

Public-Private Partnership Projects in Kuwait

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and the services available to Kuwaiti citizens and residents. In order to accommodate this initiative, Kuwait introduced Law No. 116 of 2014 (the “New PPP Law”) to provide a clear regulatory framework for the implementation of public-private partnership projects (“PPP”) in Kuwait. The New PPP Law was imperative to accommodate the ambitious PPP program and to codify some of the techniques applied in the Az-Zour North Independent Water and Power Project (Phase 1) which began in January 2014. As a result, a variety of new PPP projects are under consideration in Kuwait. Additionally, Phase 2 of the Az-Zour North Project is currently open for tenders. Invitations have also been delivered to potential contractors to participate in a waste-to-energy facility in the Kabd area of Kuwait. This activity is partly a result of the enhancements made to the regulatory environment by the New PPP Law.

Relevant Authority

Initiating and overseeing PPP projects in Kuwait will be the responsibility of the Kuwait Authority for Partnership Projects (“KAPP”). While KAPP will be seen as the primary driver of the project implementation process, its governing board (the “Higher Committee”) will have broad authorities in the implementation of the PPP process, including:

- providing final approval to public entities to enter into PPP contracts
- approving project concepts and proposals before they are advertised and tendered
- developing general policies for projects and proposals of strategic importance to the national economy
- selecting the relevant public entities that will partake in the tendering process
- selecting and supervising the public entities that participate in project implementation and operation
- developing general policies and documents for projects and initiatives (including unsolicited proposals of strategic importance to the national economy of Kuwait).

As KAPP will have the responsibility of being Kuwait’s primary facilitator and caretaker in bringing PPP projects to fruition, the participation of KAPP will be instrumental in the successful implementation of PPP projects in Kuwait.

Project Company

Under the New PPP Law, it is envisaged that each project will be implemented by a project company to be established in the form of a Kuwaiti public joint stock company pursuant to the terms of the Commercial Companies Law (“Project Company”). Prior to the New PPP Law, it was unclear whether the Partnerships Technical Bureau (KAPP’s predecessor) or the investor would be responsible for the incorporation of the Project Company and the shareholding structure. The New PPP Law now clearly mandates KAPP to undertake the establishment procedures. Each Project Company will be owned in part by KAPP and/or any public entities chosen by the Higher Committee, as well as one or more consortium companies which are to be incorporated in Kuwait and owned by the relevant contractors, investors and sponsors that are chosen to undertake the project (“Consortium Companies”).

Shareholding and Management

At the outset of each PPP project, KAPP, the Consortium Companies and potentially the relevant public authorities involved in the project will enter into a variety of agreements, including a shareholders' agreement pertaining to the ownership, governance and operations of the Project Company, pursuant to which managerial control of the Project Company may be granted to the Consortium Companies. These agreements will clearly stipulate when and how the shares that are owned by KAPP will be transferred to public entities and the Kuwaiti citizens who are invited to invest in the project.

The New PPP Law codifies the 'warehousing' concept that was utilised in Az-Zour North Phase 1. KAPP now has the authority to own shares on behalf of Kuwaiti citizens, as the New PPP Law contains provisions pertaining to the public offering of shares in Project Companies to Kuwaiti citizens once the relevant project achieves a commercially viable state of operations. During the developmental stages of each project, KAPP will own the shares reserved for public offering and will exercise all of the rights and obligations attached to those shares in accordance with the Commercial Companies Law as well as in accordance with the relevant shareholders agreement. Once the project reaches a commercially viable state of operations, KAPP will offer the warehoused shares to Kuwaiti citizens. Any shares that are not subscribed to by Kuwaiti citizens may then be offered to the public entities or the Consortium Companies.

Pursuant to the relevant shareholders agreement, the Consortium Companies will generally be ensured managerial control of the Project Company by having the right to nominate a majority of the directors to be elected to the Project Company's board of directors. KAPP and any public entities involved in the project will be contractually obliged under the shareholders agreement to vote at assembly meetings in the manner necessary to give effect to such elections.

Financing

Prior to the New PPP Law, Kuwait law was seen as too restrictive and uncertain because it prohibited the mortgage of project land as well as the buildings and possibly even the equipment situated on the land. Lenders were effectively prevented from being able to take adequate security over the material assets of the project which diminished lenders' willingness to provide the necessary financing for carrying out the project. Due to the nature of limited recourse financing, lenders need to ensure that any and all security available to them is properly registered and perfected. The New PPP Law has relaxed these restrictions and prohibitions and clarified what may be pledged as security. The New PPP Law codifies some of the financing techniques applied in the Phase 1 of the Az-Zour North Project, such as assignment of proceeds, pledge against shares in both the Project Company and the Consortium Company (even during the initial 2-year lock-out period) and mortgages over the assets comprising the project (other than the land). It also provides more clarity on the procedures to be undertaken in the event the project needs to be transferred to a new consortium.

Conclusion

While the New PPP Law is not perfect and the practice still needs time to develop, the New PPP Law creates a greater degree of certainty, reliability and flexibility for foreign contractors, investors and lenders that participate in PPP projects in Kuwait. The law goes a long way towards enhancing the bankability of PPP projects in Kuwait, which will pave the way for the Government's exciting and ambitious plans for the development of Kuwait.