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# Due Diligence Checklist

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Here are some key issues that will need to be considered regarding legal and institutional enabling environment of a country - governments need to ensure that the legal and institutional framework is clear and fair - this will also be of interest to possible investors.

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**Government Organization**

- What institutions are involved in the approval and award of PPP Projects?
- What role are any existing PPP units playing?
- Is there a clear process for identifying, carrying out outline business case study/ pre-feasibility and feasibility studies, appraising, hiring transaction advisors, choosing procurement process and approving PPP Projects?
- Where there is government support in the form of viability gap fund, subsidy or other, will additional approvals be required?
- Is there a mechanism for government oversight and tracking of direct and contingent liabilities undertaken by government?
- Monitoring and Regulation of PPP Projects post financial close – will this be sole responsibility of line ministries or will there be a central agency involved also?
- Regulation - if the PPP project is in a regulated sector, what will the interface with regulatory authority be? Will there be potential regulatory risk on revenues to the operator?

**Procurement**

- Fair and transparent process
- PPPs are different from traditionally procured projects – how, if at all, will process differ? What entities are involved in procurement process alongside line ministry?
- Is there a standard set of bidding documents for ppps
- What about unsolicited bids? Is there clear mechanism to move these to the mainstream of project appraisal and competitive bidding?
- For more, visit Procurement Laws

**Tariff Setting/ Funding Constraints**

- If some projects involve the private sector charging end users for service, is this permitted under law/ sector laws? Are there limits on charging? Can private sector cut off a supply of a utility for non-payment?
- Are there regulators/ other bodies that will set tariffs or be involved in tariff setting process to be charged to end users?
- Are there subsidies in place/ can government grant subsidies – are there limitations on this?
- For more, read Tariff Settings and Funding Constraints

**Lender Issues**

- Taking Security – is it possible to take security over assets, current and future income streams, bank accounts, shares, insurance policies?
- Is it possible to be named on insurance policy as a lender?
- Step-in Rights – can lenders be granted step in rights to step in where project is in trouble? Are direct agreements between lenders and sub-contractors possible?
- What forms of Government Support are available/ permissible?
    - Does the law allow the Government to issue guarantees to a private party? If so, what approvals are required?
    - Can Government grant subsidies?
    - Is there possibility of a fund or a line of credit that might be made available for project development and or supporting the implementation of the project? If so, what is the process for accessing this?

**Land/Environmental and Social Issues**

- What type of land rights can be assigned to private sector – especially regarding public assets?
- Are there rules regarding ownership of assets on public land and when it passed to public ownership?
- What environmental laws are in place? Is there clear framework for enforcement and clear allocation of liabilities and penalties?
- Are there processes to be followed to ensure environmental and social safeguards?

**Restrictions on Foreign Investors/Currency Exchange Controls**

- Can foreigners hold shares in/ control local companies?
- Can foreign company hold interest over public assets?
- Are there currency exchange controls?
- Are there limitations on repatriation of profits/ capital investment?

**Labor Law/Employment Issues**

- A key issue particularly where there are existing assets of facilities that are to be taken over by the private sector is
- What is to happen to public sector employees,
- How they will be transferred if at all to the private sector and
- What happens to them at the end of the contract period.
- Are there requirements in the law to employ local staff? Are there limitations on foreign staff?
- For more, visit Labor Law/Employment Issues

**Dispute Resolution Systems Available**

- Is an objective and proven mechanism for resolving disputes available to the parties to the PPP project? Can it be demonstrated that the courts are fair, independent and efficient and that the rule of law is upheld?
- What alternative dispute mechanisms and forums are available? - is it possible under the laws of [country] to use international arbitration and other forms of dispute resolution and also that the courts if asked to enforce foreign arbitral awards are required to do so- i.e. whether [country] is a signatory to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, and if so, whether the local courts recognized this properly
- For more, visit Dispute Resolution Systems Available

**Sovereign Immunity**

Can granting authority claim sovereign immunity from being sued, prosecution and enforcement. If so, can the public entity:

- waive such immunity under contract,
- agree not to invoke such immunity and/ or
- acknowledge that actions taken under the project agreement do not constitute sovereign acts.

**Regulated sectors**

- what are the powers of the regulator?
- If regulator can set tariffs and this results in a lower return for private sector, can private sector seek redress?
- Can private sector appeal against regulatory decisions?

**Contract Law - Limitations on Freedom of Contract**

- are there implied terms in the law that could have an impact on PPP projects?

**Insolvency Laws**

- What is the insolvency regime if the private party or the public sector was in difficulty?
- Would secured lenders have priority claims over other creditors?
- For more, read Insolvency Laws

**Insurance**

- Are there restrictions in law on type of insurance that is available?
- Limitations on terms of insurance?
- Restrictions on assignment of insurance proceeds?
- Restrictions on right to endorse policy in favor of lenders?
- Find more about at Insurance

**Taxation**

- What is taxation regime?
- Does the government have the flexibility to apply special tax regimes/ grant exemptions for specific projects?
- For more, read Taxes and Taxation Issues.

**Standards and Public Liability**

- Environmental and other standards such as construction standards

**Health and Safety Laws**

- Are there laws that could impact construction/ services/ employees?
- Find more at Health and Safety Laws

**Related Content**

- **Guidelines & Tools**

- **Benchmarking**
- **Checklists for Key Legal/ Drafting Issues in PPPs and sample clauses**
- **Sample PPP Clauses**
- **TORs for Advisors**
- **Welcome to ChatPPP!**

**Additional Resources**

- Laws and Regulations
- Due Diligence Process in Asset Recycling
- Selected World Bank Tools

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