Key elements of a public-private partnership framework

Recommendations for discussion

3rd Meeting of the Working Group on Infrastructure Finance in Iraq
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Alexander Böhmer
Head of Unit
MENA-OECD Investment Programme
Agenda

1. Public-private partnerships: an effective tool to support Iraq’s reconstruction

2. Why a PPP law?

3. Current basis for the implementation of PPPs in Iraq

4. Best practices for PPP laws
The use of PPPs attracts investors to Iraq

• Financial, human and technical support relieves the Government’s budget…
  – Private parties can offer better performance to build on time, within budget, and with superior quality specification;
  – The risks are distributed between the different sides of the partnerships;
  – The administrative capabilities of the public sector are improved;

• While preserving its prerogatives:
  – The government has the right to regulate according to changing economic or political circumstances;
  – It retains some control over sectors regarded as sensitive or of strategic interest while benefiting from the know-how and capital of investors.

➢ The burden on the Government budget is relieved and private sector know-how can be accessed.
What are PPPs?

- **Traditional procurement:** full control by the State over the concessionaire
- **Pure PPP model:** low control (a more 'hands-off' approach)
- **Between the two:** differing degrees of control by public & private parties:
  - Service contracts
  - Management contracts
  - Leasing arrangements
  - Build-operate-transfer models
  - Concessions

- PPP models also differ as to:
  - Asset ownership
  - Operation and maintenance obligations
  - Commercial risk allocation
  - Project duration

The long-term duration of many PPP projects provides the number one argument for a sound regulatory and institutional framework.
What are PPPs?

• Only two categories of PPP involve complex public-private arrangements:
   The various forms of BOT, BOO, BOOT, etc
   Any operations involving temporary control and/or investment commitment (concessions)

• These are the models most PPP literature refers to with the term ‘PPP’.

• These PPPs often use project financing models in which the long-term debt is raised against the cash flow generated by the project alone.
## What are PPPs?

<table>
<thead>
<tr>
<th>Option</th>
<th>Asset ownership</th>
<th>Operation and maintenance</th>
<th>Capital investment</th>
<th>Commercial risk</th>
<th>Duration (years)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Service contract</td>
<td>Public</td>
<td>Public and private</td>
<td>Public</td>
<td>Public</td>
<td>1–2</td>
</tr>
<tr>
<td>Management contract</td>
<td>Public</td>
<td>Private</td>
<td>Public</td>
<td>Public</td>
<td>3–5</td>
</tr>
<tr>
<td>Lease</td>
<td>Public</td>
<td>Private</td>
<td>Public</td>
<td>Shared</td>
<td>8–15</td>
</tr>
<tr>
<td>Build-operate-own (BOO)</td>
<td>Private (bulk services)</td>
<td>Private</td>
<td>Private</td>
<td>Private</td>
<td>20–30</td>
</tr>
<tr>
<td>Concession</td>
<td>Public</td>
<td>Private</td>
<td>Private</td>
<td>Private</td>
<td>25–30</td>
</tr>
<tr>
<td>Privatisation</td>
<td>Private</td>
<td>Private</td>
<td>Private</td>
<td>Private</td>
<td>Indefinite</td>
</tr>
</tbody>
</table>

Source: Cohen, Shams, Attia, 2002
What are PPPs?: Parties and Legal Documents

- Contracting Authority
- Export Credit Agencies/Banks
- International Lenders
- Local Lenders
- Shareholders/Promoters
- Insurers
- Project Company
  - PPP Concession Contract
  - Equity Documentation
  - Direct Agreement
  - Funding Terms
  - Security Documents
- Construction Contractor
- Operator
- Maintainer
Recent trends in MENA - Jordan

- Some of the PPP projects that are currently being implemented are:
  - Jordan National Railway Network;
  - Light Rail system (Amman – Zarqa);
  - Amman Ring Road;
  - Facility Management System;
  - Medical and Industrial Waste Treatment Plant;
  - Solid Waste Management and Recycling/ GAM;
  - Small pilot projects: Municipalities and Tourism sector.

- On July 12th, 2010, the draft PPP law was submitted to private businesses for comments.
Recent trends in MENA - Egypt

• A horizontal PPP law was approved by the Parliament in May 2010 (Law No. 67).

• The PPP Central Unit, which is a department of the Ministry of Finance, was charged by the Government with implementing and overseeing the PPP strategy in the country in different sectors: education, utilities, health, transport, oil and gas and facilities (buildings and solid waste).

• Several PPP projects are currently being implemented: 2 hospitals in Alexandria, sewage treatment plants in Cairo, Abu Rawash and Alexandria, and the Rod El Farrag access that will connect the existing ring road around Cairo with the Cairo-Alexandria highway.

• The PPP Central Unit issued “A guide for making successful PPPs in Egypt” – it advises:
  – A strong political backing;
  – A well structured, transparent, and competitive procurement process;
  – A determination by all parties and stakeholders to make the PPP work for all the stakeholders…
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Why a PPP law?

- Provide a predictable framework for promotion and implementation of PPP projects;
- Describe clearly the eligible sectors as part of the overall economic development strategy;
- Define clearly the rights and obligations of the public and the private party;
- Establish institutional capacities within the government to match knowledge of private sector - PPP unit;
What are key regulatory alternatives for PPPs?

Two approaches

TRANS-SECTORAL
Privatization/ Concession/
Public Private Partnership legislation

- operative
  - Morocco (1989/98)
  - Djibouti (1997)
  - Yemen (1999)
  - Algeria (2001)
  - Bahrain (2002)
  - Jordan (2000)
  - Lebanon (2000)
  - Egypt (2010)
- in approval process
  - Tunisia
- planned
  - Iraq

SECTORAL
Sector regulations/
Sector authorities (only)

- Libya
- Qatar
- Kingdom of Saudi Arabia
- Syria
- United Arab Emirates/ Abu Dhabi
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Iraqi current legislation: Overview

• Currently, the Government of Iraq uses several legal instruments to implement PPPs:

1. The **1986 Law of State-owned Property Sale and Lease # 32** to implement partnerships between the public and the private sector:

   - **A special agreement** is given by the Minister (Article 2)
   - **to the Iraqi or foreign private party** (Article 5: foreign parties require the authorization of the competent authority)
   - **after a mandatory public auction** (Article 3)
   - **which is detailed in the 1986 Law** (Chapter 2 – Articles 6 to 20).

2. **Article 15 (3) of the 1997 Company Law #22** which allows the State-owned enterprises to enter into partnerships with **Arab and foreign companies** specialized in the same sector of activity that fall within the same specialization inside Iraq, with the consent of the Council of Ministers.

3. **Investment law 13, 2009 Amendment:** extending land allocation benefits to PPPs, especially those involving SOEs
4. The CPA Order No. 87 of 2004 “Law on Public Contracts” completed by the Implementing Regulations for Governmental Contracts were issued in 2007 and the Governmental Contracts Implementing Regulation No. 1 in 2008 under the authority of the Office of Government Public Contract Policy (OGPCP) to better disseminate and explain the procurement procedures.

- Responses to a 2007 OECD “Survey on Current Public Procurement Legislation in Iraq” showed that it is important to redefine the terms of reference for co-operation to enhance co-ordination to achieving results in the fight against corruption in the field of public procurement.
Iraqi current practice

- Iraq launched a 5 years National Development Plan (2010-2014) on July 4th, 2010 which comprises using PPP models for infrastructure financing.

- The Plan develops a classification of models based on organizational pattern, type of sector, nature of activity and form of contract.

- This description would need further specification in a horizontal PPP law.

- A draft of a horizontal PPP law and guidelines on PPP law have been presented by UNIDO to the Task Force on Economic Reform and Private Sector Capacity.

- The adoption of a PPP law should complement the work of the Working Group on Infrastructure Finance on the project.
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A comprehensive procurement law is of central importance - a competitive public procurement process covering all investments is required by law in many countries when public or multilateral development bank funding is provided. It should foresee:

- The right to appeal against a procurement decision to an independent judicial body, and

- An independent monitoring authority/auditor to investigate PPP procurement practices and help rule out any conflict of interest in the dealings of the contracting authority.

The OECD Principles for Enhancing Integrity in Public Procurement key recommendations are:
- Transparency for fair and equitable treatment (Principles 1 and 2);
- Good management (Principles 3 and 4);
- The prevention of misconduct, and compliance and monitoring (Principles 5, 6 and 7);
- Accountability and control (Principles 8, 9 and 10).
The PPP law should clarify **private investors and government rights and obligations** in PPPs project:

- Definition of **infrastructure sectors open** to private participation;
- Definition of **agencies responsible** for approving private projects or contracts;
- Issues regarding **tariff adjustment**;
- Rules regarding **contract amendment and termination**;
- **Competitive bidding and other procurement related provisions**;
- Availability of **dispute settlement**, namely international arbitration;
- **Other issues** not treated by general law, but relevant for private participation in infrastructure.
The **contractual relationship between public and private parties in a PPP** is the final level of legal relationship impacting on the success or the failure of the PPP.

These contracts should include:

1. Step in rights,
2. Termination rights,
3. The possibility of a re-negociation, and
4. A basic description of the dispute resolution mechanism.
Thank you for your attention!

Mr. Alexander Böhmer
Head of Unit
MENA-OECD Investment Programme
E-mail: alexander.boehmer@oecd.org
Telephone: +33 1 45 24 19 12