

An overview of the Sudanese Public Private Partnership Act of 2021

Mahmoud Bassiouny, Yassir Ali, Nadia Abdallah and Amgad Nagy of **Matouk Bassiouny in association with AIH Law Firm**, discuss Sudan's PPP Act and the effect it will have on multinationals entering contracted partnerships

The Republic of Sudan is increasingly striving to capture the attention of national and foreign investors. On December 14 2020, Sudan was officially removed from the US State Sponsors of Terrorism list.

In light of the improvement of the Sudanese national economy, Sudan has published several new laws to set out a more flexible and effective legal framework, including, among others, the new Investment Encouragement Act, 2021 issued on April 11 2021 cancelling the previous Investment Act of 2013, the new Banking Act, 2021, and the Public Private Partnership Act (PPP Act), issued in April 2021.

The PPP Act is applicable to all projects that are subject to contracts entered into between the private sector and a contracting entity in order to implement a partnership project, regardless of the type, form or nature of activity.

Partnership is defined under the PPP Act as: "The Partnership Contract or the long term contract concluded in accordance with this Act between the Contracting Entity and the Private Sector or the Project Company, as the case maybe, for the purpose of developing or managing public assets or services, in which the private party bears the higher percentage of risk relating to the financing, managing, and maintenance, throughout the contract term, and where the financial dues of the private party is linked to the performance level and the size of demand of the offered service or product, or the level of use of such public assets or services by the public."

The public-sector entity or governmental entity includes any utility subordinated to the government under any governance level in Sudan, whether public authorities, companies fully owned by the government or commissions established by virtue of the Constitutional Act of the Transitional Period, 2019. The private sector, under the PPP Act, is defined as any juristic person, whether national or



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foreign, enjoying financial and technical capabilities qualifying it to enter into a partnership with the governmental entity, provided that it is not fully owned by the public sector.

Purposes and principles

The PPP Act aims to, among other things, motivate the local and foreign private sectors to invest and effectively participate in the national economic growth of the state, as well as helping to achieve the strategic targets of the various governmental sectors and increase the efficiency and competitiveness of the national economy.

The PPP Act lists some principles that should be followed while executing any project in which the state seeks to provide a public service, establish infrastructure

utilities with economic, financial, service, social or production value, or improve, develop, decrease the cost or upgrade the efficiency of current public services or infrastructure. The principles are as follows:

1. Justice: treating all competitors from the private sector objectively on an equivalent and neutral basis.
2. Transparency: by avoiding conflicts of interest and enabling the private sector, governmental entities and the public to obtain information in relation to partnership projects in all the project's stages, without prejudice to public interest.
3. Respecting contractual obligations: the contracts concluded in accordance with the PPP Act govern the relationship between its parties, accordingly the

obligations set out therein should be respected.

4. Planning: preparing and executing partnership projects shall be undertaken by virtue of plans and studies prepared through scientific and organised methods.
5. Feasibility: partnership projects shall achieve development purposes and commercial feasibility requirements for the private sector.

Newly established entities under the PPP law

The Supreme Council for Partnership between the Public Sector and Private Sector (the Council)

Establishment. The PPP Act provides for the establishment of the Council by virtue of a decree from the Council of Ministers upon recommendation by the Minister of Finance and economic planning, to be presided over by the Prime Minister. The Council has not yet been established.

Powers. The powers of the Council are listed under the PPP Act and include the following: (i) to provide funds that are incumbent on the State to guarantee the performance of its financial obligations under the partnership contract; (ii) to approve the draft budget of the Central Unit and its final accounts, as well as approving the financial and administrative structures and internal regulations thereof; (iii) to approve the studies and proposals pertaining to the partnership projects as well as offering the same for bidding in accordance with the provisions of the PPP Act.

The Central Unit for Partnership between the Public and Private Sector (the Central Unit)

Establishment. The PPP Act provides for the establishment of the Central Unit, which is subordinated to and under the direct supervision of the Ministry of Finance and Economic Planning. The Central Unit has not been established to date.

Powers. The PPP Act lists the powers of the Central Unit, including, without limitation: (i) to conduct research and set out training plans and programmes in the field of partnership contracts and projects; (ii) to promote partnership projects to raise the community awareness of the benefits and role thereof as an effective tool for socio-economic development; (iii) to set out

effective and sustainable policies to communicate with the local and foreign private sector for consultation purposes in order to benefit from the private sector's capabilities in relation to partnership projects.

Liability of the contracting entity

Initiative. Government entities are permitted, upon the approval of the Central Unit and confirmation of the Council, to enter into partnership contracts in accordance with the provisions of the PPP Act.

Governmental entities that desire to propose a project within their competence may, at their own initiative, or upon proposal by the private sector, apply to the Central Unit for this purpose, which application shall be supported by an initial feasibility study of the project in accordance with the rules and procedures set forth by the regulation promulgated in connection with the PPP Act. To date the PPP Regulation has not been issued.

Project committee. Governmental entities shall, upon the approval of the Central Unit, compose a committee for each partnership project under the name of 'Project Committee'.

The Project Committee has the power to prepare a comprehensive feasibility study in relation to the partnership project, tackling the technical, economic, environmental, marketing, social, legal, and financial aspects, including the qualification standards and the possibility of obtaining the necessary financing, in accordance with the rules and procedures fixed by the PPP Regulation. The Project Committee shall submit a report, including its recommendations to the Council through the Central Unit, in order for the Council to make a decision in respect thereof.

Control and supervision. Any governmental entity which enters into a partnership contract with the private sector or project company, in accordance with the PPP Act, shall exercise supervisory and control powers over all facilities and services subject of the partnership contract, in addition to following up on the implementation of the partnership project and the management thereof, as well as ascertaining the quality of products and services provided by the project company or the private party.

In order to implement the supervisory and control powers stipulated above, the



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agents of the contracting entities shall have access to the partnership project site or any other related site, at any time, for the purposes of exercising control and supervision powers. For this purpose, agents have the right to peruse the progress and efficiency of work, inspect all matters related to the technical, financial and administrative aspects of the project, in addition to evaluating the procedures taken to achieve the health and safety conditions and ascertaining the satisfaction of the environmental conservation requirements. The project company or private party, as the case may be, shall provide whatever may enable agents of the contracting entity to perform their duties.

Bidding process

The bidding process for partnership projects and selection of winning bidders shall comply with the principles of transparency, publicity, equal opportunities, equality, free competition and avoiding conflicts of



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interest. The winning bidder shall fulfil the required qualification conditions in accordance with the published financial and technical standards. However, the governmental entity may directly contract with the private sector or project company in accordance with the rules and procedures fixed by the PPP Regulation.

Pursuant to the PPP Act, a tender committee for each project shall be established pursuant to a decision of the relevant governmental entity, after obtaining the approval of the Central Unit.

The tender committee shall be composed of technical, financial and legal experts, as well as one or more representatives of the Central Unit, in addition to the project team. The tender committee, in cooperation with the Central Unit, has the power to declare and prepare the bid for partnership projects in accordance with the PPP Regulation.

Bid methods. Partnership projects may be offered for bid through one of the following methods:

“Sudan is increasingly striving to capture the attention of national and foreign investors”

1. One phase open competition;
2. Two-phase competition;
3. Limited competition;
4. Competitive discussion; or
5. Any other method as may be prescribed by the PPP Regulation or the Council.

The PPP Regulation shall set out the procedures and conditions of the bid.

The invitation, declaration and bid conditions. The governmental entity shall, through the tender committee, and in coordination with the Central Unit, prepare the bid documents pertaining to the partnership projects.

The bid invitation shall include all the details relating to the partnership project including, among others, the project type, the conditions for participating in the competition and the financial guarantees required.

Bidders’ qualification. The governmental entity shall, through the tender committee and in coordination with the Central Unit, conduct a pre-qualification or post-qualification of the bidders. The qualification shall follow objective standards related to the technical, financial and administrative capabilities of the bidders as well as the nature of contractual obligations, in accordance with the nature, size and value of the partnership project. In the event of conducting a pre-qualification, the invitation to bid shall be restricted to the qualified bidders.

It is worth noting that a consortium may participate in the bid, except if it is prohibited by the bid documents.

The bid award. The governmental entity may, through the tender committee and in coordination with the Central Unit, conduct preliminary meetings with qualified bidders to discuss the specifications, conditions and other matters related to the partnership project.

The governmental entity, through the tender committee, shall invite bidders or their representatives to attend the bid selection session. The rules and procedures in relation thereto shall be set forth under

the PPP Regulation. The project shall be awarded to the bidder who submitted the best offer in accordance with the evaluation criteria set out in the bid documents.

The winning bidder shall submit a final performance guarantee not exceeding 10% of the partnership contract value within 30 working days from the date of notification of the award. The governmental entity, upon the approval of the Central Unit, may extend this period to one or more similar periods.

The project company and partnership contract

Establishment of the project company. The winning bidder shall establish a Project Company with the sole purpose of implementing the partnership project. The PPP Regulation shall determine the type and capital of the project company. The contracting entity may, following the approval of the Council based on the recommendation of the Central Unit, allow the winning bidder to implement a partnership project without requiring the establishment of a project company in the case that the winning bidder proves that it has the financial and technical capacity to implement the project.

Obligations of the project company. Without prejudice to the obligations provided under the partnership contract, the PPP Act lists certain obligations on the project company, including the following:

1. To use the assets pertaining to the partnership project and undertake all necessary procedures and measures to maintain and preserve the same;
2. To comply with all the laws and regulations enforceable in Sudan, including health and safety conditions and environmental requirements; and
3. To submit regular reports to the contracting entity and the Central Unit on the performance of the project company’s obligations under the partnership contract.

Partnership contract models. The PPP Act lists the models of the Partnership Contracts. The models include ‘build, own, operate and transfer’ in which the private sector designs, establishes, finances, operates, commercially usufruct and maintains the project, then assigns and transfers its ownership, and hands over the same to the contracting entity upon expiration of the contract term.

The models also include the method where the private partner undertakes the operation and maintenance of the partnership contract, in addition to any other method approved by the Council based on the suggestion of the Central Unit.

Content of the partnership contract. The partnership contract shall cover the principal provisions governing the partnership project including:

1. Identification of the contract’s parties and their details;
2. The nature and scope of works or services subject of the partnership contract in addition to the performance provisions; and
3. The mutual financial obligations between the contract’s parties including the financing and refinancing arrangements.

Seizure. Assets, establishments, devices, tools, machineries, equipment or anything used in the operation or exploitation of the partnership project may not be subject to seizure, except after obtaining written permission from the Council. Any contrary measure or disposal shall be deemed null and void.

Partnership contract term. The term of the partnership contract shall be agreed between the parties for a period not exceeding 40 years.

Dispute resolution. Partnership contracts shall be subject to Sudanese law and the Sudanese courts are competent to settle disputes arising therefrom.

The Council shall constitute an independent committee to be known as the ‘Committee for Consideration and Adjudication of Complaints and Grievances of Partnership Projects’.

This committee will be competent to consider and adjudicate complaints, objections and grievances related to the bidding and award of partnership projects, in accordance with the provisions of Chapter VII of the PPP Act. The decisions made thereby shall be final and not subject to appeal.