Public-Private Partnerships

Contributing editors
Ivan E Mattei and Armando Rivera Jacobo

2019

GETTING THE DEAL THROUGH

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Fifth edition

Getting the Deal Through is delighted to publish the fifth edition of *Public-Private Partnerships*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Greece.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Ivan E Mattei and Armando Rivera Jacobo of Debevoise & Plimpton LLP, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH

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United Arab Emirates

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General PPP framework

1 How has the concept of public-private partnership (PPP) developed in your jurisdiction? What types of transactions are permitted and commonly used in your jurisdiction?

The PPP development model provides a framework for the public sector to partner with the private sector to deliver effective services while sharing the responsibilities, risks and rewards of a project. As a result, the United Arab Emirates (UAE) has been working to attract private-sector investment and increase the number of services delivered using the PPP model.

There is no federal PPP law in the UAE but Dubai has recently passed a special PPP law (see question 3). Generally, the partnership takes the form of a special purpose vehicle or joint venture whereby the public and private sectors can combine to ensure a high quality of services and increased revenues by making use of private-sector efficiencies and technical and financial capabilities.

The form of contract used in a PPP model depends on the tasks that the private entity is required to take on. The sharing of responsibility under a PPP model can be divided into such categories as design, finance, construction and operation and maintenance of the project.

Contracting government bodies may assign multiple stages to the private entity or spread responsibility across a number of different partners.

The contractual arrangements used in a PPP range from straightforward service outsourcing contracts to the sale of completed projects to the private sector. The following structures are permitted in the UAE:

- build-lease-transfer;
- build-operate-transfer;
- build-own-operate-transfer;
- build-own-operate;
- design-build-finance-operate;
- build-rent-transfer;
- design-construct-manage-finance;
- rehabilitation-own-operate; and
- rehabilitation-lease-transfer.

In order to maintain flexibility, the government may approve any other internationally recognised means of partnership as per the recommendations of the concerned government body.

2 What categories of public infrastructure are subject to PPP transactions in your jurisdiction?

In the UAE, a series of PPP-type projects have been implemented or are being completed mainly in the healthcare, water, power, education, property and transportation sectors.

3 Is there a legislative framework for PPPs in your jurisdiction, or are PPPs undertaken pursuant to general government powers as one-off transactions?

The UAE is a federation of seven emirates (Abu Dhabi, Ajman, Dubai, Fujairah, Ras Al Khaimah, Sharjah and Umm Al Quwain) and is a civil law jurisdiction with a codified legal system. Federal legislation consists of numerous codes and where legislation is silent, the principles of Islamic jurisprudence (sharia law), which is considered the main source of law, apply. Federal legislation, applicable across the UAE, is enacted by the Federal Supreme Council (comprising the rulers of each emirate) and each emirate is free to legislate on its own internal affairs, including introducing laws.

At the time of writing, a federal PPP law is under consideration, but no information is available on the date this law is likely to be published. However, currently, UAE Cabinet Resolution (1/1) of 2017 on the Federal Government Public Private Partnership Provisions and Procedure Manual (Procedures Manual) provides a general framework for projects procured using the PPP model by the federal entities (see question 5 regarding the definition of federal entities). The Procedures Manual contains a set of guidelines and procedures designed to help structure PPP arrangements in line with the provisions of a set of regulations contained in Cabinet Resolution No. 32 of 2014 on Procurement and Warehouse Management Regulations.

Dubai is the only emirate in the UAE to have passed a PPP law. The Dubai PPP legislation (Law No. 22 of 2015) includes a regulatory framework for PPP arrangements concerning Dubai government bodies (Dubai PPP Law). The Dubai PPP Law contains provisions governing the tendering and awarding of PPP contracts; however, it is anticipated that much of the detail required for the successful execution of PPPs will be included in the implementing regulations, which, at the time of writing, are yet to be issued.

While the Dubai PPP Law may be used to govern a wide range of PPP arrangements in Dubai, this legislation does not apply to the following:

- electricity and water projects (governed by Dubai Law No. 6 of 2011); or
- simple works contracts or supply contracts (governed by Dubai Law No. 6 of 1997).

The Dubai Supreme Committee for Financial Policy has full discretion to exclude other types of contract from the operation of this law.

In Dubai, the agreement between the private and public sectors (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 and should be drafted with the interface between these laws in mind.

4 Is there a centralised PPP authority or may each agency carry out its own programme?

At federal level, the Procedures Manual provides for the formation of a technical bureau, which is to sit within the Ministry of Finance comprising financial, technical and legal consultants tasked with providing support to the various federal entities entering into PPP arrangements.

The technical bureau is accountable to the Minister of Finance and is responsible for considering and monitoring opportunities for future joint projects with the private sector. The PPP implementation process starts with the technical bureau, which proposes projects to the financial and economic committee, which then, following consideration and approval of the project, submits it to the cabinet for final approval.

At emirate level, there is no centralised PPP authority under the Dubai PPP Law. In fact, the Dubai PPP Law gives government entities entering into a PPP arrangement the flexibility to manage the financial, economic and social feasibility of a project, as well as the distribution of risk between the parties. However, the law requires the government body concerned to establish a partnership committee, the members of which are to be nominated by way of a resolution of that government body's director general. If the total cost of a project to the government body exceeds 200 million UAE dirhams, the partnership committee must include a representative of the Ministry of Finance. The partnership committee may seek help from external experts when needed to ensure optimum utilisation and exchange of expertise.

Power and water sector PPPs are procured by the Abu Dhabi Water and Electricity Authority (ADWEA) and the Dubai Electricity and Water Authority. ADWEA has also assisted the emirate of Fujairah and other emirates in their independent water and power projects.

5 Are PPPs procured only at the national level or may state, municipal or other subdivision government bodies enter into PPPs?

Owing to the UAE's legal landscape, PPPs can be procured at both federal and individual emirate level where no financing is provided from the federal budget. The Procedures Manual is applicable to PPP projects initiated by federal entities, which it defines as federal ministries that are subject to Federal Decree Law No. 8 of 2011. This Decree relates to programmes financed by the UAE federal government and is used to achieve the emirate's economic and social development. The federal entities include the Ministry of Defence, Ministry of Energy, Ministry of Education and the Ministry of Health and Prevention.

At emirate level, the only emirate to have enacted a dedicated PPP law is Dubai. The Dubai PPP law is only applicable to Dubai government agencies, including free zone authorities, which are subject to the general budget of the government of Dubai.

6 How is the private party in a PPP remunerated in your jurisdiction?

The PPP contract will identify the remuneration process between the relevant government body and private partner. Profits arising out of the PPP are likely to be passed to the private entity, unless the government body has provided some financing for the project, in which case, profits will be distributed according to the terms of such a financing arrangement.

The private party's revenue will come from service or availability payments made by the government body to the project company for performing the service under the partnership contract. This can take the form of a fixed periodic payment in a 'government pays' form of project or a variable amount based on the output or service demand in a 'user pays' project. In both cases, the government body will pay the private company; such revenue will not be subject to retention, deduction or set off because it belongs to the government body.

7 May revenue risk or usage risk be shared between the private party and the government? How is risk shared?

The Procedures Manual regards risk sharing as a fundamental element of the PPP arrangement and provides for revenue guarantee. Under this guarantee, the federal entity will be guaranteeing the private party a minimum service fee or use. For example, in federal-funded toll road projects, the federal entity will guarantee the private entity a minimum daily revenue. In general, it is expected that the PPP contract could include a benchmarking process for sharing demand risk between the parties.

8 In situations where the private party is compensated in whole or in part through availability or other periodic payments from the government, are the payment obligations of the government subject to the relevant legislative body approving budgetary funding in the future?

Under the Dubai PPP Law, the project company cannot collect charges, fees, tariffs or any other amounts of money in return for the services agreed upon in the partnership agreement, unless the government body issues a certificate of acceptance of the completed works.

Projects to be implemented must be approved by the relevant levels of government. As such, any private entity's compensation will be approved at a level considered appropriate by the relevant authority in the framework of its annual budget.

9 Is there any cap on the rate of return that may be earned by the private party in the PPP transaction?

The Dubai PPP Law does not appear to address this issue specifically; however, the Procedures Manual offers some guidance stating that the private entity will receive payment from the government body whose revenue depends on the fees imposed on the user and the demand for the services. The government body will set such fees without intervention from the private sector. On that basis, on projects where the governing body sets its pricing requirements in relation to charges to users, there is an element of control on return to the private sector through the financial model.

Further, profit-sharing models can also be included, where there is over performance against the financial model. The profits will be shared between the government body and private entity.

10 Is the transfer of direct or indirect ownership interests in the project company or other participants restricted?

Under the Dubai PPP Law, the project company's ownership of the interest in the project cannot be changed or transferred to others unless prior approval is obtained from the partnership committee (see question 4).

Under the Procedures Manual, the project committee established by the relevant federal entity will be responsible for drafting the relevant document that may restrict the transfer of ownership interest in the project company. Where the project is project financed, the financing documents may include clauses that will restrict the transfer of interest in the project company. In Abu Dhabi, the approval of the 'employer' is required.

Procurement process

11 What procedures normally apply to a PPP procurement? What evaluation criteria are used to award a PPP transaction?

Under the Dubai PPP Law, a government entity must, before initiating a tendering process, follow the company pre-qualification procedures to shortlist private entities eligible for a PPP. The project must be announced in 'various media sufficient time in advance' before the bid deadline and the government entity must comply with the rules and criteria stipulated in the Dubai PPP Law and related resolutions when pre-qualifying a private-sector partner. A government entity may also hold preliminary meetings with pre-qualified partners to discuss preliminary specifications and conditions in relation to the proposed project and other relevant matters (eg, experience of the bidders).

During the tendering process, the pre-qualified partners are invited to collect the tender documents of the partnership project and submit their bids in accordance with the tender documents. Under the Dubai PPP Law, the process of selecting a project partner is subject to the principles of openness, transparency, fair competition, equal opportunity, equality and achieving the public interest. It is up to the procuring body and its advisers to prepare tender documentation and establish evaluation criteria suitable for the project in question.

Under the Dubai PPP Law, a private entity is awarded a PPP transaction if it is able to meet approved financial and technical standards, regulations and financial and technical conditions and prove that it has the capabilities and competencies required for working in its field of specialisation. The proposals are assessed by the partnership committee using the evaluation criteria set out in the tender document prepared for the specific project.

Under the Procedures Manual, a project committee must be established by the federal Minister of Finance, which will include members from the technical bureau, to announce the tender process for awarding the PPP contract. Under the Procedures Manual, the procurement method can be in the form of a public tender, closed tender or limited tender. The winning bids will be determined by the project committee following its assessment, followed by final approval of the economic and financial committee (a ministerial committee reporting to the cabinet established to assess the technical bureau's opinion).

12 May the government consider proposals to deviate from the scope or technical characteristics of the work included in the procurement documentation during the procurement process, without altering such terms with respect to other proponents? How are such deviations assessed?

The Dubai PPP Law does not address the issues of mandatory and variant bids specifically but states that a bid must meet 'all the technical and financial requirements and specifications stipulated in the tender documents for the project'. The law goes on to state that bids that do not meet such requirements and specifications will be disqualified.

The Procedures Manual sets out various contract-awarding methods, which include a 'negotiated procedure' whereby the bidder can submit various solutions for the required service. It is generally expected that the tender document issued will include terms on whether the government entity is expected to receive bids for the stated scope of work or is prepared to receive bids for alternative scope of work.

13 May government parties consider unsolicited proposals for PPP transactions? How are these evaluated?

The Dubai PPP Law allows a private entity to make unsolicited proposals for PPP projects and allows the government body to contract directly with such a private entity. There is no requirement for the proposals to be put out to tender.

Under the Procedures Manual, all proposals to be completed under a PPP agreement must be referred by the technical bureau to the financial and economic committee, which, in turn, must be approved by the cabinet. This indicates that a direct proposal scheme does not operate at a federal level.

14 Does the government party provide a stipend for unsuccessful short-listed proponents or otherwise bear a portion of their costs?

Under the Dubai PPP Law, no compensation is paid to bidders that are unsuccessful or where a tender process is cancelled. The Procedures Manual is silent on this issue but the position on compensation for unsuccessful bidders, or bid costs where a tender process is cancelled, is likely to be the same as in the Dubai PPP Law.

15 Does the government party require that proposals include financing commitments for the PPP transaction? If it does not, are there any mechanisms during the procurement process to ensure that the applicable PPP transaction, once awarded, is financeable?

The Dubai PPP Law is silent on whether the proposal should include a financing commitment, but the government entity, on approval of the Ministry of Finance, may authorise the project company to enter into financing arrangements for the project. The Procedures Manual sets out that the project committee can request details of the financing sources from the bidders and may even specify a debt-to-equity ratio for financing the project.

Generally, it is expected that the invitation to tender will include all details about the relevant project including, without limitation, financial requirements for the partnership and other requirements. In addition, it is expected that the private entities are given enough time to study tenders and submit bids, together with financial proposals. Where project finance or other forms of external funding proposals are submitted, the procuring government body will require written confirmation of funder commitment.

16 May the government ask its counsel to provide a legal opinion on the enforceability of the PPP agreement? May it provide representations as to the enforceability of the PPP agreement?

The Procedures Manual and Dubai PPP Law are recent developments in the UAE so there is little information available on whether a legal opinion on enforceability will be requested. In practice, it is uncommon for the government to ask for this. The contract documents are expected to comply with all applicable laws. Therefore, there should be no question as to the enforceability of contracts with any government department. Furthermore, it is unlikely that the PPP agreement will include any form of government warranty on its enforceability.

17 Are there restrictions on participation in PPP projects by foreign entities? May foreign entities exercise control over the project company?

There are no restrictions on foreign-entity participation in PPP projects in the UAE. Pursuant to the Dubai PPP Law, a project company can be a sole proprietorship and a local or foreign company licensed to operate in the emirate of Dubai. However, there are requirements, including foreign ownership restrictions (subject to change) in order to be registered or incorporated on-shore in Dubai and on-shore in the UAE. This will depend, among other things, upon the proposed activity of that company. The most common vehicles in the UAE are as follows:

- Limited liability company (onshore in the UAE): UAE Companies Law (Federal Law No. 2 of 2015) limits foreign ownership of such a company to 49 per cent, with 51 per cent to be held by a UAE national, or a locally registered company wholly owned by UAE nationals. However, the final draft is waiting for the UAE Federal National Council's approval before becoming law, which, at the time of writing, was expected to be by the end of 2018. However, it is understood that the new law will be limited to specific businesses and industries, the details of which have not yet been made public. It has been reported that the decision on which industries would be able to benefit from 100 per cent foreign ownership will be based on satisfying numerous factors, including the ability of the investment to create jobs and transfer technology.
- Branch or a representative office (onshore in the UAE): the branch or representative office must be sponsored by a UAE national or service agent.
- Free zone company: 100 per cent foreign ownership is possible but the company's activities are limited to business within and between the free zones.

Design and construction in greenfield PPP projects

18 Does local law mandate that any particular form of contract govern design and construction activities? Does it mandate the choice of governing law?

The current laws are silent on the matter of PPP contract form. The standard governing law for public contracts in the UAE is UAE law.

19 Does local law impose liability for design defects and, if so, on what terms?

The Procedures Manual recognises the risk of latent defects and provides that 'facilities must be, as far as possible, designed and constructed by the private partner unless the project requires handing over the currently existing facilities to the private partner'.

Under Federal Law No. 5 of 1985 (the UAE Civil Code), decennial liability applies to all construction projects in the UAE, running for 10 years following the date on which the project is delivered. The contractor (the private entity in this case) and the designer (usually the architect and the engineer) are jointly and severally liable in respect of:

- a total collapse of the building or structure;
- any partial collapse of the building or structure; or
- any defect that threatens the stability or safety of the building or structure.

Decennial liability will apply even where the defect or collapse has arisen because of a defect in the land on which the building or structure was built. If the designer's role is restricted to design only (with no supervisory role), it will only have design liability. However, if it has both a design and supervisory role, then the designer will be liable for structural and design defects.

In the Procedures Manual, if there are any defects to plant and equipment, the project company (the private entity) is legally obliged to fix such defects at its own cost. Also, subcontractors and suppliers dealing with the private entity shall bear the costs (if any of them caused a defect or serious issue to the project, its assets, or the plant and equipment).

Under the Procedures Manual, where the private entity takes on an existing facility, it is responsible for carrying out due diligence and is required to carry out 'extensive studies and necessary inspection of facilities' to detect any shortcomings. Therefore, where the private entity (or any main partner working under subcontract) assumes responsibility for the design and fittings, it bears the risk of defects in the same. Otherwise, the government entity bears such a risk unless insurance can mitigate the consequences.

20 Does local law require the inclusion of specific warranties? Are there implied warranties in cases where the relevant contract is silent? Does local law mandate or regulate the duration of warranties?

The Dubai PPP Law and the Procedures Manual provide that warranties are to be given; however, neither provides much detail on the types of warranties required.

The Procedures Manual requires that construction warranties should be provided; however, the Dubai PPP Law only requires that clauses dealing with warranties from the private sector should be included in the partnership contract.

The fall-back provisions will be under the UAE Civil Code, which sets out certain implied warranties (eg, goods sold or provided must be free from any defects or damage encumbrances and liabilities for third parties).

The UAE Civil Code sets out a time limit for such claims that may be brought in relation to construction contracts. Dubai Law No. 6 of 1997 provides that a contractor will remain responsible for one year for 'guaranteeing and maintaining the contract subject' as well as a 10-year warranty for every 'major defect occurring to the construction as a result of poor execution'.

21 Are liquidated damages for delay in construction enforceable? Are certain penalty clauses unenforceable?

The Dubai PPP Law and the Procedures Manual are silent on this issue. Under the UAE Civil Code, liquidated damages may be included in commercial contracts; however, the courts may increase or decrease the amount of such damages to reflect the actual loss suffered for delay. Penalty clauses are enforceable under UAE law making liquidated damages clauses unrestricted; however, if damages are set at too high a level, they may be adjusted (decreased in this case) to an amount that reflects the loss suffered. The UAE courts tend to decrease such amounts.

22 What restrictions are imposed by local law on the contractor's ability to limit or disclaim liability for indirect or consequential damages?

While the Dubai PPP Law and the Procedures Manual are silent on this issue, according to the relevant sections of the UAE Civil Code and Commercial Code, contracting parties are allowed to limit or exclude contractual liability by mutual agreement, subject to the limits and scope of public order and morality. However, tortious liability cannot be excluded in the same way. As a general rule, liability for the following cannot be excluded by agreement between the parties:

- fraud and gross negligence: the UAE Civil Code provides that, in all cases, the obligor shall remain liable on its part;
- statutory liability arising out of the operation of a provision of UAE law;
- good faith: the UAE Civil Code requires all contracting parties to act in accordance with the principles of good faith in the performance of their obligations under contract. Good faith, broadly, means not seeking to gain an unfair advantage or exploit the other party;
- the court's discretion to adjust compensation: this discretion gives rise to considerable uncertainty; however, in practice, such a provision will be used sparingly by the courts and it is worth noting that the courts are less likely to interfere with limits on liability than they are with exclusions of liability;
- tortious liability or 'acts causing harm': the UAE Civil Code provides that any harm done to another shall render the wrongdoer liable and any condition purporting to provide exemptions from liability for the harmful act shall be deemed void; and
- *diya* (blood money): money payable to the dependent family of a deceased person by the person responsible for the death (whatever the circumstances).

23 May a contractor suspend performance for non-payment?

The Dubai PPP Law and the Procedures Manual are silent on this issue. While this remedy is likely to be negotiated by the parties in the partnership contract, the UAE Civil Code provides that one party may suspend performance of the contract where the other has failed to perform its obligations under the contract.

24 Does local law restrict 'pay if paid' or 'paid when paid' clauses?

The Procedures Manual and the Dubai PPP Law are silent on this issue; however, 'pay if paid' and 'paid when paid' clauses are permitted under UAE law. The UAE Civil Code provides that a subcontractor may only claim directly against an employer if the main contractor has assigned its rights to the subcontractor. The UAE Civil Code also allows a subcontractor to negotiate a clause in its subcontract whereby the main contractor can pursue claims on its behalf. The subcontractor has the right to suspend works on account of non-payment by the contractor irrespective of a paid when paid clause, unless this is contracted out under the subcontract.

25 Are 'equivalent project relief' clauses enforceable under local law?

There are no restrictions on use or enforceability of 'equivalent project relief' provisions under local law and the position on 'pay if paid' and 'paid when paid' applies here. The private entity is required to obtain the government body's consent before entering into any subcontract in relation to the project under the Dubai PPP Law. As such, the terms of the subcontract will be the subject of review by the government body and its advisers will review such provisions to ensure that the correct flow of liability and transfer of risk applies. Note that the Dubai PPP Law provides that the proposed subcontract must not affect the project company's obligations under law and also the terms of the partnership contract.

26 May the government party decide unilaterally to expand the scope of work under the PPP agreement?

The Dubai PPP Law and the Procedures Manual are silent on this issue.

Under the UAE Civil Code, in a construction contract, where the scope of work or the design is varied, the contractor may be entitled to make a claim for additional remuneration and the value of any additional materials that are likely to be calculated by reference to rates agreed within the contract. The variation may be deemed a new agreement. If the contract is silent about compensation and rates, it is likely that the court will award reasonable and fair remuneration together with the value of any materials provided.

27 Does local law entitle either party to have a PPP agreement 'rebalanced' or set aside if it becomes unduly burdensome owing to unforeseen events? Can this be agreed to by the parties?

Under the Dubai PPP Law, the parties may agree to amend the partnership contract in case of unforeseen circumstances (whether such events are natural or man-made). Although there are no laws that expressly provide for the rebalancing of PPP contracts, there are no laws precluding the use of benchmarking processes. Mechanisms can be agreed where sectors and types of project are particularly susceptible to demand risk. Periodic benchmarking against various factors can be included, which may result in an upwards or downwards adjustment to the service fee.

28 Are statutory lien laws applicable to construction work performed in connection with a PPP agreement?

The Dubai PPP Law and Procedures Manual are silent on the issues of liens available over a project. Under UAE law, statutory liens are available to contractors; however, such a right cannot be exercised against a government entity in relation to public property (belonging to any emirate) under Law No. 11 of 1992 (the UAE Civil Procedure Law) and government property under the UAE Civil Code.

29 Are there any other material provisions related to design and construction work that PPP agreements must address?

In Dubai, the Dubai PPP Law requires the partnership contract to address issues relating to the following:

- type and scope of the works and services;
- ownership of assets and intellectual property;
- quality assurance methods;
- performance guarantees and penalties where the Project Company fails to meet its obligations; and

- the specifications of the end product (this, however, only applies to projects involving Dubai government bodies).

The Procedures Manual considers the approach at a federal level, similarly setting out standard articles, which may be included in the partnership contract, such as the following:
- details of the works to be completed;
- technical requirements;
- intellectual property rights ownership and transfer; and
- guarantees and securities to be provided by each party.

In practice, design and construction obligations in the partnership contract will be extensive and consistent with standard design and construction drafting but are matters to be agreed between the parties.

Operation and maintenance

30 Are private parties' obligations during the operating period required to be defined in detail or may the PPP agreement set forth performance criteria?

The Dubai PPP Law requires the partnership contract to include specifications of the end product and the service level with which the project company (established under the law) must comply. It also requires the partnership contract to include performance indicators.

The Procedures Manual similarly suggests that the partnership contract should set out measurement and assessment indicators of private partner performance. The Procedures Manual also requires the government entity to appoint an office at the operations stage to monitor operations in terms of output and quality of services against agreed performance measurement standards.

31 Are liquidated damages payable, or are deductions from availability payments possible, for the private party's failure to operate and maintain the facility as agreed?

Parties can agree in advance the compensation that will be payable in the event of a breach of contract as liquidated damages clauses or deductions payment mechanism provisions are enforceable under UAE law.

However, the agreed liquidated damages may be challenged by the parties if the actual loss suffered is more or less than the amount set out in the contract. The parties have a duty to mitigate losses and the UAE Civil Code allows a judge (or arbitrator) to reduce compensation, or to order that no compensation is payable, where the claiming party has participated in bringing about or aggravating that loss.

32 Are there any legal or customary requirements that facilities be refurbished before they are handed back to the government party at the end of the term?

The Dubai PPP Law states that provisions regarding the transfer of ownership of the project upon expiry of the partnership are to be agreed and set out in the partnership contract.

Under the Procedures Manual, the private entity is required to fulfil its obligations of maintenance and repair (under the partnership contract) and ensure that the project asset has been checked and revised before the partnership's expiry.

The private entity is required to provide the government body with a guarantee for the project, which can take the form of a guarantee for maintenance with deductions to be made from the payments in the event of non-performance. Otherwise, the extent to which facilities must be refurbished before they are transferred to the government entity can be agreed between the parties in the partnership contract.

Risk allocation

33 How is the risk of delays in commercial or financial closing customarily allocated between the parties?

Under the Dubai PPP Law, the project committee has the power to cancel the project at any time during the bid stage (up to the contract's award) for several reasons, including where cancellation is in the public interest. However, cancellation must be justified under the Dubai PPP Law and no bidder has the right to claim compensation for the cancellation. Therefore, although the Dubai PPP Law does not expressly state as such, the risk for delays up to the contract's award appears to sit with the private company post-bid submission, unless the procuring government entity allows a price adjustment to cover the period of delay. This will usually be restricted to the construction costs.

It is not unusual for the invitation to tender to require a period within which the price remains fixed but, following such a period, compensation will be limited to construction costs.

34 How is the risk of delay in obtaining the necessary permits customarily allocated between the parties?

The Procedures Manual states that at planning, design, construction and building stages, any delay in obtaining permits or consents will be the responsibility of the private partner. However, the Dubai PPP Law lists liability for permits, approvals and consents as one of the basic provisions and mutual obligations to be included in the partnership contract. This implies that such a risk shall be agreed between the parties on a project-specific basis.

35 How are force majeure and geotechnical, environmental and weather risks customarily allocated between the parties? Is force majeure treated as a general concept relating to acts outside the parties' control or is it defined with reference to specific enumerated events?

The Dubai PPP Law lists force majeure and the bases for the distribution of risks in cases of force majeure, emergency situations or material hardships, and the grounds for assessment of the relevant compensation, as issues to be addressed by agreement between the parties in the partnership contract. It does not state how risk shall be allocated.

The Procedures Manual states that risks of force majeure, or circumstances outside the reasonable control of the parties, shall be defined properly in a manner that excludes insurable risks where they will affect the activities of project construction or operation. Risk for uninsurable risks is to be shared between the government body and private entity.

While the UAE Civil Code does not provide a definition of force majeure, it recognises the principle that a contract (or part of it) may be cancelled where performance of that contract (or part of it) has become impossible owing to force majeure.

Risk can be allocated between insurable and uninsurable events following similar arrangements in other jurisdictions. Examples of such events include:
- fire or explosion;
- bursting or overflowing water tanks;
- civil commotion;
- power shortage;
- blockade; and
- official or unofficial strike or lockout.

36 How is risk for acts of third parties customarily allocated between parties to a PPP agreement?

The Dubai PPP Law is silent on risk for acts of third parties; however, the Procedures Manual lists these among other risks that could affect the operation requirements of the project. Excluding force majeure, the Procedures Manual lists the following acts of third parties as examples of risks that lie with the private entity:
- labour disputes;
- acts of fraud and forgery;
- environmental factors; and
- technical shortcomings.

37 How are political, legal and macroeconomic risks customarily allocated between the parties? What protection is afforded to the private party against discriminatory change of law or regulation?

Traditionally, the allocation of such risks is agreed between the parties and addressed in the contract. Under the Dubai PPP Law, this is the case. A change of law is addressed in the guidance on the Dubai PPP Law, which states that, where a change of law is expected, the private entity shall be able to account for such a risk. However, where the change in law is unexpected, provisions shall be drafted into the partnership contract distributing the risk between the two parties.

The Procedures Manual addresses political risk or 'unexpected and unconsidered behaviour' of the federal government entity that may have a severe negative effect on expected revenues (this includes expropriation or nationalisation). The Procedures Manual differentiates between general and discriminatory acts that cannot be expected. Where the unexpected act is discriminatory in nature (eg, an act that results in expropriation), the federal government body is liable and must pay special compensation to the private entity. Where such acts result in expropriation, the project shall be ended in addition to compensation being granted.

38 What events entitle the private party to extensions of time to perform its obligations?

The Dubai PPP Law and the Procedures Manual are silent in respect of a private entity's entitlement to an extension of time. The Procedures Manual states that delay risk sits with the private entity; however, it would be usual for the contract to set out relevant events allowing extensions of time.

39 What events entitle the private party to additional compensation?

The Procedures Manual sets out circumstances in which compensation will be payable by the federal government entity to the private party. These include circumstances such as hidden environmental pollution, the negative impact of uninsurable risks (a limited compensation may be granted upon project completion) and the negative impact of unexpected discriminatory acts (such as expropriation). Compensation may also be agreed under the partnership contract by way of a series of guarantees provided by the federal government entity to the private entity or by way of a compensation event procedure.

Under the Dubai PPP Law, compensation may be payable to the private entity where the government body revokes or amends the partnership contract. The law states that the rules regulating the government body's right to revoke or amend the partnership contract and the private entity's obligations to comply with them are to be set out in the partnership contract itself (as agreed between the parties). Therefore, compensation can be dealt with in the partnership contract by way of a compensation event procedure.

40 How is compensation calculated and paid?

Compensation is calculated on a case-by-case basis. The Dubai PPP Law states that the bases for the distribution of risk between the parties and grounds for assessing relevant compensation is to be included in the partnership contract (as agreed between the parties). The concept of financial adjustment on a 'no better and no worse' basis can be included.

41 Are there any legal or customary requirements for project agreements to specify a programme of insurance? Which party mandatorily or customarily bears the risk of insurance becoming unavailable on commercially reasonable terms?

The Dubai PPP Law states that the insurance obligations in relation to a project, including the types and amounts of insurance required and its operational and utilisation risks, must be set out in the partnership contract (as agreed between the parties).

The Procedures Manual sets out a number of insurance obligations highlighting the private entity's obligations to insure against risks such as:

- the risk of delay in project completion;
- insuring project assets in the event that the partnership is cancelled or the private-entity partner is liquidated or dissolved;
- where the private entity is responsible for an insurable risk becoming uninsurable (if the private entity is not responsible, then both the government body and private entity assume the risk);
- maintenance risk in the project; and
- operation risks (such as labour disputes, environmental factors or failure to obtain approvals).

Where insurance becomes unavailable on commercially reasonable terms, although the Procedures Manual does not expressly deal with such circumstances, it states that where there is a 'remarkable increase' in the rates of insurance premiums, the private entity will be responsible (unless the government entity is responsible for the same). The Dubai PPP Law leaves it to the parties to agree upon the allocation of responsibility for insurance in the partnership contract.

Default and termination

42 What remedies are available to the government party for breach by the private party?

The Dubai PPP Law addresses breach of obligations in the context of the project company (the PPP itself) rather than the private entity alone. If the project company materially or grossly breaches its obligations, or fails to meet the service levels prescribed by the Dubai PPP Law, a government entity may make a claim for compensation and impose penalties to be set out in the partnership contract.

In the Procedures Manual, where the private entity 'commits material breaches or becomes unable to achieve the required quality levels' agreed in the partnership contract, a government body may step in or terminate the partnership contract, after having notified the private entity and afforded it an opportunity to 'correct the situation' during a rectification period. This right to step in or terminate the partnership contract does not prejudice the government body's right to claim compensation and impose any penalties agreed under the partnership contract.

43 On what grounds may the PPP agreement be terminated?

Under the Dubai PPP Law, the term of the partnership contract, including when the contract can be partially or completely terminated, must be set out in the partnership contract itself (to be agreed between the parties). This allows what are considered to be standard events of contractor default, such as the following:

- abandonment;
- material breach;
- insolvency;
- breach of UAE anti-corruption and embezzlement laws; and
- termination for force majeure.

The Procedures Manual provides that, where a private entity is unable to perform its obligations under the contract or where the private entity has acted in gross breach of such obligations, the government entity can terminate the partnership contract. The agreed position on unilateral termination of the partnership contract must be set out in the contract itself. The circumstances giving rise to a unilateral termination are force majeure and contractor default, as set out above.

44 Is there a possibility of termination for convenience?

Under the Dubai PPP Law, termination of the contract is an issue to be agreed within the partnership contract. The Procedures Manual is silent on termination for convenience.

The UAE Civil Code states that a contract can only be terminated by mutual consent or an order of the courts (or a provision of the law). Agreed termination provisions – including unilateral termination provisions – under a contract, will normally be construed as 'mutual consent'. It is advisable, however, for parties to expressly agree in the termination provisions that termination, in accordance with the terms of the contract, does not require a court order.

45 If the PPP agreement is terminated, is compensation available?

The Dubai PPP Law and the Procedures Manual are silent on this issue. The consequences of termination follow positions adopted in other jurisdictions. By way of example, these include the following.

Voluntary termination or termination for default by the procuring government entity

This is applicable where compensation on termination can include an amount equal to:

- the aggregate of the following:
  - amounts owed to the contractor;
  - the value of completed works;
  - subcontractor breakage costs; and
  - profit share and capital costs;
- less any or all of the following:
  - any amounts due to the employer;

- any amounts the employer is entitled to set-off under the contract; and
- any sum allocated to life-cycle costs.

Termination for contractor default

Compensation could include an amount equal to:

- any one of the following:
  - the employer's reasonable costs of rectification;
  - any retendering costs;
  - the difference between the original contract sum and the costs of the retendered works; or
  - any other direct losses arising out of the contractor's breach;
- less any or all of the following:
  - any amounts owed to the contractor;
  - the value of completed works; and
  - any capital costs.

Where project finance has been used, there can be a detailed compensation procedure to deal with the financing elements, including a retendering process.

Termination on force majeure

Compensation can include an amount equal to:

- any one of the following:
  - amounts owed to the contractor;
  - the value of completed works; or
  - subcontractor breakage costs and capital costs;
- less any or all of the following:
  - any amounts due to the employer;
  - any amounts the employer is entitled to set-off under the contract; and
  - any sum allocated to life-cycle costs.

Where the termination occurs during the construction phase, this can include the value of loss of work and, where project financing has been used, as above, a compensation procedure can be used to cover the payback of the debt elements.

Financing

46 Does the government provide debt financing or guarantees for PPP projects? On what terms? Which agencies are responsible?

The Procedures Manual provides that guarantees in relation to the project are to be set out in the partnership contract. Under the Procedures Manual, the guarantees provided by the government body to the private entity or the project company are as follows:

- a service-use guarantee (or revenue guarantee);
- a guarantee of minimum service fees; and
- a guarantee of law and regulation amendment.

47 Are lenders afforded privity of contract with the government party through direct agreements or similar mechanisms? What rights will lenders typically have under these agreements?

The Dubai PPP Law and the Procedures Manual do not specifically address the need for government entity or funder direct agreements. Government entities in the UAE will have sufficiently broad powers to enter into funder direct agreements on projects that have obtained requisite approvals on a case-by-case basis, depending on the finance structure.

48 Is there a mechanism under which lenders may exercise step-in rights or take over the PPP project? Are lenders able to obtain a security interest in the PPP agreement itself?

The Dubai PPP Law and the Procedures Manual are silent on this issue. On projects that are project financed, it is usual for lenders to have step-in rights as per the funder direct agreements whereby the funder can step into the position of the government entity, enabling the project to continue to completion. The lender can also request collateral warranties in its favour. This creates a contractual link between the lender and the private entity, whereby the private entity will be contractually bound to fulfil its obligations under the partnership contract and the lender will have contractual recourse against the private entity in the event of a breach.

UAE law permits lenders to take assignment of the benefit of contracts on a project as security. Ideally, the consent of all parties will be obtained; however, our understanding is that assignment could take place without it.

49 Are lenders expressly afforded cure rights beyond those available to the project company or are they permitted to cure only during the same period and under the same conditions as the project company?

The Dubai PPP Law and the Procedures Manual are silent on this issue; however, to be bankable, where a project finance structure is used, there will usually be a buffer period to enable rectification.

50 If the private party refinances the PPP project at a lower cost of funds, is there any requirement that the gains from such refinancing be shared with the government? Are there any restrictions on refinancing?

The Dubai PPP Law and the Procedures Manual do not deal with the funding of PPP projects in any detail. In regard to a project being project financed, refinancing provisions adopting solutions seen in other jurisdictions can be used.

Governing law and dispute resolution

51 What key project agreements must be governed by local law?

The Dubai PPP Law states that the partnership contract under such a law is to be governed by the Dubai PPP Law and any resolutions issued in pursuance of it. Where the partnership contract is silent regarding governing law, it shall be governed by UAE law as applicable in Dubai.

The Procedures Manual does not explicitly specify the law that is to govern the partnership contract; however, all contracts entered into with any government entity must be governed by UAE law.

On a PPP project, the contract structure can be complex owing to the number of parties involved with various obligations needing to be passed along the way. While the main contract will involve a government entity and, therefore, must be governed by UAE law, there is no requirement for other contracts involving non-government entities to be governed by UAE law. However, in our experience, consistency in the governing law of each contract will provide for more certainty in the passing down of responsibilities.

52 Under local law, what immunities does the government party enjoy in PPP transactions? Which of these immunities can be waived by the government?

The Dubai PPP Law and the Procedures Manual are silent on this issue. The UAE Civil Procedures Law contains a prohibition on the seizure of public property belonging to the UAE federal government or the governments of any of the individual emirates to satisfy a judgment debt.

There are no laws in the UAE specifically addressing the issue of waiver of sovereign immunity. The UAE courts may consider a variety of factors, including public policy issues, before accepting jurisdiction in a case involving a foreign sovereign government or government entity.

53 Is arbitration available to settle disputes under the project agreement between the government and the private party? If not, what regime applies?

The Dubai PPP Law provides that disputes arising out of the partnership contract may be referred to arbitration but not outside of the emirate of Dubai. Also, it states that any dispute regarding the arbitration or its procedures only be subject to Dubai laws and rules. This is a mandatory legal provision and so any agreement to the contrary will be void.

Under the Procedures Manual, arbitration is available to settle disputes under the partnership contract between the government entity and the private party. If any dispute arises, the private partner can commence proceedings pursuant to the arbitration clause mentioned in the partnership contract but subject to approval by the Cabinet. The Procedures Manual does not stipulate the seat, venue or applicable law of the arbitration; however, in practice, it is likely to be seated and take place in the Emirate in which the government entity is based.

54 Is there a requirement to enter into mediation or other preliminary dispute resolution procedures as a condition to seeking arbitration or other binding resolution?

Under the Dubai PPP Law and the Procedures Manual, there are no requirements for alternative dispute resolution methods to be used and exhausted before the parties commence arbitration. The parties are free to agree a dispute resolution process whereby other methods are explored before litigation or arbitration. The Procedures Manual encourages this approach to avoid unnecessary costs and time being spent on lengthy proceedings.

The Procedures Manual sets out the following dispute resolution methods as alternatives to litigation and arbitration:

- mediation: where an agreement is reached, the parties will have to record it in a binding contract to be enforced, if necessary, against the other party in the future; and
- an expert report: which is often reserved for specific technical cases or where a temporary decision is required.

55 Is there a special mechanism to deal with technical disputes?

The Dubai PPP Law is silent on this issue; however, the Procedures Manual provides for the expert report determination procedure (see question 54).

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