

The New Health PPP Law In Turkey

15 March 2013

Introduction

The Turkish health sector has recently undergone major reforms, which were initiated by the adoption of the Health Transformation Program by the Ministry of Health ("MoH") in 2003. The construction and renovation of integrated health facilities through the public private partnership ("PPP") model constituted a crucial part of such reform package. Since 2009, the MoH has been conducting tenders and contract negotiations for 18 health PPP projects with an estimated investment in the amount of approximately USD 5 billion. These projects are currently at different stages varying from pre-qualification to financing.

Some of such health PPP projects have been challenged before the courts by a group of NGOs and individuals. In July 2012, the Turkish Supreme Administrative Court (the Council of State or *Danıştay*) rendered an injunction relief decision in some of such lawsuits, suspending the implementation of the projects.

The Turkish Parliament has recently enacted Law No. 6428 Concerning the Construction of Facilities, Renovation of Existing Facilities and Purchasing Service by the Ministry of Health by Public Private Partnership Model¹ (the "**New Law**"), effective as of 9 March 2013, with the aim of ensuring continuance of the pending health PPP projects by remedying the deficiencies determined in the Council of State's July 2012 injunction relief decision mentioned above and amending certain other provisions of the existing legislation to provide further support and stronger legal ground for health PPP projects. Pursuant to the New Law, the MoH is required to issue a regulation setting forth the principles and procedures of implementation of the New Law within six months from its effective date of 9 March 2013.

A. Provisions of the new law which aim to ensure continuance of pending projects

Prior to the enactment of the New Law, the main legislation governing health PPP projects consisted of Supplemental Article 7 of Health Services Basic Law No. 3359² (the "**Repealed Law**") and the Regulation Regarding Construction of Health Facilities in Return of Leasing and Renewal of such Facilities in Return of Operation of the Services other than the Medical Services³ (the "**Repealed Regulation**").

1. Commercial Areas Outside the Health Facility Campus

For some health PPP projects, it was envisaged that certain areas outside the health facility campus (on which there are currently other health facilities) would be demolished and allocated to the project company to perform commercial activities. The Council of State has concluded by its July 2012 decision that such allocation was contrary to the then existing legislation and thus suspended the implementation of the relevant tenders. The New Law stipulates that the terms of the tender specifications regarding such allocation will be deemed invalid, and the MoH will proceed with the pending projects without making such allocation.

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¹ Published in the Official Gazette No. 28582 dated 9 March 2013.

² Published in the Official Gazette No. 19461 dated 15 May 1987.

³ Published in the Official Gazette No. 26236 dated 22 July 2006.

2. Unconstitutionality Claim

The Council of State stated in its July 2012 decision that the Repealed Law transferred the legislative power of the Parliament to the Council of Ministers by giving it unlimited authority to regulate the details of the health PPP projects, such as the details of the tender process and scope of the project agreement. The Council of State decided that the unconstitutionality claim regarding the Repealed Law is a serious claim and should be decided upon by the Constitutional Court and therefore sent this claim to the Constitutional Court on 6 July 2012. Accordingly, the New Law also aims to prevent the possible adverse consequences of such unconstitutionality claim on pending projects. Hence, the New Law incorporated most of the provisions which were covered by the Repealed Regulation, such as principles and procedures applicable to the tenders and the scope of the project agreement.

B. Provisions of the new law which amend the tender process and the project agreement

The New Law further amends the provisions applicable to the tender process and the project agreement of a health PPP project as follows:

1. Project Agreement

a. Term of the Project Agreement

The term of the project agreement to be signed between the MoH and the project company (a maximum of 49 years under the Repealed Regulation) has been brought down to a maximum of 30 years plus an investment period.

b. Payments under the Project Agreement

Pursuant to the Repealed Regulation, payments under the project agreement were required to be made from the working capital of (a) the related health facilities or (b) working capital of the Central Accountancy of Ministry Working Capital. The Repealed Regulation also provided that payments were under the guarantee of the MoH. Pursuant to the New Law, these amounts shall now be paid from the working capital of the MoH and/or central management budget. The central management budget consists of the budget allocated for MoH pursuant to the Central Budget Law published each year. Therefore, although the MoH guarantee is not explicitly stated in the New Law, payments under the project agreement should be deemed to be subject to the MoH guarantee by virtue of the provisions of the Central Budget Law and general principles of administrative law. The New Law also envisages the possibility of debt assumption by the Treasury, explained in Section B.2 below.

c. Termination of the Project Agreement

The Repealed Regulation provided that the MoH could terminate the project agreement if the project company failed to perform its obligations and did not remedy the situation within the grace period provided by the MoH. However, the New Law brings more sophisticated termination provisions which function as follows:

- Regarding agreements on construction works: should the contractor not fulfill its obligations, the Administration shall provide a reasonable time for remedy and the situation shall be notified by MoH to the lenders providing the financing.
 - During the construction period, should the contractor not fulfill its obligations in the grace period, the MoH and lenders shall be entitled to change the contractor's shareholding structure. If the shareholding structure cannot be changed or the obligations cannot be performed despite such change, the MoH shall terminate the project agreement.
 - During the operation period, should the contractor not fulfill its obligations in the grace period, the services shall then be obtained from third parties by a bargaining method and the service fee shall be deducted from the amount to be paid to the contractor. If health services are not able to be provided this shall be notified to the contractor as soon as possible and the services shall then be purchased in the name and account of the contractor. The right of the MOH and lenders to change the contractor's shareholding structure shall also be reserved.
- Regarding agreements on renovation, research/development and consultancy services: should the contractor not fulfill its obligations, the Administration shall provide a reasonable time for remedy. If the contractor does not fulfill its obligations in such grace period, the project agreement shall be terminated. If health services are not able to be provided the project agreement shall be terminated immediately.

2. Debt Assumption by the State Treasury

Law No. 4749 Concerning Public Financing and Debt Management⁴ was amended in June 2012 to provide the possibility of debt assumption by the Treasury for health PPP projects. The Council of Ministers was authorized to decide on the Treasury's assumption of the project company's debts to foreign lenders upon termination of the project agreement by the MoH. The New Law now changes the applicability criteria of such debt assumption and makes it available to more projects. Firstly, it reduces the investment amount threshold from one billion Turkish Liras to five hundred million Turkish Liras. Secondly, the New Law makes this mechanism available to already tendered projects as well since it removes the requirement for such projects to receive the affirmative opinion of the Treasury for debt assumption prior to the preparation of the tender specifications.

⁴ Published in the Official Gazette No. 24721 dated 9 April 2002.

In accordance with the New Law, debt assumption may also be partial. Also, the maximum limit of the debt assumption shall be determined by the Central Budget Law of the relevant year and the Council of Ministers is authorized to double such limit under the New Law. However, such provisions of the New Law regarding partial assumption and debt assumption limits are not applicable to projects which were already tendered before the New Law went into effect.

3. Tax Incentive

Under the New Law, all transactions conducted between the MoH and the project company during the investment period are exempt from stamp tax under Stamp Tax Law No. 488⁵ as well as any duties under Duties Law No. 492.⁶ This exemption was limited by a maximum period of 36 months under the Repealed Regulation which has now been removed.

4. Contractor Requirements

The New Law provides that bidders shall provide a bid bond and a performance bond, both in the minimum amount of 3% of the total investment or bid before the execution of the project agreement. The only difference in this requirement under the Repealed Regulation was that the 3% bid bond amount was a fixed percentage. Additionally, the New Law envisages that the contractor shall provide an operation period bond in the amount of 1.5% of the total investment or bid upon completion of construction and prior to commencement of operation.

Under the Repealed Regulation, the minimum equity of the contractor was 20% of the *total fixed investment amount stated in the project agreement*. Under the New Law, the minimum equity of the contractor shall not be less than 20% of the *periodical investment amount determined in the project agreement during the investment period*.

⁵ Published in the Official Gazette No. 11751 dated 11 July 1964.

⁶ Published in the Official Gazette No. 11756 dated 17 July 1964.

As a new requirement, the New Law provides that at least 20% of the medical equipment in the scope of the investment be domestically manufactured. The domestic manufacturing percentage and conditions regarding domestic products shall be regulated under the tender specifications.

5. Application of the New Law to Current Health PPP Projects

Pursuant to the New Law, tender processes commenced prior to the effectiveness of the New Law shall be concluded in accordance with their tender specifications. This is true except for Article 3(7) of the New Law regarding the tender method and process which shall be applicable starting from the existing stage of the relevant project. Please see Sections A.1 and B.2 above for exceptions on the application of provisions regarding commercial areas and debt assumptions.

Conclusion

The New Law is certainly a positive step towards solving certain legal problems that the pending health PPP projects have encountered (i.e., legal challenges and recent Council of State decisions), as well as strengthening the bankability of projects by, for example, extending the applicability of a debt assumption. It is also important in the sense that the New Law is a clear demonstration of the political will for these projects. However, its impact upon pending projects remains to be seen in practice and once the MoH issues the above-mentioned implementing regulation.