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NAVIGATING MEGA PPP PROJECTS IN THE MIDDLE EAST

A LEGAL PERSPECTIVE

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PUBLIC AND PRIVATE PROVISION OF INFRASTRUCTURE

Public project			Private project			
Public-Private partnership						
Contract Type	Public-sector procurement	Franchise	Design-Build Finance-Operate (DBFO)*	Build-transfer-Operate (BTO)**	Build-Operate-Transfer (BOT)***	Build-Own-Operate (BOO)
Construction	Public sector (2)	Public sector (2)	Private sector	Private sector	Private sector	Private sector
Operation	Public sector (3)	Private sector	Private sector	Private sector	Private sector	Private sector
Ownership (1)	Public sector (4)	Public sector	Public sector	Private sector during construction, then public sector	Private sector during Contract, then public sector	Private sector
Who pays?	Public sector (2)	Users	Public sector or users	Public sector or users	Public sector or users	Private-sector offtaker public sector(5), or users
who is paid?	n/a	Private sector	Private sector	Private sector	Private sector	Private sector

WHAT ARE PUBLIC PRIVATE PARTNERSHIPS (“PPP”)

- PPP in construction concerns “a long-term contractual arrangement between a public sector agency and a private sector concern, whereby resources and risk are shared for the purpose of developing or refurbishing a public facility” (Norment, 2000).
- Types of PPP: based on the nature of the service and risk transfer inherent in the PPP Contract: usage-based vs availability-based
- Models:
 - Public-sector procurement
 - Post-construction take-out
 - Public sector debt funding
 - Joint-venture PPPs
 - Non-for-profit structures

WHAT IS PRIVATE FINANCE INITIATIVE ('PFI')

- The Private Finance Initiative (PFI) is a form of PPP but is also, principally, a form of contracting or procurement, the hallmarks of which are:
 - long term service contract between a public sector body and a private sector 'operator'
 - the provision of capital assets and associated services by the operator;
 - a single 'unitary' payment from the local authority which covers investment and services
 - the integration of design, building, financing and operation in the operator's proposals
 - the allocation of risk to the party best able to manage and price it;
 - service delivery against performance standards set out in an 'output specification';
 - performance related 'payment mechanism';
 - an 'off balance sheet treatment' for the local authority so that any investment delivered through the project does not count against borrowing consents; and
 - support from central government delivered through what are known as 'PFI credits'

LEGAL FRAMEWORK IN CIVIL LAW COUNTRIES

- Specific laws to overcome legal obstacles, such as:
 - the requirement to conduct separate tenders for construction and long-term O&M, rather than combining them as in a PPP
 - prohibition of deferred payments for public works
 - limitations on transfer of control of public-sector infrastructure
 - lenders' security requirements
- Framework legislation provides:
 - the roles of different arms of government
 - clarity on procurement procedures
 - basis for support for various project risks, e.g. revenue guarantees
 - procedure for changes in the project's specifications, and a method of compensating the Govt for resulting extra costs
 - clarity on investors' rights if PPP Contract is terminated early
 - lenders' security & 'Step-In' rights
 - investment incentives

CONTRACTUAL APPROACH AND STANDARDISATION IN COMMON LAW COUNTRIES

- Requirement to complete by a certain date
- Monitoring of design and construction by government
- Government obligations in relation to construction
- Provisions for government to vary specification
- Restrictions on changes in ownership / debt financing
- Insurance, insurance proceeds
- Government to intervene and take over in case of emergency
- Long-term maintenance obligations
- Provisions for early termination of the PPP Contract

CONTRACTUAL FRAMEWORK (1)

- Parties:
 - Public sector client – the Authority
 - Special purpose company – “Project Co” (the private sector partner)
 - Funders
 - Design and Build Contractor – Build Co – subcontractor
 - Facilities Management Contractor – FMCO – subcontractor
 - Others – secondary subcontractors
- Pre-Contract:
 - Project delivery model
 - Risk Strategy
 - Risk-roles and responsibilities
 - Risk matrix
 - Negotiations

CONTRACTUAL FRAMEWORK (2)

- Key documents:
 - Project Agreement (up to 35 schedules)
 - Equity documents – Shareholder’s Agreement, Equity Subscription Agreement, Intermediate Agreement
 - Subcontractors – D & B Contract and FM Contract, Collateral Agreements (subcontractor with funders)
 - Finance Documents – Facilities Agreement, Accounts Agreement, Hedging Agreement
 - Parent Company Guarantees
 - Typical transaction – 90 documents (45 active, 45 cps)
- Risk Allocation
 - Design Risk
 - Delays in Construction
 - Construction Cost Overruns
 - Operational Risk
 - Financing Risk



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