DUBAI'S NEW PPP LAW

Dubai Law No. 22 of 2015 Regulating Partnerships between the Public and Private Sectors (**"PPPs"**) in the Emirate of Dubai was published in the Official Gazette on 20 September 2015 and will become law on 19 November 2015. This much anticipated new Law will make the implementation of PPPs in Dubai a much more realistic prospect, removing the need for the project specific legislation that previous analysis suggested would have been required to implement a PPP in Dubai.

INTRODUCTION

PPPs have long been discussed in the MENA region but there have been very few examples of successful projects outside of the traditional power and water sectors that generally have their own sector specific legislation. In some countries, such as Egypt, this lack of progress has been due to wider geo-political reasons, but in others it has been largely due to the lack of financial need. High revenues from hydrocarbons have enabled governments to fund their infrastructure projects from their current budgets without the need for private sector support. With low oil prices looking like they will be around for some time to come, interest in PPPs is growing.

Whilst the more recent drivers behind the development of PPPs in Dubai are unique, the government has been interested in mobilising private investment in support of its developing infrastructure for some time. Many partnerships and management contracts have been implemented and the Roads & Transport Authority has previously used a contractor funding model on projects such as Phase 1 of the new Dubai Water Canal. However, there have been no major PPP schemes along the lines of those implemented in other markets around the world and the key question now is whether the new PPP Law will act as a catalyst to generate a pipeline of PPP opportunities in Dubai.

SCOPE

The PPP Law automatically applies to government entities that are on Dubai’s general budget but can be extended to off-budget entities with the approval of the Supreme Committee for Fiscal Policy.

The concept of a PPP is broadly defined in the new Law but the key features that are required include an intent to ensure the quality of services, the development of the government entity's income, or any other objective by taking advantage of private-sector efficiency, financial and technical capabilities.

The PPP Law defines a number of permitted structures at Article 7 and allows other structures to be promoted by the government entity and the Department of Finance with the approval of the Supreme Committee. The PPP Law would therefore apply both to user-pay (concession-type) projects or availability type schemes where the government entity retains usage risk and pays a service fee.

The PPP Law does not apply to electricity and water projects that are governed by the Electricity & Water Sector Law (No 6. of 2011) or simple works contracts or supply contracts that are governed by the Procurement Law (No 6. of 1997).

Projects can have a maximum duration of 30 years unless the Supreme Committee approves a longer period. The default position is that the maximum 30 year term runs from signature of the PPP Contract - so not from construction completion - although Article 27 provides the PPP Committee with some flexibility to specify an alternative start date (see below) .

INSTITUTIONAL AND PROCEDURAL REQUIREMENTS

We anticipate the implementing regulations will provide further detail on the institutional and procedural requirements that will apply to government entities.

However, the PPP Law includes a number of specific requirements:

- Each government entity that wants to implement a PPP Contract must form a "PPP Committee" comprising of members nominated by the relevant entity's CEO and, for projects with a total cost to the government of over AED 200 million, a representative of the Department of Finance.
- Projects that generate revenues, achieve savings or have a total cost to the government entity of AED 200 million or less can be approved by the relevant entity's CEO.
- Projects with a cost to the government above AED 200 million and up to AED 500 million can be approved by the Department of Finance and projects with a cost above AED 500 million must be approved by the Supreme Committee.

A PPP Contract that includes payment obligations for the government entity can't be concluded unless the payments have been appropriated in that entity's budget. This seems to mean that in order to avoid a delay in signing, departmental budgets may have to anticipate such payments in advance of the completion of the tender process. However, once this initial hurdle is cleared, the Public Funds Administration Law (No. 35 of 2009) permits multi-year appropriations, so this should not be an impediment to implementing schemes.

FREEDOM TO SPECIFY TENDER AND CONTRACT TERMS

One of the biggest hurdles to implementing PPP schemes in Dubai up to this point has been the application of the Procurement Law (No. 6 of 1997). This contains a number of requirements concerning tender conditions, timescales and contract terms, that do not sit easily with a PPP procurement process or contract. The PPP Law deals with this by disapplying the Procurement Law other than where the PPP Contract contains no "clear provision" on a matter. This imposes a burden on anyone drafting a Dubai PPP Contract to ensure that all relevant matters are covered, but this would obviously be the case in any event.

Articles 14 to 24 of the PPP Law contain provisions relating to the prequalification, tender and selection processes and PPP Contract terms including:

- bidding terms and conditions and financial security (Article 17);
- conditions of the PPP Contract, bid bond value, performance bond value calculations and means of comparing bids (Article 18); and
- tender scoring and evaluation procedures (Articles 22 and 23).

These provide the government entity with a high degree of flexibility to specify the tender and contract conditions on a case by case basis. The overriding award criteria is the "most financially and technically advantageous bid", but the government entity has a discretion to specify the detail of this, including the balance between technical and financial criteria, in the tender documents.

It's worth noting that Articles 12 and 14 of the PPP Law allow private entities to make unsolicited proposals for PPP projects and allow the government entity to contract directly with the entity that makes such a proposal. There is no requirement for such proposals to be put to tender and no regulation of the intellectual property rights issues that will arise in this situation. It will be interesting to see whether the implementing regulations deal with these issues, but we can envisage these Articles generating significant interest within Dubai.

CORPORATE ISSUES

The PPP Law makes it clear that the successful bidder for a project must establish a Project Company to execute the Project unless the government entity is satisfied that the successful bidder has the financial and technical capabilities to perform the PPP Contract and it provides sufficient financial security. Where a Project Company is to be established it must be either a sole proprietorship or a local or foreign company licensed to operate in Dubai. The Project Company will need to be properly licensed by the Department of Economic Development in Dubai.

In practice this will mean that in most (if not all) cases, the Project Company will need to be an onshore Dubai entity and that free zone entities will not be suitable. This also means that the local ownership requirements of the UAE Companies Law (No. 2 of 2015) will apply to the Project Company. Careful consideration will be needed where the project or funding structure anticipates an offshore holding company to ensure that the requirements of the PPP Law are respected.

There are no specified levels of the interest that the government entity might hold. Any government shareholding will have to be held by an affiliate of the government entity or by a government-owned company and, as we understand it, this would mean that the interest would fall to be managed by the Dubai Investment Corporation.

Our initial view is that if the government entity does choose to become a shareholder in this Project Company, this would have wide ranging implications, not just for the tender and project documents, but also for the status of the Project Company under Dubai law and its potential treatment as a "Government Company". These issues will need further detailed considerations if any government entity exercises this option.

Unlike other regional PPP Laws - most notably Kuwait - the Dubai PPP Law does not impose any requirement for any part of the Project Company to be issued to the public through an IPO, although of course if the government entity does take an interest, that could potentially be floated at some future point.

FUNDING ISSUES

The PPP Law doesn't deal with the funding of PPP projects in any detail. Article 36 provides that the government entity (in co-ordination with the Department of Finance) may authorise the Project Company to enter into arrangements with "banking institutions" to finance its business and activities. The Article goes onto say that in such circumstances Project Company will be "solely liable" for the obligations arising and this may have some implications for deal structuring that will need to be taken into account.

The PPP Law doesn't specifically address the need for government entity/funder direct agreements. Most government entities in Dubai should already have sufficiently broad powers to contract such that this is not an impediment, but it will need to be reviewed on a case by case basis.

CONCLUSION

The Dubai PPP Law is an overwhelmingly positive step forward in facilitating PPP projects in the Emirate. The key issue now is how the deal pipeline will develop.

MORE INFORMATION

If you would like to understand further potential implications of the new PPP law, please contact:

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