

Herguner Bilgen Ozeke

Hukuk Burosu

Attorneys at Law

TURKEY'S NEW PPP LAW IS ON THE WAY

The draft of Turkey's long-awaited new law on Public-Private Partnerships ("PPP") is now ready for the parliamentary legislative process. Although entitled the *Law on Public-Private Cooperation Models*, the key rationale behind the draft law – as evident from its provisions – is to balance distribution of project risk between public and private parties to contracts. The draft law declares one of its key goals to be allocating risk to the party which can best cope with it, whether public or private.

Brief History

Until the 1980s, the technique used for long-term delegation of public infrastructure services to the private sector in Turkey was the rarely-used concession method. This method is still regulated mainly by the Concessions Law of 1910, which provides only a general, non-detailed framework for the process. Concession contracts executed pursuant to the concession method are administrative law contracts granting superior authority to the administration or public party, as opposed to private law contracts in which both parties have equal status.¹ Being a distinctive contract type under administrative law, concession contracts are subject to prior review by the Council of State, and to the jurisdiction of the Council of State in case of disputes. However, as noted in the following paragraphs, after more than a decade of debate over granting the private law contract option to public service contracts – away from the Council of State's strict review and jurisdiction – the 1999 amendments to the Constitution granted a national and international arbitration option to the concession contracts if the public entity opted for arbitration.

After the 1980s, seeking to close the critical infrastructure investment gaps – particularly in the electricity sector – by motivating foreign direct investment, Turkey started experimenting with other methods. In 1984, the first Build-Operate-Transfer ("BOT") Law, Law No. 3096, which regulates the delegation of electricity sector projects to the private sector, was enacted. Finally, after a number of sector-specific BOT and BO laws, in 1994 a new and a general BOT law for realizing projects in almost every infrastructure sector including energy, transportation, communication and municipal services, Law No. 3996 ("**BOT Law**"), was released.

In addition, in response to prolonged legal controversies about the legal regime of BOT and similar models – controversies which caused the delay or cancellation of many projects – in 1999 the Constitution was amended to secure the realization of BOT and similar model projects through private law contracts. This has made it possible to evade the Council of State's prior review and jurisdiction, yet also use the arbitration option. Today, the BOT model is used for many greenfield infrastructure

projects in different sectors, while the concession method is still in use particularly for the transfer of rights to operate existing publicly-owned infrastructure facilities, such as ports.

However, despite the examples of successful BOT projects in operation – particularly airport projects thanks to their attractive ability to generate foreign currency income in a tourism-oriented country, and major power plants owing to take-or-pay clauses backed by Treasury guarantees – there are some weaknesses in the legal and institutional framework of the PPP model in Turkey that may discourage stakeholders and thwart the categorical success of the PPP model in line with international best practices. Besides the need for technical improvements in the various provisions of current regulations to foster better PPP, the disorganized state of the current regulations governing PPP models and the absence of any sponsoring and supervising institution in the government to guide public entities through this complex public service procurement method can be cited as general shortcomings.

Today

Fortunately, such hurdles facing the comprehensive success of the PPP model have led the government to prepare a new PPP framework law, after years of discussion. The draft law revokes all the existing separate laws and regulations mentioned above and standardizes the provisions applicable to all sub-models (*i.e.*, BOT, BO, TOR et al) by improving them in line with international best practices, in appreciation of the public and private sectors' roles as equal partners. It also establishes a central unit in the government to supervise and promote the model in Turkey.

It is expected that this draft law will be on the parliamentary agenda in June 2009 and released in the second half of 2009. However, as stated in the draft law, the new PPP Law's secondary regulation setting forth the detailed provisions for the implementation will be drafted by an inter-ministerial commission within six months following the release of the law. The commission will be composed of leading government entities and ministries, including the Treasury, Ministry of Finance, Public Procurement Authority and key investment ministries such as the Ministry of Energy and the Ministry of Transport. Thus, the new PPP Law's implementation should not be expected to begin before 2010.

Highlights of Key Provisions of the Draft PPP Law

Highlights of what the draft PPP Law introduces above and beyond the current BOT Law may be summarized as follows:

- PPP is defined in the legislation for the first time. It is defined as a general model covering all sub-models such as BOT, Build-Operate, Transfer of Operation Rights and unnamed hybrid models.
- All five laws regulating different PPP sub-models – including the BOT Laws dated 1984 and 1994 mentioned above and some articles of the other PPP related laws – are revoked.
- The draft PPP law introduces standard general provisions and procedures valid for all sub-models, *e.g.*, the rules for starting up a project, tendering, risk sharing, project assessments and dispute resolution.
- A PPP unit is established in the central government called the General Directorate of Public-Private

Cooperation. Besides supervising the public entities, the unit assumes an implementing role in the PPP project cycle. The new unit approves feasibility reports and project contracts.

- The Treasury guarantee instrument for payment obligations of non-central-government contracting authorities, such as municipalities or state economic enterprises, continues to exist, yet a new guarantee type for central government entities is also available.
- The sectors that may be subject to the PPP model have been expanded to cover all sectors, in addition to the classic investment sectors listed in the BOT Law, such as transportation or energy. The PPP model is designated to cover any kind of government facilities, including prisons, state hospitals or state schools. However, it should be highlighted that for central government facilities used in core public services – such as prisons, state hospitals or state schools – the project scope would be limited to non-core services, *e.g.*, construction and maintenance of buildings and other physical structures, and providing soft services such as catering for prisoners.
- Sharing project risks between public and private parties and allocating risks to the party that can best cope with them are established as key goals.
- Shadow pricing, introduced by the 2008 amendments to the BOT Law, continues to exist.

by Hergüner Bilgen Özeke

¹ Turkish Administrative Law was modeled after the French Administrative Law. Thus, the basic concepts and institutions (such as the Turkish Council of State – French Conseil d’Etat) of the Turkish Administrative Law are similar to those in French Administrative Law.