Healthcare PPPs in Turkey

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The Turkish healthcare market has in recent years undergone major reforms that to be completed will require substantial new investments in healthcare. These reforms have occurred as a result of liberalising the healthcare market, the healthcare market being fast growing, and Turkey's potential accession to the EU. Due to the limited available public resources to fund these new investments in healthcare, the government has decided to procure them by using a build-lease-transfer model via public-private partnerships (or PPPs).

Indeed, the Ministry of Health is currently progressing 18 health PPP projects. The first health PPP project, Kayseri Integrated Health Campus (that is a 1,583-bed healthcare complex), was awarded in August 2011: it has a construction period of 3 years and operation period of 25 years. The financial close has not occurred in this project. With respect to half of the other health PPP projects, the preferred bidder has been selected, and the implementation agreement is in the process of being finalised, except for three of them for which stay of execution decisions have recently been issued. The decisions relate to certain matters under the tender documentation, which are held incompliant with the applicable legislation. The Ministry of Health has yet to announce its agenda with respect to these three projects.

This article describes the healthcare 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 contracts with the private sector to carry out certain public services (including undertaking health PPP projects).

The key pieces of legislation that apply to health PPPs are the Law on Healthcare Services No. 3359 dated May 15, 1987 that was amended in 2005, and its implementing healthcare PPP regulation dated July 22, 2006. Law no. 3359 introduced the build-lease-transfer PPP model in the healthcare sector.

Under the build-lease-transfer PPP model, healthcare facilities are constructed (or renewed), and leased by the project company to the government for a certain period and specified price. At the same time as such healthcare facilities are developed, as part of the health PPP project the project company will develop and may operate other non-healthcare facilities, such as a car park, hotel and restaurant.

The type of healthcare facilities that can be developed as part of a health PPP project are very broad ranging from hospitals to emergency care centres.

Awards

There are three options as to the manner in which health PPP projects can be awarded. These are the open bid procedure among bidders selected via a prequalification process, open bid procedure, and a negotiated procedure. The healthcare PPP regulations favour the open bid procedure among selected bidders.

The negotiated procedure may only be used if the other options could not work or if the health PPP project comes within one of three categories. These categories are that there is an urgent need for the healthcare facility due to a natural disaster or epidemic, the healthcare facility requires specific expertise, or the total cost of the healthcare facility is expected to be under 5 million Turkish Liras.

A number of parts of the government will be either directly or indirectly involved in any health 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 Ministry of Health (in particular its Department of Public Private Partnership established to monitor the healthcare projects), and the Under-secretariat of the Treasury. The Ministry of Health selects health PPP projects to be undertaken and prepares feasibility and other reports as well as other tender documentation. The Supreme Planning Board will be involved in a limited number of decisions of fundamental importance, such as signing off on the health PPP projects proposed by the Ministry of Health. The Under-secretariat of the Treasury will in most cases procure the land required for the health PPP projects.

Terms of Implementation Agreements

Some of the terms of health PPP project implementation agreements are controlled under the healthcare PPP regulatory framework. The most important controls are outlined below.

In respect of greenfield health PPP projects basically five factors will be taken into account when calculating the lease payments under the implementation agreement. These are the term of the project, if the land is owned by the Treasury or a private party, cost and profitability of the health PPP project, amount of any revenue to be generated from non-healthcare facilities, and if medical equipments will be procured by the project company. Lease payments are increased annually by the arithmetic average of the Turkish Producer Price Index and Turkish Consumer Price Index for the preceding year. This annual increase may be further adjusted to take into account the increase in the Central Bank's currency basket, if such increase is higher than the average of the Producer Price Index and Consumer Price Index.

With respect to renewal health PPP projects rather than lease payments, the provision of non-healthcare services or facilities are granted to the project company and a service fee is paid for such.

The project company has to procure the financing required for the health PPP project. In order to increase the bankability of the health PPP projects, the legislation stipulates that the Ministry of Health guarantees the lease payments during the term of the agreement. In addition, it has been reported that the Ministry of Health may provide a "patient" guarantee to the project company.

The term of the project is determined by the Ministry of Health and stated under the tender documentation. It may be up to 49 years and starts from the handover of the premises to the project company.

At the end of the term, the health PPP project facilities are to be returned to the state in good working condition, at nil cost and without any encumbrances. However, if the land is owned by the project company, the transfer is not automatic. Instead, the project company and the government will at such time negotiate a price for the sale of the health PPP project facilities.

Projects may be developed on Treasury-owned land. In such a case, a construction servitude (that is a right to use the land) is granted to the project company for up to 49 years free of charge. Securing the land and obtaining the required permits are the Ministry of Health's responsibility. Alternatively, health PPP project facilities may be developed on the project company's land or on land belonging to other private parties, in which case the government would need to pay compensation to those affected, if the land is not otherwise purchased.

There are statutory exemptions from value added tax for health PPP projects. Further, the transaction documents between the Ministry of Health and the project company executed during the investment phase are exempted from stamp duty and fees: however, such exemption is limited to the shorter of the construction phase and a period of 36 months.

The project company will be liable for any damage caused by the health PPP project. However, presumably it would cover this risk by passing it on to its insurance. In addition, the Ministry of Health may impose certain penalties under the implementation agreement for the faulty construction or operation processes.

The project company will need to provide a bid bond of 3% of the total investment required to undertake the relevant health 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 total fixed costs of the health PPP project.

The project company may only assign its rights or transfer its obligations under the implementation agreement with the consent of the Ministry of Health. The Ministry of Health may transfer its rights and obligations under the project agreement: however, in such case, term of the agreement, lease price, scope of the services undertaken and other similar provisions may not be changed without the consent of the project company.

In case the project company fails or a force majeure event occurs, the government has certain step-in rights, including taking over certain contractual arrangements that the project company has put in place.

The governing law for the implementation agreement will be Turkish law.

The dispute resolution mechanism under the implementation agreement can be either domestic arbitration (under Turkish law and in Turkey) or the courts. As health PPP projects are governed by private (not administrative) law, the relevant courts are the judicial and not the administrative ones.

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This feature is the third in a series looking at the PPP market in Turkey. Earlier articles focused on the ports sector and the airports sector.

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