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KEY LEGAL CONSIDERATIONS WHEN GOVERNMENT-OWNED COMPANIES ACT AS PPP PROCURERS IN SAUDI ARABIA

Government-owned companies play an increasingly visible role in the development and delivery of projects in Saudi Arabia that might otherwise have been undertaken directly by ministries or other government entities.

Depending on their mandate, such companies may be entrusted with developing projects, bringing them to market, managing the procurement process and overseeing their subsequent implementation. This role is not limited to conventional government procurement. The Saudi private sector participation (PSP) framework itself expressly contemplates circumstances in which a Government-owned company may tender and contract for a PSP project.

The application of the PSP framework to projects tendered by Government-owned companies is principally addressed in Article 4 of the PSP Law and Article 4 of its Implementing Regulations. Importantly, these provisions do more than identify a level of Government ownership; they also link the application of the PSP framework to the purpose for which the relevant company was incorporated or is owned by the Government and to the nature of the project being tendered.





WHEN DOES ARTICLE 4 APPLY TO GOVERNMENT-OWNED COMPANIES?

Article 4 of the PSP Law expressly extends the application of the PSP framework to contracts concluded by a company which, for the purpose of executing a PSP project, is incorporated by the Government or is more than 50% directly or indirectly Government-owned.

Article 4 of the PSP Implementing Regulations provides further clarity by identifying three circumstances in which a company will be considered to have been incorporated or owned by the Government for the purpose of tendering a PSP project. These are where:

1. The company is established, with the approval of the Approving Authority and on the basis of the Business Case Documents, for corporatization in preparation for divestment;
2. The company is established or owned by the Government for the purpose of tendering an infrastructure or public service project through PSP; or
3. The company is wholly Government-owned and its establishment contemplated the transfer to it of assets related to public infrastructure for the purposes of divestment.

The application of Article 4 therefore requires more than simply identifying the Government's shareholding in the relevant company. In practice, the company's establishment documents, mandate and the purpose of Government ownership may become relevant in determining whether the required connection with the PSP project exists.

Once those conditions are satisfied, the more practical question becomes how a Government-owned company operates as a Contracting Authority under the PSP framework and what this means for the private sector parties contracting with it.

THE GOVERNMENT-OWNED COMPANY AS CONTRACTING AUTHORITY

Where the PSP framework applies, the Government-owned company will need to perform its role within the governance and approval structure established under the PSP Law, its Implementing Regulations and the PSP Governing Rules.

This extends throughout the preparation, tendering and implementation of the PSP project and may include the preparation of the Business Case and Tender Documents, management of the procurement process, award and execution of the Project Agreement and subsequent contract management, subject in each case to the approvals reserved to the relevant Supervisory Committee and other Approving Authorities.

For a Government-owned company, this means that its existing corporate decision-making framework must be considered alongside the approvals required under the PSP framework. An early mapping of these respective approval routes can therefore be important to avoid duplication, gaps or inconsistency as the project progresses.

A separate consideration concerns the land and assets forming part of the project. The fact that a company falls within Article 4 does not, of itself, establish its ownership of, or legal rights over, the

relevant assets. The legal status of the land and assets, the company's rights of use or control over them, and its ability to grant the private party the access, possession or other rights required for implementation of the project will need to be considered as part of the project due diligence. The same applies to any approvals required for the use, allocation or transfer of rights relating to such assets.

Similarly, where the project contemplates the collection of revenues or charges from users, the legal basis on which those rights are granted to the private party, together with any specific approvals required under the PSP framework, needs to be considered separately.

Article 4 therefore establishes the route through which a Government-owned company may fall within the PSP framework; it does not, by itself, determine the company's underlying rights over project assets or the approvals required to implement the project.



THE PRIVATE SECTOR PERSPECTIVE

Article 16 of the PSP Law provides that contracts subject to the Law are concluded in the name of the Government, with the Contracting Authority representing the Government in matters relating to the contract and any Ancillary Contract, unless the decision approving the contract provides otherwise.

This provision deserves particular attention where the Contracting Authority is itself a company with separate legal personality.

The fact that a Government-owned company is preparing and tendering the project does not therefore necessarily answer, by itself, the legal capacity in which it will ultimately enter into the Project



Agreement. The relevant approval decisions, Project Agreement and transaction structure need to be considered together.

For both the Government-owned company and the private sector bidder, clarity on this point is important. It may affect not only the drafting of the Project Agreement, but also the analysis of contractual recourse, payment obligations, Government support and ultimately the bankability of the project.

From an investor's perspective, Government ownership of the procuring company will inevitably be relevant. It should not, however, be used as a substitute for analyzing the actual contractual and credit structure of the project. Government-owned does not necessarily mean Government-guaranteed.

A bidder considering a long-term PPP will want to understand the source of the revenues underpinning the project, the entity responsible for any payment obligations, the treatment of termination compensation, and whether any form of Government or Ministry of Finance support is contemplated.

These questions become particularly important where the relevant Government-owned company does not have a substantial standalone balance sheet or where the project gives rise to material long-term payment obligations.

The PSP Law itself recognizes that project-financed transactions may require protections extending beyond the Project Agreement. Article 18 permits, subject to the required approvals, direct agreements and undertakings with parties connected with the PSP project. It also recognizes the financing of PPP projects and the ability of the private party to pledge its own project assets, subject to the limitations set out in the Law.

The relevant question for investors and their lenders is therefore unlikely to be simply whether the procuring company is Government-owned. The more important question is what contractual and credit protections have actually been built into the project structure.

Depending on the project, the analysis may extend to Government support or credit enhancement, direct agreements, lender step-in rights, termination compensation, revenue arrangements, rights over project assets and the consequences of a default by the Contracting Authority.

THE PRACTICAL IMPLICATIONS BEYOND ARTICLE 4

Article 4 of the PSP Law is only the starting point. Once that gateway is crossed, the fact that the procurer is a Government-owned company raises its own set of legal and commercial considerations.

For the Government-owned company, the focus shifts to authority, governance, approvals, rights over project assets and the interaction between its corporate framework and the PSP regime.

For bidders and lenders, the questions are different: who is legally behind the Project Agreement, what rights and revenues support the transaction, what approvals have been obtained, and what protections are available if the project does not proceed as intended?



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As Government-owned companies assume a greater role in the delivery of infrastructure and public services in the Kingdom, these issues are likely to become increasingly important to the structuring, allocation of risk and bankability of PPP projects.

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