QATAR - AN OPPORTUNITY FOR OPERATION AND MAINTENANCE PPPS

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INTRODUCTION

According to MEED.com Qatar awarded projects worth over US$136 billion between 2011–2020. Over the last decade, the focus of Qatar's investment has been on the development of infrastructure related to the FIFA World Cup to be hosted in 2022. This includes stadiums and ancillary infrastructure such as metro lines, an airport expansion, expressways, and hotels.

According to the Supreme Committee for Delivery & Legacy's website, several venues for the FIFA World Cup are modular and will have demountable top tiers. Ras Abu Aboud Stadium in Doha will be the first fully demountable FIFA World Cup stadium. This is to ensure that Qatar is left with stadiums fit for purpose beyond 2022 and that there will be no so-called 'white elephants.' A similar approach was adopted by other host cities such as Innsbruck and Basel with modular stadiums developed for the 2008 UEFA European Football Championship.

In light of the great investment made by Qatar and with much of this infrastructure already built and the rest well underway, it may be worth shifting focus to the future of such infrastructure. Some questions that may assist such inquiry include, what are the best means to utilize this infrastructure to its full potential and how to best fund and deliver long-term infrastructure improvements that may be required over the upcoming decades.

We may need to find the answers to these questions sooner rather than later. Generally, newly built infrastructure starts to decline after approximately five years. One example of how infrastructure may deteriorate if not maintained and rehabilitated properly, is the U.S. Interstate Highway System that was authorized by the Federal Aid Highway Act of 1956 (the Highway System). The initial cost estimate for the Highway System was US$25 billion over 12 years; however, it ended up costing US$114 billion (equivalent to US$530 billion in 2019) and took 35 years to complete. Once constructed, the highways had to be maintained and that proved to be a major flaw in the system, which was not accounted for at the outset. The funding for maintenance and improvements was very limited (despite reliance on fuel taxes and tolls collected from users) and resulted in major deterioration. The American Society for Civil Engineers in its March 2021 scorecard on the status of U.S. infrastructure, including the Highway System, gave scores ranging from D- in transit to C in bridges. A similar issue can be found in the maintenance (as well as utility) of several Olympic venues and other international sporting venues post games.

Qatar is well-positioned to learn from the mistakes of other jurisdictions with respect to underfunding public infrastructure. One way to do this is by continuing to finance the operating costs or operating expenditures and reinvestments (infrastructure renewals or lifecycle costs) from its state budget. The delivery of various operation and maintenance (O&M) services may be, to some extent, done directly by some state agencies (such as Public

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Works Authority, Ashghal) or, more likely, procured in a traditional way from various service providers in exchange for a price determined in a competitive tender. However, in many jurisdictions, public-private partnerships (PPPs) demonstrate better value for money than a comparable public alternative, and satisfying that test is commonly a pre-requisite to proceeding with a PPP. In this article we will consider:

- What are the benefits of using PPPs in the context of long-term O&M and infrastructure rehabilitation;
- How Qatar may utilize the existing legal framework for PPPs to ensure proper maintenance and rehabilitation of the state infrastructure; and
- How PPPs should be delivered in order to minimize the risk of potential failures.

EXAMPLES AND BENEFITS OF O&M PPPS

Firstly, not all PPPs require the design and construction of the new asset that is to be maintained under the PPP. PPPs can exist as O&M only contracts, although typically some capital upgrade is required to bring those assets up to an initial standard suitable for the contractor to maintain over the life of the contract. Secondly, not all O&M contracts should be regarded as PPPs (at least for the purpose of our analysis below). Only those contracts which transfer significant risks from the public sector to private, are performance oriented and have a relatively long contract term (at least five to seven years) will be discussed in this article. Therefore, we exclude from our article more conventional O&Ms, including schemes where the private contractor is not required to make any investments or where its remuneration is on a cost-plus basis.

Examples of PPPs that could be utilized in respect of existing infrastructure may include:

- O&M of the FIFA World Cup stadiums where the private partner would take the risk of monetization of the venue (e.g., conversion of stadia into community sporting and event facilities, affordable housing, retail shops that pay rent, parks, cycling tracks, concert venues, and theatres) and would assume the demand risk (to be shared with the government if agreed revenue thresholds are exceeded);
- Limited refurbishment, IT upgrade and management of existing public facilities (e.g., primary schools), including cleaning, catering, waste management, and maintenance, where the private partner is remunerated on the availability basis subject to quality adjustments;
- Street cleaning and comprehensive gardening services, where the private partner is compensated by an annual fixed rent, subject to deductions based on Key Performance Indicators (KPI);
- Contract to convert an existing multi-lane road to a toll road (or shadow toll road) with a comprehensive O&M, including provision of necessary equipment and IT infrastructure, where the private partner's revenue would be an agreed percentage of the toll collected (or a payment by user of a road), or a fixed amount subject to availability or quality deductions;
- O&M of Qatar's road system in exchange for an availability fee payable to the private partner upon achieving specified KPIs; and
- Comprehensive review of the existing street lighting infrastructure by the private partner who would be also responsible for revamping the infrastructure and O&M in exchange for payments from the

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government that would consist of a fixed and variable part dependent on the value of savings generated due to improvements.

All these projects have potential to create various benefits to the government. By way of non-exhaustive list, the potential benefits would include:

Risk Transfer

The idea behind PPPs is that risks are allocated to the party that is best able to manage them. PPPs allow for greater risk transfer from the public to the private sector, with the private partner typically taking the risk of O&M and rehabilitation costs being higher than initially estimated and being responsible for a performance change in the O&M term, resulting in greater budget certainty for the public sector;

Innovation and Cost Savings

PPPs unlock private sector innovation (often linked to using new technology), competition, and operational efficiency. The benefits resulting from the innovative approach taken by the private partner should be sufficient to outweigh the increased costs of private funding (compared to the costs of borrowing by the public sector). This is especially the case since competition does not necessarily drive public sector service delivery. The costs of private financing are also typically offset by the risks allocated to the private partner (which would lead to greater financial liability had such risks stayed with the public sector), and if done correctly, are intended to result in cost savings;

Better Performance

The private partner would be responsible for achieving performance specifications allowing the public sector to incentivize service delivery often through very robust performance and reporting regimes, including various deductions, fee adjustments, and incentive (bonus) payments;

Holistic Lifecycle Approach

Given that the contract is for long-term service delivery, the private partner would be incentivized to minimize costs and maximize efficiency for the full length of the lifecycle of the project or asset;

Private Financing

Where O&M PPPs require substantial rehabilitation and lead to an initial investment burden on the private partner, the private partner may be required to supplement its own funds/equity by obtaining external financing. In this case, the lender diligence and oversight over the O&M contract term adds another layer of accountability for the private partner, this is in addition to the public sector's own contract management;

Handover and Asset Condition

The private partner would be responsible for the condition of the facility, project, or asset at the end of the contract term and would be subject to strict handover conditions, ensuring quality; and

Local Focus

PPPs can be utilized in order to develop local private sector capabilities and transfer skills and know-how through joint ventures with large international firms, as well as create sub-contracting opportunities for local firms.

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LEGAL FRAMEWORK

Qatar has taken a major step in adopting a comprehensive legal framework for the development of PPPs last year by enacting the long-awaited Law No. (12) of 2020 Regulating Public Private Partnerships (PPP Law). It defines 'Partnership' quite broadly, being partnership between the Government Entity (defined as the Ministry of Commerce and Industry (MoCI), and any other government agency, public authority or public corporation) and the Private Party (defined as the private corporate person or consortium of such corporate persons) effected under the PPP contract (i.e., a contract for the delivery of the project) pursuant to this law and the PPP policy (to be developed by the competent department at the MoCI) (Article 2). The definition suggests that the PPP project can be undertaken not just by Qatari ministries themselves but also by Qatari public authorities (e.g., Ashghal) or even public corporations, such as the Qatar General Electricity Corporation, Kahramaa. Ashghal and Kahramaa are in charge of critical infrastructure in Qatar, including the road network, water, sewage, and electricity lines.

The PPP Law expressly recognizes O&M as one of the models in which the Partnership can be carried out (Article 3). The law also allows for needed flexibility in that other project delivery models may be also used if recommended by the MoCI and approved by the Council of Ministers. This means that where the Government Entity decides to implement a “hybrid” project where the private sector will, for example, own, finance, O&M the existing asset until it is transferred to the government, that project could be also realized, subject to obtaining the required approvals. Any such project (i.e., traditional O&M or hybrid) can be identified for implementation by the Government Entity or the MoCI but the PPP Law also expressly allows for unsolicited proposals that can be submitted by the private sector for governmental approval (Article 4).

Under the PPP Law, the project company (formed either solely by the private sector or jointly with the Government Entity) is entitled to charge fees or otherwise seek revenue or derive a financial return from the project, its assets, or its end users, pursuant to the PPP contract and the PPP Law (Article 21). Hence, the PPP Law allows for various compensation schemes to be applied, including unitary charge (availability payments) payable by the government to the project company and fees that may be charged by the project company from infrastructure users. That means that the PPP contract can be also modelled as a concession where the demand risk is borne by the private partner who, in turn, is remunerated by being permitted to exploit the service. This arrangement is similar to service concessions that are popular in some of the member states of the European Union and regulated by the Directive 2014/23/EU on the award of concession contracts.

RISKS TO BE AVOIDED

PPPs are not a risk-free solution. There are many PPP projects that did not go well; however, Qatar being relatively new to this market can learn from the mistakes of other jurisdictions and avoid the same pitfalls.
One of the examples of PPP, which happened to be too ambitious and ultimately resulted in a failure, was the London underground PPP project. It allowed for two private sector consortiums to take over infrastructure maintenance and rehabilitation of the whole London underground system, including trains and civil infrastructure. Private financing was arranged to fund the infrastructure rehabilitation programs and the PPPs also received annual service charge payments from the government. The PPP contract was for a 30-year period beginning in 2004, however, by early 2010 both private consortiums had failed and control of the infrastructure had returned to the government. It is believed that the London underground PPP project was too complex to be procured as a single PPP. Generally, PPPs work best if their scope is more limited and involves the rehabilitation of a single,

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defined facility. That allows for the project estimates to be more accurate. Output specifications and KPIs should be defined otherwise the private sector will price in all uncertainties resulting in increased project costs. This is because private sector will do what it is paid to do and no more than that, so any incentives and performance requirements need to be clearly set out in the PPP contract documentation.

A few other concerns with respect to PPPs, as well as ways to manage such concerns, are noted below:

Uncertainty of Risks

Not knowing the risks involved with a project and its lifecycle will make it difficult to allocate risks effectively and result in higher project costs. For example, a project where the private partner is to assume the availability risk based on existing infrastructure which was not surveyed or tested by it, is unlikely to attract sophisticated bidders or may lead to an increase risk premium on account of the private partner. One way to manage this is to allow the private partner to rely on reports provided by consultants as to the condition of such infrastructure at the bidding stage. Another example is in a concession arrangement, where there is revenue uncertainty due to end-user demand being uncertain, the public sector will need to be more willing to share such risk with the private partner;

Effective Contract Negotiation

Once risks are identified, they need to be allocated effectively in the project contract to the party best able to manage such risk and the negotiation of such contract becomes key in ensuring that value for money is achieved. Without this, the public sector may retain risks that it should otherwise hand over, or risk higher project costs on account of the private sector. Some risks that a public authority would typically retain include changes in law, acts of government that may frustrate the private partner's performance of the contract and government initiated variations to the scope of services; and

Contract Management by the Public Authority

The public authority responsible for the PPP project must have the contract management expertise in-house in order to ensure that risks allocated to the private partner are in fact carried out by it. Monitoring the performance of the private partner in accordance with the O&M PPP contract and ensuring that remedies are actioned (e.g., deductions to the payments being made to the private partner when appropriate, will ensure that the private partner is fulfilling its obligations).

Notably, an international survey conducted by Service Works Global in 2017 revealed that one of the key risks to the success of PPP projects in the O&M phase in Canada (which is a global leader in PPPs) was differences in contractual interpretation. Similar risks were identified internationally, confirming that any ambiguity in the performance management documentation presents the most significant risk to the success of PPP projects.

POSITIVE EXAMPLE

In early 2020, Ashghal awarded the Catchment Zone Framework contract to three partners tasked with O&M works and services of Qatar's drainage assets in three zones: north, south, and west. The project comprised comprehensive O&M of the sewer infrastructure systems in the State of Qatar including regular routine, planned preventative and corrective maintenance works, planned overhauling, breakdowns operation of the treated water network, sewer cleaning, customer service response, and any incident or emergency management necessary for

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the performance of the scope of works. The project also comprised of the repair, replacement, rehabilitation, and related works to the sewer infrastructure network.

According to Ashghal, the authority has achieved a total savings of 23 percent of the costs of O&M of drainage networks just one year after awarding the Catchment Zone Framework contract. The project involves latest technologies, such as modern asset management systems and integrated solutions that are aimed to improve the operational efficiency of drainage networks and pumping stations, in addition to saving maintenance costs and enhancing health and safety measures at work sites. The project allows to not only reduce the costs but also increase the quality of service provided to the community (and, according to Ashghal the speed of responding to customers increased by 98 percent). It is worth noting that at the time the Catchment Zone Framework project was tendered the PPP Law was not yet in force. It is expected that any similar O&M projects will be procured by Ashghal going further in accordance with the new PPP legislation.

CONCLUSION

Qatar is in a fortunate position to make use of the opportunities that lie ahead given the vast infrastructure it has heavily invested in recently. PPPs seem to be one of the realistic solutions that can be employed to ensure that Qatar's O&M needs of public infrastructure are met and the standard of the asset preserved throughout its operational life. There are many lessons to be gained from other jurisdictions using PPPs, which could be of benefit to Qatar and help attract appropriate private sector parties. With the flexibility of the new PPP Law, Qatar can be at the forefront of yet another wave of infrastructure projects in the region that take advantage of private sector innovation and extract long-term value for money through appropriate risk transfer to the private sector.

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