai or foreign commercial banks, Thai government bonds, or Thai state enterprise bonds. The obligation period and conditions for returning or forfeiting the tender security shall also be specified.

The foreign commercial bank issuing the tender security under Paragraph One shall be rated by credit rating agencies established under foreign laws and approved by the Securities and Exchange Commission at a higher level than the bank credit rating of Thailand.

The Tenderer shall furnish the Tender security to the Project Owner Agency within the tender submission date. The Project Owner Agency shall return the tender security to the unsuccessful Tenderer within fifteen days from the date the selection result has been approved by the Policy Committee or after one hundred and twenty days from the date the Selection Committee has resolved to select the Successful Tenderer, whichever happens first. Additionally, the tender security of the successful tenderer will be returned when the Tenderer has signed the joint investment contract.

Clause 13 The Project Owner Agency with approval from the Selection Committee shall determine the appropriate value and forms of reliable performance security. They shall be the performance security issued by Thai or foreign commercial banks with qualifications under Clause 12 Paragraph Two, Thai government bonds, or Thai state enterprise bonds. The conditions for returning or forfeiting the performance security shall also be specified.

The Tenderer shall furnish the performance security to the Project Owner Agency on the joint investment contract signing date. The Project Owner Agency shall return the performance security to the private entity party at the time specified in the joint investment contract, taking into account the performance received by the public sector, liability insurance, and operation in compliance with the joint investment contract.

Clause 14 Reservation of rights shall comprise at least the following:

- (1) Reservation of rights to cancel the tender process or not to accept the Tenderer with the highest net present value of compensation. In any case, the Tenderer shall not claim any expenses or damages incurred thereby;

(2) Any other reservation of rights that the Project Owner Agency and the Selection Committee has stipulated. However, the rights reserved shall take into account the principles of Public-Private Partnership and fairness with all private entities;

Section 3

Methods of Invitation to Tender

Clause 15 The Project Owner Agency shall issue the invitation to tender publicly according to the period that the Project Owner Agency deems appropriate with the approval of the Selection Committee. However, it shall not less than sixty days before the tender submission date and shall be notified at least through the following channels:

- (1) On the information network system of the Project Owner Agency and the Office;
- (2) At the office of the Project Owner Agency and the Officer for the Development of the Eastern Economic Corridor;
- (3) On the radio or television broadcasting publicly for not less than three days;
- (4) In at least one nationally distributed daily newspaper for at least three consecutive days;

In the case that the Project Owner Agency and the Selection Committee deem appropriate to select foreign private entities, the Project Owner Agency shall issue the invitation to tender to the relevant embassies or by any other means under the specified period.

Section 4

Tender Evaluation Procedures

Clause 16 The Selection Committee shall precede the tender evaluation as follows:

- (1) Opening the tender and tender security of the Tenderer or the representative of the Tenderer within the tender opening period, and examining the tender security and qualifications of the Tenderer according to the criteria specified in Clause 8;
- (2) Evaluating the tender according to the criteria under Clause 8. The Selection Committee may ask any Tenderer for clarification. However, the Selection Committee shall not permit any Tenderer to change the substance of the tender. In the case that the Selection Committee deems appropriate, the Selection Committee and the Project Owner Agency may negotiate with one or more, but not more than two Tenderers who has passed the evaluation to support the consideration;

(3) Considering the results of negotiation between the Selection Committee and the Project Owner Agency and the Tenderer who have passed the evaluation under (2) for the project benefits and take into account the public interests.

In the case that the Tenderer's proposal contains the details other than the required substantial parts, and such differences cause no advantage or disadvantage effect to other Tenderers or are minor mistakes, the Selection Committee may not disqualify such Tenderer based on the criteria defined by the Project Owner Agency and the Selection Committee. And all the examinations of the document shall be recorded in writing.

Clause 17 In the case that only one Tenderer or many are proposing but only one Tenderer is found eligible based on the requirements specified in this notification or has passed the tender evaluation, the Selection Committee may consider such Tenderer as the successful Tenderer if its tender is beneficial to the project while the new tender selection may not work well.

Clause 18 In the case that there is no Tenderer submitting the proposal or no Tenderer passing the evaluation, the Project Owner Agency shall arrange the market sounding again, along with reviewing the request for proposal documents to submit to the Selection Committee and issuing the invitation to tender again. If it is necessary to change the request for proposal document and it affects the principles of the project approved by the authority, the Project Owner Agency shall propose a new project.

Section 5

Pre-Qualification Selection

Clause 19 In the case that the Project Owner Agency deems appropriate to apply the pre-qualification selection of the prospective tenderer with the consent of the Selection Committee, the following procedures shall be undertaken:

(1) The Project Owner Agency and the Selection Committee shall clearly specify criteria and procedures for the pre-qualification selection together;

(2) The Project Owner Agency shall publicly notify the invitation for prequalification to interested applicants to submit pre-qualification documents for consideration for not less than thirty days before the first day of pre-qualification document submission of the prospective tenderer through the channels specified in Clause 15. The notification shall comprise at least the following:

(a) Objectives of the pre-qualification selection;

(b) Summary of the project overview;

(c) Details of pre-qualification documents requiring the prospective tenderer to submit e.g. general qualifications, technical qualifications, and financial qualifications, experience and performance as defined in Clause 6, or other details as specified by the Project Owner Agency and the Selection Committee;

- (d) Criteria and procedures for pre-qualification selection under (1);
 - (e) Venue, date, time of submission and opening the prequalification documents of the prospective tenderer;
 - (f) Reservation of rights to cancel the pre-qualification selection.
- (3) The Selection Committee shall consider the completeness of the pre-qualification document of the prospective tenderer, which must at least contain the details as specified in the invitation to pre-qualification under (1).
- (4) After finishing the pre-qualification selection, the Project Owner Agency shall notify the list of selected pre-qualification applicants for not less than thirty days according to the method that the Project Owner Agency deems appropriate.
- (5) The Project Owner Agency shall send the invitation to tender under Clause 3 to the selected pre-qualification applicants, not less than forty-five days before the first day of the tender submission date.

Section 6

Private Entity Selection without Auction Procedures

Clause 20 In the case that the Policy Committee approves the private entity selection without auction procedures, the Project Owner Agency shall notify the following details:

- (1) The private entity selection procedure used in the project;
- (2) Essential principles and rationales for applying the private entity selection procedure under (1);
- (3) The List of prospective private entities that will participate in a joint investment by the private entity selection procedures under (1) (if any), in line with the methods and time specified in Clause 15.

Clause 21 The Project Owner Agency shall send the invitation notice under Clause 3 to the private entity who will receive a selection of joint investment without using the auction method, not less than forty-five days before the opening date for the proposer's envelope.

Section 7

Standard Requirements of the Draft of Joint Investment Contract

Clause 22 The Project Owner Agency shall prepare a draft of joint investment contract which shall at least consist of the standard requirements:

- (1) Background, objectives, and scope of the project;
- (2) Definition and interpretation;

(3) Priority and enforcement of all documents under the joint investment contract of the project, which shall at least state that the joint investment contract is effective over other documents under the joint investment contract of the project;

(4) Rights, duties and responsibilities of each party;

(5) Period of joint investment contract, specifying the duration of each phase and the total duration of the project;

(6) Funding sources and investments of each party;

(7) Project assets, including ownership of the asset of each party, utilization, examination of use, maintenance, project asset development, and benefits in using project assets. In case that there is the transfer ownership of the asset to the Project Owner Agency at any time or the end of the joint investment project duration, guidelines for calculating the value of such asset for ownership transfer shall be clearly determined, by taking into account the acquiring cost of such asset and its value at the time of ownership transfer;

(8) Project operation, output specification, and level of service to be delivered by the private entity;

(9) The transfer of knowledge in the quality development of public servicing of the project to the personnel of the state;

(10) Employment and subcontracting (if any);

(11) Fees rate collected from service users, determination and change of such fee rate, and payment methods, including identifying the examination of correctness and completeness of the aforementioned service fees;

(12) Benefits to each party and methods for payment of such benefits, including identifying the examination of correctness and completeness in calculating incurred benefits;

(13) Project support measures, both financial and non-financial support measures;

(14) Rights of the Project Owner Agency to exercise power for the public interest;

(15) Supervision and examination of the project operation of each party;

(16) Taxes and fees;

(17) Intellectual property;

(18) Force majeure and its consequences, as well as leniency reasons and consequences;

(19) Interest and fines;

(20) Dispute resolution by the court or arbitration method which shall not bind the Project Owner Agency to use the arbitration method to resolve the dispute, unless the case that the private entity is a foreign juristic person or in the case that the Project Owner Agency demonstrates reasons and necessity as normal practices of that type of joint investment contract or any other unavoidable causes;

(21) Expiration of contract, including reasons for contract termination, procedures for contract termination, consequences of contract termination, and any operation or compensation payment from contract termination due to the fault of each party;

(22) Certification, guarantee, disclosed information, and agreement to indemnify for damages;

(23) Data collection, confidentiality, and disclosure of information;

(24) Insurance, in which the Project Owner Agency shall determine types of insurance, insured assets, the insured person, and the beneficiary;

(25) Change of contract party, contractor, or subcontractor, and transfer of claims;

(26) Transfer of rights and duties under the joint investment contract in the case that a juristic person is replaced;

(27) Amendments to the joint investment contract of the parties, including revision of the requirements for the project operation;

(28) Amendment and changes of the law, as well as the results of legal changes;

(29) Performance security and surety, by specifying conditions for returning or forfeiting the performance security;

(30) Language and effective laws, specifying that the joint investment contract and relevant documents are applicable under Thai law;

(31) General requirements;

(32) The party may specify details related to any standard requirements of the joint investment contract in the joint investment contract or the attachment of the joint investment contract. In the case that it is defined as the attachment of the joint investment contract, the party shall stipulate in the joint investment contract that such attachment is a part of the joint investment contract.

Clause 23 A joint investment contract shall not contain any of the following requirements or content:

(1) Allowing the renewal or extension of the project duration;

(2) Granting the rights only to the private entity and related parties to adjust or change the operating conditions, which might affect the provision of public services or the public interests.

The Project Owner Agency and the Selection Committee jointly determine the requirements in the draft of joint investment contract which cannot be negotiated in the request for proposal document and inform related information and conditions to all Tenderers thoroughly and fairly.

Section 8

Miscellaneous

Clause 24 The Selection Committee shall consider and give consent to a draft of invitation to tender, a draft of request for proposal document, and a draft of joint investment contract, including details in the aforesaid documents.

Clause 25 The Office shall have the authority to prescribe practical guidelines for the operation under this Notification.

Clause 26 This Notification shall come into force on the day of notification onwards.

Issued on the 9th day of October B.E. 2560 (2017)

Kanit Sangsubhan

Secretary-General of the Eastern Economic Corridor

Policy Committee