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PRIVATE/PUBLIC PARTNERSHIPS: WHAT DOES IT MEAN TO YOU?



In recent times, much has been said by Government on both sides of the political divide about Public/Private Partnerships. This is a very nice sounding term, but what does it mean?

Dealings with "Government" can take many forms and involve numerous pitfalls for the unwary. "Government" can broadly be divided between central Government and statutory bodies. As the name suggests, a statutory body is not a part of central Government, but an entity created by an Act of Parliament, usually to perform a specific function and/or mandate.

There are over twenty statutory bodies in Jamaica, such as the National Water Commission, the Betting, Gaming & Lotteries Commission and The HEART Trust/NTA.

These bodies are the vehicles through which central Government frequently operates when contracting goods or services in a specific field or area.

Now, what does this mean to you?

Firstly, a statutory body has a specific mandate set out in the Act which creates it. It usually has a Board of Directors or a Commission which governs its functions and applies Government policy in that field, subject to oversight by the Ministry of Government under which it falls and any other relevant Ministry.

For example, if you, as a private individual had a great idea about how to transport water more cheaply in hard to reach areas, you would not go to Heart Trust/NTA or the BGLC with this idea. You would need to investigate whether the proposal should be made directly to the Ministry with responsibility for water or to the National Water Commission. If the proposal is accepted, you would then need to confirm whether you are contracting with the NWC or the Ministry directly. In either case, it is always prudent to confirm that the person you are contracting with has the power to do so.

To determine this issue, you would need to look to the Act which gives the Minister with the portfolio for water his powers and/or the Act governing the NWC. The reason this is important is that any contract entered into by a public official without the power to do so can be set aside by the Court as being outside the powers of that official. If that happens, you may be left significantly out of pocket with very little remedy. Contrast this with a private company, whereby, if the person you are dealing with appears to have the authority to contract on behalf of the company, it is likely that that contract will be upheld by a Court, even if it turns out that that person didn't have the authority they claimed to have.

A case which brought this issue to the fore is Jamaica Public Service Company Limited v Dennis Meadows & Ors decided in 2015 by our Court of Appeal. In that case, Dennis Meadows and others sought to challenge the power of the Minister of Energy to grant an exclusive license under the Electric Lighting Act (ELA) to JPS to supply electricity to the entire island. The Applicants argued that the ELA did not specifically give the Minister the power to issue a license of that nature. The Court in its Judgment noted that the ELA had been promulgated over 100 years ago and, though amended over the years, considerable time and money was spent by all parties because the legislation did not explicitly state that the Minister had the power to do what he did. Had the applicants been successful, it is possible that the license given to JPS might have been deemed invalid. This would have impacted JPS' entire business model, not to mention its potential effect on consumers.

There are many anecdotes of individuals who made investments on the basis of assurances or public announcements as to initiatives which were fixed to commence, but never came off the ground. While there is never certainty and always some risk in business, investing before the effecting of laws necessary for a plan to be legally viable is a very uncertain course of action.

For this reason, when engaging in a public/private partnership, it is always prudent to check whether the initiative requires Cabinet approval, Ministerial approval and/or the approval by the Board/Commission of the statutory body. If any such approval is required, request written proof that the approval has been granted.

Persons should also determine the need to register with the National Contracts Commission (NCC), whether the contract requires NCC approval and the extent to which it requires compliance with the Handbook of Public Sector Procurement Procedures.

The Private Sector working alongside the Public Sector can be very rewarding for both. However, to ensure that "What Sweet Nanny Goat Don't Run him Belly", potential investors must do their own due diligence and, when in doubt, consult an Attorney-at-Law.

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THE SPECIAL ECONOMIC ZONE - A REMIX OF THE FREE ZONE?



Is a free zone by another name still a free zone?

The Special Economic Zones Act (the SEZ Act), which came into force on August 1, 2016, has repealed the Jamaica Export Free Zones Act (the JEFZ Act). The SEZ Act provides for the designation, promotion, development, operation and management of Special Economic Zones (SEZs), the establishment of a Special Economic Zone Authority, and the granting of tax incentives and other benefits.

The Jamaican government envisions that SEZs will attract investment and new economic activities (e.g. logistics) to Jamaica; generate employment; give domestic suppliers the opportunity to sell to companies located in the SEZs and thus become part of global supply chains; and create other synergies and linkages with the rest of the Jamaican economy to maximize broader positive economic impact.

Like many legislative reforms in today's Jamaica, this one was strongly encouraged by international multilateral bodies. The entire progress of the reform can be traced in Jamaica's Letters of Intent with the International Monetary Fund - from the December 13, 2013 Letter, in which the government committed to review the Export Free Zones regime to ensure compliance with World Trade Organization rules, through to its August 30, 2016 Letter, where it finally reported that the SEZ Act had been brought into force to replace the Export Free Zones Act.

Comparison of the SEZ Act and the JEFZ Act

The structure of the SEZ regime is very similar to the free zone regime.

The supervisory body under the SEZ Act is the Authority, whereas under the JEFZA, it was the Council. The Authority has similar functions to the Council, but also appears to have an expanded portfolio of responsibilities, including managing and operating a business acceleration centre, promoting research and development on zone activities, and marketing the SEZs. One gets the impression that the Authority is expected to carry out a more modern, proactive and commercially-oriented role than the Council did.

"Developers" under the SEZ Act have replaced "promoters" under the JEFZ Act. Instead of receiving a licence from the Council, a developer will enter into a master-concession and lease, or a licence-agreement, with the Authority, valid for up to 50 years, and receive an operating certificate. Developers will design, finance, construct and maintain infrastructure within the SEZs, and enter into sub-concessions with "occupants", who have replaced "approved enterprises". An occupant is a person who, with the consent of the Authority, conducts business in a SEZ via a sub-concession with a developer.

Similar to the previous requirements, both developers and occupants must be companies limited by shares registered in Jamaica. Issued and paid-up share capital must be at least US\$1.5M for a developer and US\$25,000 for an occupant. A developer must make investments in an SEZ sufficient to accommodate at least three occupants, unless the SEZ is designated as "single-entity" or "specialized". An occupant must invest at least US\$50,000 in zone-related buildings, equipment and facilities in the first year of its sub-concession. However, these requirements can be waived for micro, small and medium enterprises (as defined in the Act) with "sufficient development potential", if they have a sub-concession with a developer and meet certain conditions.

Under JEFZA there was a fixed list of "approved activities" that could be carried out in a free zone. These activities included services, but were mainly geared at manufacturing, processing, packing and assembling items for export. The SEZ Act contains no such list of approved activities, but instead a list of "excluded activities" - extractive industries like mining and quarrying, tourism, telecoms, financial services, construction, real estate, health services, catering, and retail trade. It therefore appears that, for the time being, all other legal commercial activities are permissible. This may reflect an effort by the government to diversify the economic activities within the SEZs, and therefore multiply the potential linkages with businesses and individuals in the wider economy.

The tax incentives to be enjoyed by developers and occupants are quite similar to those under the JEFZA. These include exemptions or zero-rating in respect of asset tax, transfer tax, and customs duty and GCT on items imported into the SEZ. However, one major difference is that while promoters and approved enterprises under the JEFZ Act paid no income tax on profits earned from manufacturing or international trading, developers and occupants must pay income tax (albeit at a reduced rate of 12.5%) on income earned from conduct of trade within the SEZ. They will however receive a tax credit for expenditure on research and training up to a maximum of 10% of income tax payable, and pay no income tax on profits derived from rentals in the zone.

Any existing Jamaican business considering moving to an SEZ in order to benefit from these incentives should note that this will not be permitted for another ten years.

Existing free zone promoters and approved enterprises will keep their fiscal incentives until December 31, 2019, or any earlier date on which they become entitled to benefits under the SEZ Act. In order to benefit under the SEZ Act, within four years from August 1, 2016, promoters must apply to the Authority to

continue as developers and approved enterprises must enter into a sub-concession with a developer to continue as an occupant.

In conclusion, apart from certain changes in the fiscal incentives and the responsibilities of the relevant actors, the special economic zone appears to be rather similar to the free zone. However, in renaming the Act, the drafters apparently wished to signal a clear departure from the past. Here's hoping that small legislative changes lead to significant economic impact.

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