

The Sultanate of Oman's Legislation on 3 P

By

Laurent Richer

Professor of Public Law (emeritus)

Sorbonne Law School

Senior Partner, Richer & Assoc. - Droit Public, LLP

&

Rami F. Saad¹

Phd in Arbitration in administrative Contracts

Sorbonne Law School

Of-Counsel Oman, Richer & Assoc. - Droit Public, LLP

1. - While the Sultanate of Oman was the first GCC member state to use a public private partnership to carry out a project (Al-Manah independent power project in 1994), it was not until 2019 that it adopted general legislation on the subject. New legislation was probably not essential to allow the development of the partnership, since it had already been used in the energy and water sectors (IPPs / IWPPs), but its adoption has been a signal in a very difficult economic context, dominated by the requirement of diversifying resources. Thus, the question is how to create a legal framework that generates enough security to encourage the participation of foreign capital. One of the objectives of the legislation relating to public economic contracts is the same worldwide: reassure the banks!

2. - The new texts to be discussed are the Royal Decree n°54/2019 (with legislative value) Establishing the Public Authority for Privatization and Partnership and Promulgating its System, and the Royal Decree 52/2019 Promulgating the Public Private Partnership Law. They were supplemented by an executive regulation n°3/2020, adopted by the PAPP on April 22, 2020 which deals with the procedures, the rules of incorporation of the Project Company, control over it and administrative remedies.

3. - The particularity of the laws and decrees adopted by Sultan Qaboos at the end of 2019, in the last year of his reign, is due to its extremely broad field of application. Indeed, the heart of the system is constituted by the creation of an authority endowed with a serious “**strike force**”, the Public Authority for Privatization and Partnership (**PAPP**) which, as its name indicates, is competent to both privatization and public-private partnership. The connection

¹ Dr. Rami F Saad, works in the Sultanate of Oman as Senior Legal Counsel to Genetco LLC. (WJ Towell Group), and Certified arbitrator by the GCC commercial Arbitration Centre and member of the ASA. Dr. Saad is also a certified Corporate Governance Practitioner member of the ACGP- UK.

between privatization and partnership can be explained by the objective pursued, which is to encourage the arrival of private investors, but, apart from that, the two mechanisms differ profoundly: privatization is characterized by the sale by the state or a state owned entity of existing assets and their entry into the private sector, while the partnership corresponds to the creation of assets which are public or intended to become public, and whose management must be the subject of monitoring over a long period. In each case there is a contribution of private capital, but they are processed through entirely different methods since the funds invested in privatization come to feed the state budget, while those in a partnership are allowed to be put “off the books” as an investment, but have in return charges for the state, competent public body and/or users/taxpayers.

The connection made by Omani legislation between privatization and partnership poses the risk of confusing these two very distinct concepts², but the risk of reaction of an opinion hostile to privatizations is less sensitive in the Omani context than in Western countries.

The Public Authority for Privatization and Partnership (PAPP)

4. - The attribution of the two fields of competence to the same authority is therefore far from imposing itself; it is a political choice consisting in setting up a single authority in charge of the preparation and execution of measures corresponding to one of the major objectives of the Vision 2040 program (<https://www.2040.om/en/oman-vision-2040/themes/economy-and-development/>). This objective is **“Creating Wealth through Economic Diversification and Private Sector Partnership”**.

5. – To this end, the authority has very broad missions and powers. Article 5 of Decree 54/2019 Establishing the Public Authority for Privatization and Partnership and Promulgating its System gives it the following mission:

“1° Encourage public-private partnership and expand the role of the private sector in investing in the PAPP projects.

2°. Contribute to the development of the national economy, the enhancement of the local added value and the diversification of the income sources.

3°. Contribute to the capacity building of Omani citizens and increasing their employment opportunities.

4°. Contribute to increasing the market and competitive strength, and the development of the capital market”.

Encouraging partnerships is therefore only the first mission, supplemented by three economic policy missions. At first glance, these general missions go beyond the development of partnership and privatization, and involve much more varied interventions, but this is not confirmed by the following article which defines the

² See, for example: Conference Board of Canada, *Dispelling the Myths: A Pan-Canadian Assessment of Public-Private Partnerships for Infrastructure Investments*, January 2010, which responds to the criticisms addressed to the "3 Ps" by its adversaries, including the criticism of privatization.

powers of the authority. It appears from paragraphs 1 and 2 of article 6 that its powers are only exercised by the Authority in the context of operations linked to partnerships or privatizations. Article 5 §§ 2 to 4 therefore defines the framework in which the operations carried out by the Authority must stay.

6. - The same applies to the powers mentioned in § 3 of article 6 in relation to the Tawazun Program (common with the UAE), which only concerns the defense sector: the Authority is responsible for contributing to the implementation of this program common to the CCG States on the occasion of the conclusion of contracts within the framework of a partnership or privatization operation.

However, these operations are considered to be one of the most important instruments of expected economic change. The Authority therefore has a major political role and cannot be assimilated, with regard to its powers in matters of partnership, to one of these "PPP units", independent structures which have been created in almost all the countries with "PPP regulations"³.

7. - The model of these units is supplied by the United Kingdom, where a non-governmental organization specializing in PPP projects called Partnerships UK was created in 1999 (<http://www.partnershipsuk.org.uk/>), and which assists the British Treasury and the private sector in the negotiation and execution of projects. The mission of these independent structures can only be to provide logistical support and, in particular, to help test the character of general interest. However, the units are also sometimes in charge of launching projects and/or encouraging the use of partnerships, which risks compromising their objectivity, according to the OECD⁴.

8. - The PAPP only partially fits into this classical scheme. Admittedly, a tribute is paid to this design by article II of decree 54/2019 according to which: "The Public Authority for Privatization and Partnership shall have a legal personality and financial and administrative independence", but the perusing of the statute of the Authority shows that this independence is not actual.

According to article I of decree 54/2019 it is "established under the Council of Ministers" and according to article 6 of the second part of the same decree it will "Execute the government policies geared to promote the national economy by implementing the PAPP projects".

The control by the government is confirmed by the existence of powers of approval of the Council of Ministers (e.g. on resources) or the Minister of Finance (e.g. on the launching of each PPP project, the setting of fees for services rendered).

³ cf. A. Sanghi, A. Sundakov, D. Hankinson « Conception et utilisation des unités PPP dans le secteur des infrastructures », *Gridlines*, n°27, septembre 2007 (<http://www.ppiarf.org/>)

⁴ OECD *Public-Private Partnerships: In Pursuit of Risk Sharing and Value for Money*, June 2008, p. 108 sS.

In addition, it was the Minister of Trade and Industry who was appointed chairman of the PAPP's board of directors, with said board of directors being appointed by the council of ministers and made up of senior officials.

The PAPP is therefore an agency of the government and not an independent administrative authority, despite its legal personality.

9. - This insertion in the administrative hierarchy is a choice of organization, which does not raise any problem by itself. The lack of independence of an authority is only open to criticism when there is a risk of a regulator being taken over by economic operators or an issue of protection of fundamental rights. This is not the case here, but the fact remains that this situation is not without consequences for the functions of the PAPP and, in particular, for the exercise of its prior evaluation mission.

The preliminary evaluation

10. - Almost all the PPP legislations provide for a preliminary assessment stage⁵. This peculiarity is due to two reasons; one of form, the other of substance.

11. - The formal reason is the complexity of the implementation and the transaction costs linked to the partnership contract, which implies that the decision to use it is based on a comparison with lesser transaction costs consuming methods of procurement.

12. - The basic and most important reason is the risk of irrational use of the partnership. Governments may be tempted to use it under conditions that make it a "time bomb", i.e. for purely financial reasons⁶. The OECD recalls that "The rationale for procuring via PPP is not to avoid these costs but rather to lower them by achieving optimal value for money". With regard to this recommendation, we can be reserved on article 6-Second-3 of decree 54/2019 which assigns as an objective that PAPP, through the partnership will "Reduce the financial burden on the general State budget in financing the infrastructure and public utilities projects". It is therefore important to have an evaluation based on a rational and independent socio-economic analysis. For this reason, it is preferable that this analysis comes from a separate body from the contractor and that this body is not at the same time responsible for promoting the partnership. On this last point, the example of France - before a reform in 2016 – showed the dangers of combination of promotion of partnership and evaluation: in several cases the MAPP (government service responsible for assisting the competent bodies)

⁵ Thus in Great Britain, from the beginnings of the PFI, an evaluation was required with regard to traditional methods. This is the Public Sector Comparator (PSC). It plays a central role in Australia, Canada, the Netherlands, South Africa and Japan (cf. OECD Report, 2008, p. 72 et seq.; J. Leigand and C. Shugart "Is the public sector comparator right for developing countries?" Gridlines, n°4, April 2006).

⁶ OECD *quoted above*, footnote 4; & *OCDE Public-Private Partnerships in the Middle East and North Africa. A Handbook for Policy Makers*, 2013.

delivered opinions favorable to the signing of a partnership contract, but subsequently the administrative courts held that the conditions laid down by law were not fulfilled.

13. - In the case of Oman the decrees of 2019 do not expressly provide for a prior assessment phase, but this necessarily exists and article 8 of decree 52/2019 sets out that a regulation adopted by the PAPP will indicate how it will "undertake the necessary evaluation for the partnership project". We have noticed that the PAPP has, among other missions, that of encouraging the PPP (art. 5 Dec. 54/2019), which risks undermining the objectivity of its preliminary evaluation. However, this risk is limited by the supervision provided for in the decision to use the partnership.

14. - The initiative for a PPP project belongs to the competent authority (ministry, public establishment, etc.) but it is the PAPP that gives the "approval of the floating and announcement of the partnership projects" (art. 10-6 Dec. 54/2019). For this purpose, it has fairly large freedom since it is also it defines the approval criteria (id. Art. 10-4). Nevertheless, these criteria must fall within the framework of article 4 of decree 52/2019 Promulgating the Public Private Partnership Law according to which "*It is not permitted for a competent body to conclude partnership contracts in application of the provisions of this law except if the partnership project has an economic or social return and is in line with the strategy of the Sultanate and its development plan*".

The notion of "economic or social return" encompasses the cost/benefit balance of the PSC (see footnote 5), but goes beyond it and leaves a wide margin of appreciation, albeit the link to the plan must be taken into account.

The plan in question is currently the ninth five-year plan provided for in the program "Vision 2020 strategy" (replaced by "Vision 2040"). This plan, approved by decree 1/2006, defines national priorities and annual amounts of investments; projects are retained after examination by the Supreme Council for Planning.

Article 4 of Decree 52/2019 does not seem to go so far as to require that the project be included in the development plan, but the obligation to be "in line" with the plan has two consequences.

Firstly, the project must contribute to the implementation of the plan which has defined objectives (health, education, employment of citizens, etc.) and priority intervention sectors (manufacturing sector, transport and logistics, tourism, mining, fishing).

Secondly, the assessment made of the "economic or social return" must conform to the definitions given by the plan of these notions:

« The economic return shall be defined based on the share of the sector in the GDP, provision of employment opportunities, contribution to economic diversification, in addition to awarding priority for programs related to the promising economic sectors.

The social return shall be defined based on the contribution level of these projects to human development, building of national capabilities of youth, provision of social needs for all citizens, and development of services and expansion of scope of e-government services". (The 9th Five-

Year Development Plan (2016-2020) Moving Towards Economic Diversification Policy and Coping with Change, <https://www.scp.gov.om/PDF/NinthfiveyearplanEnglish.pdf>, p.78).

15. - In this context, the regulations define the content of the prior assessment. The provisions in question are rather surprising.

Article 7 of Decree 52/2019 admits that anyone can propose an idea for a PPP; but the principle is that the initiative rests with the competent authority.

The implementing regulation reverses this order by giving priority to private initiative PPP: the second chapter of the regulation devotes 8 articles out of 13 on this subject (art. 3 to 10) and the rules applicable to the prior assessment are defined by reference to the PPP on private idea.

The said evaluation is the responsibility of the author of the idea. It is up to the author to first present a feasibility study, and then, if the proposal is accepted by PAPP in coordination with the competent authority, to establish the actual evaluation which must relate to the economic and technical aspects defined in the Article 6, including the "comparative cost", i.e. "the estimated total cost of implementing a partnership project through partnership with the private sector compared to the total cost of its implementation by the government".

If the idea is retained, a specific contract is signed with its author, relating in particular, to intellectual rights. However, but this does not exempt said author from putting the project in competition according to normal procedures.

It is only at the end of the chapter and by reference that the evaluation of a project of public origin is regulated. In this case it is the PAPP which carries out a preliminary study. Afterwards, if the project is selected, it establishes in agreement with the competent authority a prior evaluation; the content of which is defined by reference to the provisions relating to the assessment by the author of a PPP idea.

The necessary studies can and will certainly be entrusted to consultants. The regulations define the procedure for contracting with consultants, which includes a prior qualification phase (entry in a register) followed by a call for tenders.

The award procedure

16. - With regard to the award procedure, decree 52/2019 lays down the main rules and refers to a regulation and guidelines adopted by the PAPP to go into more detail. The purpose of this regulation is to define "the rules and procedures relating to floating, award, submission of bids, opening of envelopes, documents, and information that must be included in each envelope, financial guarantees, the statutory periods to respond to bidders, and other rules and procedures "(art. 5). The regulation must also indicate how to deal with spontaneous proposals (art. 7). But the provisions of the decree alone make it possible to have a fairly precise idea of the procedure and, first of all, of the role of the PAPP.

17. - Once the decision to initiate a partnership contract procedure has been taken, the role of the PAPP does not stop. A peculiarity of its status is that it is very involved in the choice of participants and award of contracts, which has the effect of drawing important limits of the autonomy of the competent body.

The decree organizes a real "co-awarding" which goes far beyond assistance.

Article 9 of Decree 52/2019 gives PAPP the task of preparing the consultation documents "in coordination with the competent body". Still "in coordination" with the competent body, it is also the PAPP which assesses applications and offers (art. 11) and which, at the end of the procedure, approves the contract (Dec. 54/2019, art. 10-10).

The procedure must, in accordance with universal standards, respect "the principles of transparency, publicity, equal opportunity, non-discrimination, and free competition".

18. - The presupposition of the decree seems to be that the principle procedure is the formal tendering procedure without negotiation. This is implied by the fact that the decree admits negotiation only in a limited way, at the end of the procedure (art. 12). However in the case of defense contracts falling in the scope of the Tawazun program a specific solution is adopted by decree 54/2019 (art. 6): the PAPP negotiates "in parallel" with the negotiation of the rest of the contract and in coordination with the competent body the conditions for implementing the Tawazun program, which seems to imply that the rest of the contract is also negotiated, but it is perhaps linked to the specificity of defense contracts.

In favor of the competitive tendering requirement principle, the decree presents the possibility of using competitive dialogue as an exception linked to the "special nature" of partnership projects (or at least of most of them). "Special nature" refers to the complexity of the partnership contract, a complexity due to both the technical project and the multidimensional contractual arrangement⁷.

Complexity has the consequence of making it difficult, if not impossible, to define *a priori* a complete set of specifications, which makes it necessary to work jointly with the candidates, enabled by competitive dialogue. It should be noted, however, that in practice (especially in France), even in this context, it often happens that the administration imposes from the outset most of the clauses of the contract, particularly regarding the allocation of risks, which prevents a truly competitive dialogue.

19. - The implementing regulations specify the award procedures.

Like the decree, these give the competitive dialogue an exceptional character by reserving it for PPPs with a "special nature" without giving any details on this "nature".

The normal procedure is a procedure with negotiation. It comprises three phases, the management of which is entrusted to PAPP, without any provision being made at this stage for coordination with the competent authority. On the other hand, it is in coordination with the competent authority that the PAPP defines the specifications of the contract documents. The bidder must submit a financial offer separate from the technical offer. Offers are evaluated by the PAPP and it is also the PAPP who selects the winning bidder. Then a

⁷ Cf. S. Arrowsmith *The Law of Public and Utilities Procurement*, 3^e ed., 2014, Vol. 1, p. 859 sq.

negotiation takes place with the latter, who cannot refuse the elements announced at the outset as non-negotiable. The regulation also foresees solutions in the event of failure to negotiate with the winning bidder.

The contract clauses.

20. - The contract is concluded with a dedicated company (SPV), created by the successful tenderer, which is the norm in the case of project financing. As an exception to ordinary law, foreign partners may hold the entire capital of the SPV. But in all cases the law applicable to the contract is that of the Sultanate (art. 24 Dec. 52/2019). The implementing regulations provide details on the constitution and operation of the company; it also provides that the competent authority may oppose the conclusion of an important contract for the company on grounds of general interest. Decree 54/2019 contains interesting provisions regarding the content of the contract.

21. - To prevent omissions, the decree gives in its article 17 a list of subjects which must be treated in the contract. We note in particular that there must be a clause on the *“Risk allocation in the case of contractual imbalance due to change of law, unforeseeable event, or force majeure, and the principles for quantifying damages as the case may be”*, which does not prevent dealing with other types of risks. The duration, which cannot exceed 50 years, must also be specified. Compulsory clauses are also made that give the contract an unequal character in the general interest: the power of unilateral modification (17-10) and the power of unilateral termination (17-14) including consequences regarding compensation.

22. - Unilateral termination is only possible if the contract provides for it (art. 22). Alternately, the power of unilateral modification is enshrined in article 19 of Decree 54/2019 which generally recognizes it for the contracting body, subject to the approval of the PAPP and compensation. The modification can even relate to the price. We thus find the special rules justified by the general interest, which, in French law, characterizes the administrative contract. It is also possible to modify the contract by agreement between the parties (art. 18); the decree does not specify that the modification must not call into question the competitive bidding procedure, but this limit is necessarily imposed.

23. - The general interest is also the basis of the rules governing the assets concerned by the partnership contract. These assets are subject to a triple protection. The first protection consists in the prohibition of impounding the *“Establishments, devices, tools, machinery, equipment, or others that are used in the operation or use of the partnership*

project" (art. 21). This provision is very broad, and not limited to essential assets or necessary for the performance of the contract, which may cause some implementation problems.

The same uncertainty could be found with regard to the second protection, relating to the property at the end of the contract. Article 23 of the decree establishes a regime similar to that of "returnable assets" in French law by laying down the principle that "*the assets of the partnership project*" are transferred free of charge to the state", which leaves aside the case where the public body has a personality distinct from that of the state. However, article 23 stipulates that certain assets will remain at the company or will be transferred to the state with compensation, which may concern assets not yet depreciated.

A third protection results from inalienability. Section 26 prohibits the sale or mortgaging of the project land. It is, however, permitted to grant personal or rights *in rem*, including the mortgage, for the financing of the project after authorization by the PAPP. Besides the land, article 29 prohibits the sale of project assets except for replacement purposes and with the authorization of the PAPP.

24. - These general provisions apply regardless of the type of partnership contract. The law leaves the choice between two kinds of contract open. The first kind is the concession with "Revenue received by the private sector operator based on user charges", the second kind the "Availability type of PPP" in which "the private party's revenue consists mainly of payments made by the public authority" (OECD *Public-Private Partnerships in the Middle East and North Africa Report*, quoted footnote 6). Only one provision of the Omani rules seems more particularly to concern one of the two kinds, i.e. the concession: article 28 which lays down the principle of absolute equality of users.

Accountability and litigation

25. - The role of the PAPP is less important at the stage of the exercise of control and the power of sanction, even if its intervention is not entirely absent.

Thus, article 20 provides for the possibility of take-over by the competent body, with the approval of the PAPP; Article 30 makes a periodic report compulsory, a copy of which must be sent to the PAPP, which also has a general mission of *ex post* evaluation of partnerships (art. 6-2 Dec. 54/2019).

However, the competent body acts alone to exercise documentary and on-site control (art. 31, art. 32, art. 33, and art. 34). The legislator was aware, at this stage, of the limits of the intervention of the PAPP.

26. – The PAPP still finds a role in the event of litigation. It has a mission comparable to that of the Board of Contracts in the U.S., which examines disputes relating to the award of the contracts. Disputes arising from the performance may, for their part, be submitted to arbitration (art. 24 Dec. 54/2019) and it is to be expected that contracts will generally include an arbitration clause. There are no special rules about litigation before state courts.

27. - In conclusion, the legislation of the Sultanate has the advantage of including important provisions for the protection of the general interest while leaving open the options for drafting contracts, which is obviously fundamental for the financing and completion of projects. It raises, however, a concern related to the very wide scope of the missions assigned to PAPP as well as PPP and Privatization.