



Attorney Ahmad El-Khatib



It took ten years to embrace the PPP law; will it take ten more to implement it?

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First adopted by the Council of Ministers in 2007, law no. 48 Regulating Public Private Partnerships (“**PPP Law**”) was passed by the Lebanese parliament on 7/9/2017 and published in the Official Gazette on 14/9/2017. In other words, it took us a decade to have a PPP law.

Back in 2007, Lebanon’s public debt was circa \$42 billion. Nowadays, it has reached about \$86 billion, nearly double what it was just over 10 years ago.

Is this increase caused by the absence of the PPP Law?

The answer is no. However, a significant portion of the additional \$44 billion could have been saved had the PPP Law been passed and implemented since 2007.

The benefits of PPPs are numerous. In addition to the risks allocation between the public partner and the private partner, which provides Value for Money, the PPP benefits that are most relevant to Lebanon are the following:

- 1) It minimizes the financial risks to the government given that PPPs are regarded as an alternative method to public finance for financing the new development or upgrading of infrastructure, which is a capital intensive business. Funds to finance these works will come from the private partner instead of coming from the government budget (“Off Balance Sheet Finance”).
- 2) It increases the project efficiency (when applying PPP to the right projects and under the right structure and procurement process) and effectiveness (when using PPPs for achieving the desired outcomes in a time and cost effective way).
- 3) It helps fostering transparency and controlling corruption, the prime impediment to the economic growth and sustainable development of Lebanon.

Nevertheless, the above benefits will not be achieved unless the PPP project is sensible (i.e. it addresses a public need), suitable for a PPP, well prepared and appraised (commercially feasible and bankable), properly structured and tendered, and proactively managed through the life of the partnership agreement.

The importance of the PPP Law lies in the fact that it ensures that different projects are structured, tendered and managed in a consistent manner. This consistency lowers costs for the private sector and builds confidence in the market as in the absence of such a robust framework, different ministries may act in an inconsistent way, which can be frustrating and result in the loss of some bidders.

Moreover, the principal benefit of this PPP Law is that it codifies the pre-procurement process, as well as the procurement process, that the State, public institutions, municipalities, federations of municipalities, or any moral person of public law, as the case may be, should follow in order to procure a PPP Project.

In accordance with para (1) of Art. IV of the PPP Law, PPP Projects can be proposed by:

- 1) The president of the High Council for privatization and PPP (“**Council**”) or the Concerned Minister (with respect to projects undertaken by the State or public institutions or any moral person of public law); or
- 2) The president of the Municipal Council or the president of the Federation of Municipalities (with respect to projects of municipal nature).

In this regard, it is important to stress the need to create a pipeline of projects that increase the attractiveness to sponsors while, at the same time, focusing on the sectors contributing the most to the growth of our public debt. By doing so, the same types of sponsors will be more willing to incur bid costs in the knowledge that, if they are unsuccessful, they can simply roll-over their resources into the next project in the pipeline.

Furthermore, a sector-focused pipeline also assists with the governments’ “Value for Money” and “affordability” challenges, as it allows for the private sector to increase bid efficiency and reduce bid costs and execution time in order to submit the most attractive proposal possible.

Now that the PPP Law exists, the challenge is not only to attract private partners, but also to attract the right ones.

When investing in a foreign country, the private parties look at certain risks such as (i) foreign exchange, (ii) economic viability including GDP and inflation, (iii) regulatory risks, and (iv) political risks including government stability.

Unfortunately, Lebanon is well-known for its political instability and governments’ long formation process. For instance, PM Hassan Diab announced the resignation of his government on August 10th, 2020, and PM Saad Hariri was designated on November 22nd, 2020, to form a new Cabinet which remains unformed today.

Despite this important fact, the PPP Law confers a major role upon the Council of Ministers throughout the procurement process of PPP Projects undertaken by the State, public institutions or any moral person of public law. In our opinion, this constitutes a major loophole of the PPP Law. According to the said law, the Council of Ministers intervenes in the procurement process of PPP Projects on five levels, as follows:

- 1) Following the approval of the PPP project by the Council, the latter shall refer the project file to the Council of Ministers for its approval (para (1) Art. VI).
- 2) Once the Council approves the Tender Document prepared and submitted by the project committee, the president of the Council shall submit it to the Council of Ministers for final approval (para (10) Art. VII).

- 3) In the event the Public Entity has contributed to the share capital of the Project Company, the Public Entity shall be represented at the board of directors of the Project Company for the duration of its contribution by one member to be appointed by the Council of Ministers based on the suggestion of the Concerned Minister (Para. (3) Art. IX).

In this respect, it is worth noting that the PPP Law by mentioning “Public Entity” (defined as “*The State or public institutions including regulatory bodies or municipalities or federations of municipalities and all moral persons of public law*”), it did not distinguish between the State, public institutions or any moral person of public law on the one hand, and municipalities and federations of municipalities on the other hand. This means that in the event the municipality or the federation of municipalities contributes to the share capital of the Project Company, it is the Council of Ministers, and not the Municipal Council or Federation of Municipalities, who has the authority to appoint the member representing the municipality or the federation of municipalities on the board of directors of such Project Company, based on the suggestion of the Minister of Interior and Municipalities being the Concerned Minister in this case.

- 4) The Partnership Agreement should be signed by the Concerned Minister, being the authorized signatory on behalf of the State, and the representative of the Project Company (Art. X). Similarly, any amendment to the Partnership Agreement shall also be signed by the Concerned Minister.
- 5) If the implementation of the PPP Project requires the expropriation of private properties, then there will be a need to issue a decree declaring public benefit which necessitates the meeting of the Council of Ministers (para (2) Art. XIII).

The approvals, appointments and issuance of decrees mentioned in (1), (2), (3) and (5) above cannot be carried out by a caretaker government, nor can a caretaker minister sign a partnership agreement in view of the obligations it sets on the part of the public entity.

Accordingly, imagine how long the procurement process of a PPP project will take if Lebanon continues to have long-standing caretaker governments (During the past fifteen years, Lebanon has been governed by caretaker governments for over half this period (i.e. more than 7.5 years)). As such, there could be cases where the Council has prepared and approved a PPP Project but there is no government to give the final approval for the same and, accordingly, the project committee would be unable to launch the process to select the Private Partner. Further, the Tender Document may be approved by the Council but there is no government to approve it or, even worse, the Private Partner could be selected, bearing in mind the thorough and long process of

tendering, but the Partnership Agreement could not be signed because a Caretaker Minister has no authority to do so.

If any of the above situations arises, will the Private Partner wait? What message will we be sending to the international investors if this likely scenario does take place? Was the reputational risk that this may cause taken into consideration at the time the PPP Law was drafted?

Therefore, it would have been preferable to keep the Council of Ministers out of the procurement process of a PPP Project as much as possible and, at the very least, to bestow the aforementioned authorities on the Council, with the exception of expropriation, for PPP Projects of a certain size (e.g. up to \$50 million).

However, on the other hand, PPP Projects of municipal nature are easier to process and implement as municipalities are more stable than governments in Lebanon, and the authorities mentioned in (1), (2), and (4) above are granted to the president of the Municipal Council or the president of the Federation of Municipalities, as the case may be.

In light of the foregoing, municipalities and federations of municipalities are urged to undertake PPP Projects as much as possible given the flexibility and stability they have in the related procurement processes.

Apart from the Council of Ministers intervention issue, the PPP Law is silent on the conflict of interests that the Council's employees, project committee members, work team members, Concerned Minister, any Minister, President of the Municipal Council, Municipal Council members, President of the Federation of Municipalities, and/or their relatives may have with the Project Company, the sponsors, or the contractors. This is a very crucial issue in order to fight corruption, and should be addressed in the implementing decrees of the PPP Law.

Ultimately, more than three years have passed since the PPP Law was promulgated, and no PPP Project has seen light yet. We hope that, despite all the challenges mentioned above, we see the first PPP Project implemented in a shorter time than the time it took to pass the PPP Law.