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Dubai Embraces PPP … *Again*

Dubai has joined the growing list of governments with a Public Private Partnership (**PPP**) specific law. The new law is more significant as a welcome sign of intent rather than anything game-changing at this stage. There remain significant challenges to be overcome in order for the law to be effective.

THE BACKGROUND

PPPs in the UAE or the wider GCC are not new. They have historically been undertaken under project-specific legislation or approvals. Mubadala Development Company initiated PPPs in the UAE with UAE University in 2007, Paris-Sorbonne University Abu Dhabi in 2008 and Zayed University in 2009. Dubai has also previously partially embraced PPP in the form of operation and maintenance contracts (such as the Dubai Metro) rather than full PPPs. GCC governments have also had a successful history of quasi-PPPs in the electricity and water sectors (for example the ADWEA IWPP programme).

The benefits of PPP to GCC governments originally differed from those of other governments. Instead of wanting significant infrastructure programmes without having to pay for them up-front, GCC governments focussed on bringing in new skills, better allocating risks to the private sector (including completion on-time and on-budget) and diversifying their economies away from carbon reliance. Enthusiasm for PPPs in the GCC faltered in the wake of some high profile restructurings, when governments tightened their belts and prioritised initial capital expenditure (which it could afford to pay from its own pocket) over whole-life project costs.

However, the current low oil price environment has encouraged GCC governments to look again at PPP. As well as Dubai, Kuwait (which also has a PPP law), Oman, Qatar and Saudi have all been looking at PPP structures to assist with their infrastructure programmes.

A WHISTLE-STOP TOUR OF THE DUBAI PPP LAW

First, the Dubai PPP law expressly excludes projects, works, services or supply of materials in the electricity and water sectors, as well as contracts exempted by the Supreme Committee for Financial Policy (the **Committee**) and, in line with general international practice and PPP legislation in other jurisdictions, it also excludes PPP contracts in excess of 30 years.

The objectives of the Dubai PPP law are set out in Article 3. These are reassuringly not surprising and include:

- encouraging private sector participation in development projects;
- increasing investment to serve Dubai's economic and social growth;
- enabling the government to perform strategic projects efficiently and effectively;
- using the private sector to enable the public to obtain the best services at the least cost;
- increasing productivity and improving the quality of public services;
- transferring knowledge and experience from the private sector to the public sector;
- minimising the financial risks to the government; and
- increasing competition for projects (locally, regionally and internationally).

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The law also enshrines the principles of equality amongst users of the services / assets and (other than to the extent of an unsolicited bid) publicity, transparency, competitiveness, equal opportunities, equality, announcement of competition and the public interest (Articles 14 and 29).

Projects are to be approved by (a) the director general of the relevant government department, if the total costs to the government are less than AED200m (USD55m), (b) the Department of Finance (**DoF**), if total costs are between AED200m (USD55m) and AED500m (USD135m) and (c) the Committee, if the costs are higher (Article 8), although any financing obtained by the project company is to be approved by the government department (in coordination with DoF) (Article 36). It is not clear whether the Article 8 approval is to be calculated on the basis of capital costs or (noting the maximum 30 year tenure) whole-life project costs. In any case, given the thresholds, it is likely that the majority of projects will require Committee approval. In addition, Article 5(C) makes it clear that no PPP contract may be made if the government entity does not have a budget allocation for the whole of the project. Given Dubai's budget is allocated on an annual basis, this adds to the expectation that the majority of projects will require Committee approval, notwithstanding Article 8. This reflects the approach on Sorbonne and Zayed. Increased Committee approval could be viewed positively, as it should help to bring consistency to large-scale projects.

However, the principal benefit of the Dubai PPP law is that it codifies the pre-procurement process, as well as the procurement process, that government departments must follow in order to procure a PPP project. It is hoped that, by codifying these processes, public stakeholder "buy-in" for each project will be obtained at the outset, learning the lessons from some of the region's aborted projects. Helpfully, although it is hoped that it is not used, Article 24 includes the process to be followed in cancelling any tender. Although, in-line with global market practice, no compensation is permitted to be paid to any bidder on cancellation of any project.

Articles 26, 32 and 34 contain minimum content requirements in relation to any PPP contract. Again, reassuringly, none of these are surprising. However, it is silent as to the terms of any risk allocation or whether there is to be any standard form. It is understood that this level of detail will be fleshed out in the regulations and guidebook to be issued by DoF under Article 9, which again is consistent with other PPP legislation across the world.

Article 36 provides that only the project company shall be liable for any third party financing of any project. It inadvertently appears to prevent any corporate financing / support from any shareholders of the project company, but it is intended to prevent the government from guaranteeing any third party debt (as opposed to PPP contract payments, about which the law is silent) and probably should be interpreted accordingly.

Article 39 revokes any other laws to the extent of any conflict, which presumably would include Dubai's public debt law (Dubai Decree No. 24 of 2007 and Committee Decision No. 1 of 2008) given Articles 8 and 36.

However, most of the above is subject to exemption should the Committee (Article 7(5), 15(2), 26(18), 27(B), 31 and 38) or DoF (Articles 7(5), 9, 21(B), 26(18) and 29(B)) so approve.

THE CHALLENGES

The first challenge that needs to be overcome for the Dubai PPP law to be game-changing is the creation of a pipeline of projects that increases the attractiveness to sponsors. This means focussing on particular sectors, so that the same types of sponsors are willing to incur bid costs in the knowledge that, if they are unsuccessful, they can simply roll-over their resources into the next project in the pipeline. Traditionally, GCC governments have been extremely successful at this in the electricity and water sectors. Turkey has done this well too (focussing on healthcare projects and, shortly, schools) and, previously, so did Abu Dhabi (with its focus on universities). By contrast, Kenya (for example) has prioritised its top 50 infrastructure requirements. A sector-focussed pipeline also assists with the governments' "value-for-money" and "affordability" challenges, as it allows for the private sector to increase bid efficiency and reduce bid costs and execution time in order to submit the most attractive proposal possible.

The second challenge is ensuring that risk allocation and pricing are sufficiently attractive to international project financiers to fill any local bank void. Reduced oil revenues are not just impacting the government cashflows, but also local banks' capital reserves and, therefore, liquidity

significantly. However, this does not mean that the government should pay more. Rather, it should have a greater focus on "value-for-money". For example, the requirement to provide a performance bond for the life of any project (Article 26.8) does not provide "value-for-money" and is simply an added cost (approximately 1-2% of the capital costs of the project per annum) with no benefit to a genuine PPP, where the amount of any compensation on termination payable by the public authority typically only exceeds the performance bond value between years 18-20. During this period of time, the performance bond provides very little additional protection but comes at a significant cost. Instead, reliance on set-off rights would be a better "value-for-money" and more "affordable" solution.

So, whilst the introduction of the Dubai PPP law is a welcome sign of Dubai's intent, there remain significant challenges to PPPs re-starting in Dubai and the wider GCC.

Stephen Knight is a senior associate in Allen & Overy LLP's Abu Dhabi office, having previously worked in Allen & Overy LLP's Project, Energy and Infrastructure Group in London. He is a PPP specialist and has experience advising grantors, sponsors and lenders on a wide range of finance transactions and regularly advises on both finance documents and commercial contracts.

Stephen Knight
Senior Associate – Abu Dhabi
Tel +971 2 418 0406
Mob +971 50 459 2917
stephen.knight@allenovery.com

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