14. Challenging Case: Doraleh Container Terminal, Djibouti

Photo Credit[30]

Background

Djibouti is strategically located in the Horn of Africa between the Gulf of Aden and the Red Sea, and adjacent to the Suez Canal, one of the world's busiest shipping lanes. Djibouti Port serves as Djibouti's and landlocked Ethiopia's main seaport. To leverage this strategic opportunity and to diversify its port operations, the Djibouti government decided to build a new container terminal in Doraleh, a location just outside Djibouti City. It elected to pursue PPP to construct the new container terminal – the first-ever PPP in Djibouti.

Project Structure

The Djibouti government and Dubai Ports (DP) World, a Dubai-based, multinational port terminal operator, entered into a joint venture (JV) called the Doraleh Container Terminal SA (DCT). DCT is 67 percent owned by PAID (Port Autonome International de Djibouti – the old port of Djibouti authority) and 33 percent owned by DP World. The JV is responsible for the development, financing, design, construction, management, operation, and maintenance of the container terminal under a 30-year, Build-Operate-Transfer (BOT) PPP structure. The concession agreement came into effect in February 2004, with the option for two 10-year renewals. The agreement stipulated that the Djibouti government could not grant concessions for any other port and free zone facilities within Djibouti during the contract period. The contract also granted DCT the right to appoint most DCT board members, despite being a minority shareholder. This right allowed them to retain control of the JV's management and operations.

The total project cost was estimated at USD 396 million. Of this amount, USD 263 million was provided as debt from five banks: Bank of London and the Middle East, Dubai Islamic Bank, Islamic Development Bank, Standard Chartered Bank, and WestLB AG – with guarantees provided by the Multilateral Investment Guarantee Agency (MIGA) totaling USD 160 million. The main financing was provided under an Islamic, Sharia-compliant structure, with a 10-year tenure that included a two-year construction phase; with another USD 103 million provided by the African Development Bank and Proparco under a 10-year senior loan. The remaining investment cost was financed through equity. The project generates its revenue from terminal handling charges, while the government also receives income through import and export taxes.

The terminal, with an annual capacity of 1.5 million shipping containers, opened in 2009 and is estimated to have created around 10,000 direct and indirect jobs. It was regarded as Africa's most advanced container terminal, equipped with modern facilities offering world-class productivity of 34m/hour/crane average. It has been reported that the net income of the new terminal ranges between about USD 55 to 80 million per year.

Lessons Learned

In February 2018, the government of Djibouti unilaterally terminated the 30-year contract with DP World, stating that the move was needed to "save the country's sovereignty and economic independence." The government also accused DP World of bribing the head of PAID to get advantageous terms for the concession. Concurrently, the government of Djibouti took control of the terminal, forcing DP World employees to leave the country. It was reported that, in 2013 before termination, the Djibouti government sold 23.5 percent of PAID's shares to China Merchant Holding International (CMHI). Following the sale of these shares, PAID signed a deal with CMHI to build the new Doraleh Multipurpose Port, which opened in 2017.

[30] Skilla1st (https://commons.wikimedia.org/wiki/File:The_container_terminal_at_the_Port_of_Djibouti.jpg), https://creativecommons.org/licenses/by-sa/4.0/legalcode

[31] MTBS. "PPP project prospects in the African Indian Ocean ports: Opportunities for Value Optimization." Presentation for the 9th Indian Ocean Ports & Logistics Conference, White House, Rotterdam, January 22, 2015. Accessed January 25, 2019. http://www.transportevents.com/presentations/Mozambique2015/MTBS.pdf;

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Parks, Philip. 2010. "Case Study: Doraleh Container Terminal Djibouti IFC Ports PPP Seminar." Cairo, April, 2010. Accessed January 25, 2019. https://docplayer.net/35967682-Case-study-doraleh-container-terminal-djibouti.html; MIGA. n.d. "Project Djibouti: Doraleh Container Terminal S.A.R.L."Miga. Accessed May 27, 2019. https://www.miga.org/project/doraleh-container-terminal-sarl;

Following the unilateral termination, DP World commenced arbitration against Djibouti before the London Court of International Arbitration. DP World accused Djibouti of breaching the agreement by revoking DP World's exclusive rights and developing a partnership with CMHI on other port projects. DP World also denied the allegations of corruption, noting that the agreement was approved by the Djibouti parliament. The arbitral tribunal found in favor of DP World, finding that the contract with the government of Djibouti is still valid and binding. The Tribunal awarded DCT USD 385 million plus interest for Djibouti's breach of DCT's exclusive rights and another USD 148 million for historic non-payment of royalties, plus costs and fees incurred in arbitration. DP World is also pursuing litigation against CMHI before courts in Hong Kong SAR, China. A wholly publicly owned Djiboutian company called SGTD now runs the Doraleh Container Terminal.[31]

This project highlights why prospective private partners may express concerns over the possibility of expropriation when entering into PPPs, especially in emerging PPP markets where there is little or no past practice. The private partner to a PPP is likely to insist on robust, contractual protections in the event of such adverse government actions with equally reliable dispute-resolution mechanisms, including international arbitration, as well as assurances that any ensuing court or arbitral award is enforceable against the public partner. While the public partner to a PPP may have legitimate reasons to terminate the partnership early, the private partner needs to be sure its financial interests are protected in the event of such a decision.

Roads, Tunnels, and Bridges

15. Bundled Bridge Replacement, Pennsylvania, United States

Photo Credit[32]

Background
The State of Pennsylvania needed to replace a series of small bridges spread throughout the state. The Pennsylvania Department of Transportation (PennDOT) selected bridges based on the need for replacement and a set of deliverability considerations, including minimizing disruption to the public; minimizing changes to existing alignment; maintaining existing profiles; limiting impact to utilities, waterways, and other users; and minimizing environmental impacts. Through this process, more than 2,000 bridges were screened, and 558 were selected. PennDOT then aggregated the repair and maintenance of these bridges into a single PPP project under its old bridges' rehabilitation program. While the average investment cost for each individual bridge was estimated to be as low as USD 2 million, the aggregate project was large enough to attract serious investors and significant competition, which may not have been the case with multiple, smaller projects.

Project Structure
The winning bidder of PennDOT's public tender for the aggregated bridges project was Plenary Walsh Keystone Partners (PWKP), a consortium that includes companies specializing in large infrastructure projects and local construction companies. The resulting PPP agreement has a duration of 28 years, with 42 months of construction, 25 years of contracted maintenance, and an estimated value of USD 1.1 billion. Other key stakeholders in the project include the local governments where the bridges are located.

The project is financed through a combination of tax-exempt Private Activity Bonds (PABs)[33]

World Bank. 2013. *Transport and Logistics in Djibouti: Contribution to Job Creation and Economic Diversification.* Washington, D.C.: World Bank Group. Accessed May 27, 2019. https://openknowledge.worldbank.org/handle/10986/13245?show=full&locale-attribute=en;

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32 Photo in the public domain published by Nyttend https://commons.wikimedia.org/wiki/File:Arroyo_Bridge_replacement.jpg

33 PABs are tax-exempt debt instruments allocated by the U.S. Department of Transportation (DoT) to qualifying authorities, for projects that leverage private investment. The aggregate amount of tax-exempt bonds that can be allocated by the DoT is capped at USD 15 billion. The aim of the PAB facility is to attract greater private sector investment in transportation infrastructure by reducing the cost of capital for eligible projects by providing tax-exempt debt instruments.