

Tariff Setting and Funding Constraints

Full Description

The operator and any other investors or lenders will want to ensure the stability of income from the PPP project and, where relevant, the expected return on capital and new investment.

If the income is coming from a single offtaker, such as the government or a utility, then the legal issues associated with the revenue stream may be limited. More complex issues arise where the operator or project company collects revenues directly from customers.

Listed below are some of the legal issues that may arise:

- is the tariff that the operator is allowed to charge set by a regulator or other third party? If so, the regulator may not be permitted to or wish to fetter its discretion in setting tariffs. If the regulator sets a tariff that does not allow the expected return of the operator, how is the operator to be compensated? Is there a right at law for the operator to be compensated for the lost expected revenues? Is it possible for the awarding authority to agree by contract to compensate the operator for the difference? Can the operator bring a legal challenge against the regulator for its decision?
- even where the awarding authority guarantees a tariff level in the contract, and there is no regulatory tariff setting at the inception of the contract, a regulator may be introduced at a later stage. Is there flexibility in the legal environment to allow for this? Will this need to be captured in the contract? In such event, the issues raised in the previous bullet will be relevant.
- does the law prohibit the operator as a private entity from collecting tariffs from consumers? If so, can the operator collect tariff as agent of the awarding authority?
- does the law prohibit the operator from enforcing collection of tariffs? If so, can the operator do so as agent of the awarding authority?
- can the operator impose sanctions on defaulting customers such as the right to charge default interest, levy fines or even cut the customer off from access to the service?
- do penalties charged for breach of contract or lack of performance need to have some specific relationship with the level of actual damages to be incurred? Do the courts have a right to revise the level of penalties or sanctions agreed in a contract? Can penalties and sanctions be passed through to the consumer tariff?
- what limitations apply to the government's ability to pay bonuses to the project company for good performance? Do the courts have a right to revise the level of bonuses agreed in a contract? Can bonuses be passed through to the consumer tariffs?
- is the project company entitled to disconnect or convert illegal connections? Can they impose fines for failure to pay, or must they resort to actions for breach of contract (a generally more costly and time consuming effort)?

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