

Public-private partnerships in the healthcare sector

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Healthcare & Life Sciences Turkey

Introduction

In February 2014 Minister of Health Mehmet Müezzinoğlu made the following announcement:

"We aim to show the brand value of health in Turkey to the neighbouring region comprising a population of 1 billion; and increase healthcare tourism revenue from \$2.5 billion to \$10 billion in the next five years. Here we hope to succeed in establishing centres providing healthcare services to the people of our country and to our future by combining intelligence capital, investor capital, management capital and financing."

The government's proposed solution to achieve these aims is the public-private partnership (PPP) model.

Legal framework

The regulatory groundwork for PPPs in the healthcare sector was laid through the enactment of the Regulation on the Construction of New Healthcare Premises against Lease and the Renovation of Existing Healthcare Premises against Operation of Non-medical Services and Functional Areas of Activity, which was initially based on the additional Article 7 of the Principal Law on Health Services (3359). After Article 7 was repealed, the government established a new legal basis for the regulation. Now, all PPP projects in the healthcare sector are regulated by Law 6428 on the Construction of Facilities, Renovation of Existing Facilities and Purchasing Service by the Ministry of Health by Public-Private Partnership Model, which was recently amended on March 1 2014.

Law 6428 establishes the procedures through which the government will determine how to integrate third parties in the development of new healthcare facilities and the maintenance and modernisation of existing facilities. In accordance with the classic PPP model, the government takes the supervisory and regulatory role in these projects; the Ministry of Health and its affiliates, together with the Supreme Planning Council - which

consists of the prime minister and other ministers appointed by him - are the competent decision-making bodies.

As the only secondary legislation, the Regulation on the Construction of New Healthcare Premises against Lease and the Renovation of Existing Healthcare Premises against Operation of Non-medical Services and Functional Areas of Activity sets out more detailed rules on the tender procedures and the terminology applicable in healthcare PPP projects.

Financial support for PPPs

Financial institutions invariably seek alternative guarantees in order to secure the loans they provide for investment and will often reject credit applications for PPP projects due to the lack of such guarantees or meaningful government support.

In response to these deficiencies, the public sector has established a legal arrangement to encourage private investment in infrastructure projects. The government initially included a provision in the Law on Public Financing and Debt Undertaking and allowed the Undersecretariat of Treasury to provide credit undertakings. A new mechanism was subsequently introduced on April 19 2014, when the Regulation on Debt Assumption to be Undertaken by the Undersecretariat of Treasury was published in the *Official Gazette*. The relevant administrations may now provide debt undertaking covenants for PPP projects executed by the Ministry of Health under Law 6428 and worth at least TRY500 million, if there are provisions allowing the relevant administration to take over the facility by terminating the agreement before the end of its term.

The parties to this covenant will be the administrative authority that announces the tender and the creditor providing the credit to the project company. The administrative authority will inform the Treasury of the project for which it wishes to provide the treasury guarantee before announcing the project specifications. When a debt is undertaken, the receivables will be collected from that administrative authority. The Treasury will then assess the provisions governing the debt undertaking and the draft agreement, and provide an opinion accordingly. The covenant offer will then be submitted for resolution to the Council of Ministers. Once the Council of Ministers has issued a resolution, the covenant will be signed between the parties. However, the debt assumption agreement will not be published in the *Official Gazette*, in order to leave the

Treasury with a bargaining chip and protect the trade secrets of the credit agreements entered into by project companies.

The debt assumption amount provided by the Treasury will cover 85% of the principal loan amount in the event of termination of the PPP agreement due to default of the project company, and 100% of the principal loan amount together with all financing costs in case of termination of the PPP agreement due to reasons outside the control of the project company.

Where the main agreement is terminated, regardless of the cause, in order for the administration to assume the principal loan and default interest and any other financing costs, the project company must provide a joint and several surety to the Treasury in the amount of at least 10% of the highest repayment figure to be made to the creditor.

This regulation is important in that it provides comfort to project companies that are seeking loans from financial institutions due to liquidity shortages. However, it has also been criticised for increasing the financial burden on the Treasury.

Main points of PPP agreements

All projects are realised through tenders organised by the Ministry of Health (by way of open tender, invited tender or negotiated tender). The investor which is awarded the relevant tender will be entitled to conclude an agreement with the ministry for a certain period in order to complete the project. One essential element of the agreement is its term, given that investors will naturally wish to know when they will see a return on their investment and generate a substantial profit from the project. The term of the agreement is determined by the ministry and cannot exceed 30 years, excluding the fixed investment period. Proper specification of this term is important, since the facility, management and entire inventory will be transferred to the ownership of the relevant administrative authority at the end of this term.

Pursuant to the March 1 2014 legislative amendment, the parties may amend the agreement and its exhibits with the approval of the Ministry of Health, provided that the amount of the agreement does not change. The grounds specified as justification for the amendment of PPP agreements are as follows:

- A *force majeure* event, extraordinary situation or other event which affects the application of the agreement and its exhibits occurs; or

- The change is necessary to replace a clear, valid and enforceable provision of the agreement and its exhibits in relation to which a dispute has arisen.

If the work envisaged in construction projects may not be completed under the conditions foreseen in the agreement due to *force majeure*, an extraordinary situation or other reasons which cannot be attributed to the contractor, the amount of the agreement may be updated, taking into account the date on which the final offer was made, and necessary revisions may be made to the agreement with the approval of the minister of health.

Changing a party to the agreement by transferring the rights and obligations arising therefrom is subject to a different procedure. A private party may transfer its agreement to a third party with the approval of the Ministry of Health, provided that this third party fulfils all requirements and conditions formerly required during the tender procedure.

Law 6428 provides that the agreement will be subject to Turkish law and the Turkish courts will have jurisdiction over any disputes arising from the agreement. Arbitration may also be an option, but in such cases the governing law of the agreement will be Turkish law and the arbitration must take place in Turkey.

Expectations from project company

The main expectation from the project company is to provide the specified services in exchange for a reasonable fee. It is mandatory for the project company to establish a joint stock company, provide various securities and sustain equity capital in the amount indicated by law before commencing execution of the contract. The quality of medical devices and materials provided by the project company is also regulated by Law 6428; at least 20% of the medical equipment to be utilised in the project must further be supplied by local producers.

The consideration to be granted to the project company in return for its services consists of certain payments to be made by the authority during the term of the agreement. Exemptions from stamp duty and any fees arising from the Fees Act (492) during the term of the investment period are also considered financial benefits for investors in such projects.

Outlook

In a bid to attract alternative financial resources, Turkey has undergone a liberalisation process. In order to strengthen its financial position and obtain the requisite support from the private sector, the government has also decided to embrace the PPP model and has enacted the necessary legislation to facilitate this.

Given its strategic nature, the government has paid special attention to the healthcare sector and adopted specific legislation to establish a new legal basis for healthcare PPPs. The legislation is not without its drawbacks, as the rights and obligations of each party are not specified in detail. To address this deficiency, Law 6428 was recently amended to clarify the ambiguous provisions. That said, the amendment is still insufficient, as the law provides for the enactment of further secondary legislation which should shed further light on its shortcomings, such as the provision governing the extension of the contract period.

Additionally, according to the Strategic Plan for 2014 to 2018 published by the Turkish Public Hospitals Institution of the Ministry of Health, the government aims to increase the capacity of public hospitals through the construction of new buildings and the modernisation of existing facilities in the near future. For instance, it is planned that the number of beds in intensive care units will increase from 10,728 to 16,979 and the number of districts in which all qualified health services are offered increase from four to 29 by 2018. These goals may be realised through projects based on the PPP model, which are expected to afford innovative opportunities for private sector players. It remains to be seen whether PPP is the ideal model for procurement of services in the healthcare sector or ends up causing headaches for interested parties.

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