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A Comparative Overview Of Public Private Partnerships With Those In Turkey

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PPP's in general

There are numerous ways in which the private sector may invest in public infrastructure. Depending on the level of risk, the variety of arrangements range from public procurement (where a contractor does not assume any project risk) to privatization (where public assets or shares in a public company are acquired by an investor assuming all the risks). The most complex arrangements lie between procurement and privatization. The volume and number of public private partnerships (PPP's) have increased significantly globally since 1990s.

A PPP is a contractual agreement between a public sector agency and a private sector entity. By way of this agreement, the skills and assets of each sector (public and private) are shared in delivering a service or facility for the utilization of the public. In addition to sharing of resources, each party shares in the potential risks and rewards in the delivery of such service and/or facility. The UK was the first to take concrete steps to create exemplary PPP models. . This was mostly due to establishing PPP models and Private Finance Initiative (PFI), by mitigating the obstacles that would cause the private sector not to get involved in public sector affairs.

The benefits of PPP's in general is to provide high quality public services effectively and cost efficiently avoiding extending construction time and to remove cost increases frequently encountered in projects executed in the public sector. The benefits of PPP's for the public sector are; (i) to provide a new opportunity in public financing,(ii) to direct the private sector to areas where social benefit is high, (iii) to benefit from the correct determination of market needs,(v)to put resources into effective use, (vi) and to share joint liability with the private sector and to benefit from a more correct analysis of the risks in providing services. The benefits of PPP's for the private sector is to reduce the commercial risks and to make use of public sources.

PPP's models

There are various PPP models that are implemented. Some of the PPP models are as follows:

- **Build- Operate- Transfer Model (BOT)**
The private sector partner will finance the project, constructs and operate it, and at the end of the designated time, will return the property back to the administration.

- **Build- Rent- Transfer (BRT)**
The private sector partner finances the project, constructs, rents the property to the administration for a designated period and returns the property to the administration at the end of the rental period.
- **Build-Operate (BO)**
The private sector partner finances the project, constructs and operates it, after which the ownership of the property will eventually belong to the private sector partner.
- **Transfer of Operating Right (TOR)**
The administration transfers its assets or one of its units to the private sector in consideration for payment and in order to transfer operation for a designated period of time. The ownership shall continue to belong to the administration.

PPP's in Turkey

Present Legislation

The implementation of concessions in Turkey dates back to the Ottoman Empire and the Law of Concessions Regarding Public Benefit (*Menfaii Umumiyyeye Müteallik İmtiyaz Hakkında Kanun*) which was enacted in 1910 still remains in effect as the foundation for legislation for the granting of concessions to the private sector in Turkey.

During the 1980's in Turkey, certain PPP models became prominent increasing the role of the private sector in the economy. From 1980 onwards, several legislations were enacted in Turkey with regard to the PPP's, as follows:

- n **(General) BOT Law:** The Law on the Build-Operate-Transfer No. 3996 published in the Official Gazette on June 13, 1994, No. 21959;
- n **TOR Laws:**
 - n **(General)** The Law on Privatization No. 4046 published in the Official Gazette on 27 November 1994, No 22124),
 - n **(Electricity)** The Law on Turkish Electricity Authority for Generation, Transmission, Distribution and Trade of Electricity No. 3096, published in the Official Gazette on 19 December 1984, No 18610, and;
 - n **(Airports)** Law No. 5335 (transfer of operation rights of airports and passenger terminals by State Airports Authority) published in the Official Gazette on 27 April 2005, No 25798.
- n **(Highways) BOT Law:** The Law on Construction, Maintenance and Operation of Highways No. 3465 published in the Official Gazette on 2 June 1988, No 19830;
- n **(Electricity) BO Law:** The Law on the Establishment and Operation of Electricity Production Plants and Energy Sales No. 4283, published in the Official Gazette on 19 July 1997, No. 23054)

n (Health) BLT Law: The Law on Build-Lease-Transfer in Health Sector No. 5396 published in the Official Gazette on 15 July 2005, No. 25876)

Difficulties encountered by previous PPP schemes

The main problems that were encountered upon implementation of the PPP projects based on the above schemes were; (i) lack of political, economical, legal stability; (ii) the lack of experience of the public sector in drafting the PPP agreements and different applications by the public sector entities; and (iii) unbalanced risk distribution between the public and the private sector.

Furthermore, from the structural standpoint, despite some successful PPP applications, several issues were also noticed in the implementation of the PPP models in Turkey. These were; (i) limited number of the PPP models in the existing legislation, (ii) lack of harmonization in the PPP legislation, (iii) the absence of a single responsible state authority governing PPP Projects.

Draft PPP Law

In order to overcome the structural difficulties, a study was conducted by the State Planning Organization (SPO). Following these studies, the draft PPP Law (Draft PPP Law) has been prepared and posted on the web-site of SPO for further review and comments.

The major points concerning the Draft PPP Law are as follows:

- **The purpose of the Draft PPP Law** is the determination of procedures and principles for the fulfillment of certain investments and services currently conducted by the public authorities, social security administrations, local administrations and state economic enterprises by way of public private partnerships.
- **Coverage of the Draft PPP Law** is the fulfillment of investments and services by way of public private partnerships, in the fields of agriculture, irrigation, mining, manufacturing, energy, transportation, telecommunications, high technologies, tourism, housing, culture, city and urban infrastructure, municipal works, environment, research and development as well as education, health, judiciary, security and general administrative infrastructure that are currently conducted by public administration, social security administrations, local administrations and state economic enterprises.
- **The main principles of the PPP process** are as follows:
 - (a) public benefit and contribution to the economic and social development;
 - (b) administration to act in line with their duty in PPP projects;

- (c) conformity to the public guarantee with respect to amount and time with the market dynamics;
- (d) conformity of the public guarantees with the financing balances of the state and administrations.
- **PPP Models** set forth in the Draft PPP Law are BOT, BO, BL, TOR or Joint Ventures whereby the private sector stake cannot exceed 49%.
- **The tender process** in accordance with the Draft PPP Law is as follows:
 - (i) application by the relevant administration to the SPO, accompanied by the feasibility and tender strategy, is to be made;
 - (ii) opinions of the relevant public administrations and agencies concerning the proposed project will then be collected;
 - (iii) Upon obtaining a positive response from the SPO, the application to the High Planning Council (HPC) must be sent. Authorization by the HPC of the relevant authority must be sought to initiate the tender process;
 - (iv) Projects having the value of less than TRY 10,000,000 can be authorized by the SPO, without the need for approval of the HPC; and
 - (v) Initiation of the tender by the relevant administration and approval of the tender by the relevant minister or minister of interiors for the local administrations. Execution of the implementation agreement between the winning bidder and the administration following the approval of the terms of the implementation agreement by the SPO. Entry into the implementation agreement after the approval of the HPC.
- **Tender methods** stipulated in the Draft PPP Law are stated below. The general principle are based on the application of the open tender method or bids among certain bidders method.
 - (i) Open tender method: whereby all bidders may submit their bid. No limitation can be put on the number of bidders allowed. The bids will be in written form. The conditions of the tender will be determined in the tender specifications.
 - (ii) Bids among certain bidders: whereby the pre-qualified bidders may submit bids. In this method, the administration can receive bids from the bidders whose technical and financial pre-qualifications are approved by the administration.
 - (iii) Competitive dialogue method: whereby the administration invites pre-qualified bidders and enters into dialogue with these bidders. In case the administration cannot define the technical standards and functional requirements objectively, and the legal and financial characteristics of the project cannot be determined, or the project cannot be allocated to an open bid or a bid among

certain bidders, the dialogue method can be used. Following the dialogue period, administration will request the submission of bids by the candidates.

- (iv) Negotiation method: in the event that the administrations cannot receive satisfactory bids via open tender method or where the existing risks will not permit bid among certain bidders method or competitive dialogue method, the tenders can be concluded by negotiation method.

- The implementation agreement to be entered into by and between the winning bidder and the administration will be subject to private law. The term of the implementation agreement shall not be longer than 49 years. The material provisions of the implementation agreement, such as guarantee types, operating term, costs, financing conditions, tariffs, lease amounts, etc. cannot be amended against the interest of the administration. On the occurrence of force majeure conditions, amendments to the implementation agreements in favor of the administration require the approval of HPC.

Immaterial changes will be concluded between the administration and the assigned company. The penal sanctions in case of non-fulfillment of obligations by the assigned company against the administration and consumers, breach of the terms of the implementation contract, bankruptcy, composition with the creditors and insolvency will be determined in the implementation agreement. The administration has the right to take and implement the necessary precautions for the continuation of the public service upon the termination of the implementation agreement. The disputes will be resolved under Turkish law and the Turkish courts will have competence to resolve the disputes. The parties may agree that the disputes will be resolved by arbitration under Turkish law.

The key to successful PPP's in Turkey

- To summarize, the following needs to be made for a successful PPP application in Turkey:
 - The legal framework should be improved via enactment of the Draft PPP Law covering all models. The secondary legislation should also be enacted in a way that the tender process will be competitive, simple and transparent.
 - The institutional framework should also be improved in a manner that a central specialized PPP unit with special staff be formed and the related staff of public administrations should have the necessary educational background to properly handle the PPP projects.
 - Precautions should be taken to eliminate the imbalance of agreements, and the internationally recognized agreement forms should be used to the maximum possible extent, such as FIDIC contracts, PFI-Standard Contracts, etc