Airport PPPs in Turkey

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The Turkish Government has successfully developed and operated a number of airport projects as PPPs. This has involved developing new airports as well as transferring the operation rights of existing ones: these airports have included Istanbul's two existing airports, Atatürk and Sabiha Gökçen, Ankara Esenboğa Airport and İzmir Adnan Menderes Airport. In addition, there are a further number of upcoming airport PPP projects, such as Istanbul's third airport that is expected to be tendered within 2013 and to be operational in 2017.

With Turkey's economy emerging strongly from the global financial crisis, as shown by the fact that over the last two years it had the highest real growth rate in gross domestic product of any OECD country, Turkey is one of the most exciting high growth markets. Some anticipate that it will be the world's second fastest growing economy by 2018. With such strong economic fundamentals and resulting demand for infrastructure, the Turkish government is keen to use the PPP model to address the requirement for additional infrastructure. Based on its economic fundamentals, its demand for infrastructure, the government's support for such projects, and its current airport PPP programme, Turkey is a market with many potential opportunities.

This article describes the airport PPP regulatory framework in Turkey.

Statutory Framework

Article 47 of the Turkish constitution allows the use of public-private partnerships. It allows the government to enter into contracts with the private sector to carry out certain public services (including developing and operating airports as PPP projects).

A number of laws apply potentially to airport PPP projects. The key ones are the Law no. 3996 of June 13, 1994 regarding the realization of certain infrastructure and public services with the Build Operate Transfer model (general BOT Law) and the related Council of Ministers decree no. 2011/1807 implementing the Law no. 3996, and an omnibus Law no. 5335 of April 27, 2005 authorizing the lease or transfer of operation rights of airports under the Law no. 4046 of November 27, 1994 relating to privatizations.

Law no. 3996 is a general BOT law that covers various specified parts of the infrastructure and energy sectors. Current greenfield airport PPP projects are being developed under Law no. 3996. However, the transfer of operation rights of existing airport projects is being undertaken pursuant to another statute -- Law no. 4046 relating to privatisations -- as the core of such a transaction is effectively the transfer of the right to operate an airport project for a fixed period of time. For instance, the operating rights of the domestic, international and general aviation terminals and the car park in Istanbul Atatürk Airport have been leased until 2021 with a fixed annual lease price of US$ 165 million.

Awards

There are two main methods for tendering greenfield airport projects, that is sealed bids (among all or certain qualified bidders) and a negotiated procedure. The negotiated procedure may only be used if the other options could not work.

However, the transfer of operating rights for existing airport projects may be awarded by open bid among all bidders or through a negotiated procedure. In contrast to greenfield projects, the negotiated procedure is not a fallback, it is the government's discretion to use it or the open bid among all bidders.

A number of parts of the government will be either directly or indirectly involved in any airport PPP project. However, the three key government entities that will have a role will be the Supreme Planning Board (that is a committee made up of the prime minister and eight other ministers), the State Airports Authority (that is an autonomous public entity associated with the Ministry of Transportation, Maritime Affairs and Communication), and the Under-Secretariat of the Treasury. On a day to day basis, airport PPP projects will be managed by the State Airports Authority. The Supreme Planning Board will be involved in a limited number of decisions of fundamental importance. The Under-Secretariat of the Treasury will participate in certain decisions with financial implications.

Contractual Structure

The government will in each case enter into an implementation agreement with the relevant project company setting out the terms on which it will undertake each PPP project. Important constraints are outlined in this section.

The private sector concession of a new airport PPP project may be up to 49 years. However, in practice it may be considerably shorter. For instance, the operation periods of the new international terminals at Istanbul Atatürk Airport and Antalya Airport were 5.5 years and 9 years, respectively. Also, the terms in existing airport projects are generally longer than the new projects. Operating rights of Zonguldak Airport and Gazipaşa Airport in Antalya have been transferred for a period of 25 years.

At the end of the term, the airport PPP project must be transferred back to the government in good working condition, at nil cost, and without any encumbrances.

The project company will be strictly liable for any damage caused by the airport project. However, presumably it would cover this risk by passing it on to its subcontractors and insurance.

Turkish law governs the implementation agreements. The dispute resolution mechanism under the implementation agreement can be either arbitration (which can be international arbitration if there is a foreign element - foreign arbitration awards are recognized in Turkey as it is a signatory to the New York Convention) or the courts. As airport PPP projects are governed by private (not administrative) law, the relevant courts are the judicial and not the administrative ones.

The project company may only assign its rights or transfer its obligations under the implementation agreement upon an affirmative opinion from the State Airports Authority and also with the approval of the Minister of Transportation.

Financial Terms

When tendering an airport project, the government may ask for upfront or periodic payments, or a combination of the two. In addition, for brownfield airport projects, the project company may be required to continue to offer services at regulated tariffs for specified periods. For both greenfield and brownfield projects, there could also be obligations to encourage cost separation in order to ensure fair and competitive pricing.

With respect to any state subsidy to be provided to the project company (and thereby built into its revenue structure), there are two options as to how the state may structure such a subsidy. These are a demand guarantee (meaning a guarantee that there will be at least a minimum customer flow in the new or existing airport), and a guarantee of the debts owed to the project's lenders. The subsidies have usually taken the form of demand guarantees in airport projects (and payments have been made when demand guarantees have been breached). For instance, a guarantee of 4 million international flight passengers was provided for the first year of operation of Istanbul Atatürk Airport, and 1.3 million passengers for Ankara Esenboğa Airport.

If the project company fails, the government has certain rights to step into the project, including taking over certain contractual arrangements that the project company has put in place. Recently new legislation has been enacted, in relation to BOT projects, to explicitly confirm that the relevant part of the government has the right to assume the loans and other financial obligations taken out by the project company, if an implementation agreement is terminated early.

There are statutory exemptions from value added tax for airport PPP projects. Further, the actual deal documents are exempt from stamp duty and fees. Double taxation agreements and bilateral investment treaties to which Turkey is party provide certain additional limited protection to foreign sponsors and lenders.

The project company will need to provide a bid bond of 1% of the total investment required to undertake a greenfield airport PPP project when the implementation agreement is signed. The equity part of the financing that the project company obtains should be at least 20% of the expected fixed costs of the project.

Regulatory Issues

Various consents are required to undertake an airport PPP project, such as the Ministry of Transportation, Maritime Affairs and Communication's consent and an affirmative opinion of the General Staff of the Army. Planning permission and obtaining environmental clearances are also required.

Obtaining planning permission includes having the relevant zoning plan amended (the zoning plan for an area includes details of any planned construction), and obtaining the consents required for certain types of land. Amending the zoning plan can be a challenge. Even if changes to the zoning plan are approved by the relevant municipality (and by the Ministry of Environment and Urbanisation, as the case may be), the approval is open to challenges in the courts. As a general rule, challenges to administrative actions and decisions (such as municipality approval) do not interfere with their execution as long as no stay of execution has been secured.

An environmental impact assessment is required for airport PPP projects with runways exceeding 2.1 km and they may therefore only proceed if the Ministry of Environment and Urbanisation issues an "environmental impact assessment affirmative" decision. For other airport PPP projects, the Ministry of Environment and Urbanisation will decide whether an environmental impact assessment process should be commenced.

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