THE LAW ON PUBLIC-PRIVATE PARTNERSHIP OF THE REPUBLIC OF ARMENIA: OVERCOMING THE LEGAL CHALLENGES TO SUCCESSFUL PUBLIC-PRIVATE PARTNERSHIP

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ABBREVIATIONS AND COMMON PPP TERMS

Availability Payment	Payments made by the government to the Private Partner over the lifetime of a contract in return for the private party making the infrastructure and /or services available.
BEE	*Black Economic Empowerment* is a racially selective program launched by the South African government to redress the inequalities of Apartheid by giving black South African citizens economic privileges that are not available to Whites wealth redistribution.
BOOT	Build Own Operate Transfer
BOT	Build Operate Transfer
BTL	Build Transfer Lease
DBFO	Design-Build Finance Operate
CIS	Commonwealth of Independent States
CIS IPA	The Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States
Concession	A contract between the government and the Private Partner granting specific rights to the Private Partner to undertake a PPP Contract. The contract can include: a) Financing, designing, constructing, operating and maintaining infrastructure (it can be for all or some of these functions) b) Operating and maintaining infrastructure, including ensuring the availability of the infrastructure c) Service provision on behalf of the government.
Contingent Guarantees	These are guarantees provided by the government against a future event or circumstance which is possible but cannot be predicted with certainty and which might affect project revenue, for example, a minimum traffic guarantee, a minimum patient guarantee.

Contingent Liabilities	Obligations/liabilities triggered by an uncertain future event. This term is especially for those liabilities that affect the government under the PPP Contract.
EBRD	European Bank for Reconstruction and Development
Economic Internal Rate of Return	A metric used for capital budgeting in order to assess the profitability of potential investments. Financial Internal Rate of Return is the discount rate, in case of which the Net Present Value of net cash flows from financial revenues and costs of the assessed project is equal to zero.
Facility	Public infrastructure
Fiscal Affordability	This means that the PPP project does not lead to exceeding the total maximum permissible limit of Contingent Liabilities set by the government.
Government	Government of the Republic of Armenia
Grandfather Clause	A grandfather clause is a provision in which an old rule continues to apply to some existing situations, while a new rule will apply to all future cases. Those exempt from the new rule are said to have grandfather rights or acquired rights or to have been grandfathered in.
IFI	*International Financial Institution* is a financial institution that has been established (or chartered) by more than one country. Its owners or shareholders are generally national governments, although other international institutions and other organizations occasionally figure as shareholders. The best known IFIs (WB, ADB, EBRD, etc.) were established after World War II to assist in the reconstruction of Europe and provide mechanisms for international cooperation in managing the global financial system.
IMF	International Monetary Fund
KPI	*Key performance indicators* refer to a set of quantifiable measurements used to gauge a project's overall long-term performance.
Model Law	CIS model law on PPP

MRG	*Minimum Revenue Guarantee*, where the government assumes a portion of the traffic risk to guarantee a minimum level of revenue and profitability to the investors, is a standard risk mitigation mechanism for PPP Contracts.
OECD	Organization for Economic Co-operation and Development
PFI	*Private Finance Initiative* is a procurement method that uses private sector investment to deliver public sector infrastructure and/or services according to a specification defined by the public sector.
PICKO	Private Infrastructure Investment Center of Korea
PPI	Private Participation in Infrastructure
PPL	Public Procurement Law of the Republic of Armenia
PPP	Public-Private Partnership
PPP Law	Public-Private Partnership Law of the Republic of Armenia
PPP Contract	The contract between the Public Authority and the Private Partner (Project Company) under which a private-sector party invests in a Facility (design, construction, finance, and operation) to provide a public service to or on behalf of the public sector.
PPP Unit	A specialized center of PPP expertise in the public sector.
Project	PPP or Concession project
Project Company	The Project Company lies at the center of all the contractual and financial relationships in a PPP project. Where Project Finance is being used, these relationships must be contained inside a separate "box," known as an SPV. The Project Company, as an SPV, cannot carry out any other business that is not part of the Project.
Project Risk	The chance of an event occurring that would cause actual project circumstances to differ from those assumed when forecasting project benefits and costs. Achieving value for money that justifies the development of a project as a PPP depends on the ability to identify, analyze and allocate

	project risks between the government and the private party based on 'which party is best able to be responsible for/manage the risk.' The financial viability of a project also depends on proper Risk Allocation.
Project Finance	The long-term debt financing of a project, where the basis of the loan is the predictability of cash flows generated by the Project. Project Finance security includes the Concession agreement, supporting lump sum fixed cost construction and operations agreements and direct revenue support by the government if any. (It excludes liens on assets and guarantees by parent or affiliated sponsor entities)
Private Partner	Private Partner is the Project Company or an SPV who concluded a PPP Contact with the Public Partner for a Facility supply.
Public Authority	The Public Authority may be a central government department, a state or regional government, a local (municipal) authority, a public agency or any other entity which is public-sector controlled.
Public Partner	Public Partner is the government or any Public Authority who is authorized to conclude a PPP Contract with the Private Partner
PUK	*Partnerships UK plc* was an organization responsible for furthering public-private partnerships in the United Kingdom
RFP	Requests for Proposal
Risk Allocation	The definition of and then allocation of the consequences of all the Project Risks to one of the parties in the contract or agreeing to deal with the risk through a specified mechanism that may involve sharing the risk. (Risk sharing is based on an agreed formula established in the Concession Contract).
SDG	*Sustainable Development Goals*, also known as the Global Goals, were adopted by all United Nations Member States in 2015 as a universal call to action to end poverty, protect the planet and ensure that all people enjoy peace and prosperity by 2030.

Shadow Toll	A shadow toll is a contractual payment made by a Public Authority per driver using a road to a Project Company that operates a road built or maintained using private finance initiative funding
SOC	*Social Overhead Capital* is the basic facilities and services needed for the communities and societies that are the social capital mainly owned by the government.
Special Purpose Vehicle (SPV)	A corporate legal entity created to undertake a single task or Project. In establishing a project consortium, the sponsor establishes a special purpose vehicle (SPV) which contracts with the government. SPV has no activity other than those connected with the Project. Additional terms for it are: “private partner” or “project company.” The SPV is created to protect the shareholders with limited liability, often used for limited or non-recourse financing.
Step-in rights	Step-in rights enable one party (the beneficiary) to 'step in' to the shoes of another party concerning the rights and obligations of a contract, typically, in case of a severe breach of contract. Step-in rights can be used to enable a project to continue with one party being replaced by another.
USP	An unsolicited proposal is a proposal for a PPP project implementation. It is initiated by a private party, rather than in response to a request from the government.
Value for Money (VfM)	*Value for Money* means achieving the optimal combination of benefits and costs in delivering services users want
Viability Gap Funding (VGF)	A project with low financial viability is given financial support from the government to make it financially viable as PPPs. The bidder who bids for a project with the least amount of financial support from the government is generally awarded the Project.
WBRG	Worked Bone Research Group

INTRODUCTION

1. The term "public-private partnership" appears to have originated in the United States. Initially related to the joint public- and private-sector funding for educational programs, and then in the 1950s to refer to similar financing of utilities; it came into broader use in the 1960s to refer to public-private joint ventures for urban renewal[1].
2. Nowadays, there is no universal definition of PPPs. Each government has its interpretation of PPP that is slightly different from the other. Nevertheless, most of the available sources describe PPP as a long term cooperation contract between Public Authority and private sector company (generally an SPV) for development and management of a public asset, in which the Private Party bears significant risk and management responsibility throughout the life of the contract[2].
3. The primary purpose of the PPPs is financing, building and operating projects in sectors, such as public sector infrastructures, public utilities, public transportation, social infrastructures, communication networks, etc. In other words, PPP is a tool to deliver new or upgraded Facilities with private finance participation. It is a well-established technique for avoiding fiscal limitations, both legal and financial, on public-sector budgets.
4. The Public Authority may be a central government department, a state or regional government, a local (municipal) authority, a public agency or any other entity which is public-sector controlled. The private-sector party usually is an SPV created by private-sector investors expressly and exclusively to undertake the PPP Contract[3]. It should be noted that the relationship between these two parties is not a partnership in the legal sense but is contractual; being based on the terms of the PPP Contract[4].
5. Structuring PPPs is complicated because of the need to reconcile the aims of a large number of parties involved. On the private-sector side, there are investors, lenders, and companies providing construction and operational services. On the public-sector side, Public Authorities are creating and implementing PPP policies as well as those procuring (implementing the open

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[1] *E.R. Yescombe (2007), Public-Private Partnership, Yescombe Consulting Ltd. Published by Elsevier Ltd., P. 2*

[2] *1.1 Defining PPPs for the Purpose of This PPP Guide | The https://ppp-certification.com/ppp-certification-guide/11-defining-ppps-purpose-ppp-certification-guide*

[3] *This means that an SPV cannot carry out any other business which is not part of the project, since Project Finance depends on the lenders's ability to evaluate the project on a stand-alone basis.*

[4] *E.R. Yescombe (2007), Public-Private Partnership, Yescombe Consulting Ltd. Published by Elsevier Ltd., P. 3*

tender process for the selection of the Private Partner) the PPP, not forgetting the general public who use the facilities that a PPP provides. Most of these parties need to have a basic understanding of policy and finance issues, and how their part of the Project is linked to and affected by them[5].

6. Very often, there is confusion between privatization and PPPs. There is, however, a clear difference between these two forms of private sector engagement. In its real sense, privatization involves the permanent transfer to the private sector of a previously publicly owned asset and the responsibility for delivering a service to the end-user. However, a PPP necessarily involves a continuing role for the public sector as a "partner" in an ongoing relationship with the private sector[6].

7. The main critical elements of PPPs are as follows[7]:

- a long-term contract between a Public Partner and a Private Partner;
- for the design, construction, financing, and operation of public Facility by the Private Partner;
- with payments over the life of the PPP Contract to the Private Partner made either by the Public Partner or by the general public as users of the Facility for the use of that Facility, and
- with the Facility remaining in public-sector ownership or reverting to public-sector ownership at the end of the PPP Contract.

8. Other common features are[8]:

- The Private Partner is usually constituted as an SPV.
- Financing raised by the Private Partner is usually in the form of "Project Finance."
- Revenues are earned by the Private Partner only (or mainly) when the asset is completed and ready to be used.
- Consistent with the performance focus of remuneration to the Private Partner, technical and service requirements are also focused on results or "output specifications," rather than on inputs. The requirements also leave room for innovation.

[5] *E.R. Yescombe (2007), Public-Private Partnership, Yescombe Consulting Ltd. Published by Elsevier Ltd., P. XV*
[6] *The APMG PPP Certification Guide (2016), P. 15.*
[7] *E.R. Yescombe (2007), Public-Private Partnership, Yescombe Consulting Ltd. Published by Elsevier Ltd., P. 3*
[8] *The APMG PPP Certification Guide (2016), P. 20*

9. Most of the time, PPPs are classified based on the point at which legal ownership of the Facility is transferred from the Project Company to the Public Authority (BOT, BOOT, BTO, DBFO, etc.). Nevertheless, such distinctions are legal technicalities and do not affect the commercial and financial reality that PPP Facilities are public-sector assets which cannot in the common practice be sold off to the private sector. It is more useful to classify PPPs based on the nature of the service and risk transfer inherent in the PPP Contract. On this basis, PPPs can be split into two main categories: usage- and availability-based, the latter being divided into three main sub-categories: accommodation, equipment, systems or networks, and process plant[9]:
10. *Usage-Based* is the prime example of a PPP where usage risk is transferred to the private sector, and probably still the most widely applicable type of PPP. But usage risk can also be transferred, for example, through the payment of Shadow Tolls; here payment is by the Public Authority but based on usage of the Facility. There can also be a mixture of the two approaches, whereby users pay tolls or fares, but with public-sector subsidies.
11. *Accommodation-based* projects are those such as hospitals, schools, and prisons, where payment is generally made for making a building available for use by the Public Authority (typically in the social infrastructure field).
12. *Equipment, systems, or network-based* PPPs are less common. Payments by the Public Authority in such cases are based on a form of Availability Payment. Examples are DBFO road projects where, instead of payment being dependent on usage, it is dependent on the road being available. Similarly, payment for rail projects can be made based on how well the system works rather than the volume of passengers.
13. *Process Plant:* The original BOT model for power generation, of course, falls into this category, but this is now quite uncommon as a PPP because of the widespread privatization of power generation and distribution. The critical difference between these and other types of projects set out above is that they all involve a measurable process. The payments based on usage are comparatively less risky; hence availability is again the main criterion.
14. As I already discussed above, PPPs involve complex process management on many fronts that require a programmatic approach to establish PPPs as a recurrent option for appropriate projects. As in any programmatic action, or any action or approach that has a long-term aim, a framework is necessary. Different countries have different approaches to framework

[9] *E.R. Yescombe (2007), Public-Private Partnership, Yescombe Consulting Ltd. Published by Elsevier Ltd, P. 13*

documentation. The method chosen will mainly depend on two factors: the legal system or legal tradition of the country, and the degree of development in terms of PPP experience and use.

15. This paper is divided into two Chapters, which will discuss interrelated issues. In **Chapter 1**, the paper will analyze the generally adopted approach to PPP legislative framework and implementation aspects in place in different countries. In **Chapter 2**, the paper will examine the interactions between the PPP Law, PPL and the other relevant legal acts aimed to guarantee a successful implementation of PPP Projects in Armenia. The primary purpose of the Chapter will be to find the fundamental gaps in the legislation. The question, what kind of legislative amendments are required for the successful implementation of a PPP Project, will be addressed. The **Conclusion** will briefly outline the main findings of the research. Bibliography listing of all sources used for the paper is added at the end.

CHAPTER 1. WHAT IS PPP? INTERNATIONALLY ADOPTED APPROACH TO PPP LEGISLATION AND THE LAW ON PPP OF THE REPUBLIC OF ARMENIA

16. The huge infrastructure deficit experienced in many developed as well as emerging, and developing countries of the world, budget constraints and the need to benefit from private sector expertise are the main reasons why governments around the world seek to collaborate with the private sector to procure much-needed Facility[10].
17. The positive correlation between investment in infrastructure and economic growth is well noted in the literature[11]. Infrastructure not only improves the quality of life of citizens but also has a multiplier effect on employment, and therefore productivity[12]. Essentially, it plays a significant role in poverty reduction and the attainment of the SDG[13].
18. The OECD defines a PPP as *an agreement between the government and one or more private partners according to which the private partners deliver the service in such manner that the service delivery objectives of the government are aligned with the profit objectives of the private partners and where the effectiveness of the alignment depends on a sufficient transfer of risk to the private partners*[14]
19. According to IMF, *a PPP refers to arrangements where the private sector supplies infrastructure assets and services that traditionally have been provided by the government. In addition to private execution and financing of public investment, PPPs have two other important characteristics: there is an emphasis on service provision, as well as investment, by the private sector, and significant risk is transferred from the government to the private sector*[15].

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[10] *The World Bank & Department for International Development of the United Kingdom (2009), Good Governance in Public-Private Partnerships: A Resource Guide for Practitioners, P. 14*

[11] *H. Esfahani and M. Ramirez, "Institutions, Infrastructure and Economic Growth" 70 (2003) Journal of Development Economics 443-477; D. Aschauer, "is Public Expenditure Productive" (1989) 24 Journal of Monetary Economics 171- 188; W Easterly and S Rebelo "Fiscal Policy and Economic Growth: An Empirical Investigation", (1993) 32 Journal of Monetary Economics 417-458.*

[12] *ibid*

[13] *Bhattacharya and others, "Driving Sustainable Development Through Better Infrastructure: Key Elements of a Transformation Program" (July 2015), available at https://g24.org/wp-content/uploads/2016/02/Driving-Sustainable-Development-Through-Better-Infrastructure-Key-Elements-of-a-Transformation-Program-Bhattacharya-Oppenheim-Stern-July-2015.pdf, P.208*

[14] *OECD (2008), Public-Private Partnership -In pursuit of Risk Sharing and Value for Money, P 12*

[15] *IMF (2004) Public-Private Partnership, Prepared by the Fiscal Affairs Department (In consultation with other departments, the World Bank, and the Inter-American Development Bank), P. 4.*

20. PPP policies serve to define PPPs as distinct from other forms of procurement. Policies describe the reasons and/or goals for the choice of PPP schemes as well as guide the implementation of PPP in any given country. While these policies may or may not carry the force of law, they are an indication of the direction of the government.
21. Concessions always require a specific law relating to the Project, or a "framework" law relating to Concessions in general, to allow a private-sector company to charge and collect revenues from users for providing a public-sector service. In some countries, especially common-law countries PPPs are treated as a variety of government procurement, for which no special legal arrangements are needed. In others, primarily civil-law countries, specific PPP laws may be required to provide a framework for this type of contract, in a similar way to Concession laws. Thus, some countries needed to pass a specific PPP law to overcome legal obstacles to PPPs, such as[16]:
    - The requirement to conduct separate tenders for construction and long-term operation and maintenance works, rather than combining them as in a PPP.
    - Prohibition of deferred payments for public works (because this was an obligation against future budgets which legally must be agreed on an annual basis and cannot be committed in advance).
    - Limitations on the transfer of control of public-sector infrastructure.
    - Lenders' security requirements.
22. Several countries have passed or substantially amended PPP laws since there are clear benefits in framework legislation, whether for Concession- or PFI-Model PPPs. It provides an opportunity for the government[17]:
    - to confirm its political commitment through explicit legislation;
    - to set out the roles of the different arms of government, including control and approval of individual PPP projects;
    - to provide clarity on procurement procedures;
    - to set out the basis on which a Public Authority may provide support for various Project Risks, e.g. revenue guarantees (Contingent Guarantees);

[16] *E.R. Yescombe (2007), Public-Private Partnership, Yescombe Consulting Ltd. Published by Elsevier Ltd, P. 31*
[17] *E.R. Yescombe (2007), Public-Private Partnership, Yescombe Consulting Ltd. Published by Elsevier Ltd, P. 32*

- to provide a procedure for the Public Authority to make changes in the Project's specifications, and a method of compensating the Project Company for resulting extra costs;
- to provide clarity on investors' rights if the PPP Contract is terminated early, whether because of default by the Project Company or because the Public Authority wants to take the Facility back under public-sector control;
- to give lenders the ability to take security over the PPP Contract (which the law might not otherwise allow), as well as "Step-In" rights;
- if appropriate, to allow for the provision of investment incentives such as special tax treatment, etc.

23. Different legal systems favored the separate evolution of PPP structures, which in the last decade have influenced each-others. In continental Europe, the problematic transplanting of Common Law-based PPP structures into Civil Law systems discouraged the adoption of such a model and, consequently, the creation of a shared PPP concept[18]. The British and Australian models suffered the same "transplanting" difficulties as they treated PPPs as a variety of government procurement. At the same time, in Civil Law countries, PPPs were considered a special typology of contracts. The US model profoundly influenced the Commonwealth PPP model. In the UK and Australia, the US PPP "partnership type" was institutionalized into the "procurement type" and highly commercialized through a very successful acronym: "PPP" whose third P constitutes, in fact, the real novelty. For the less famous North American model, traditionally associated with urban renewal and downtown economic development, (which by far preceded the British one only introduced in 1992 with the PFI)[19] , the difficulty of its replication into the non-Anglo-Saxon world was probably due to its ignorance in addition to the different socio-economic, institutional, and political environment in which it was developed. Nonetheless, it is worth noting that the US seems to have rediscovered PPPs during the last years as a means for rebuilding or updating its ageing infrastructure network. Though, curiously, the US is reintroducing a PPP more influenced by the European PPP "contract type" than the British or Australian one[20].

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[18] E.R. Yescombe (2007), Public-Private Partnership, Yescombe Consulting Ltd. Published by Elsevier Ltd, P. 31
[19] Osborne S.P. (2000), Public-Private Partnerships, Routledge, P.38
[20] The World Bank & Department for International Development of the United Kingdom (2009), Good Governance in Public-Private Partnerships: A Resource Guide for Practitioners, (2009), P. 11

24. Taking into consideration the importance of having a legislative framework for the successful implementation and enforcement of the national policies and regulation of the activities of the different parties in both public and private sectors, in this Chapter, I will discuss specifics of PPP and legislative framework in several countries including in Armenia.

United Kingdom[21]

25. In the 1980s, British public policy strongly discouraged the use of private financing of Facility, because this would relax the constraint the government wanted to exercise over the public-sector budget as a whole. But soon, it became evident that there was a need for some relaxation of this policy since these constraints meant that vital investment in Facilities was not taking place. In 1993 a Private Finance Panel, consisting of public- and private-sector members and seconded staff, was formed to stimulate new ideas for the use of private finance for the public sector.
26. In 1997 the Ministry of Finance took over direct control, and a Treasury Taskforce was created to implement detailed procedures. The Treasury Taskforce was initially intended to have a limited life, but the benefit of a permanent "center of expertise" to provide support to the public sector as a whole became clear. Therefore in 2000, its activities were transferred to a separate company, PUK. PUK is itself a PPP with both private- (51%) and public-sector (49%) shareholders and provides technical support to the Treasury on policy issues and project-specific support to Public Authorities.
27. Currently, the British government remains firmly committed to PFI as a method of procuring Facilities. The British government maintains the position that PFI projects are not about removing Facilities from the public budget. They are only undertaken if there is a VfM case for doing so, and in fact, approximately half of the cumulative PFI program is (or will be) on the public-sector balance sheet.

United States[22]

28. Early development of U.S. roads relied heavily on private-sector financing, and turnpike (toll) roads were prevalent throughout the 19th century. Construction of public-sector funded toll

[21] *E.R. Yescombe (2007), Public-Private Partnership, Yescombe Consulting Ltd. Published by Elsevier Ltd, P. 33*
[22] *E.R. Yescombe (2007), Public-Private Partnership, Yescombe Consulting Ltd. Published by Elsevier Ltd, P. 39*

roads and bridges was also typical in the first half of the 20th century. Still, the use of tolls was primarily superseded by direct public-sector funding with the development of the federal-funded Interstate highway system from the late 1950s. Federal funding typically provides around 80% of the cost, but the projects are carried out by individual states, which have to find the balance of the financing.

29. In general, the private sector has always played a relatively more significant part in the provision of Facilities in the United States than in most other countries. However, it has been in the transportation sector that PPPs (3Ps) has taken a higher profile.
30. Unlike most countries, in the United States, public sector funding for highways has generally come from dedicated fuel and vehicle taxes, and tolls were expressly forbidden on federal-funded roads.
31. State funding has also come from public bond issues, which are usually tax-exempt and are issued either by the state, specific Public Authorities, or publicly controlled projects. However, the growth in federal tax revenues has not kept pace with the increase in demand for highways. As a result, from the early 1990s, various methods of private-sector involvement in highway construction were explored and are used in practice in the USA.

France[23]

32. France has a long history of Concessions for Facility, dating back to the Canal du Midi from the Atlantic to the Mediterranean in the mid-17th century.
33. Concessions are one form of a contract for *délégation de gestion du service public* (delegation of operation of public service). The other primary type is *Affermage* (i.e. Franchises). It involves operation and maintenance carried out under a contract with the Public Authority. The private-sector investors take demand risk and have to meet performance targets. Meantime, the Public Authority provides funding for the construction of the Facility and retains ownership. An *Affermage* contract can also come into play at the end of a Concession, to allow continued operation of a Facility by the private sector.
34. France began the adoption of PFI-Model structures for social infrastructure from 2002, with sector-specific legislation covering health and prisons. General PPP legislation was passed in 2004.

[23] *E.R. Yescombe (2007), Public-Private Partnership, Yescombe Consulting Ltd. Published by Elsevier Ltd, P. 43*

Belgium

35. As is the case in the vast majority of other European Member States, PPPs are increasingly favored by Belgian law and policymakers. Belgium is a federal State, known for its particularly complex organizational structure. State powers are allocated to the Federal State Level, the Regions and the Communities. Each different corporate entity is thereby entitled to resort to PPP for the development and the management of PPP projects in areas for which they are competent[24].
36. The Flemish Parliamentary Assembly enacted the Decree of July 9th, 2003, dealing with PPPs in the Flemish Region. This Decree firstly affirms the PPP Knowledge Centre to be the leading information service within the Flemish public administration concerning PPP collaborative ventures. The 2003 Decree secondly provides a legal framework for conducting PPP Projects in the Flemish Region.
37. Nevertheless, the procedure of competitive dialogue is currently not used in Belgium. Most contractual PPP projects are, therefore, realized by using the different negotiating methods. The two preferred grounds to commence a public-private procurement are, firstly, "*in exceptional cases, when the nature of the works or services or the risks attaching thereto do not permit prior overall pricing*[25]." And the second ground to commence a public-private procurement, merely applicable for services, is "*when the nature of the services to be procured is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selecting the best tender according to the rules governing open or restricted procedures*[26]*."*

Spain[27]

38. Spanish toll-road Concessions began in the 19th century when private investors also developed tolled bridges and railways. A program of private-sector motorway development (the first in Europe) started in 1967, and by 1976 15 Concessions covering 1,500 km had been signed.

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[24] *Van Garsse, S. (2007). Public private partnerships in Belgium P. 30-32*
[25] *Art. 17, § 3, 2' Act of 24 December 1993 relating to public procurement.*
[26] *Van Garsse, S. (2007). Public private partnerships in Belgium P. 30-32/ Art. 17, §3,4' Act of 24 December 1993 relating to public procurement.*
[27] *E.R. Yescombe (2007), Public-Private Partnership, Yescombe Consulting Ltd. Published by Elsevier Ltd, P. 46*

39. In more recent years, budgetary constraints have led to a large-scale growth in new Concessions. The 1972 Concession Law was primarily intended for roads but was superseded in 2003 by a new law that covers all types of PPP, including the PFI Model. PPPs now account for around 20% of Spain's infrastructure investment.
40. There is little central direction on PPPs—each autonomous regional government works out its policies, and there is no national center of expertise. The procurement process is fast and low in cost; typically, Spanish projects are said to incur bidding costs one-tenth of those for a British PFI project and to be procured in a substantially shorter time.
41. Major construction contractors dominate Spanish PPPs, and financial investors do not play a significant part in the Spanish market, other than domestic banks, which are closely linked to contractors. Therefore, Spain is *de facto* a market closed to foreign competition and investment, although Spanish contractors would claim they compete fiercely between themselves.

Brazil

42. The government is in charge of providing public services, whether directly or indirectly[28]. At the federal level, only two types of services shall be provided directly by the government: the postal service and the air postal service[29]. Indirectly, there is an extensive, non-exhaustive list of public services that may be provided through transference to private management.
43. The 11.079/04 Act (the PPP law) establishes the PPPs. The procedure is mandatory not only for the federal government, but also for states, the Federal District of Brasilia, and local municipalities.
44. In Brazilian law, a PPP is created when the government delegates a project or service's operation to a private entity. Two kinds of objectives may be involved in a contract: (i) a *concessao* to manage public services, or (ii) a contract to provide a service in which the administration is the direct or indirect user. Brazil created two modalities of PPPs following these objectives. One is the "*sponsored concession*" related to the management of a public service, which may or may not be preceded by the construction of a public project. In both

[28] *Welber Barral & Adam Haas (2007), Public-Private Partnership in Brazil / Federal Constitution of Brazil, Article 175*
[29] *ibit/ Federal Constitution of Brazil, Article 21, X*

instances, the contract implies a direct government payment to the Private Partner in addition to user charges collected by the private partner. Another modality of PPP is the "*administrative concession*." This occurs when the Concession involves a contract for providing services to the administration, as the direct or indirect user, even if public works or the supply and installation of goods are included[30].

South Korea[31]

45. The rapid export-based industrialization and economic growth of South Korea up to the early 1990s was not accompanied by adequate investment in Facilities. The Private Capital Inducement Act of 1994 was the country's first attempt at bringing private-sector investment to help fill this gap using Concessions.
46. In 1999 the process in effect began again with the Private Participation in Infrastructure Act, which continues (with amendments) to provide the basis for the current PPI program. A vital aspect of the growth of the PPI program has been the MRG. As initially enacted, this provided for public-sector guarantees of up to 90% of the projected revenues of the Facility (80% in the case of unsolicited projects). The PPI Amendment Act of 2005 changed this to a sliding scale of 75% for the first five years, 65% for the next 5, and zero thereafter, restricted to solicited projects only.
47. The PPI Act also provided compensation for foreign exchange losses above 20% and allowed the Public Authority to take an equity share of up to 50% while allowing all dividends to be paid to the private-sector investors.
48. The 1999 PPI Act also established the PICKO as a 'one-stop' center of expertise, to provide policy support, appraise and develop new projects, assist in bid evaluation and negotiation of Concession agreements, and provide education and training in PPI.
49. A VfM test, projects using the PFI Model, and provisions to encourage the growth of infrastructure investment funds and for sharing of Refinancing Gains between the public and private sectors were introduced in the 2005 Amendment Act.
50. The Korea Infrastructure Credit Guarantee Fund supports debt financing for PPI projects. It receives its funding from government, MRG fees, its guarantee fees and bank loans, and

[30] *Barral, W.; Haas, A. (2007). Public-private partnership in Brazil. International Lawyer (ABA), 41(3), P. 957-974.*
[31] *E.R. Yescombe (2007), Public-Private Partnership, Yescombe Consulting Ltd. Published by Elsevier Ltd, P. 44*

provides guarantees for revenues or debt in PPI projects, subject to a limit of USD 200 million per Project.

51. It also appears that the MRG encouraged projects to be built without adequate analysis of usage risks, and as a result, some large claims have been made on MRGs. However, it has to be said that without the MRG, the PPI program could never have developed on the scale which has been achieved to date, and even if some public subsidy of Concessions has resulted this is not unreasonable in macroeconomic terms.

South Africa[32]

52. The quantity and quality of infrastructure in Africa are low, mainly due to low levels of investment over the years and poor maintenance culture[33]. Most African countries are constrained by the paucity of funds, thereby turning to the private sector for investment. This investment drive is usually through the instrumentality of PPPs[34].
53. It is not uncommon for governments to send out RFPs soliciting qualified private sector investors to bid for the delivery of infrastructure projects or services. In this case, the potential private sector investor would be merely responding to the invitation to provide specific infrastructure or service according to specification and, most of the time, in line with the country's infrastructure plans. However, an increasingly large number of these proposals are unsolicited[35].
54. South Africa has developed a varied PPP program. It offers an interesting example of what can be achieved in a developing country, albeit one with a sophisticated finance and investment sector, which has been a key factor in the growth of the program. PPPs began in the mid-1990s on an entire *ad hoc* basis—the National Roads Agency, which already tolled parts of the major national roads, developed Concession structures to overcome budgetary constraints on upgrading parts of this network.

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[32] *E.R. Yescombe (2007), Public-Private Partnership, Yescombe Consulting Ltd. Published by Elsevier Ltd, P. 47*
[33] *Damilola Olawuyi, Extractives Industry Law in Africa (Springer, 2018) 55-80.*
[34] *Damilola Olawuyi, "Financing Low-Emission and Climate-Resilient Infrastructure in the Arab Region: Potentials and Limitations of Public-Private Partnership Contracts" in Walter Leal Filho, Amr Abdel Meguid, Climate Change Adaptation in the Arab Region: Case Studies and Best Practice (Springer, 2017).*
[35] *A 2014 study by the Public-Private Infrastructure Advisory Facility (PPIAF) revealed that the there was a remarkable global growth in the use of USPs and that African countries accounted for majority of this growth. See: PPIAF, "Unsolicited Proposals - An Exception to Public Initiation of Infrastructure PPPs: An Analysis of Global Trends and Lessons Learned" (World Bank, 2014)*

55. The government of South Africa demonstrated its commitment to a PPP policy thrust in the delivery of quality infrastructure when the Cabinet commissioned the Minister of Finance to take steps to develop a comprehensive PPP framework for the country[36].
56. The National Treasury established a PPP Unit, whose approval to proceed is required at three stages: (i) after preparation of the feasibility study; (ii) before procurement documentation; and (iii) before signing final documentation. Moreover, all PPPs are subjected to this strict three-point test[37]: (i) is substantial technical, operational and financial risk transferred to the private party? (ii) can the institution afford the envisaged fee? and (iii) is it a value-for-money solution?
57. A standard form of PPP Contract was issued in 2004, after consultations with private-sector investors and lenders.
58. In South Africa, BEE is a national policy objective, and PPPs are considered as a means for promoting and developing the objective. This policy has been formalized in the Code of Good Practice for Black Economic Empowerment in Public-Private Partnerships, which was issued according to the Public Finance Management Act[38]. The overlying purpose of the Code, as stated in the Preamble, is *"to redress the stifling economic effects of apartheid*."
59. BEE is a crucial constituent of South African PPP projects, each of which is structured on a careful combination of financial, technical, and BEE components to achieve value-for-money in the state's delivery of infrastructure.

CIS Model Law[39]

60. The need for the development of public infrastructure is extremely relevant for the CIS countries. The existing infrastructural restrictions are well known, and in recent years many of those countries have become actively involved in creating conditions for the development of PPPs.
61. With the EBRD's technical expertise and financial support, the Model Law was developed based on internationally accepted standards and best practices in PPP legal frameworks.

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[36] *National Treasury PPP Unit (2007), Introducing Public Private Partnerships in South Africa P. 7*
[37] *National Treasury PPP Unit (n 22) P. 13*
[38] *National Treasury PPP Unit (n 22) P. 15*
[39] *CIS Model Public-Private Partnership: Developing Practical Guidelines (2019), Alexei Zverev Senior Counsel, EBRD, Law in Transition Journal 2019*

62. The CIS IPA approved the Model Law on PPP on November 28th, 2014. The framework and non-mandatory nature of the provisions of the Model Law allow the governments of the CIS countries to choose the most appropriate regulatory option, considering local and territorial specifics. The adopted laws contain a number of progressive provisions from the Model Law, namely, providing for an open list of PPP objects, public financial support for PPPs by government bodies, provision of a national regime for foreign legal entities, and guarantees of private investor rights and funding organizations, including the following:
    - exclusion of discriminatory measures;
    - the right for compensation of losses;
    - taking into account private investments during the formation of tariffs;
    - non-interference of government and municipal bodies into investors' activities;
    - the possibility of changing the PPP Contract due to a significant change in circumstances
    - so-called "Grandfather Clause."
63. As a result of the current phase of cooperation between the EBRD and the CIS IPA, the EBRD through its Legal Transition Program developed the first collection of model documents, guidelines and practices, which includes the following:
    - heads of terms for a PPP Contract;
    - project implementation guidelines;
    - model PPP policy terms;
    - termination and compensation checklist;
    - value for money matrix;
    - PPP projects effectiveness evaluation Guidelines;
    - Risk Allocation matrix;
    - methodology on the KPIs' application to a PPP project;
    - annotated recommendations on monitoring the quality of services and output in PPP projects.

Armenia

64. Back in 2011, acknowledging the need for having a distinct PPP law that gives investors a singular starting point for understanding what the policies of the Government in this area are, the Government circulated a draft law on PPP which has never been adopted.

65. In 2012 the Government adopted a decree stipulating criterion for the assessment and approval of PPP Projects before the beginning of the procurement procedure and after the selection of the Private Partner through the procurement procedure[40].
66. Fast forward to 2017, the Government, re-affirmed, as a matter of policy, the need to have a distinct law on PPP to establish the legal base necessary to enact a framework that will allow the Government and its agencies to use PPP as a way of financing in a way that allocates risk to the partner, public or private, best suited to handle that risk. Thus, the process of drafting the PPP Law was kickstarted again in 2017.
67. To start, the Government approved a Policy Statement on PPP in November of 2017[41]. The Policy Statement, among other things, defined what a PPP is and what is not a PPP in the eye of the Government; because, as we already know, there is no universal definition of PPPs, and consequently, each government interprets it slightly differently. It also described the essential characteristics of PPPs, PPP Contract types, stages of PPP project implementation, appraisal of projects, institutional arrangements as well as contract monitoring, oversight reporting and evaluation.
68. With the adoption of the Policy Statement, the Government committed to developing a coherent, systematic approach to PPPs and a robust basis for implementing them in Armenia. The Government's goal was for the strengths and resources of the private sector to be mobilized in the most favourable way, consistent with the best international practice where possible, to contribute to the economic and social development of Armenia.
69. The Government committed to developing an enabling environment to encourage private sector participation in PPP projects in Armenia, both local and foreign. The Government supports PPP projects and understands the legitimate concerns and requirements of the private sector, respecting their property and contractual rights and commercial expectations.
70. Though having a distinct law was a policy decision by the previous Government supported by IFIs who felt that having a distinct law was better for potential investors/concessionaires looking to understand the local legal framework and policies toward PPPs, the current

[40] *Government decree No. 1241-Ն on the Assessment and Approval of PPP Projects, adopted on September 20, 2012 (no longer in force)*
[41] *Government protocol decree No. 47/38 on adoption of a Policy Statement on Public-Private Partnership, adopted on November 9, 2017*

Government continued this policy. In June 2019, the PPP Law was adopted by the Parliament of the RA and came into force on January 1st, 2020.

71. It is worth mentioning that in English, the title of the law is The Law on Public-Private Partnership of the Republic of Armenia. In Armenian, it is «*Պետություն-մասնավոր գործընկերության» մասին ՀՀ օրենք*. The word "*Public*" has been translated as "*Պետություն*" (State), which is a wrong translation and could be interpreted to limit the application of the law to Government sector only while the term "public" has a much broader application. Notably, in other parts of the PPP Law, the word "Public" is translated as "Հանրային," e.g. "Public Partner" – "Հանրային գործընկեր," "Public Infrastructure" – "Հանրային ենթակառուցվածք," "Public Service" – "Հանրային ծառայություն," etc.
72. Initially, the PPP Law has been drafted based on the CIS Model Law. Still, during the internal discussions among the Public Authorities, mainly based on the recommendations of the Ministry of Finance, it has been changed and adopted as it is now. PPP Law sets forth only the general principles of PPP Contract award and high-level requirements to tender procedures. Implementation of PPP projects falls under the scope of regulation of PPL. The study of PPL shows that the current regulatory framework has been developed to regulate the traditional public procurement sector (procurement of works, services, and goods). As a result, due to the current unclear regulations in PPL to the extent and in matters relevant to the requirements of PPP Law, the PPP projects may face many conceptual and implementational inappropriate and non-applicable provisions that make the implementation of a PPP project almost impossible. In the 2nd Chapter, I will discuss the specific provisions of the PPL that need to be amended for the successful implementation of PPP projects in Armenia.

CHAPTER 2. ARMENIAN PPP LEGISLATION: ANALYSIS OF THE FUNDAMENTAL LEGISLATIVE GAPS

Issues related to the Price and Procurement Subject

73. As I already discussed in the previous Chapter, PPP regulates and includes a chain of successive tasks, such as financing, design, building, and operating the specific project/infrastructure in a single long-term contract. In contrast, traditional procurement assumes the individualization of each of these tasks. Consequently, it requires private parties to deal with each of the tasks separately in terms of separate tenders and applicable procedures.
74. The subject matter of the PPL outlined in Article 1 does not fit the essence of the PPP projects. Article 1 of the PPL stipulates that the law regulates "…*the process of procuring goods, works and services…*". It should be amended, and a provision should be added stipulating that the PPL also regulates the procurement of a Facility and, therefore, the selection of a Private Partner under the PPP Law.
75. Article 2 of the PPL lacks any definition of PPP Contract, Private Partner selection procedures, Public Partner, Private Partner, PPP. So, it will be preferable to define those terms or to refer to the definitions presented in the PPP Law.
76. Furthermore, Article 2 (16) of the PPL defines the Subject of Procurement as "*goods, works or services to be purchased*." The given definition does not reflect the specificities of PPPs, as in the case of PPPs, the subject of procurement is the Project itself, which may include but not be limited to the goods, works or services. Moreover, a PPP Contract does not imply the procurement of goods, works or services, but rather, the granting of exclusive rights by the Public Authority, in exchange to which the Private Partner takes several responsibilities and develops the Facility. This Article should be amended, and the procurement of a Facility should be added as a Subject of Procurement explicitly defining that in PPP Projects "procurement" does not have the conventional meaning of "purchase" as it is in other cases.
77. Most of the time, PPP Projects do not have a procurement price. Instead, they have an estimated price, sometimes referred to as Project Cost, which may also have a cap. This cost is covered both by the Private Partner and the Government. Since the Government covers only a part of the Project Cost, PPP Law lacks any definition of procurement price. Instead, Article 2(1)(16) of the PPP Law defines the *Permissible limit of PPP liabilities*, which is the maximum

permissible limit of the Contingent Liabilities of RA under PPP Contract. The Government adopts the methodology for the calculation and assessment of the Contingent Liabilities. Therefore, the PPL should precisely define that the price for the PPP projects is the permissible limit of PPP liabilities approved by the Government. Therefore, the PPL should stipulate not only the procurement price but also concepts of PPP Project cost and permissible limit of PPP liabilities.

78. Article 2 (1)(16) defines the *Procurement Subject* as "*means goods, works or services to be purchased*," whereas, as I already discussed in point 74, the PPP Project is neither good or work nor service. The Procurement subject in PPP Projects is the *right* to build-operate-transfer or build-own-operate-transfer the Facility. Therefore, it is logical to define that the Public Party obtains a Facility as a result of the implementation of a PPP Project.

Planning issues

79. According to Article 15 of the PPL, *"The state procurement process begins with planning, which is the design of the procurement plan."* The logic of PPP Law is that a PPP Project should comply with the public investment management policy. The PPL lacks any provision regarding the interaction between the procurement plan and public investment management policy. From the implementation point of view, it is also impossible to meet the requirements of PPL regarding the procurement plan, as I have already discussed, to define the subject of procurement and procurement price without the proposed amendments in paragraphs 76 and 77.
80. Requirements of Article 15 (4) of the PPL make the implementation of PPP procedures for projects involving construction (basically, for absolute majority of PPPs) impossible. In particular, the mentioned paragraph states: "*Financial resources for the procurement of construction works shall be earmarked based on the design documents approved and having passed an expert examination, under the prescribed procedure. Where no design documents are available, financial resources for the procurement of construction works may not be earmarked."* However, in the case of PPP Projects in the field of construction, documentation design is itself a part of the Project. Therefore, this Article directly contradicts the essence of PPP Projects and hinders the implementation of PPP Projects in the construction sector.

81. The same approach continues in the Government decree N 526-Ն (2017). In particular, Clause 19 (2) provides that *"Procurement of project documentation development, expertise, designer and technical supervision services necessary for the implementation of construction projects are carried out by the body(s) developing and implementing the policy of the Government of RA in the construction sector, but the construction projects (construction works) are procured by those state administration bodies, which or subordinate organizations of which, use the property concerned."*
82. Article 15 (7) of the PPL stipulates: "*The contracting authority shall assume financial obligations under the contract, only where financial allocations required for carrying out that procurement are earmarked, and only within the framework of those allocations*." In the case of a PPP Project, it is practically impossible to calculate and plan the amount of allocations and, therefore, undertake liabilities only within it. In PPP Projects, these allocations are considered as Contingent Liabilities calculation and evaluation methodology of which, according to the PPP Law, should be provided by the Government.
83. Article 15 (8) of PPL makes it impossible to obtain allocations from the state budget because of its stipulation that "*Financial resources for carrying out procurement shall be earmarked under relevant items of economic classification of budget expenditures for the acquisition of goods, works and services*." As I have already mentioned, since in PPP Projects, the subject is not good, work or service, it is impossible to give their economic classifications. Therefore, in addition to the suggested amendment referred to in point 76, the economic classification of Facility procurement should also be given.

Procurement Procedures, Pre-qualification and Direct Negotiations

84. Article 18 of the PPL stipulates procurement procedures. However, international practice indicates that the only working method for PPP procurement is tender. So, the PPL should precisely specify that the procedures for PPPs are only tender or two-stage tender.
85. According to existing regulation, it is not clear when precisely the pre-qualification stage shall be organized[42]. In particular, the analysis of PPL shows that the organization of the pre-

[42] *The purpose of pre-qualification stage in PPP projects is to have the possibility to include in the bidding process only those bidders that appear to be technically, commercially and financially capable of carrying out the PPP in an adequate manner.*

qualification stage is obligatory in the case of two-stage tender (Article 19) and closed tender (Article 21[43]). At the same time, it can be inferred from the wording of Article 24 of PPL that the organization of the pre-qualification stage for remaining procedures falls under the discretion of the public party. No exact guidelines are suggesting in which cases the pre-qualification stage shall be organized.

86. PPL stipulates that the two-stage tender is envisaged for cases where the customer (Government, municipality, etc.) allows the participants to submit alternate proposals on the possible characteristics of the procurement subject. Another example is the state negotiates with the participants for clarifying the features of the subject matter of the procurement. Whereas, in the case of PPP projects, the pre-qualification stage is required to select the most appropriate participants for the project implementation and only pre-qualified bidders, who are professionally and technically compliant with the Public Partner's requirements can bid. Another difference is that there are no negotiations during the pre-qualification stage of PPP projects.
87. Clause 68 of the Government decree N 526-Ն (2017) provides that "…*the pre-qualification stage is organized in cases of (i) two-stage tender, (ii) closed targeted tender, (iii) closed periodic tender, (iv) price quotation for tenders including state secret, (v) for procurement of consultancy services via open tender or closed targeted tender*." However, it would be preferable to amend the PPL and stipulates that the pre-qualification stage is a mandatory tender stage in the case of PPPs.
88. According to Article 23 of PPL, organizing procurement through direct negotiations can be invoked in limited cases. Those cases are as follows:
    - Article 23 (1) (1) regards to copyright and adjacent rights, unique or exclusive rights as a prerequisite of application of direct negotiation for procurement procedure.
    - Article 23 (1) (2) sets out Force Majeure cases.
    - Article 23(1)(3) allows single-source transactions only if there is an initial contract (the Price of the further procurement shall not include 10% of the initial Price), Article 23(1)(4) sets out the AMD 1 million thresholds (which is not possible to be calculated in case of PPPs),
    - Article 23(1)(5) allows a single-source procurement if it is made outside of Armenia.

[43] *Closed tender shall be used, where the procurement process contains a state secret.*

89. However, the PPP Projects require a rather extensive list of applicability of direct negotiations for PPP Projects. In particular, the direct negotiations may be invoked in (i) in case of PPP Projects based on an unsolicited proposal, (ii) for reasons of national defense and/or national security and/or other strategic interests of the state; (iii) in cases when there is only one available source realistically capable of creating the required Facility and/or providing the necessary public service (e.g. in the case of patented technology or unique know-how).
90. The PPP Law does not address the issue of direct negotiations. As a result, implementation of PPP Projects through direct negotiations is under question at this point as well, given the fact that Article 15 of the new PPP Law provides that the PPP Contract is signed with the winning bidder. In the case of direct negotiations, a winning bidder does not exist.
91. Therefore, it would be preferable to set out rather an extensive list of applicability of direct negotiations for PPP Projects. Direct negotiations should be allowed in cases presented in Paragraph 89 and in exceptional cases upon the Government decree.

Issues related to Bundling

92. Article 25(2) of the PPL prohibits grouping of items with different descriptions under one lot, except for cases when the contracting authority substantiates the necessity of such grouping. The specificity of a PPP Project is that it may involve a combination of several activities, such as design-construction-operation, and only one tender is organized (Private Partner selection) for obtaining the Project, and only one contract is concluded. In PPP Projects, such combination is quite common and is called bundling. The international practice shows that it allows organizing the implementation of a PPP Project in the most effective and cost-efficient manner. Nevertheless, it is not clear from the regulation of the Article 25 of the PPL whether the application of PPP Projects can be carried out through grouping without any additional justification, which may give rise to subjective approaches to the rule and additional risks.

Determination of the Winning Bid

93. The main criterion for determining the winning bid is the proposed price under the PPL. Article 34 (2) stipulates: "*The bidder ranked the first shall be determined:*

- *from among the bidders having submitted bids evaluated as satisfactory by the principle of giving preference to the bidder having submitted the lowest price proposal; or*

- *by the method of selecting the bidder, the total sum of coefficients given to the price proposal and the non-price criteria thereof is the highest*."

94. Clause 96 of the Government decree N 526-Ն (2017) provides the calculation method, and again we see that 70% coefficient is given to the price criteria.
95. When dealing with PPPs, the concept of VfM is used instead of the lowest bid price. The compliant proposal that offers the best VfM should be selected. Although it is still possible to use the lowest price approach to evaluating PPPs, however, the evaluation needs to be set up accordingly to make sure quality/quantity and risk are duly considered.
96. Value for Money is the cost advantages and benefits of undertaking a project through PPP procurement vs government standard procurement. The VfM analysis will provide the Government with data on how the public sector standard procurement process compares with adopting any form of PPP as the procurement method. VfM is achieved through private sector efficiency and the appropriate Project Risk Allocation between the government and the private sector.

Contract Security

97. Article 35 of the PPL stipulates *contract security* provisions. Contract security requirements for PPP Projects should be set out for each PPP separately, following the financial model of the PPP Project. Moreover, contract security can be considered as both a prerequisite for contract conclusion and precondition for the entry into force of an already executed contract. However, according to provisions of this Article, contract security is only a prerequisite for concluding the contract.

Contingent Liabilities

98. According to PPP Law, PPPs may involve Contingent Liabilities for the Public Authority, which should be Fiscally Affordable.
99. As a rule, the Government includes the amount of Contingent Liability in the budget only in the period they are certain to become due. Therefore, first, there is a need for a comprehensive methodology on the assessment of the fiscal effect of PPP transactions, as well as accounting/reporting of such liabilities, which is unfortunately absent in Armenian legislation.

100. Moreover, under the cash-based budget accounting system, Contingent Liabilities are not accounted for in the State Budget. The Government recognizes payment under Contingent Liability only after a triggering event. However, the international practice encourages public disclosure of Contingent Liabilities to understand real Government exposure.

101. Government liabilities are a measure of fiscal risk. Contingent Liabilities, whether explicit or implicit, can affect the government's fiscal position and, therefore, its capacity to meet its spending obligations. Parliament and the civil society organizations should ask governments to include information on the purposed and potential fiscal impact of Contingent Liabilities in budget reports, and they could carry out their analysis of the rationale and potential impact of such liabilities on the allocation of scarce budget resources. In this sense, comprehensive information on government liabilities is key to understanding and assessing the level of fiscal risk that a government faces and thus should be reported publicly[44].

102. The IMF recommends that information on Contingent Liabilities should be included in budget documents, describing their significance and nature. Such information should include the policy rationale behind the government's choice to provide a specific guarantee, their total amount, their intended beneficiaries, and the likelihood that the liability will, in fact, be incurred. Quantitative estimates of their potential fiscal impact should be published, as well[45].

Unsolicited Proposals

103. Both PPP Law and PPL lack any regulation on USPs. However, it was included in the very first draft of PPP Law stipulating that a private initiator may develop and submit an unsolicited proposal on implementation of PPP to the competent body authorized to evaluate such proposals. If the responsible body passes a resolution to implement a PPP on other terms, it shall negotiate in respect of such terms with the private initiator. It shall either decide to enforce the PPP on the negotiated terms or a decision against implementing the PPP. Following a decision to implement the PPP, the Public Partner shall post the summary of the proposal of the private initiator, along with the draft PPP Contract, on the official website of the Public Partner and request any third parties to submit their expressions of interest in the Project. If no

[44] *International Budget Partnership: The Open Budget Initiative – Guide to Transparency in Public Finance: Contingent Liabilities.*

[45] *International Monetary Fund. Manual on Fiscal Transparency (2007). Washington, D.C.: International Monetary Fund. (esp. pp. 77-79) http://www.imf.org/external/np/pp/2007/eng/051507m.pdf*

third parties submit any expressions of interest within the timescale specified for doing so in the PPP procedures, the Public Partner shall enter into the PPP Contract with the private initiator. If a third party submits its expression of interest within the above period, the Public Partner shall organize proceedings under the law. If as a result of the proceedings it is resolved that the Public Partner shall conclude the PPP Contract with a Private Partner other than the private initiator, then such partner shall compensate the private initiator's reasonable, justified and adequately documented costs incurred in connection with the development and submission of its unsolicited proposal.

104. At the initial stage of the PPP development, especially in developing countries, business expresses active interest in participation in PPP Projects through submission of USPs[46]. There is a common opinion that the PPP proposals prepared by the governments are suited to meet the public interests, whereas the USPs are not (a lot of such examples could be found in the Guidelines[47]). Nevertheless, it is worth mentioning that it is not so always, as there are many cases in developing countries where PPP proposals prepared by the public authorities do not meet those interests as well.

105. There is also a belief that USPs have more commercial nature and are not socially attractive in contrast with PPP proposals prepared by the Public Authority. Nevertheless, I should mention that this is not necessarily so. Business usually understands PPP Projects better due to its commercial nature. Business is more focused on providing the public with services that have high demand and are commercially feasible.

106. Another point against the USPs is the fiscal sustainability of a PPP Project. In both cases, the analysis of the fiscal sustainability of a Project should be performed. For public authorities, it might be easier but only in instances where the relevant state bodies possess highly qualified staff, which is not so in most of the developing country cases. But at the same time, this risk may be avoided if the government sets clear fiscal criteria for the PPP proposals, which will be considered by a private party while developing the proposal.

107. As another negative characteristic of USPs is mentioned competitive advantages of the USP initiator over the rest of the bidders. Nevertheless, it is not always so, as the only technical

[46] *Opinion · Unsolicited Proposals for PPPs in Developing https://epppl.lexxion.eu/article/EPPPL/2019/2/8*

[47] *Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects (Volume 1,11,111) - World Bank Group, PPIAF*

proposal of the USP is used for the tender, and the other participants have the same opportunities to win.

108. Another mentioned problem with the PPP proposal is the high transaction costs. Public proposals are designed using public funding, whereas the private party finances the USPs. Moreover, international experience shows that due to comprehensive knowledge and skills accumulated in the private sector, spending the own money of the business for the development of USP transaction costs of the private sector is significantly lower.

109. Taking into consideration all the issues mentioned above regarding the interaction between PPL and PPP Law, I believe that the best solution in this situation is to provide a separate chapter in the PPL on the PPP project. This Chapter will stipulate all the procedures regarding Private Partner selection. Notably, Article 3 of the PPL should be supplemented and specify that a distinct section of the PPL shall govern the selection of private partners in connection with PPP Projects. Other provisions of the PPL shall apply to the Private Partner selection procedures only in case a particular provision explicitly refers to it.

Draft Law on Amendments to the Law of the RA on Public-Private Partnership

110. On April 28th, the Ministry of Economy published a Draft Law on Amendments to the Law of RA on Public-Private Partnership (Draft) at e-draft.am. As a purpose of the Draft, the Ministry of Economy mentioned the following considerations:

- PPL doesn't clearly define the Procurement Subject of the PPP process;
- PPL provides that an estimated cost should be provided in the budget for the implementation of the procurement, which is not applicable for PPP tenders;
- Only public administration bodies and local self-governance bodies can be a contracting authority.

111. It also refers that the current PPP system has been evaluated both from the institutional (independence) and applicability perspectives by experts from the World Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the Organization for Economic Co-operation and Development, the EU SIGMA program, and representatives of state government bodies and Armenian National Interests Fund. As a result of discussions, a joint position has been reached. The consensus is the need to envisage the selection procedures of the Private Partner within the framework of the PPP Law.

112. In this section of my paper, I will present my thoughts and remark about the Draft.

113. The draft proposes to add new 24.6 and 24.7 points to Article 24 of the PPP Law, stipulating winning bid selection principles on the *qualification* stage, which are (i) quality and value-based selection, and (ii) value-based selection. Simultaneously, Article 14.6 (4) of the Draft stipulates that the mentioned principles apply to the tender generally. It continues in Article 14.6 (5) that the preferable way of tender evaluation shall be the quality- and value-based selection. This may lead to some misreading. Therefore, points 24.6 and 24.7 should be harmonized with Article 14.6 (4) of the draft.

114. Moreover, as already mentioned in points 93 to 96, VfM should be the main and the decisive factor for the bid selection. Therefore, it would be advisable to add a provision stipulating that in case of using both the principles mentioned above, the selected bid should also provide the highest VfM.

115. Article 9.1 (4) of the Draft stipulates PPP Contract management as a procedure of the PPP Project. Nevertheless, neither the Draft nor the PPP Law defines what is meant by PPP Contract management, how and who should implement it.

116. Article 14 (1) of the Draft stipulates the Private Partner selection principles. While all the listed principles are vague, Clause 14 (1) (4) stipulates the flexibility of the selection procedure. It is very unclear what flexibility means in the context of the Private Partner selection procedure.

117. Article 14.1 (1) stipulates the list of persons that shall not have the right to participate in the Private Partner selection process. The provided list would be easily verifiable if all the bidders are local companies while it seems not so easy in case of foreign bidders. Even if the foreign applicants proclaim that none of the provisions is applicable to them, it would be challenging, time and resource-consuming or even impossible for the PPP Unit to check the data accuracy. The PPP Unit might request the foreign bidders to present confirmations and evidence from the authorities of the specific country, but that will be a discriminatory approach towards the foreign bidders as it will create an additional burden of document submission.

118. Article 14.3 of the Draft stipulates that "*In case of a discovery of an illegal deed of the applicant or its governing body representative during the process of the Private Partner selection, the competent Government Authority shall inform in a written form the law enforcement agencies, on the day of such discovery.*" The consequences of such a deed are

unclear. I think it should at least stipulate that such participants should be deprived of the right to further participate in the process.

119. Article 14.4 of the Draft stipulates the language of the process. It stipulates that "*the documents related to the Private Partner selection process shall be prepared and published in Armenian, and the pre-qualification announcement – also in Russian and English.*" This means that the invitation to participate in the qualification stage shall be only in Armenian unless a fee is charged for the provision of the invitation in English or Russian. Simultaneously, it sets out that the bids can be submitted in English or Russian but necessarily accompanied by an Armenian version.

120. Taking into consideration the fact that presumably, the vast majority of the process participants will be foreign companies, I would consider this provision to be overburdening for the foreign participant. This Article can be applicable in case of local procurements when all the participants are Armenian companies or Armenian establishments of the foreign companies but not in case off PPP project procurement. My approach is that all the documents shall be prepared and published in Armenian, Russian and English, and the applications should be accepted in any of the three languages. I think language should not be an extra burden for the procedure participants.

121. Article 14.7 (4) stipulates that the evaluation committee members and the secretary shall be obliged to maintain the confidentiality of the information submitted through the bids during the whole term of the committee activities. However, the Draft does not stipulate provisions on the applicable sanctions in case of a breach of this provision.

122. The provisions of Article 14.7 (5) and 14.7 (6) replicate the same provisions used in the state procurement legislation. However, in the case of the state procurement procedures, the evaluation commission secretary is a natural person, not a unit. Therefore, the provisions such as family members, relatives, companies established by the secretary, etc. apply only to a natural person and cannot be applied to the PPP Unit.

123. Article 14.13 (4) stipulates: "*If, as a result of the negotiations, the parties fail to conclude a PPP Contract on terms acceptable to the parties, the negotiating group, may, with the agreement of the Prime Minister of the Republic of Armenia, terminate the negotiations and to invite the next ranking bidder to negotiations for concluding a PPP Contract.*" I see some risks in this provision. For instance, we can have a case where the winning bidder regrets the

participation, changes its mind, and intentionally causes failure of the negotiations instead of refusing the conclusion of the contract. This way, it may avoid being included in the list of participants banned from the participation in Private Partner selection procedures in future.

124. The Draft does not refer at all to the requirements and procedures of receiving the envelopes, their registration, provision of a receipt if necessary. Also, no provisions are listing the mandatory information that should be included in or stated on the envelope.

125. From the wording and the entire content of the Draft, it is evident that in the Private Partner selection procedure, the bids are delivered in hard copies in sealed envelopes. My approach is that the electronic sealed bid system would be a perfect alternative. A well-designed online bidding platform will allow reducing the human-factor to a possible minimum. Besides, it is both time and cost-effective. Firstly, the bidders will have the opportunity of preparing their bids for a longer time. For example, in the case of foreign companies, they have to make sure that they send the bid on time so that it will be delivered before the closing date. Otherwise, they must have someone in place who can deliver the bid on time, which is an additional cost. Secondly, hard copy submission has other disadvantages, such as the risk of no-delivery or late delivery due to unpredicted situations such as traffic, weather, unknown interfere of competitors or, as life showed us recently, lockdown due to a pandemic. Electronic submission of the bids will remove these risks. It can also provide the bidders with an electronic receipt of the documents. I would also like to mention environmental issues here because online submission reduces the use of paper and transportation. Therefore, it is more environmentally friendly.

126. The draft also lacks any consideration that the Privat Partner should be an SPV. I have already discussed the role of an SPV in points 2 and 4. I think the PPP Law should have provisions on how after winning a bid, Private Partner should establish an SPV and how the contractual obligations and financial resources will be passed to that SPV. I do not suggest that the bidder establishes an SPV and participates in the Private Partner selection procedure via the SPV, as a newly established SPV has no chances to meet all the requirements presented in the PPP Law and the Draft. Therefore, the most logical approach would be defining the procedure on how the SPV comes into relations and becomes a party.

CONCLUSION

127. Summarizing the findings, observations and respective law analyses presented under the relevant chapters of this Master Paper, we can conclude that PPP is a complex process of financing, building and operating projects for delivery of new or upgraded Facilities with private finance participation. Thus, the massive infrastructure deficit, public budget limitations are the main factors that make governments seek cooperation with the private sector for procuring necessary Facilities.

128. As I already discussed, there is no universal definition of PPP, and each government has its approach to the projects that can be considered as a PPP. The approach is mainly depending on the legislative framework documentation of a specific country. But one thing is universal that PPP policies serve to define PPP as distinct from other forms of procurement. While these policies may or may not carry the force of law, they are an indication of the direction of the government.

129. Article 4 of the PPP Law stipulates that a PPP project must comply with all the mentioned criteria:

- have, pursuant to a PPP Contract, at least five years duration, which is calculated from the day of fulfilment of all conditions precedent for the entry into force of a PPP Contract;
- be aimed at construction and/or improvement and/or operation and/or technical maintenance of public infrastructure;
- ensure allocation of risks between a Public Partner and a Private Partner, pursuant to the PPP procedures;
- ensure economic return for the Republic of Armenia, i. e. have Economic Internal Rate of Return, which will exceed the base rate prescribed by the PPP procedures;
- comply with the priorities prescribed by the public investment management policy adopted by the Government;
- be Fiscally Affordable;
- have VfM greater than zero, where applicable.

130. In Armenia, the first attempt to have a distinct law was made back in 2011, but the draft law was never adopted. In 2017, the Government re-affirmed, as a matter of policy, the need to have a distinct law on public-private partnerships. Thus, the process of drafting a Law on PPP

was kickstarted again in 2017. In the same year, the PPP Policy statement has been adopted by the Government, which described the essential characteristics of PPPs, PPP Contract types, stages of PPP Project implementation, appraisal of projects, institutional arrangements as well as contract monitoring, oversight reporting and evaluation.

131. With the adoption of the Policy Statement, the Government committed to developing a coherent, systematic approach to PPPs and a robust basis for implementing them in Armenia. The Government's goal was for the strengths and resources of the private sector to be mobilized in the most favourable ways, consistent with the best international practice where possible, to contribute to the economic and social development of Armenia.

132. The current Government continued this policy. In June 2019, the PPP Law was adopted by the Parliament of the RA and came into force on January 1st, 2020.

133. Although the PPP Law came into force, it sets forth only the general principles of PPP Contract award and high-level requirements to tender procedures. Implementation of PPP Projects falls under the scope of regulation of PPL. The study of PPL presented in Chapter 2 shows that the current regulatory framework has been developed to regulate the traditional public procurement sector (procurement of works, services, and goods). As a result, due to the current unclear regulations in PPL, the PPP Projects face many conceptual and implementational inappropriate and non-applicable provisions that make the implementation of a PPP Project almost impossible. The need for legislative amendments is obvious.

134. Although the Ministry of Economy presented a Draft law on Amendments to the PPP Law, unfortunately, it does not cover or solve the problems related to the legislative framework of PPP in the Republic of Armenia.

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