**Ashurst Dubai**
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Infrastructure and utilities briefing

# A new era for Kuwaiti PPPs?

The new Kuwait public-private partnership (**PPP**) law, Law No. 116 of 2014 (**New PPP Law**) came into full force and effect last week. This briefing discusses how the New PPP Law and its executive regulations have reformed the legal framework in order to help facilitate the procurement of PPP projects in Kuwait.

## A roadmap for change

In mid-2014, Kuwait passed the New PPP Law; however, other than the introductory provisions, the New PPP Law did not come into come into full force and effect until the publication of the law's executive regulations (**Implementing Regulations**) which took place on 29 March 2015.

The legal framework under the New PPP Law is aimed at overcoming challenges faced to date in procuring PPP projects in Kuwait; clarifying the law and bringing it better into line with international standards. The old PPP law (Law No. 7 of 2008) (**Old Law**), which is now repealed by virtue of article 45 of the New PPP Law, set out a framework for PPPs but was subject to a number of issues, including:

- a IPO requirement for public joint stock companies, with issues related to timing of the IPO and unsubscribed shares;
- restrictions that limited an investor's ability to grant security to the project's lenders; and
- a restriction on the amendment, renewal or extension of a project.

The New PPP Law seeks to address these issues and to embody the lessons learnt from the recently closed Az-Zour North independent water and power project phase 1, so as to provide a roadmap for the implementation of future headline projects in Kuwait. The New PPP Law is also designed to attract more private sector investment into Kuwait.

## Attracting investors

The New PPP Law places an emphasis on the principles of transparency, openness, freedom of competition and equality of opportunities, all of which will be welcomed by investors. This over-arching philosophy translates into more investor-friendly provisions in the New PPP Law, particularly in relation to attracting financing.

The Old Law inhibited the use of non-recourse or limited recourse financing in some respects: prohibiting mortgages on project company assets and limiting assignment rights, undermining the ability of lenders to take viable security packages and restricting the use of lender direct agreements. In a significant step towards making Kuwait PPP projects more attractive to foreign investment, Article 23 of the New PPP Law affords rights for an investor to grant security over the project contracts and assets to lenders, including a share pledge within the first two years.

## New Higher Committee

The Higher Committee is the main decision-making body responsible for PPP projects in Kuwait. Article 2 of the New PPP Law provides for the establishment of a new Higher Committee for Public Private Partnerships (**PPP Higher Committee**), replacing the previous Higher Committee for Projects.

The constitution of the PPP Higher Committee is similar to its predecessor but its powers are broader. Its powers include approving the procurement of projects on a PPP basis, including approving the feasibility study for a project, requests for the allocation of land for a project and the PPP contracts for a project, as well as deciding upon the request of a public entity to terminate a project in the public interest. The decisions of the PPP Higher Committee must be ratified by the Minister of Finance before they can take effect.

## New public authority

Under the New PPP Law, Kuwait Authority for Partnership Projects (**KAPP**) has replaced the Partnerships Technical Bureau (**PTB**), which was previously the main body responsible for implementation of PPP projects in Kuwait. KAPP is expected to have greater autonomy and authority than its predecessor, while its staff and assets are expected to remain broadly the same. KAPP will be supervised by and attached to the Ministry of Finance and overseen by the PPP Higher Committee.

KAPP's main responsibilities are largely similar to those of its predecessor PTB; however, notably, KAPP will have the power to establish public joint stock companies for the performance of PPP projects. As a stroke this helps solve one of the main difficulties experienced with the old law. In addition, KAPP's powers include: assessing feasibility studies for PPP projects, developing contract templates, drafting RFPs and PPP agreements, submitting recommendations to the PPP Higher Committee, following up on the implementation of PPP projects and preparing a new guidebook for PPP projects.

## Levelling the playing field for foreign companies

As well as providing a more beneficial financial framework for investors, the New PPP Law includes provisions for foreign investors to compete on a more level playing field with Kuwaiti companies. Article 34 of the New PPP Law lifts foreign ownership restrictions permitting project companies to be foreign owned. Further, the automatic pre-qualification for Kuwaiti Stock Exchange companies that applied under the Old Law has been dispensed with under the New PPP Law.

## Procurement of the project company

The New PPP Law provides a simpler approach for establishing the project company, addressing potential difficulties under the Old Law as to the timings of the incorporation process and who is responsible for its incorporation.

The general framework under the New PPP Law is:

- if the total cost of the PPP is not expected to exceed KWD60m (approximately USD205m), the investor must establish the project company;
- if the total cost is expected to exceed the KWD60m threshold, KAPP must establish a public joint stock company; and
- similar to the Old Law, the PPP Higher Committee will have the power to implement development projects of a special nature by way of a private project company (to be established by the investor), provided the value of the project does not exceed KWD250m (approximately USD860m). Under the previous regime, this power was sparingly used.

For project companies that are required to be public joint stock companies, under the New PPP Law, the shares must be allocated as follows:

- 6 to 24 per cent of shares to be held by project public entity/ies (with KAPP holding the shares on their behalf until the project company is operational);
- a minimum of 26 per cent of shares to be held by the successful investor, subject to a maximum of 10 per cent being allocated to the initiator, if any; and
- 50 per cent of shares to be allocated for an IPO by Kuwaiti nationals (with KAPP holding the shares on their behalf until the project company is operational).

As stated above, under the Old Law, the timing of the IPO (during the period between financial closing and commercial operation) was a key concern and this has now been addressed. Moreover, the Old Law also provided that the if the Kuwaiti public did not subscribe to part of or all of the shares offered under the IPO, then these shares, or the unsubscribed parts, would be auctioned to potential private investors. This could have led to investors unexpectedly being required to subscribe for more equity than they had budgeted. This issue has also been resolved in the New PPP Law. Under the New PPP Law, if the Kuwaiti public fails to subscribe for all or part of the shares allocated for the IPO, such shares shall remain registered in the name of KAPP on behalf of the state until their disposal.

The share allocations under the New PPP Law are similar to those under the Old Law; however the definition of project cost has been amended from total cost of a project to capital expenditure for implementing a project or preparing it for operation, which in theory could reduce the calculated value of a project for the purposes of determining whether KWD60m threshold may apply.

Consistent with the IWPP law, the requirement for board members to hold shares in the company (as required under Decree No. 25 of 2012 regarding Kuwait Commercial Company Law) has been waived by the New PPP Law until a project company's shares are listed on the Kuwaiti stock exchange. This will remove any restrictions on the number of board members and will allow for technical board members to be appointed without them having to also be a shareholder for the construction period of the project term.

## Procurement process and project agreements

Under the New PPP Law, previous restrictions on being able to negotiate the PPP agreement have been removed. The New PPP Law provides that contractual terms (other than those terms considered non-negotiable according the RFP), may be negotiated. This will strengthen competitive dialogue.

The New PPP Law expressly permits arbitration as a form of dispute resolution and removes the previous restriction on amending the PPP agreement during the project term; the PPP agreement may be amended if there are unforeseen circumstances, both welcome changes to investors.

The New PPP Law also allows investors to establish potential projects for a term of up to 50 years. The previous ambiguity of whether a 20-year restriction on leases under the State Properties Law (Law No. 15 of 1980) applied to PPP projects has been removed, as the New PPP Law clearly states that the usufruct period will be equivalent to the period of investment.

In keeping with the Old Law, project facilities and the site must be handed back to the government of Kuwait at no cost to the government upon expiry of the project term. Moreover, under the New PPP Law, if an investor participates in the retendering of a project they get a preference of 5 or 10 per cent of the best proposal price, such percentage being dependent on whether it is a public joint stock company or not.

Finally, the Implementing Regulations provide that the terms of references for projects (i.e. RFPs) will include privileges that may be offered to the successful investor. These may include exemptions from income tax, other taxes and customs fees with the aim of encouraging investment in Kuwait.

## Ongoing projects or procurements

The New PPP Law provides that projects already signed under the Old Law can continue under the existing regime; however, there is no interim legal framework for PPP projects that are already in the procurement stage but not yet signed.

The procurement of PPP projects where the procurement process has already commenced but not been concluded should therefore recommence and secure the approval of the PPP Higher Committee. Practically speaking, this may result in the redrafting and re-release of some procurement developed under the old regime documentation.

It is hoped that the new regime will open the door for the procurement, development and implementation of a greatly increased flow of PPP projects in Kuwait.

There are a number of ambitious projects in the pipeline that have been announced by KAPP, including:

- Al-Zour North Phase 2 IWPP
- Al Abdaliyah integrated solar combined cycle plant
- Al Khairan IWPP
- Umm Al-Hayman wastewater treatment plant
- The Kuwait Schools Development programme
- The Kabd municipal solid waste facility, a waste to energy project
- The Failaka Island development
- Abdullah Alahmad Street commercial/recreational centre
- Rest houses and Doha chalet centres
- The new physical medicine and rehabilitation hospital
- The South Jahra Labour city: the first city to house expatriate labour

## Long-term impact: A new era for Kuwaiti PPPs?

The New PPP Law and its Implementation Regulations are a positive step for Kuwaiti PPPs and resolve a number of the challenges that were present under the previous regime. We hope the new regime will provide the foundation for a more investor-friendly and streamlined PPP landscape to flourish in Kuwait.

## Further information

For more information on the New PPP Law and its implications, please speak to your usual Ashurst contact or to one of the following:


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Ashurst is a leading global law firm with a rich history spanning almost 200 years. From its inception the firm has built a culture of providing exceptional standards of service that has seen it become a key adviser to local and international corporates, financial institutions and governments on all areas of commercial law.

Ashurst has been working on deals involving the Middle East for over 100 years. Across the firm, we have a team of over 60 experienced lawyers who have worked extensively on regional deals and who can offer a wealth of practical advice to clients in a wide range of business sectors.

The focus of Ashurst Middle East is on the energy, resources, transport/infrastructure industries. We serve these industries across a wide range of legal products including: corporate, commercial, capital markets, Islamic finance, project finance, construction, concessioning, procurement, finance, restructuring and special situations. As a leading full service international law firm, we are able to offer a full range of legal services to our clients with the support of our global network of offices, including (in addition to those above), dispute resolution, investment funds, regulatory and tax.

## Experience in Kuwait

Ashurst is proud to have a strong relationship with Kuwait and over the years has undertaken a significant amount of work on behalf of the State of Kuwait and associated "K Companies" on oil and gas projects. In a region where long-term relationships are key, this is valuable experience.

Notable transactions which our lawyers have been involved with in Kuwait include advising on the State of Kuwait on the Kabd Municipal Solid Waste project and the US$10bn Kuwait Metro PPP project and the lenders to the Marubeni Consortium in relation to its bid for the Az Zour North IWPP.


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