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## Information Note on Construction and Renewal of Healthcare Facilities through Public Private Partnership Model

Turkey, being one of the fastest growing economies in the world, aims to be one of the ten biggest global economies with more than 500 billion USD of export and generating 2 trillion USD of national revenue by 2023. With these ambitious targets, Turkey needs to make significant infrastructural investments in many of its public service areas, such as transportation, education, energy, health, etc. Since the public resources are limited and the government is willing to benefit from the specific expertise of the private sector, the Public Private Partnership (“PPP”) Model has become a common method for procuring such investments.

With respect to the use of PPP model in relation to healthcare services, such PPP model was previously shaped under the supplementary Article 7 of the Health Services Law numbered 3359 (“**Law No 3359**”) and the Regulation on the Building of Health Facilities in Exchange for Leasing and Renewal of the Areas and Services Outside the Areas for Medical Services in the Facilities in Exchange for Leasing” (the “**Regulation**”). Based on the Law No 3359 and the Regulation, the Ministry of Health has held holding a significant number of tenders, the details of which may be found as follows:

Concluded Tenders (13.005 beds in total)	Negotiation Phase (11.895 beds in total)	Tendering Phase (2.970 beds in total)	Submitted to Approval of HPC (7.815 beds in total)	To be Submitted to Approval of HPC (8.950 beds in total)
Kayseri	Manisa	Isparta	İstanbul Üsküdar	Antalya
Ankara Etilik	Konya	Kocaeli	İstanbul Bakırköy	Diyarbakır Kayapınar
Ankara Bilkent	Mersin	Eskişehir	Samsun	Diyarbakır Yenişehir
Elazığ	Bursa		İzmir Güney	Kahramanmaraş
İstanbul İkitelli	Adana		Şanlıurfa	Bolu
Yozgat	Gaziantep		Tekirdağ	İstanbul Sancaktepe
	İzmir Bayraklı		Denizli	İstanbul FSM
			Ankara Sincan	Manisa
			Trabzon Fatih	Aydın
				İstanbul Erenköy
				Ordu

The Council of State, however, has issued a stay order for the tender processes relating to Ankara Etilik, Ankara Bilkent and Elazığ Healthcare PPP projects. That was because the Council of State is of the view that, under the said tenders, the contractors may not be granted with the right to commercially operate the areas which do not have any connection with the “health facility concept” (such as certain parking lots, hotels, restaurants, etc.). The Council of State has also brought an action for the annulment of the supplementary article 7 of the Law before the Constitutional Court due to the fact that supplementary article 7 of the Law grants the administrative body an exceedingly broad regulatory power on a wide range of issues (such as tender procedures or the scope of the implementation contract) which would normally be regulated by the legislative body.

Following these developments, the Ministry of Health has accelerated its studies to establish a more coherent and comprehensive legal framework regulating healthcare PPP projects. In this respect, The Law on Construction and Renewal of Facilities and Provision of Services through Public Private Partnership Model numbered 6428 (“**PPP Law**”) has been entered into force on 9 March 2013 which sets out the procedures and principles for the construction and renewal of the healthcare facilities under PPP Model.

The PPP Law can be analyzed under three main categories, namely (i) the construction and renewal of healthcare service and provision of related services; (ii) the procedures and principles regulating the tender; and (iii) the agreement between the administration and the appointed company.

## **1. The PPP Law**

### **1.1. Construction and Renewal of Healthcare Services and Provision of related Services**

Under the PPP Law, a healthcare facility may be constructed by a private sector investor through a public tender under the PPP model in return for a consideration to be determined in the implementation contract (“**IC**”). Other than such greenfield projects, the Ministry may also award the renewal of an existing healthcare facility to a private sector investor in accordance with the procedures and principles set out under the PPP Law.

In addition to the consideration to be paid by the administration to the appointed company under the IC, the contractor may also be granted the right to operate certain services and the commercial service areas in the facility. The PPP Law categorizes the commercial services area into two groups, namely mandatory and voluntary commercial service areas without defining them in greater detail. However, as indicated above, the Council of State in its previous decisions ruled that the operation of commercial areas that are not in connection with the “healthcare facility concept” cannot be granted to a private investor through a public tender. Thus, we believe such terms will, and should, be further defined in a secondary legislation to be prepared by the Ministry.

The construction of the facilities will be made on the properties owned by the Treasury by way of establishing a right of construction in favor of the private investor. It is not crystal clear whether a pledge may be granted on such right of construction; however, under certain circumstances; one may reasonably argue that this right of construction may be pledged in favor of the banks as a part of the security package under the general principles of the Turkish Civil Code.

Finally, it is worthy to note that the tender for the construction work can only be held after the project is approved and the administration is authorized by the High Planning Council (“**HPC**”).

### **1.2. Procedures and Principles Governing the Tender**

The PPP Law has its own tender procedure and it is further clarified that the acts and transactions to be made under the PPP Law are not subject to the State Procurement Law no. 2886 or Public Procurement Law no. 4734. Therefore, the healthcare PPP tenders will be held only in accordance with the procedures and principles set out under the PPP Law.

First, it should be stated that during the course of the tenders, the administration will be under the obligation to ensure the transparency, competition, equal treatment, credibility, confidentiality, public control and efficient usage of the public resources. As a general rule, the bid that provides maximum benefit with minimum expense with regard to the work quality in each project will be considered as the most advantageous bid.

As to the tender procedures, the tender for the renewal and construction of the healthcare facilities may be held under (i) open tender procedure, (ii) tender among predetermined bidders or (iii) negotiation procedure. Under the open tender procedure, all concerned parties may submit their bids, whereas under the tender among predetermined bidders, only the bidders who are invited at the end of a preliminary qualification process may submit their proposals to the tendering committee. It is also noteworthy that, the PPP Law introduces, for the first time, a new tender method, namely “auction by underbidding” under the tender among predetermined bidders. According to this method, once all the bids are collected from the applicants under the tender procedure among predetermined bidders, the

administration requests the bidders to develop their projects to reach one single project for all the bidders. After this step, the bidders will be invited to an auction where they will be required to underbid to determine the lowest bid. Thus, the administration is given another method to determine the most economically advantageous offer.

In line with the general tender practice, the participants are required to deposit a bid bond in the amount of % 3 and a performance bond in the amount of %6 of the fixed investment or bid price. On a separate note, the PPP Law further stipulates that at least 20% of the medical instruments within the scope of the fixed investment have to be manufactured in Turkey.

## **1.3. The IC**

### **1.3.1. General Terms of the IC**

First of all, it is important to indicate that the IC will be subject to private law, enabling the contractor to have certain rights and entitlements towards the administration that it would not have got, had the IC been subject to the administrative law. The term of the IC may not exceed 30 years excluding the fixed investment period.

Under the PPP Law, it is stipulated that the contractor will be responsible for (i) project design and financing of the construction of the facility and commercial service areas; (ii) construction, maintenance and restoration; (iii) performance of the services left upon the contractor and the management of the commercial services areas; and (iv) delivery of the premises to the Ministry free from all debts and undertaking in a well-kept, running and in-service condition at the end of the term of the IC. With respect to the liability issue, it is specified that the contractor will be liable for all the damages that it may inflict upon third parties.

The PPP Law regulates that the contractor may transfer all its rights and obligations arising from the IC under the same conditions to another private law person upon consent of the administration. In case of such transfer, all other related agreements will also be transferred to the transferee. However, this provision, to our view, is somehow problematic, as “all other agreements” also include the agreements made with the loan agreement, O&M contract, EPC contract, etc. As one may notice, it seems that such agreements may also be transferred upon agreement between the contractor and the administration without need to obtain the consent of the lenders, operators, constructors, etc. We are not sure at this stage as to how this issue will be handled in the IC.

The IC will also include provisions regulating non-performance of the obligations of the contractor, the penalty clauses and the relevant compensation of damages that administration may suffer. Similarly, the IC will also regulate the non-payment of the consideration by the administration and the default interests which may arise as a result of such failure.

At the end of the term of the IC, the premises will automatically be transferred to the Ministry free from all debts and undertaking in a well-kept, running and operable condition.

On a final note, all legal disputes arising out of or in connection with the execution of the IC will, in principle, be resolved by the courts of Republic of Turkey. However, the parties may also agree to resolve the matter in accordance with the International Arbitration Law no. 4686, provided that Turkish law is chosen as the governing law of the agreement and the seat of arbitration is in Turkey.

### **1.3.2. Step-In Rights**

In parallel to classic build-operate-transfer projects, under the PPP Law, certain step-in rights have been granted to the lenders. However, to our view, they do not follow the same spirit as the step-in rights within the framework of classic BOT projects.

Under the PPP Law, if the contractor is unable to fulfill its undertakings during the investment or operation period or unable to meet performance criteria during the operation period, then after the elapse of a reasonable cure period, the lenders and the administration may agree on a change in the corporate structure of the appointed company to ensure the fulfillment of such undertakings. If such change in the corporate structure cannot be agreed, the administration may terminate the agreement.

As indicated above, this change in the corporate structure is not a classic replacement of the appointed company; but, rather, a replacement of the parents of such appointed company to ensure the continuity of the project. However, such a replacement of the parents of the appointed company would mean a compulsory transfer of shares by them to another person to be determined by the administration and the lenders. That being controversial under the Turkish law, we will see how it would be handled under the relevant ICs in the future.

### **1.3.3. Contract Value**

The PPP Law stipulates that the contract value and the operation period will be determined based on the following factors: (i) the essence of the investment and project; (ii) whether the equipment and medical devices will be provided by the contractor; (iii) the profit of the contractor; and (iv) whether the facility and the services and the commercial service areas will be operated by the contractor.

It is also indicated that prior to the completion of the construction work, no payment can be made by the administration to the contractor. However, the IC will regulate the partial acceptance by the administration in case the project is divided into phases.

### **1.3.4. Minimum Equity**

The contractor will be solely liable for the financing of the necessary works that are the subject matter of the IC. It is stipulated that the minimum equity amount that the contractor will provide for the construction works pursuant to the PPP Law cannot be less than %20 of the periodic investment amount determined for the investment period under the IC.

### **1.3.5. Exceptions**

All the transaction and documents executed between the administration and the contractor will be exempt from stamp tax duty, as well as any charges, provided that such exemption is limited with the investment period.

## **1.4. Debt Assumption by the Treasury**

According to the PPP Law, the healthcare PPP projects may enjoy from debt assumption mechanism in case the IC is terminated and the relevant facility is taken over by the administration before its term. Under the PPP Law, if the contract value of the project exceeds 500 million Turkish Liras and if the IC is terminated and the relevant facility is taken over by the administration before its term, the Council of Ministers is entitled to decide that the foreign loans will be assumed by the Treasury. This is one of the most important aspects of the PPP Law in terms of bankability of the healthcare PPP projects, in particular, from the foreign lenders' point of view.

## **2. Conclusion**

As indicated above, certain tenders have been stayed by the Council of State and the PPP Law provides certain comfort for such tenders as well. According to the PPP Law, the ongoing tenders will be completed in accordance with their own tender specifications. However, the administration may apply tender procedure among predetermined bidders to the ongoing tenders as of their current status.

Furthermore, it is stipulated that, with respect to the ongoing healthcare PPP projects, the provisions enabling the operation of commercial areas by the contractor will not apply and the operation of such areas will not be awarded to the contractors. Consequently, we believe that Ankara Bilkent, Ankara Etilik and Elazığ Healthcare PPP Projects will resume without the right to operate such commercial areas.

# Güner Law Office...

*Güner Law Office was established in 1996 and has since grown into one of the major corporate, M&A, banking, litigation, energy, TMT and capital markets practices in Turkey. The office is headed by Ece Güner.*

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