

PPP in KSA Education

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The Saudi National Center for Privatization and PPP (“NCP”) was established last year with a remit to act as the gatekeeper for the government’s ambitious privatization programme foreshadowed in its Vision 2030 and National Transformation Programmes.

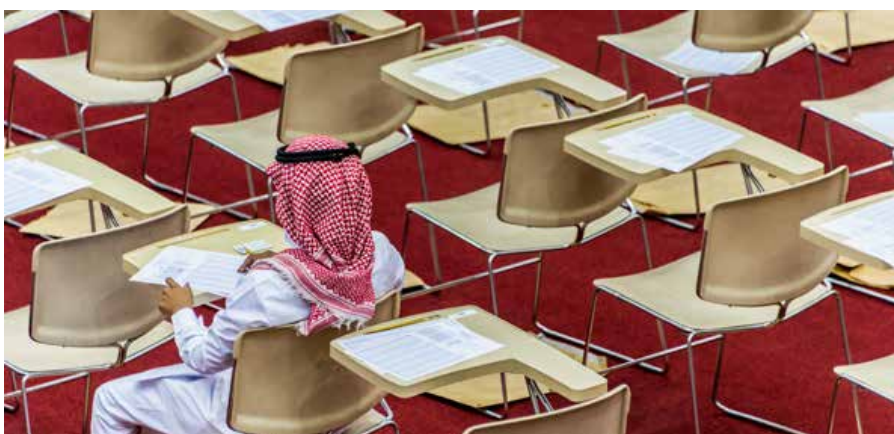
Since its establishment, the NCP and the sectoral supervisory committees that are the key decision-making bodies for projects have been through a process of recruitment and institution building.

The NCP has recently published a Privatization Projects Manual (the “Manual”) which will serve as the “enabling” roadmap for privatization and PPP projects in the Kingdom. The Manual is the first tangible product of the newly established NCP and is a key indicator of its strategy and approach.

A letter from the NCP’s Chairman of Board of Directors (Mr. Mohammad Mazyad Al-Tuwajiri) is included as a preface to the document and makes explicit the intention of the NCP to keep the Manual under continuous review; updates will be made as needed to ensure that the privatization and PPP programmes are consistent with international practice.

Hard on the heels of the Manual a draft Private Sector Participation Law has also been published – giving further authority and depth to the contents of the Manual. That draft law was open for public consultation until 29 July 2018. The combination of the Manual and the draft law will be powerful enablers of private sector participation in the economy.

Of particular interest to foreign investors will be draft articles 56 and 57, which permit participation in healthcare and education PPP schemes. This is consistent with the developing approach of the Saudi Arabian General Investment Authority (“SAGIA”) which facilitates [foreign ownership of schools](#) subject to Ministry of Education approval.



A frequent refrain of the contracting and advisory communities in the Kingdom has been that the Government Tenders and Procurement Law (“GTPL”) regime is not suitable for complex privatizations and public/private partnerships – for example, the GTPL did not permit a multi-phase bidding process. The risk with the new Manual was that the GTPL would continue to apply in the gaps thereby causing some uncertainty. Moreover, the GTPL is itself in the process of reform with a new draft law in circulation.

These concerns have very recently been addressed. Royal Decree No. (101) dated 20/10/1439 AH

(04/07/2018) and published on 18 July 2018 specifically disapples the GTPL from privatization contracts. It provides as follows:

“All contracts, necessary for execution of the privatization operations shall not be governed by the Government Tenders and Procurement Law.”

An analogous provision directed at PPP schemes is included in the new draft law, which contains (at Chapter 15) a comprehensive list of other laws which are proposed to be adjusted in order to facilitate private sector participation. However, Royal Decree No.101 is now in force and provides a very important first step – even if this is limited only to addressing the GTPL.

The Manual is a decisive and welcome step to break away from the GTPL “straightjacket” which will obviate the need for enabling decrees for these projects.

So what does the Manual say?

First, the Manual is crystal clear that it must be applied and there is no escape or workaround the Manual. Deviations from the Manual’s provisions require explicit NCP approval (more on which below). The well-understood procedural steps in the GTPL for managing receipt of bids are largely replicated and amplified/adjusted as necessary. The Manual also provides for an appeal process for disgruntled parties with the establishment of a new appellate body – “the Privatization Procurement Appeals Board”. Further detail on this new body will be available later in the year (its procedures are already elaborated under the draft law).

Second, the Manual provides clarity and transparency around the gateway processes for approval of projects. The four “file” approval framework (Pre-Feasibility Study; Partial Business Case; Full Business Case and post competition Final Business Case) is consistent with best practice elsewhere. This process is likely to give confidence to the market that a project will stand a good chance of closing. The process is designed to identify key challenges as early as possible in the process, for example, issues relating to offtakes and government guarantees (if any) on termination must be exposed at the Partial Business Case stage. The process envisaged is similar in many respects to the old “negotiated procedure” under EU procurement rules.

Third, there are some interesting innovations. For example, the notion that the private sector actors can approach the NCP with projects (and potentially be rewarded for their origination efforts) is clearly intended to encourage investors and contractors to have a fresh look at the National Transformation Program with a view to engaging with the NCP pro-actively.

The Manual requires a draft privatization contract to be in play at the time of File Three (Full Business Case) submission to the NCP as part of the overall Procurement Plan. However, the Manual also signposts not only a Privatization Standard Contract – deviations from which must be approved – but also a standard Heads of Terms. The Manual provides a process for securing deviations from the NCP but neither the standard contract nor the standard heads of terms are yet in circulation.

Comment

Despite all the good elements of the Manual, there remain some issues which will have to be clarified under the draft law (which have not been addressed by Royal Decree 101). So, for example, the draft law will allow arbitration in government contracts (Article 54) with prior approval. Currently, government

contracts may not provide for an arbitration-based dispute resolution process unless this has been approved by the Royal Court. Foreign investors will likely monitor this aspect very closely.

There are also areas where additional clarity would be useful, for example, whether it is acceptable for bidders (whether in consortium or not) to be able to contract with public authorities through a special purpose vehicle without exposing their parent entities to joint and several liability. The Manual certainly seems to anticipate the use of SPVs but bidders may consider it desirable to obtain the explicit approval of the NCP at the RFQ stage for the structure of their bid and the scope of any underpinning parent company guarantee. Likewise, on the government side of the equation a number of new companies are being established to act as the counterparties under PPP style arrangements; the level of budgetary commitment and/or sovereign guarantee in these structures will have to be assessed on a case-by-case basis.

In the last year or so there have been a number of changes in KSA corporate, foreign investment and banking laws which combine to bolster the realization of Vision 2030. The Manual is an important step in that journey. In combination with the new draft law (and Royal Decree 101) it is a welcome and much needed embellishment of the Vision 2030 and the NCP enabling process. The draft law, once enacted, will fire the starting pistol for foreign investment in education PPP schemes.