

ROYAUME DU MAROC



**Direction des Entreprises
Publiques et de la Privatisation**



المملكة المغربية



مديرية المنشآت العامة والخصوصية

INTRODUCTORY NOTE THE PUBLIC-PRIVATE PARTNERSHIP BILL

In recent years Morocco has undertaken several reforms supported by sectorial strategies to enhance the country's competitiveness, diversify its resources and accelerate territorial and human development.

Through the new constitution which guarantees the principles of democracy, rule of law, separation of powers, pluralism, correlation between responsibility and accountability and equal access of citizens to public services, the government has revealed its willingness to improve infrastructure and public service provision in order to best meet public expectations and further the country's competitiveness and business climate.

In order to take advantage of private sector innovation and skills to implement PPPs, it is necessary to develop a partnership approach to provide, under the responsibility of the public authority, social and economic infrastructure and services to contribute to national development and improve the population's living conditions.

In this context, it is clear that Morocco has enjoyed success in terms of concessions acquired under Law No. 54-05, regarding the delegated management of public services, and other laws regulating the use of PPP in some sectors, such as ports and water, urban transport and production of electricity.

Consequently, the purpose of the new BILL is to define a consolidated and sound framework to develop Public Private Partnerships in Morocco on behalf of the State, local authorities and public bodies which can be applied to different sectors.

Public-Private Partnership is defined as a form of cooperation in which public contracting authorities (i.e., the State, regional authorities, public institutions, public enterprises, and other legal persons governed by public law) via a fixed term administrative contract assign to a private partner the responsibility to design, finance, all or part, construct or rehabilitate, maintain and/or operate an infrastructure required to provide a public service.

This approach can benefit from private sector know-how and financing and ensure an optimal risk distribution by transferring risks to the party that can manage them effectively and efficiently. In return, the private partner only receives payment if services are delivered according to the requirements of the PPP agreement. It also furthers a new culture in public sector capital investment based on needs assessment, performance analysis, accountability and monitoring of results.

The PPP procurement route can only be used when a needs analysis has been properly conducted, options have been assessed and it is feasible for the project to be delivered under a PPP structure. This appraisal needs to take into consideration the project's complexity, expected performance, quality of services provided and risks inherent to a project.

During the PPP bidding process, selection of the preferred bidder is subject to the principles of publicity, transparency, free competition, equal opportunity and fairness, and good governance.

There are three procurement procedures clarified in the draft BILL; standard procedures, competitive dialogue and the negotiated procedure.

The standard procedure (open/restricted tender) is subject to the principle of competition and allows the selection of the most economically advantageous tender based on criteria produced in the tender document and communicated to all tenders.

Competitive dialogue is initiated by the public authorities when they are not objectively able to define the technical means to satisfy their needs and objectives and are not able to specify the financial or legal structure of a project.

Negotiated procedure can be exceptionally selected in the following cases:

- The service can be conducted or operated, for technical or legal concerns, only by a single private operator;
- An emergency resulting from unforeseeable events for the public authority
- Reasons of national defence or public security.

The contract is awarded to the candidate submitting the most economically advantageous bid while meeting the output specifications. The tender document must include the economic and qualitative criteria related to the overall cost, performance objectives, sustainable development's requirements, technical and innovative features of the offer and measures to promote small and medium enterprises.

The PPP contract should include mandatory clauses regarding duration, performance targets, risk sharing, asset transfer, sub-contracting, control and supervision of the private partner, guarantees, personnel and contract termination.

The PPP contract duration shall not be for less than five years and shall not exceed thirty years, which distinguishes it from traditional procurement and allows sufficient time for amortization before transferring assets back to the public authority. The duration of the PPP contract may be for up to fifty years based on project needs.

Performance targets for each PPP project allow the public entity to control the private partner optimally, based on indicators specified in the contract. They also help to meet citizens' expectations in terms of service quality and availability. In addition, the public authority can audit the terms and conditions of preparation, procurement and implementation of the contract.

Identifying and sharing risks properly in a PPP contract maintains contract equilibrium and allocates risks to the partner judged best able to assume and manage them.

The private partner's remuneration based on performance targets allows the public entity to optimize resource allocation. The tender document, mainly performance indicators, determines whether the private partner will be paid by only the public authority, partly by third parties or revenues from the operation of facilities, goods and equipment under the project.

Monitoring performance objectives assigned to the private partner, including the required quality of service, facility, equipment or intangible assets, provides an opportunity for the public authority to supervise the activity on a regular basis and ensure that the private partner is compelled to his obligations.

When a private partner fails to meet its obligations, particularly for non-compliance with performance targets, the contract includes penalty clauses to which are applied subject to formal notice.

Subcontracting of obligations by the private operator provides for better risk distribution and allows for tasks to be evaluated and/or managed efficiently.

The ability to modify some aspects of the contract facilitates adaptation to the changing needs of the public authority, to technological innovation and changes in financing conditions.

Prior agreement from the public authority before contract transfer is required to ensure service continuity under the same conditions as under the original contract.

A substitution clause in the case of a defaulting private partner (step-in rights) aims firstly to ensure continuity of a public service, and secondly to reassure funders about the certainty of debt recovery. In all cases, substitution remains the responsibility of the public authority and is applied under the same conditions as the original contract.

The transfer of assets produced or acquired by the private partner, for the contract execution, wholly to the public authority at the end of the PPP contract, allows restoring back all the assets required for the operation and public service continuity. This transfer is crucial to distinguish a PPP contract from a privatization.

Granting securities to financial institutions over assets acquired or realized within the project will facilitate access to financing for the private partner with prior approval from the public authority.

Early termination clauses in the contract allow public and private partners to terminate the contract when there is a serious infringement or a "force-majeure" event and receive compensation. Also, the use of alternative means of dispute settlement, mainly "conciliation", prior to any arbitration or legal recourse, allows for effective, rapid and economical dispute resolution.

This BILL will not cover PPP projects already initiated or in progress.