The Legal Regime of Public Private Partnership in Bangladesh: An Overview and Analysis

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Abstract: Infrastructure is the backbone of economic growth of a country. Export, import, supply of goods and energy depends on infrastructure. A country with a strong infrastructure attracts investment as the risk factors regarding business seems deductible. Infrastructural development itself requires investment. The Government of a country basically initiates the projects relating to the development. Mega scale projects require a huge amount of monetary investment as maximum of these projects generates income for a long period. The prospect of mega infrastructural development attracts entrepreneurs. Moreover, the huge monetary investment required for long term projects needs private investors as the Government may not always be able to bear the responsibility of the sole contributor. The concept of Private Public Partnership (PPP) originated to facilitate the infrastructural development of a country. This concept allows both the Public sector and the Private sector to work side by side as investors and contributors. Bangladesh has set up a goal to become a member of the second world country by 2021. The Government prepared its vision 2021 as a strategic paper and development of infrastructure through PPP is one of the top priorities. As a result, Bangladesh got its first PPP related legislation in 2015. This paper concentrates on the history, development and features of current PPP related laws and papers of Bangladesh.

Key Words: *Infrastructure, Investment, Public Private Partnership, Contractual Models, PPP Act 2015.*

Introduction

In its Vision 2021 the Government of Bangladesh (GoB) has set the goal of becoming a second world country. To sustain high growth rates against weakening external demand, increase productivity, and allow Bangladesh to take full advantage of its young population and low labour costs, private investment (including foreign) needs to increase and exports should be diversified into new, higher value-added goods and services. This requires: better public infrastructure. Efforts should focus on

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increased public investment on high priority and cost-effective projects in power and transport infrastructure and fostering private participation through public-private partnerships (PPP).[2]

Participation of the private sector through PPP is considered an important route to reduce the investment deficit. The GoB has taken a number of measures to create an enabling environment for attracting private investments on a sustainable basis. In 2004, the Bangladesh Private Sector Infrastructure Guidelines (PSIG) was issued to facilitate projects in line with PPP concepts. Since then, private investment on sectors such as power, gas and telecommunications is increasing. However, much more investment is required in these sectors and several other priority sectors in order to accommodate economic growth. Mass communication sectors like ports, roads, railway demands investment to generate income through swift carriage of business goods, transit and tourism, on the other hand sectors like e-service can insure proper advertisement of the potentials that Bangladesh can offer.[3] To present a lucrative Bangladesh for investment and facilitate PPP the government is working consistently. In Consequence the Parliament of Bangladesh has enacted the Public Private Partnership Act, 2015.

Background of PPP in Bangladesh

Bangladesh has been facing many challenges since gaining independence in 1971. To overcome some of these challenges, the country requires significant investment in energy, transport, and water supply infrastructure and several other sectors.[4]Political turmoil and fragile economy held Bangladesh's progress in PPP sector till 1990. In the mid 1990's for the first time a policy framework was designed. In 1996 the Private Sector Power Generation Policy (PSGP) was introduced in Bangladesh to attract and regulate investment in the power

[2] International Monitory Fund, 2015, Article IV Consultation—Press Release; Staff Report; and Statement by the Executive Director for Bangladesh, IMF Country Report No. 16/27, (2016).
[3] The Asia Foundation, Promoting Public-Private Partnership in Bangladesh, A Brief Guide for Partners, (2010), p 5.
[4] Ibid. at 1-2.

generation sector.[5]As a result the 360MW Haripurand 450MW Meghnaghat Power Projects became the landmark in terms of launching PPP projects in Bangladesh. To maintain consistency and encourage investment flow the Government introduced another policy in the early 2000's.The Private Sector Infrastructure Guidelines 2004(PSIG 2004)was endorsed to boost partnerships with the private sector to facilitate fundamental infrastructural development.[6]

In its national budget of the financial year 2009-10 the GoB had made a significant allocation of funds for PPP projects which demonstrates a strong commitment to the implementation of PPPs. The government also issued a position paper on PPPs entitled, "Invigorating Investment Initiative through Public-Private Partnership", in June 2009. In spite of all these commitments, the PPP initiative did not achieve significant results in terms of project work on the ground. This was mainly due to the absence of clear policy and strategic guidelines.[7]

The deadlocks of the position paper of 2009 was identified and resolved by continuous dialogue between the government and business representatives. The GoB has agreed to address the limitations of the initiative taken in 2009 and started to frame another policy paper to overcome the obstacles. Consequentially the PSIG 2004 got replaced by a new policy in 2010. The Policy and Strategy for Public-Private Partnership (PPP), 2010 came into force with a view to modernise the framework. As a result a more efficient, transparent system came into force with a clear regulatory and procedural guideline to enhance the ambit of PPPs on multiple sectors. A PPP Office (PPPO) was established to insure a central approach and regulate the projects from a single organisation which is directly governed by the Prime Minister Office.[8]The initiative of the Prime Minister's office of taking the responsibilities to administer projects under the PPP

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[5] Your Guide to PPP in Bangladesh, retrieved on 25th September, 2016, https://www.scribd.com/document/293927174/Your-Guide-to-PPP-in-Bangladesh

[6] Your Guide to Public Private Partnership in Bangladesh, Public Private Partnership Office, (2013), p 2.

[7] Ibid.at 5.

[8] Ibid. at 2.

policy indicates the priority of foreign investment and its protection from the top level of the government.[9]

Since the introduction of the 2010 Policy and the creation of PPPO under the Prime Minister's Office have improved the regulation regarding PPPs.[10] It is the duty of the PPPO to advice and oversee the PPP projects. Documents relating to the process and guidelines for different sector are published by the PPPO in a regular basis to achieve its purpose.[11] The duty of assessing the financial viability and the scale of government support is determined by a separate PPP unit that works under the Ministry of Finance.

The continuous positive trend of investment and several on-going as well as upcoming mega scale PPP projects made the Government feel for the absence of a core law for serving the purpose of investment. To fill the legal vacuum the PPPO had published a draft law in open forum for public consultation.[12]After intense discussion and amendments of the draft on September 16, 2005 Bangladesh gets its first Public-Private Partnership law. The law provides public-private partnership a firm legal basis and hopefully will promote economic development.

Legal Regime of the PPP Framework

Bangladesh Private Sector Infrastructure Guidelines (PSIG)

The Cabinet issued the Bangladesh Private Sector Infrastructure Guideline (PSIG) in 2004. This guideline was not a supplementary provision to any legislation. As a result there were doubts about the legal status of the regulation and in some cases it lacked harmony with the Public Procurement Regulation (PPR) 2003. The approval, financing and development of any

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[9] The Asia Foundation, *supra*, at 1-2.

[10] Public Private Partnership Authority Bangladesh, retrieved on 25th September, 2016, http://www.pppo.gov.bd/

[11] Uddin, Syed Afsor H, Making a real difference in delivering public services in Bangladesh, World Bank Group, 2015.

[12] Public Private Partnership PPP, retrieved on 25th September, 2016, https://resource.ogrlegal.com/category/public-private-partnership-ppp/

project where government was involved being regulated by the PPR 2003 and PSIG guided the same sectors of the private projects. Absence of clear guidelines in terms of supremacy made it difficult to run PPP projects in Bangladesh.

The Public Procurement Act (PPA) 2006

The Public Procurement Act (PPA) 2006 came into force to eradicate the above mentioned inconsistency. The parliament took a massive step to promote investment and PPP through this legislation. For the benefit of the foreign investors the government extended its jurisdiction in terms of concession agreement. Section 66, of the Act enables government to generate separate and independent guidelines for PPP projects.

In other words, PPP projects can have their own guidelines focusing on its own procedures without any ambiguity and inconsistency with any other regulations. These individual guidelines also possess the same legal footing as the other guidelines of the Government.

The Public Procurement Rules (PPR)

The Public Procurement Rules (PPR) was supplementary to the Act of 2006. This rule was promulgated in 2008. The PPR, 2008 came into force on 31 January, 2008 with an aspiration to a ensure transparency, fair treatment and accountability, regarding every government procurement. The PPR is embodied with 130 rules in nine chapters.

Rule 129 of PPR have integrated various models for PPP. According to rule 129(1) not withstanding anything contained in the rules the government can sign concession agreement with private organization or entrepreneurs on projects facilitating public interest and public service.

Three different models are being mentioned in the PPR. They are i) Build Own Operate ii) Build Operate Transfer) and iii) Build Own Operate Transfer.[13]

[13] Rule 129 (1), Public Procurement Rules, 2008, p 663.

Policy and Strategy for Public Private Partnership (PPP), 2010

The venture to improve PPP alleviated by the introduction of the Policy and Strategy for Public-Private Partnership (PPP), 2010 which provides a meticulous description of PPP along with some key characteristics. The paper in its prologue described the necessities of PPP for achieving the countries goals encrypted in its vision 2021. The paper was published through government gadgets on 2nd August, 2010.

"Public-private partnership (PPP) projects normally cover public good provisions characterised by indivisibility and non-excludability, natural monopoly characterised by declining marginal cost (and associated average cost), and lumpy investment characterised by long gestation period. PPP is a win-win relationship between the government and various private sector players for the purpose of delivering a service by sharing the risks and rewards of the venture under a contractual obligation."[14]

According to this Policy, Public-private partnership also means, a cooperative venture between Public and Private sectors through contract; where the Private Sectors supplies assets and/or services of a public nature traditionally which are usually provided for by the Government.

Under the agreement, the Private Partner is obliged to undertake the investment. The Govt. defines its requirements by way of output and result. Private sector assumes the associated risks in exchange for the right to earn an adequate return.

Objectives of Policy and Strategy for PPP 2010:

1. Spell out the principles of partnership with private sector
2. Define an institutional framework
3. Ensure balance between risk and reward for both the government and private partners

[14] Gadget of the People's Republic of Bangladesh, Prime Minister's Office, Paper no: 03.068.014.03.00.005.2010(part-2)-323, August 2, 2010, p 3-4.

Different Contractual Models for PPPs Applied in Bangladesh

The models of the PPP contracts vary case by case. There are several indicators that are assessed properly before approval of any PPP. A feasibility and market engagement study is conducted before sanction of any PPP. The core objective of this study is to determine the viability, bankability and sustainability of the project to figure out whether it will contribute to the economy of Bangladesh and serve the interest of the country.[15]

Like the PPR 2008, the strategic paper focuses on different models and approaches for PPPs:[16]

Build-Own-Operate (BOO): In this model, the private sector manages the infrastructure on a build-own-operate basis. The government usually does not manage the infrastructure developed under this model. The Independent Power Producer (IPP) is an example of the BOO model.

Build-Operate-Transfer (BOT): Here the private sector manages the infrastructure on a build-operate-transfer basis. The private sector manages the infrastructure until a specified time, after which the government is responsible for its management.

Build-Own-Operate-Transfer (BOOT): This is an extended version of the BOT model. Under this model the ownership and management belongs to the private sector until a specified time. After expiry of the term, ownership and management is transferred to the government.

Applicability of PPP under the Policy and Strategy for Public Private Partnership (PPP), 2010

Projects through PPP can be conducted where at least one of the following circumstances exists.

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[15] Your Guide to PPP in Bangladesh, Public Private Partnership Office, supra, at 4.
[16] The Asia Foundation, supra, at 3.

- Financial resources constraint or absence of expertise with the government alone;
- Private investment would increase the quality or level of service or reduce the time to implement ;
- Opportunity for competition, among prospective private investors;
- Private investment in public service provides an opportunity for innovation; and
- No regulatory or legislative restrictions in taking private investment in the delivery of public service.

Time Period for PPP Procurement Process

Time consumption for the accomplishment of PPP's differs from each other. The time line depends on the volume of the infrastructure, complicacy, market interest and other social as well as environmental issues. Usually it takes 16-20 months to complete any PPP which is using the two stage procurement process. On the other hand, projects following a single procurement process take 10-12 months to get completed.[17]

The Government's Incentives to Encourage Investment in PPP Projects

Several incentives and benefits for PPP investors are introduced in the PPP policy framework. These include:

Viability Gap Financing: Projects having less commercial vale but with a high socio-economic outcome gets a significant budgetary fund as financial subsidy. The government is ready to contribute up to 30% of the total project cost as capital contribution at the time of construction or in the form of allowance during operation.[18]

Fiscal Incentives: The PPP investors can get several kinds of benefits from different provisions relating fiscal incentives. For example provisions regarding reduction of import tax and capital

[17] Public Private Partnership Office, supra, at 6.
[18] Your Guide to PPP in Bangladesh, retrieved on 25th September, 2016, https://www.scribd.com/document/293927174/Your-Guide-to-PPP-in-Bangladesh

goods and tax holidays can reduce the implementation cost of the project and enhance economic feasibility of the project.[19]

Special Incentives (Non-Fiscal): The strategic paper also advocates for other special but non-fiscal incentives for specific projects. These special incentives are designed to facilitate to enhance the ease and efficiency of any project. Exemption from certain insurance relating regulations, foreign exchange regulations and banking regulation are the examples of such incentives.

Unsolicited Proposal: To encourage private investor participation and innovation in PPP projects, government has permitted the submission of unsolicited proposals for the delivery of PPP projects. However, to ensure openness and transparency unsolicited proposals are also subject to an open and competitive procurement process. The Bonus System or Swiss Challenge System are introduced to incentivized the PPP investors in the case of Unsolicited proposal. The unsolicited bidder can resubmit and increase his bid through the Swiss Challenge system. On the other hand the unsolicited bidder can have pre-agreed bonus during the evaluation of the bidding by applying under the Bonus System.[20]

The Government's Long Term Financing Facilities for PPP Projects

The government of Bangladesh recognises that only uninterrupted financial flow is mandatory to attract PPP investors to invest in mega infrastructural development. The strategic paper bestows that separate and independent financial institutions can provide capital to meet this challenge. Two non-bank financial institutions namely Infrastructure Development Company Limited (IDCOL) and Bangladesh Infrastructure Finance Fund Limited (BIFFL) were being established to eradicate investors' concerns for long term projects.

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[19] Ibid.
[20] Ibid.

IDCOL is capitalised mainly through the contribution of multilateral donors; while BIFFL is capitalized through the provision of ring fenced budgetary funds from Government of Bangladesh.[21] It was established in 14 May 1997. The strategic paper introduced this non-banking financial institution to the PPP sector.[22]

BIFFL is in operation since 2011 with a paid up capital up to 19.40 billion taka and BIFFL has a strong mandate to invest in the large infrastructure projects of Bangladesh, including power & energy, ports, connectivity, tourism and economic zones.[23]

The Public Private Partnership (PPP) Act, 2015

In 2013, PPP Office published a draft laws for public consultation. The Public Private Partnership Act, 2015 was come into force as *sui generis* on 16 September 2015.[24] Public Private Partnership now stands on a firm legal basis.

Earlier, the only legal basis for procurement existed for goods and services, which proved insufficient for developing infrastructure using private capital. The new PPP law is intended at streamlining the formulation and execution of PPP projects.

It has also expanded the definition and process of government procurement to include concessions. The PPP law also provides for the establishment of a PPP Authority overseen by a Board of Governors. The PPP Authority will, among other tasks, develop policy, guidelines and standard documents, appoint consultants and advisors, provide approvals, and develop capacity within ministries and agencies through provision of training.[25]

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[21] Ibid.

[22] About, retrieved on 25th September, 2016, http://idcol.org/home/about

[23] Bangladesh Infrastructure Finance Fund Limited (BIFFL), retrieved on 25th September, 2016, http://www.biffl.org.bd/

[24] Public Private Partnership PPP, retrieved on 25th September, 2016, https://resource.ogrlegal.com/category/public-private-partnership-ppp/

[25] Stanley, Jenn, "Bangladesh Turns to Public-Private Partnerships to Fix Infrastructure", retrieved on 25th September, 2016, https://nextcity.org/daily/entry/bangladesh-public-private-partnerships-infrastructure-investment

Key Provisions of the Public Private Partnership (PPP) Act, 2015

A. Establishment of PPP Authority

The government will set up the Public Private Partnership (PPP) Authority. Section 4 authorises the Government to establish such authority. The PPP authority can take any project apart from the Annual Development Programmes and implement that project through PPP. The PPP Authority will operate under the Prime Minister's office. It will be governed by a Board of Governors. The Prime Minister will be the Chairman and the Finance Minister will be the vice Chairman of the Board of Governors.

At least six meetings of the Board must be held in a year. The PPP Authority will have a Chief Executive Officer (CEO). The head office of the PPP Authority will be in Dhaka. The Authority will be able to set up branch offices anywhere in the country and abroad. Policies and guidelines of the body will be formulated by its authority.

B. Responsibilities of the Authority

Section 9 of the Act provides a detailed description of the power and responsibilities of the authority. Developing the policies, regulations and guidelines is one of the key responsibilities of the authority. The authority can determine the ambit of the participation of government in any PPP and can provide opinion about these projects.[26]

It is the duty of the authority to prepare and provide samples of mandatory documents for facilitating the process and circulate these documents to reduce procedural hassles of the investors. Selection of partners, projects, signing of contracts, recession of contracts and providing incentives are the sole responsibilities of the authority. Moreover the authority is bequeathed with the

[26] Public Private Partnership (PPP) Act, 2015

duty to arrange training, seminars and learning tour in foreign countries to rectify the PPP policies of Bangladesh.[27]

C. Project Identification and Approval

Section 13-18 constitutes the third chapter of the Act which professes about the selection of the PPP projects and approval of them. Though the PPP Authority takes the first initiative, it is the exclusive jurisdiction of the Committee on Economic Affairs to confirm PPP projects.

D. Subsidies

According to section 17 of the Act, the Authority will be able to provide subsides. The recommendation of the Board of Governors is necessary for selecting a project for subsidies. The law empowers the Government to provide subsidies in following cases namely: technical assistance financing, viability gap financing, financing against equity and loan and financing against linked component.[28]

E. Selection of Private Partner

A detailed guideline for selection of partners for PPP is not provided in the Act.

F. Unsolicited Proposal

According to section 20 of the Act any organization or partner can submit unsolicited proposal to the government and the proposal will be scrutinised through the regulation provided by the board of directors of the authority.[29]

G. Project Company

A separate project company will be established before or after the completion of the agreement between the parties. The

[27] Ibid.
[28] Ibid.
[29] Ibid.

company will be incorporated in Bangladesh and also be limited by shares. According to sec 22 the PPP projects will be contracted with a separate Project Company other than the sponsors. The project company will bear all the liabilities.

H. Corruption and Conflict of Interest

Section 24 and 25 provide provision relating to corruption and conflict of interests. Every allegation of corruption and conflict of interest will be dealt with the existing laws of Bangladesh.

I. Project Agreement

According to section 26(2) the legal relations, risk allocation and the rights and duties of the parties will be governed by the project agreement. Section 26(3) provides a details outline of the factors that are needed to be included in the project agreement.[30]

Conclusion

Consistent economic growth of a country depends on infrastructural development. Public Private Partnership ensures continuance of infrastructural development to boost the economic growth. The legal regime regarding PPP needed to be compact to facilitate private investment. Though Bangladesh lacked a clear and consolidated legal regime regarding PPP till now, the recent enactment can be termed as the founding stone of such jurisprudence in Bangladesh. The continuous effort of the government to establish a workable PPP system since 1990's and its ambitions to achieve the goals of vision 2021 clearly indicates that a rapid legal development is due in upcoming years in PPP sectors. The strategies like subsidies and establishment of specialized non-banking organization for the funding of long term PPP projects depicts a serious approach. Consumption of five years for the enactment of a specialized law may illustrate a sloth procedural approach of the government in case of finalising official procedures and regulation. Inclusion of anticorruption provisions shows concern of the government to maintain its reputation. It can surely be said that the system

[30] Ibid.

governed by the current laws are not sufficient to conduct PPP projects efficiently as supplementary laws are not yet enacted. On the contrary proper utilisation of resources and application of current legal regime can surely ensure continuous investment in PPP projects that may ensure a better Bangladesh.