

KAZAKHSTAN'S HEALTH PPP PROGRAMME

IN THIS ARTICLE WE GIVE AN OVERVIEW OF KAZAKHSTAN'S PUBLIC-PRIVATE PARTNERSHIP (PPP) LAW AND ITS APPLICATION TO THE HEALTHCARE SECTOR IN KAZAKHSTAN. BY **AYESHA K WAHEED**, PARTNER, **ASEM BAKENOVA**, INTERNATIONAL PARTNER, **NUR-SULTAN**, AND **DANIYAR ZHUMAKHANOV**, ASSOCIATE, ALMATY, **MORGAN LEWIS**.

It is no surprise that developing countries around the world are focusing on improving the quality and efficiency of their healthcare sectors. The impact of the current Covid-19 crisis has served to highlight the stark disparity between the delivery of healthcare in developing economies compared with developed economies.

The public-private partnership concept was first introduced in Kazakhstan through the Law on Concession adopted in 2006. In an attempt to improve its legislative and institutional framework, Kazakhstan adopted the PPP Law¹ in 2015, which created the basis for implementing public-private partnerships in almost all sectors with limited exceptions, extended the list of PPP participants and the forms and types of PPP contracts, and introduced a private finance initiative.

As a result, there has been a significant increase in the number of PPP projects implemented over the last five years: while only 21 PPP agreements, for an aggregate amount of approximately US\$150,000, were entered into in the period 2003 to 2016, 588 PPP agreements, for an aggregate amount of approximately US\$3.75m, were signed during the period January 2017 through to February 2019. As of 5 March 2020, 1,475 PPP projects have been, or are in the process of being, implemented in Kazakhstan, of which approximately 20% are in the healthcare sector.²

Further development of the relevant legal framework has led to a number of recent amendments to the PPP Law leading to:

- Simplification of PPP planning via a reduction of PPP project planning stages;
- Provision of a long-term offtake/consumption guarantee by the state partner;
- Development of standard documentation aimed at saving time for all parties involved; and
- The launch of a unified database of PPP projects.

The PPP Law

The planning and execution of PPP projects is carried out in partnership with international investors and private partners selected on the basis of transparent international competitive procedures. Importantly, PPP regulation

in Kazakhstan generally reflects accepted international standards. Under the PPP Law, a public-private partnership has the following exclusive features:

- A relationship is established between the public and private partners by their entering into a PPP agreement;
- The PPP project is for a medium-term or long-term period, from three to 30 years, depending on the specifics of the project;
- There is joint participation by the public and the private partner in the implementation of the PPP project;
- Resources of the public and private partners are combined for the implementation of the PPP project; and
- Risks are shared between the parties based on which party is in the best position to manage the risk at a lower cost.

PPP project implementation is a fairly standard process, which includes:

- Development of an investment proposal by the public partner or a business plan for a PPP project by the private partner;
- Selection of the private partner; and
- Execution and implementation of the PPP agreement.

PPP projects can be implemented in any sector of the economy, except for those facilities that have been selected by the Kazakhstan Government as not being appropriate for PPPs, such as major water supply facilities, facilities of historical and cultural heritage, healthcare organisations engaged in blood services and HIV/AIDS prevention other than the acquisition of medical equipment and their maintenance.

There are two main types of PPPs:

- An institutional PPP, which envisages incorporation of a joint venture by state-controlled entity(ies) and private partner(s); and
- A contractual PPP, which can be implemented via a concession agreement, state property lease and trust management agreement, leasing agreement, life cycle contract³, service contract, etc. Certain of the contractual PPPs are governed by specific legal acts – for example, the Law of the Republic of Kazakhstan On Concessions.

Generally, the private partner is selected through a tender, which can be either a regular, or simplified, tender, or a two staged tender. In certain limited circumstances, the private partner may be selected by the relevant Ministry, for national PPP projects, or by local executive authority Akimat, for local PPP projects, by way of direct negotiations with the potential private partner.

The selection of the private partner through a tender process is made on the basis of the best bid, taking into consideration the following criteria:

- The amount of funds to be provided by the bidder for the purposes of implementation of the PPP project;
- The timelines provided by the bidder for the construction, reconstruction, modernisation and/or operation of the PPP facility;
- The bidder's technical and economic indicators for the PPP facility;
- The bidder's track record in successful completion of PPP projects; and
- The availability of qualified specialists.

Direct negotiations may apply where:

- The PPP project is initiated by a potential private partner in relation to an asset that it owns or for which it has a long-term lease; or
- The PPP project is inseparably linked to proprietary rights to intellectual property belonging to the potential private partner.

In case of direct negotiations there are procedures that must be followed before the PPP agreement is entered into, such as examination of the PPP project business plan and negotiations between the parties to the PPP agreement.

Standard tender documents

Kazakhstan law provides for standard tender documentation and a standard PPP agreement, in particular in respect to healthcare PPP projects for ambulatory and polyclinic infrastructure and services. Due to the standardisation of tender documentation and the PPP agreement, familiarisation by potential private-sector partners with such documentation can be useful for a general understanding of the expectations of the state partner.

Qualification criteria

The PPP Law sets out the qualification criteria applicable to a potential private partner participating in tenders or direct negotiations. These include minimum criteria for the private partner's legal capacity and solvency and availability of financial, material and labour resources.

Depending on the specifics of the PPP project, additional qualification criteria may apply. For example, potential private partners willing to implement healthcare PPP projects may be required to confirm the availability of maintenance centres in the Republic of Kazakhstan, the existence of an insurance contract for the PPP facility, and monitoring capabilities for integration into information databases of medical institution(s).

The state organiser of the tender process or direct negotiations is not entitled to add any qualification requirements in addition to those required under Kazakhstan law, and potential private partners have the right to not provide information that is beyond the qualification requirements set out under Kazakhstan law.

There are no specific qualification requirements or exemptions for foreign private partners compared with resident private partners. Non-resident private partners are required to submit the same documents or documents containing similar information.

If a potential private partner is found to have provided false information confirming compliance with qualification requirements, it may be subject to a three-year ban from participation in future PPP projects.

State support measures

While the specific support provided to a project will be tailored for each individual project, the PPP Law sets out the range of state support measures generally available to PPPs. Such measures include: land or other in-kind grants; engineering infrastructure for the project; state guarantees; co-financing; and consumption guarantees.

However, the aggregate amount of state support measures available to a PPP project may not exceed the cost of development of the PPP facility.

Financing

Based on the PPP Law, the following sources of financing can be used for implementation of a PPP project: the private partner's own funds; financing from third-party lenders; state budget funds; funds of quasi-public sector entities; and any other funds not prohibited by the laws of Kazakhstan.

Revenue sources

PPPs are able to generate revenue from a number of sources, including: income from the sale of goods – works, services – produced by the PPP facility or management fees and rental charges for use of the PPP facility; receipt of availability payments or state subsidies; and receipt of compensation for investment and/or operation costs from the state partner.

The specific terms and conditions of a PPP project's financing are set out in the PPP agreement but the amount of financing obtained, when aggregated with any state compensation for investment costs, is not permitted to exceed the cost of the development and construction of the PPP facility.

PPP agreement

The PPP agreement is a so-called combined contract, which embodies a number of different types of contracts such as contracts for the supply of equipment, execution of works and delivery of services, and operation and management.

The PPP agreement must contain certain provisions that are expressly stipulated by Kazakhstan Law, including information regarding the proprietary rights to the PPP facility, the scope and types of services to be provided under the agreement, the amount and terms and conditions of financing and investment, compensation of costs and state support measures, timeline of implementation of the PPP project, conditions and scope of development of the PPP facility, the rights and obligations of the parties, environmental obligations, currency risk mitigation measures if applicable, liability of the parties, and conditions concerning amendments to and termination of the agreement.

The maximum term of the PPP agreement, including any extensions, is 30 years. In certain circumstances, the term of a PPP agreement may be extended by a court decision, for example, in the case of a delay or suspension of the PPP project as a result of circumstances beyond the control of the parties to the PPP agreement, including due to force majeure.

Notably, an assignment or transfer of the private partner's rights or obligations, as well as any pledge of its rights under the PPP agreement, is only permitted with the prior written consent of the state partner.

If the private partner is a non-resident of Kazakhstan, the parties are permitted to agree to the selection of a foreign law as the governing law of the PPP agreement.

Direct agreement, step-in rights

A direct agreement with the project's lenders is only available for PPP projects that are considered to be of particular national importance: in such cases, a direct agreement may be entered into

among the state partner, the private partner and the project's lenders, thus enhancing the bankability of such projects.⁴

The PPP Law provides that direct agreements should include:

- The acknowledgement of the pledge or transfer/assignment of the private partner's rights or under the PPP agreement to its lenders;
- The state partner's obligation to notify the private partners' lenders of any material breach of the PPP agreement by the private partner;
- The right of the project's lenders to demand replacement of the private partner in case of a material breach by the private partner of its obligations under the financing agreements or under the PPP agreement and to propose a substitute private partner; and
- The terms and conditions of the private partner's replacement.

These provisions suggest that lenders will have the right to step in and take over the management of the PPP project – ie be granted step-in rights – in case the private partner defaults. However, the PPP Law does not address this matter in much detail and, given that direct agreement provisions are relatively new in Kazakhstan, the use and practice around such agreements is yet to be developed.

Current pipeline

The State Program on Healthcare Development 2020–2025, Healthcare Program, was approved by the Kazakhstan Government at the end of 2019.⁵ The stated objectives of the Healthcare Program are the improvement of the quality of medical care services being offered and sustainable development of the healthcare system, with



Health care in Kazakhstan. Stethoscope and medical uniform © Andrianocz | Dreamstime.com

construction of medical institutions, including through a PPP structure with compensation of investment costs, being identified as one of the priority areas.

The preliminary total cost of implementation of the Healthcare Program is reported to be US\$8bn. This cost is expected to be financed from the state budget, both national and local, assets of the social health insurance fund, investment by private partners, and other sources permitted under the law, for example loans from multilateral institutions.

According to the Healthcare Program, at least 14 healthcare projects are expected to be implemented over the next six years in the cities of Aktobe, Kokshetau, Ust-Kamenogorsk, Atyrau, Taraz, Karaganda, Kostanay, Kyzylorda, Aktau, Pavlodar, Petropavlovsk, Almaty, Turkistan, Nur-Sultan, including four university hospitals. These include the following projects:

- Construction of six large clinics;
- Construction of a medical image repository of a national scale;
- Implementation of eight investment projects for the construction of large multi-disciplinary hospitals;
- The introduction of the International Classification of Functioning, Disability and Health to improve rehabilitation services;
- Construction of large medical facilities with compensation of investment costs, including via a PPP structure; and
- Creation of seven centres of percutaneous coronary intervention.

In an effort to facilitate development of PPP projects, the Kazakhstan Government and the European Bank for Reconstruction and Development (EBRD) entered into a memorandum of understanding on the implementation of a comprehensive programme for the modernisation of healthcare infrastructure in Kazakhstan in December 2019.

The EBRD has also agreed to help the Ministry of Healthcare prepare six hospital projects in the following cities: Kyzylorda, Kokshetau, Kostanay, Taraz, Pavlodar and Atyrau, all of which, other than Kyzylorda, are expected to be structured as PPPs, Kyzylorda is expected to be structured as a design-build-operate-maintain project.⁶

Kazakhstan and Turkey

Relations and economic ties between Kazakhstan and Turkey have been improving dynamically over the last 20 years. This cooperation has led to extensive implementation of joint and coordinated projects in a number of different sectors, including construction and healthcare. The total volume of investment in Kazakhstan by Turkish companies during this period has been over US\$4bn.

Given the successful implementation of the PPP healthcare programme in Turkey, which involves the design, construction and subsequent operation of healthcare facilities of different sizes, the Turkish precedent was carefully studied

by the Kazakhstan Government and was selected as the model on which to base the Healthcare Program, thereby further strengthening cooperation between the two countries.

To facilitate dialogue and exchange experience, the Kazakh-Turkish Business Forum was held in Istanbul in November 2019, the main purpose of which was to discuss potential cooperation between Kazakhstan and Turkey in the fields of business, trade and investment.

As a result of this forum, the governments and a number of conglomerates of the two countries executed a total of 18 memoranda or agreements relating to cooperation in various fields, including healthcare, involving a total amount of US\$1.5bn.⁷

Conclusion

Private investment in Kazakhstan's healthcare sector is growing steadily. For the period from 2016 to 2019, investments in the healthcare sector more than doubled with an average annual increase of 31%.

Kazakhstan government bodies continue to work on improving the PPP methodology for the creation and maintenance of a balance of interests between the state and commercial enterprises in order to further increase the number of private investors, including foreign investors, in the PPP programme.

One example of the investor friendly steps taken is the creation of a One Window section on the official website of the Kazakhstan PPP Center, which allows potential investors to receive information about any PPP project, both planned and ongoing. ■

Footnotes

1 – Law of the Republic of Kazakhstan on Public-Private Partnership, No. 379-V dated 31 October 2015 (PPP Law).

2 – Please see <https://kzppp.kz/projects>.

3 – Life-cycle contract is a public-private partnership agreement providing for a full cycle of work on the design, construction, creation, reconstruction, modernisation and operation (including repair and maintenance) of a PPP facility, the sale of goods, works and services produced, as well as obligations to ensure compliance of the public-private partnership facility with the required technical and operational indicators throughout the term of the public-private partnership agreement.

4 – The lists of such PPP projects is approved by the Kazakhstan Government. To-date, PPP projects of particular importance have included five projects, two of which are in healthcare.

5 – Resolution of the Government of the Republic of Kazakhstan No. 982 dated 26 December 2019.

6 – For more information please see the EBRD's website at <https://www.ebrd.com/work-with-us/procurement/pn-82870.html>

7 – For more details please check the official website of Kazakhstan Project Preparation Fund Limited Liability Partnership, which acts as the primary adviser for the Kazakhstan Government on all PPP projects.