

WATSON FARLEY & WILLIAMS

BRIEFING

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- OBJECTIVES
- SCOPE
- PROJECT PROPOSALS
- PROJECT APPROVAL
- PROJECT PARTNER
PRE-SELECTION PROCESS
- BIDDING PROCESS
- PROJECT DEVELOPMENT
- PARTNERSHIP CONTRACT
- PROJECT FINANCING



Dubai Law No. 22 of 2015 in respect of the regulation of public-private partnerships (“PPP”) in the Emirate of Dubai came into force on 19 November 2015 (the “Dubai PPP Law”).

PPPs are not new arrangements to Dubai, having been successfully implemented in various sectors over the years, but these have been, in large part, implemented on an ad hoc basis.

“WITH THE INTRODUCTION OF THE DUBAI PPP LAW, A LEGAL FRAMEWORK NOW EXISTS TO REGULATE PPPs ACROSS VARIOUS SECTORS.”

However, with the introduction of the Dubai PPP Law, a legal framework now exists to regulate PPPs across various sectors. This should in turn increase investors’ and financial institutions’ confidence in Dubai’s legal and regulatory system in respect of infrastructure projects. In so doing, it is very likely that the number of PPP opportunities will increase along with the quality and quantity of projects that can be delivered to meet Dubai’s demand growth and achieve the goals of UAE Vision 2021.

Some of the key features of the long-awaited Dubai PPP Law are highlighted below.

OBJECTIVES

The Dubai PPP Law’s stated objectives include:

- i. regulating the contractual relationship between the public and private sectors so as to ensure, among other things, the quality of the service provided;
- ii. encouraging private investment in economic and social development projects;

“DUBAI HAS ADOPTED A MULTI-SECTOR PPP APPROACH.”

“...WHERE THE PRIVATE INVESTOR HAS PROPOSED THE PROJECT, THE DUBAI PPP LAW ALLOWS THE RELEVANT GOVERNMENTAL ENTITY TO CONTRACT DIRECTLY WITH SUCH PRIVATE INVESTOR, WITHOUT UNDERGOING THE BIDDING PROCESS OTHERWISE APPLICABLE...”

- iii. executing the Government of Dubai’s strategic projects, efficiently and effectively;
- iv. enabling Dubai residents to receive better services and at a lower cost;
- v. reducing the Government of Dubai’s financial risk burden;
- vi. transferring the risk from the public to the private sector; and
- vii. shifting the public sector’s role from investor to regulator.

SCOPE

The Dubai PPP Law applies to all entities which are subject to the Government of Dubai’s public budget and any other governmental entity that the Supreme Committee for Fiscal Policy (the “Supreme Committee”) may decide.

Contrary to many other countries in the MENA region that have adopted specific sector legislation governing PPPs, Dubai has adopted a multi-sector PPP approach.

The Dubai PPP Law applies to all sectors except (i) partnership agreements relating to the production of electricity and water that are governed by the Electricity & Water Sector Law No. 6 of 2011; (ii) agreements for works and provision of materials that are governed by Procurement Law No. 6 of 1997; and (iii) any other agreements specified by the Supreme Committee.

All private companies, regardless of nationality, are welcome to participate in PPP projects in Dubai.

PROJECT PROPOSALS

Projects will, of course, be proposed by a governmental entity but they may also be proposed by a private investor, which is an interesting feature that is sure to stimulate innovation. It is worth noting that where the private investor has proposed the project, the Dubai PPP Law allows the relevant governmental entity to contract directly with such private investor, without undergoing the bidding process otherwise applicable under the Dubai PPP Law.

The Dubai PPP Law also allows for PPP projects to take on various forms including, “Build-Operate-Transfer”, “Build-Own-Operate-Transfer”, “Design-Build-Operate”.

PROJECT APPROVAL

Once a PPP project is proposed, it must be approved by the relevant competent authority, depending on the monetary value of the project.

- i. Projects expected to achieve revenues or financial savings of and projects with a total cost to the relevant governmental entity under AED 200,000,000 must be approved by the director general of such government entity;
- ii. Projects expected to cost the relevant government entity more than AED 200,000,000 but less than AED 500,000,000 must be approved by the Department of Finance of Dubai (“DoF”); and
- iii. Projects expected to cost the relevant governmental entity over AED 500,000,000 must be approved by the Supreme Committee.

“ALL INTERESTED INVESTORS MUST BE PRE-SELECTED IN ORDER TO COMPETE THROUGH THE BIDDING PROCESS.”

PROJECT PARTNER PRE-SELECTION PROCESS

The Dubai PPP Law calls for an open, transparent and competitive process for selecting a project partner. The potential project partners are selected based on a number of criteria established to evaluate their ability to complete the proposed project, including (i) public interest requirements, and (ii) financial and technical capabilities.

All interested investors must be pre-selected in order to compete through the bidding process.

The Dubai PPP Law allows the relevant governmental entity to hold preparatory meetings with any qualifying partners in order to discuss the terms and conditions of the proposed project. Each qualifying partner may request that the relevant governmental entity not publish or reveal any details relating to the proposed economic or financial terms of the project in question, so as to preserve confidentiality.

BIDDING PROCESS

Pre-qualified potential partners will be invited to submit their offers in respect of the proposed project. It is worth noting that an offer can be submitted by a consortium of several pre-qualified partners, provided that such pre-qualified partners only form part of one consortium.

A partnership committee, composed of specific members of the relevant governmental entity in accordance with the Dubai PPP Law, will open bids from all potential partners in an open process attended by all of the potential partners.

In order for an offer to be considered by such partnership committee, an offer must meet all of the technical, legal and financial conditions specified in the relevant tender offer. The partnership committee will then evaluate all offers meeting such specified conditions and award the proposed project to the pre-qualified potential partner having submitted the most technically and financially beneficial offer.

“THE DUBAI PPP LAW IS SILENT ON THE SHAREHOLDING THRESHOLD THE GOVERNMENTAL ENTITY IS ENTITLED TO TAKE. ANY SUCH ARRANGEMENT WOULD NEED TO BE CAREFULLY CONSIDERED FROM A STRUCTURING PERSPECTIVE...”

PROJECT DEVELOPMENT

A project company must be established by the winning bidder to develop the project.

If the governmental entity wishes to participate in the project company, it may, with the winning bidder, set up a limited liability project company incorporated in Dubai in which both the governmental entity and the private investor are shareholders. The Dubai PPP Law is silent on the shareholding threshold the governmental entity is entitled to take. Any such arrangement would need to be carefully considered from a structuring perspective to avoid potential negative corporate and financing ramifications.

If the governmental entity does not wish to participate in the project company, the winning bidder may set up a project company incorporated in Dubai. Investors will need to take advice on the form and shareholding structure of such project company as well as the required participation of a UAE national as shareholder in order to comply with UAE foreign shareholder restrictions (commonly known as the 49:51 rule) and consider other viable options such as a free-zone company or establishing a branch of a foreign company (where permitted by the Dubai Government).

“THE GOVERNMENTAL ENTITY AND THE PROJECT COMPANY MUST ENTER INTO A PARTNERSHIP AGREEMENT SETTING OUT HOW THE PROJECT WILL BE IMPLEMENTED AND THE MUTUAL OBLIGATIONS OF THE PARTIES.”

Subject to the approval of the DoF, the winning bidder may be permitted to develop the project without setting up a new project company if such winning bidder exhibits the necessary financial and technical capabilities and provides sufficient financial guarantees. In this case, the winning bidder will be treated as the project company.

PARTNERSHIP CONTRACT

The governmental entity and the project company must enter into a partnership agreement setting out how the project will be implemented and the mutual obligations of the parties. Such partnership agreement must include a certain number of elements specified in the Dubai PPP Law, which in large part are standard provisions relating to the scope of work and services, ownership of the project assets and intellectual property, allocation of responsibility for obtaining permits and licences, the respective financial and technical obligations of the parties, insurance requirements, risk allocation, Emiratisation, environmental measures to be taken, etc.

A few provisions in particular, however, bear mentioning:

- i. The partnership contract may unilaterally be amended by the governmental entity for “public interest” reasons or in the event of a “public emergency”. Neither “public interest” nor “public emergency” is clearly defined. It will be left to see whether the implementing regulations clarify these terms.
- ii. The maximum duration of the partnership contract is 30 years (from the signature date of the partnership contract rather than from construction completion), unless the Supreme Committee approves a longer period.
- iii. There is an obligation to obtain prior governmental approval for any sub-contracts entered into by the project company. This could quickly become cumbersome for the project company if a threshold (or other form of arrangement) is not agreed between the parties.
- iv. The partnership contract and any disputes arising under it must be subject to UAE law. Disputes may be settled by arbitration but such arbitration must be settled in Dubai.
- v. The partnership contract must comply, not only with the provisions of the Dubai PPP Law but also with the other laws of the Emirate of Dubai, including the existing procurement law (Law No. 6 of 1997) which is not extinguished by the Dubai PPP Law. In drafting any such partnership contract, it will be necessary to be mindful of the interface between these laws.

PROJECT FINANCING

The Dubai PPP Law briefly touches on financing PPP projects in its Article 36 – The relevant governmental entity, in coordination with the DoF, may give the project company permission to enter into financing arrangements with lending institutions; however, the Dubai PPP Law states that the project company alone will bear all obligations arising from such financing arrangements. Accordingly, project financing considerations will need to be carefully considered.

CONTACTS

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