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Energy, Infrastructure, Project and Asset Finance

April 2015

New Moroccan PPP law

In order to facilitate the development of infrastructure projects, the Kingdom of Morocco recently created a new category of contracts implemented through the enactment of the law n°86-12 pertaining to public-private partnership contracts. The purpose of this law is to help define a unified and incentivizing framework conducive to the development of infrastructures in Morocco and to the increase of visibility of foreign and local investors, it being specified that these provisions will be completed shortly by an implementing decree.

This law was published on 24 December 2014 and the French version was published on 5 February 2015. The law was drafted after analyzing the different legal frameworks of public-private partnership contracts in various countries, such as France, Spain and Egypt, which influenced the legal scope applicable to these contracts. The publication of the PPP law constitutes an interesting opportunity to verify if the pitfalls other countries encountered in this matter can be avoided.

The rules pertaining to the tender procedure of a PPP contract

The tender procedures

The PPP law provides that PPP contracts can be subject to three different tender procedures: competitive dialogue, call for tenders and a negotiated procedure. The PPP law requires that the public authority carry out a preliminary assessment which must include a comparative analysis with the other frameworks of implementation of the project. In addition, the preliminary assessment considers the complexity of the project, the financial arrangement and the means of financing. However, contrary to what was implemented in France, the entering into of this contract is not strictly delimited. Indeed, the PPP law does not solely apply to contracts characterized by a trait of urgency or complexity, thus diminishing the risk of litigation.

The possibility of spontaneously submitting an offer

The PPP law also provides, following the example of the relevant French framework, that candidates can present a spontaneous offer to the public authorities considered under the PPP law. Consequently, the public authority can be presented with an innovative project by an operator, and, if the project addresses the public authority's needs and presents technical and financial innovations, it can decide to proceed to the necessary preliminary assessment of the project and initiate a competitive dialogue or a



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call for tenders with other candidates. The PPP law also provides that the public authority can conduct a negotiated procedure, that is to say without advertising or call for competition, with the operator when the spontaneous offer addresses an innovative and urgent need, whilst at the same time being financially competitive.

The setting up of a ministerial commission for PPP contracts

The draft decree pertaining to these contracts provides that a commission, mainly composed of representatives of various Moroccan ministries, will be set up under the aegis of the Ministry of Economy and Finance. The purpose of this commission is to issue opinions on PPP contracts entered into with the State, preliminary assessments, the award of the contract and possible amendments.

It should be noted that the draft decree specifies that concerning the award of the PPP contracts, a criteria of national preference could be taken into account in order to support the local economy.

The main provisions of a PPP contract

The PPP law provides for a list of mandatory clauses which must be included in the PPP contract. These mandatory clauses pertain to the financial conditions of the PPP contract, as well as to the performance conditions.

The financial clauses

Under the PPP law, the remuneration of the private partner will be paid, in its entirety or partially, by the public authority. In the event where the public authority does not pay the entirety of the remuneration of the private partner, it may be remunerated by the users and by the cash flow generated by the project. This remuneration is linked to performance objectives, thus guaranteeing the compliant carrying out of the PPP contract. The corollary of these objectives is the possibility for the public authority to impose penalties on the private partner, in the event where the latter does not fulfill its contractual obligations.

Pertaining to security interests, the PPP law provides that the private partner can, for the benefit of financial institutions, create security interests over its assets acquired or carried out under the performance of the PPP contract. The type of security interests which can be granted is quite large since the PPP law takes into account "all security interests". Furthermore, the assignment of receivables by way of security does not appear confined in the sense that the amount of claims which can receive an act of acceptance from the public party, as assigned debtor, is not limited to 80% of the investment and financing costs.

The performance clauses

The PPP law provides for a maximum duration of the PPP contract of fifty years. It also imposes the inclusion of a clause in the PPP contract pertaining to the allocation of risks between the parties, which is modelled on the contractual practice of optimal risk sharing.

Furthermore, the PPP law establishes a substitution right, whereby the public authority can replace the private partner with a substituted entity, notably in the event of a serious breach of its obligations. It should be noted that the PPP law also enables the lenders to ask the public authority to substitute the private partner with a new entity, in the case of a serious breach of its obligations.

Conclusion

In conclusion the PPP law takes into consideration standard market practices which are implemented in international project finance and should permit to avoid the main pitfalls observed in countries with similar frameworks.