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BANGLADESH – A MODEL PPP INVESTMENT DESTINATION

In an otherwise complex context, the Public-Private Partnership (“PPP”) experience in Bangladesh demonstrates a high level of transparency from which neighboring countries in the region can learn. Within a relatively short period, Bangladesh has established a fairly sophisticated PPP framework in the transport sector as well as transparent government processes to stimulate foreign investment in this sector. These developments have been supported by international organizations led by World Bank through its institutions, such as the International Finance Corporation. Consequently, Bangladesh could be a natural fit as a model PPP investment destination.

Notably, in Bangladesh, the PPP Authority works directly under the Prime Minister. In this jurisdiction, although there is often significant conflict on various issues between different government departments, the role played by the PPP Authority is very positive. In Bangladesh, the PPP Authority acts as a uniting factor, coordinating between different agencies and enforcing transparency. As many neighboring countries in the region also lack transparency in the government sector, they can take inspiration from Bangladesh as a good example of how a

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nation where processes are typically opaque may still maintain efficiency in a specific sector, as seen with PPPs in Bangladesh.

Several recent projects were carried out successfully by foreign investors, as the entire PPP process is laid out with a degree of sophistication. As is proved by the Bangladesh example, any government willing to do so can insert or establish a PPP process in a jurisdiction that is otherwise deemed by investors as lacking transparency. In this article, we take a look at the details of the PPP experience in Bangladesh.

PPP framework

In Bangladesh, a separate set of PPP laws along with supplementary guidelines and rules are provided in an attempt to bring about transparency and overcome legal, institutional, and financing constraints. PPP projects are highly regarded, which is evident from the involvement of the Prime Minister's office and the Ministry of Finance as well as other agencies such as the Bangladesh Bank (Bank), Bangladesh Investment Development Authority ("**BIDA**"), etc. The Bangladesh government has attempted to streamline the PPP process with regards to ministerial, managerial, and technical matters, and has also attempted to provide financial and other support, aimed at strengthening the system through capacity. However, implementation at the ground level still faces certain challenges.

Procurement

The Procurement Guidelines for PPP Projects 2018 ("**Guidelines**") provide various requirements in the selection of a private partner for a PPP project and enhance the ease of doing business in Bangladesh. They also provide the processes and timescales for different phases of PPP projects as well as the institutional roles and responsibilities involved. These Guidelines thus makes the system more transparent and efficient by specifying all the requirements for PPP project bidders.

Government budgeting

As per Criteria 6.1 of the PPP Screening Manual ("**Manual**"), gaining approval for a PPP project is the first step before launching the procurement process. Furthermore, as per the Viability Gap Funding ("**VGF**") Rules, approvals relating to VGF for PPP projects are granted by the Ministry of Finance. In addition, the PPP Technical Assistance Fund ("**Fund**") was established under the PPP Technical Assistance Financing; if a PPP project is approved, the Fund provides early-stage project development funding support to such projects. Additionally, the Bangladesh Infrastructure Finance Fund Limited ("**BIFFL**") is a non-bank financial institution established by the Bangladesh government for financing

infrastructure-related PPP projects. The BIFFL aims to provide long-term financing in local currency to such projects.

Investment and corporate laws

It should be noted that there are certain sectors where only the government can operate and where any private sector investment, whether local or foreign, is prohibited (known as a negative list). Such sectors include arms and ammunition, defense equipment, and nuclear energy. Generally, only in sectors controlled by administrative licensing processes, there are restrictions relating to foreign investment. Such sectors include banks and financial institutions, insurance companies, and crude oil refineries. Certain sectors are on the negative list, such as national defense and other matters of national security. Notably, PPP projects are generally allowed in all sectors that are not part of the negative list. Additionally, certain activities will fall outside the purview of PPPs:

- Outsourcing of a public service that involves a simple function
- Creation of a State-Owned Company, i.e., a government-owned enterprise
- Government borrowings from the private sector



An entity can form a limited liability company (public and private), partnerships, and proprietorships to establish a project entity. In addition, foreign investors can incorporate 100% foreign-owned companies or joint ventures with local partners.

Environment law and social impact

Incorporating a company in Bangladesh requires certain licensing and registration requirements, including the following:

- Environmental registration in the case of industries
- Environmental Impact Assessment in the case of a PPP, particularly in projects relating to the construction of roads and bridges
- Compliance with laws on public health and safety

Secured transactions law

Security in Bangladesh generally includes immovable properties (freehold or leasehold), movable assets, shares in a company, bank accounts, intellectual property, contractual rights, and receivables; personal guarantees and corporate guarantees are also available. Prior permission of the bank is required for the creation of security in favor of foreign lenders. However, if a foreign loan, as well as the security package against the borrowing, is provided by BIDA, separate approval from the bank is not required. Additionally, as mandated by BIDA, foreign lenders will be required to engage a local bank as an agent for holding the local assets provided as security. Furthermore, a mortgage of immovable property must be registered; the registration must be perfected with the office of the relevant land registrar. The particulars of the mortgage are required to be recorded with the Registrar of Joint Stock Companies and Firms within 21 days of the date of its creation in case of creation of mortgage, hypothecation, or charge by a company incorporated in Bangladesh. Notices to counterparty may be required in certain cases.

Land ownership restriction

Ownership of land in Bangladesh is primarily held by the government or private entities/individuals, and the government may convert public land for private use. Practically, there are land ownership and lease restrictions for foreign individuals to hold land in Bangladesh. However, a 100% foreign-owned company established by a foreigner can buy land in its name, as it would be treated as a local entity.

Land acquisition

As provided in the Manual, the procuring authority is required to make the necessary arrangements for screening of the project to meet the requirements of land either already available or to be acquired for the project. The Manual also specifies the land-related requirements for a PPP project. It should be noted that the public partner deals with the land acquisition matters and bears the resettlement risks involved in the PPP. Furthermore, a right of way will be notified for the private partner.

Procurement process

The private partner for a PPP project is selected according to the Procurement Guidelines for PPP Projects of Bangladesh ("**Procurement Guidelines**"), which specify the selection of a Private Partner in four phases. The four phases include identification, development, bidding and approval, and award. Guidelines for Implementation of Unsolicited Proposals 2016, (issued under Section 20 of the PPP Act) are applicable in case of unsolicited proposals. In addition, the Procurement Guidelines would remain applicable to unsolicited proposals along with adhering to requirements under the Guidelines for Implementation of Unsolicited Proposals 2016, which require submission of a Concept Note to the governmental authorities for unsolicited proposals. This Concept Note is submitted instead of the phases under the Procurement Guidelines.



Corporate matters

Section 2 (22) of the PPP Act 2015 provides the kind of private partner suitable for delivering PPP projects — such private partners may include any private organization. The private organization may include any natural person or any local or foreign company, association, legal entity, group of individuals, consortium, foundation, or trust. Section 22 of the PPP Act 2015 provides for the incorporation of a project company. It states that “after being finally selected, the private partner shall, either before or after execution of the PPP contract, incorporate a company limited by shares by provisions of the existing laws related to company formation.” For companies intending to incur foreign or local currency debt, the Bangladesh Investment and Development Authority stipulates a fixed requirement relating to the debt-equity ratio which is as follows:

Specifications	Debt-equity ratio
Foreign currency debt	70:30
Local currency debt	50:50
Sector specific debt, like power sector	80:20

The PPP Law is silent on the issue of change of control and share transfers in a PPP Special Purpose Company post establishment. Additionally, the lender step-in rights that allow the lenders to take control of the PPP project are not allowed under the regulatory framework (including standard contractual clauses) in the following cases:

- if the private partner defaults; or
- owing to unsuccessful performance in meeting service obligations, the PPP contract is under threat of termination.

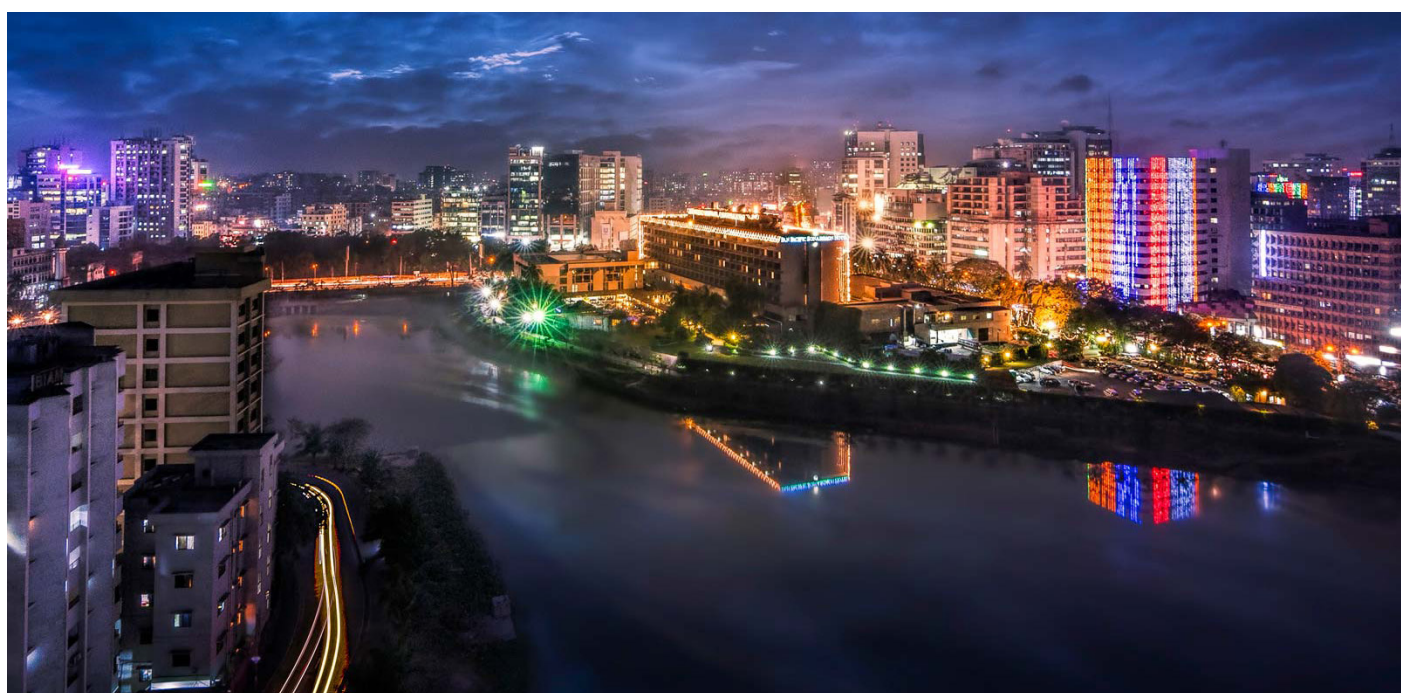
Moreover, all mergers and acquisitions require approval by the Bangladesh Competition Commission (“BCC”) as per the Competition Act 2012. Furthermore, in case of acquisitions, permission is required to be taken from the bank by filing an application when a company controlled by persons resident in Bangladesh ceases to be controlled by the resident of Bangladesh. A company is deemed to be controlled by another company if the other company has the authority to appoint or remove the holders of all or a majority of the directors at its discretion without the consent or concurrence of any other person. In addition, the bank is to be informed regarding any transfer of shares involving non-residents within 14 days.

Tax incentives

In Bangladesh, the government has declared a tax exemption, in effect from July 2017, for a period of ten years for PPP projects. The tax exemption is provided for the development of national highways or expressways and related service roads including, but not limited to, seaports, flyovers, airports, elevated expressways, etc. The exemption is further extended to capital gains from a transfer of shares relating to projects. Additionally, the exemption also covers the royalties and technical assistance fees. Furthermore, a 50% tax exemption is also granted to foreign technicians for three years. The milestone date for calculation of three years is the fifth anniversary of the commercial operation date of the project. Moreover, the total exemption is also granted on import duties on capital machinery and spares for selected PPP projects. Exemptions from VAT are also extended to construction contractors, suppliers, legal service providers and consultancy/supervisory firms relating to all the receivables that are due through the PPP projects.

Investment protection

The Foreign Private Investment (Promotion and Protection) Act 1980 was enacted to ensure protection to foreign private investment in cases



such as the following:

- ensuring fair and equitable treatment of foreign investment and guaranteeing free repatriation of investment
- ensuring protection against discrimination
- ensuring protection against unlawful expropriation, i.e., expropriation or nationalization of ownership rights of investors will take place only for a public purpose by the government along with compensation at market value

Institutional framework

Located in Dhaka, Bangladesh, and falling under the Prime Minister's Office, the Public-Private Partnership Authority (PPP Authority) is responsible for the management and support of PPPs. It is an autonomous government agency that acts as a PPP unit managing all PPP projects in the country. It conducts the selection of private partners in PPP projects and is also an exclusive procuring authority. With a single, centralized entity selecting and monitoring all matters covering the procurement of PPP projects, the system is more efficient, which is seen in very few economies. However, this centralization of power when it comes to the selection of PPP projects may act as a demoralizing factor for other ministries and government agencies who are only involved in the

contract management phase but who are responsible for the delivery of infrastructure.

Offshore loan approvals

BIDA, as a regulator, provides prior authorization to the industrial undertakings in the private sector about their borrowings from abroad, including determination of fees, etc., to be charged from foreign lenders.

Forex management

Bangladesh Bank, i.e., the central bank of Bangladesh regulates all the inward and outward remittances under its Guidelines for Foreign Exchange Transactions ("GFET"), and any transactions besides those mentioned under GFET require approval from Bangladesh Bank. The Foreign Exchange Regulation Act 1947 deals with matters relating to foreign exchange, and the rights of foreign investors are largely protected under the Foreign Private Investment (Promotion and Protection) Act 1980.

In conclusion

The PPP Authority can be seen as an island of excellence in a sea of opacity. Other government institutions as well as neighboring countries can learn from this experience. For more information on upcoming PPP projects and detailed advice on entry into Bangladesh, please contact us.

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