

REGULATION ON THE MANAGEMENT OF FISCAL LIABILITIES IN PPP PROJECTS



UZBEK GOVERNMENT STRENGTHENS CONTROL OVER THE BUDGETARY COMMITMENTS OF THE STATE IN PPP PROJECTS

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On 23 October 2023, the Cabinet of Ministers of the Republic of Uzbekistan adopted the Regulation No.558 "On the Management of Fiscal Liabilities of the State in PPP Projects" (Regulation No.558).

Effective immediately upon issuance, Regulation No.558 introduces new procedural steps to be fulfilled by the main stakeholders in PPP projects – the Ministry of Economy and Finance (MoEF), the public partner and the private partner – during the PPP project development and implementation stages. The main novelty introduced by Regulation No.558 is that the implementation of PPP projects is now subjected to the availability of budgetary allocations sufficient to cover both direct and contingent liabilities of the State (Fiscal Liabilities) that arise or might arise in connection with such PPP projects. In this regard, the document describes the mechanisms for assessing the budgetary burden of PPP projects, the procedure for accounting for the State's Fiscal Liabilities under PPP projects and control over their fulfilment.

As per the new rules, the public partner must identify and calculate all Fiscal Liabilities of the State Budget resulting from PPP projects and get them agreed upon with the MoEF and, if the project total cost is above USD 10 mln., with the Cabinet of Ministers. Notably, such calculation and approval of the Fiscal Liabilities must take place both at the initial stage of the project development (i.e. during the approval of the project concept and the project evaluation document) and upon finalization of the execution version of the PPP agreement. However, it is not clear how the Fiscal Liabilities can be calculated at the initial stage of projects, where the price (be it availability payment, purchase price, user payment, or other) of works, goods and services is designed to be determined through competitive tender.

Nota Bene: Regulation No.558 affects even those PPP projects that have already been approved, awarded, or are in the tender or implementation stages. In particular, within 30 days from the date of Regulation No.558, relevant public partners in ongoing PPP projects are required to submit to the MoEF the documents, information and calculations necessary for identifying direct and contingent liabilities of the State.

The document establishes that the State's payment obligations arising from the occurrence of the contingent liability of the State will be satisfied upon the issuance of the affirmative decision of the MoEF and at the expense of the Guarantee Fund for Servicing the State Debt under the MoEF (Guarantee Fund).

Below you can find an overview of the key provisions of Regulation No.558.

Fiscal Liability

Under Fiscal Liability, it is understood both direct and contingent liabilities of the State under the PPP projects.

Direct liability of the State in a PPP project is defined as any known payments with precise amounts, terms and period payment to be paid by the public partner under the PPP agreement, including one-time advance payment, regular payments over the term of the PPP agreement, output based payments, service payments and subsidies.

Notably, Regulation No.558 recognizes any definite payment obligation of the public partner under the PPP agreement as the State's direct financial obligation. Nevertheless, given that as per the PPP Law (and as the practice shows) the public partner is not always necessarily a budgetary entity – there might be projects where the public partner is a commercial company (though, as a rule, a state-owned one). In this regard, it is unusual for the State to consider the financial obligations of a commercial entity as its own direct liability. We assume this matter will further be clarified by the MoEF.

The State's *contingent liabilities* are any potential financial liabilities of the State in connection with the PPP project with unknown timing and amount that may arise due to certain circumstances, the occurrence of which cannot be predicted and controlled by the State.

Assessment and Approval of Fiscal Liabilities

The public partner must agree with the MoEF the volume of Fiscal Liabilities reflected in the PPP project concept, project evaluation document (PED), tender documentation and the draft PPP agreement. To do so, the public partner shall submit abovementioned documents to the MoEF for approval¹ with the following information provided in their respective financial sections²:

- (a) risk allocation matrix between the public partner and private partner under the PPP agreement;
- (b) annual anticipated expenses (in real and nominal values) arising in case of occurrence of direct and contingent liabilities of the State over the PPP agreement term;
 - fiscal risks matrix (template form of which is provided in Annex 2 to the Regulation No.558)
 - information table on the types and amount of direct and contingent liabilities (as per the form provided in Annex 3 to the Regulation No.558);

¹ The wording of the Regulation No.558 here is quite confusing and it is not clear whether the draft PPP agreement must be submitted together with the project concept and PED.

² It is not clear from the Regulation No.558 what should be understood under the "financial section" of the PPP agreement.

- nominal value calculations of the amount of compensation for early termination of the PPP agreement;
- description of the key terms and conditions that may result in the contingent liability of the State;
- risk mitigation measures;
- (c) Fiscal Liabilities in connection with the provision of extra State support for the PPP project; and
- (d) a note with information about the annual budget, revenues and expenditures of the public partner.

The MoEF must review and evaluate the submitted documents within 5 working days³ against the following criteria (a template of an evaluation form is provided in Annex 4 to Regulation No.558) and either approve the scope of Fiscal Liabilities or return the documents to the public partner for the revision:

- appropriateness of direct obligations of the State;
- acceptability of the risks that may cause the contingent liability of the State;
- where Fiscal Liabilities are covered at the expense of the State Budget, the availability of an appropriate budgetary allocation for these purposes.

Furthermore, the same procedure of approval of the Fiscal Liabilities has to be undertaken immediately before signing the PPP agreement. That is, once the final signing version of the PPP agreement is negotiated with the private partner, the public partner must submit to the MoEF the draft agreement together with updated forms and information on the State's Fiscal Liabilities in connection with the project. Within 3 working days from the date of submission, the MoEF will review the final terms and conditions of the project and assess their suitability with the abovementioned criteria. It is not specified in the Regulation No.558 whether the MoEF is in position to cancel the project or demand the retendering if the final financial settings of the project do not meet the Fiscal Liabilities acceptability criteria listed above.

Nota Bene: Any new PPP project with total a value exceeding USD 1 mln. must undergo the Fiscal Liability approval procedure with the MoEF. The amount of the State Fiscal Liability under the PPP projects with a total amount of more than USD 10 mln. has to be additionally approved by the Cabinet of Ministers.

³ Although it is not clearly stated in Regulation No.558, our reading is that the approval of the Fiscal Liabilities will take place at the same time and by the same state agencies as the approval of the PPP project concept and the PED. Thus, there is an inconsistency as that Regulation No.558 sets only 5 working days for approval of the Fiscal Liabilities, while under the PPP Regulation No.259 the MoEF can consider the project concept and the PED within 10 working days.

Interestingly, public partners of the ongoing PPP projects i.e. the projects (i) with already approved project concept; and/or (ii) on a tender stage; and/or (iii) awarded, reached the commercial or financial closing; and/or (iv) on the implementation stage are also required to submit to the MoEF the above information regarding the Fiscal Liability within 30 days of the date of issuance of Regulation No.558 (i.e. until 23.11.2023). However, unlike the new PPP projects, such submission on the Fiscal Liability will be for information purposes only and may not serve as a ground for changing the terms and conditions of the PPP agreement or the approved parameters of the ongoing PPP projects.

Management of Fiscal Risks

In order to organize the effective management of fiscal risks, the MoEF must:

- together with the Cabinet of Ministers, annually present to the Parliament recommendations on setting the upper limits for the amount of State guarantees and Fiscal Liabilities in PPP projects for the upcoming year;
- monitor the fulfillment of financial obligations of the parties in PPP agreements;
- establish a database for recording and summarizing the total direct and contingent liability of the State in PPP projects; and
- keep a record of all Fiscal Obligations emerging from the PPP projects at the end of each year and include in the annual State Debt Report the information on the total amount of the Fiscal Liability and the status of their payment.

The public partner shall submit regular reports to the MoEF including the information on fiscal risks, fiscal stability, loan repayment schedules and overdue debt in a form provided in Annex 5 to the Regulation No.558.

Contingent Liability Claims

According to the Regulation No.558, the contingent liability claims of the private partner that are not being disputed or, if disputed, have been resolved by independent third party (e.g. commercial arbitration) must be submitted to the MoEF. Once the MoEF decides to satisfy the claim, it will be repaid within 180 days at the expense of the public partner or the Guarantee Fund.

If the amount of the contingent liability claim exceeds the projected numbers, the decision on the payment of such claim must be issued by the MoEF's in agreement with the Cabinet of Ministers.





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