

Public-Private Partnership in Jordan

Murad Sawalha - Associate - Corporate / Mergers and Acquisitions
- Sharjah

December 2014 – January 2015

PPP involves a contract between a public sector authority and a private party, in which the private party provides a public service or project and assumes substantial financial, technical and operational risk in the project, while the public sector ensures fair competition, transparency and, in some cases, a guaranteed rate of return. PPP is a facilitating process that allows the government to initiate a project that has public sector defined goals and well-stated performance indicators to be monitored accordingly, whereas the private sector funds and operates the project based on a set of contractual agreements. PPPs help make the most of scarce public funding and introduce private-sector technology and innovation to provide better-quality public services through improved operational efficiency. PPPs also allow for the better allocation of risk between public and private entities, taking into account their capacity to manage those risks.

Until recently, Jordan had not implemented a single piece of legislation dealing specifically with concessions or incorporating the legal framework for PPP. However, Regulation No 80 of 2008 for Implementing Privatization Transactions (“Privatization Regulation”) issued in pursuance of Article 20 of the Privatization Law Number 25 of 2000 although not dealing specifically and exclusively with PPP, did provide for various mechanisms by which privatization may occur. Additionally, sector-specific laws allow for privatization of certain projects under a relevant sector. For example, the Water Authority Law No 18 of 1988, Public Electricity Law No 64 of 2002 and the Telecommunication Law No 13 of 1995 deal with PPP with respect to the water, electricity and telecommunication sectors respectively.

In contrast, the Public-Private Partnership Law No 31 of 2014 (“PPP Law”) aims to encourage the participation of the private sector in the Kingdom’s economic development and provide a legislative environment for joint projects between the two sectors. The PPP Law focuses on identifying infrastructure sectors open to private participation, designating the agencies responsible for approving private projects or contracts, clarifying rules regarding contract amendments and termination, ensuring competitive bidding and other procurement related provisions and defining the availability of dispute settlement, namely international arbitration. The PPP Law also aims to rehabilitate, construct, operate and maintain the public infrastructure, as well as encouraging the private sector to invest with the government and extending funding for feasible public projects.

For said purposes, the PPP Law provides for the establishment of a new Association Council between the Public and Private Sectors (“Council”) to evaluate and approve contracts entered into with the private sector. The Council is responsible for developing policies of joint projects between the private and public sector, identifying priority activities and sectors, taking decisions regarding proposed partnership projects and submitting them to the Council of Ministers for approval, granting approval of a tender bid for a PPP project and awarding the same, approval of the draft PPP contract, adoption of the standard project cycle stage, looking into disputes arising between contracting parties and entities from the private sector, discussing the necessary draft regulations needed to implement and enforce the provisions of this law. The PPP Law also establishes the Partnership Unit Between the Public and Private Sectors (“Unit”), which essentially registers PPP projects, stipulates the correct process of procurement, reviews the due diligence reports, reviews the contracts being negotiated, provides technical support during the execution stage and facilitates and records the progress of the PPP projects.

Importantly, the PPP Law further sets out the tendering and bidding process applicable to PPPs, as well as the conditions relating to the management of such projects. Pursuant to Article 4 of the PPP Law, PPP projects may be established in any economic field, with the exception of certain fields as may be determined by the Council of Ministers upon the recommendation of the Council.

In this regard, Article 11 of the PPP Law stipulates that private sector entities may approach a governmental entity directly and propose a project, but that does not ensure it will be awarded such project. Rather, a set of conditions need to be met in order for such a proposal to be considered; including, inter alia, that it has to be in line with the contracting party's priorities and that it must not contradict the Government's development plan.

A proposed PPP project shall be referred to the Unit to submit its formal proposal, and the contracting party, after registering such proposal at the Unit, shall conduct a feasibility study and carry out a due diligence report. The Council shall approve or reject the award, taking into consideration the report and recommendations of the Unit.

It is important to note that Article 21 of the PPP Law prohibits a member of the Council, the Unit, an employee at the concerned Ministry, a consultant or any technical or advisory committee member, from working on a PPP project directly or indirectly. Said ban extends to their spouses, children and relatives to the second degree. This was implemented to avoid bias and corruption during the bidding and tendering processes. It should also be noted that, pursuant to Article 13, no PPP contract shall exceed 35 years.

The PPP Law was essentially implemented to codify the method of PPP project procurement, the way tenders are to be issued, the process of submitting and accepting bids and the rules and regulations of PPP projects. PPPs are one way to assist in providing for increased competitiveness, efficiency and productivity. In some cases, PPPs can bring great benefit by leveraging the management capacity, innovation and expertise of the private sector, but at other times a traditional public sector approach could be more appropriate. Clearly, legislation is an important element; whereas the old law was limited to traditional concessions and the Build Operate Transfer form of PPP, the new PPP Law, through a competitive tendering process, seeks to attract the best technical and financial partners to implement PPP projects in all sectors of the economy for the purposes mentioned.