

## NOTE

**Subject** : Brief analysis of the new Law on Construction and Renovation of Premises and Obtaining Service through Public Private Partnership Model by the Ministry of Health and Amendment of Various Laws and Statutory Decrees numbered 6428, dated February 21, 2013.

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The new Law on Construction and Renovation of Premises and Obtaining Service through Public Private Partnership Model by the Ministry of Health and Amendment of Various Laws and Statutory Decrees numbered 6428, dated February 21, 2013 (the “**Law**”) has been published in the Official Gazette on March 9, 2013. This Note aims to provide a brief analysis of the Law.

### **I. Introduction**

The Law intends to determine general principles and procedures of public-private partnership (“**PPP**”) contracts between the Ministry of Health and private companies in order for construction of facilities, refurbishment of existing facilities or obtaining of consultancy and R&D services as well as services requiring high technology or financing for these projects. In this respect, the Law determines the general principles, the procedure, duties and rights of the parties to the PPP contract.

### **II. Major Issues**

#### *1. Project Types*

Article 2 determines the structures anticipated for PPP projects. The Ministry of Health should have the approval and authorization of High Commission of Planning (*Yüksek Planlama Kurulu*) to issue a tender. We may find three different types of PPP projects.

Regarding construction projects, the contractor is entitled to the right of superficies on immovable property of the administration and to remuneration in exchange for the public service offered. The property right on the facility constructed is transferred to the administration upon termination of the term of construction agreement between the contractor and the administration as per Article 7.

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Concerning refurbishment projects, the remuneration may be public service offering and/or operating commercial service facilities and/or payment for the refurbishment.

Finally, the Ministry of Health may issue a tender for research, consulting, developing and project services related to these construction and restoration projects.

## *2. Tender Types*

According to Article 3, three methods may be used for PPP contracts: open tender procedure, restricted tender procedure or negotiated tender procedure.

## *3. PPP Contract*

According to Article 4, the PPP contract is subject to private law and the contract term may not exceed 30 years (in addition to the construction period). During the contract term, the administration has the right to supervise and to audit the contractor's activities. The administration may also authorize a different person (public or private) to audit contractor's activities.

It is noteworthy to mention that the contractor has the right to transfer all its rights and duties on the PPP contract to a third person which fulfills the conditions required by the Law upon prior approval of the administration.

Regarding all disputes arising under this contract, Turkish courts have jurisdiction; and Turkish law is applicable. However, parties may sign an arbitration agreement provided that the Turkish law is applicable to the dispute and the place of the arbitral proceeding is Turkey.

## *4. Remuneration and Funding*

According to Article 5, the contractor is not entitled to any remuneration before the termination of the construction with the exception of partial termination and partial service offer with the administration's approval.

Article 6 states on the other hand that contractor has to provide entire funding for the project.

## *5. Cashing the Performance Bond*

One of the key features of this Law is that, in case the contract is terminated on grounds attributable to contractor, performance bond of the contractor is registered as revenue to the Treasury and such performance bond is not deducted from the liability of contractor.

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Contractor may not claim any rights, remuneration or indemnification for such performance bond.

### *6. Treasury Guarantee on the Foreign Funding*

Article 13 annuls the last paragraph of Article 4 of the Law on Public Finance and Debt Management Organization dated March 28, 2002 and numbered 4749. The same provision inserts Article 8/A concerning assignment-assumption of liabilities to the foreign funding entities.

According to this Article the Council of Ministers is authorized to determine the assignment of the liabilities towards the foreign funding entities to the Undersecretariat. The article covers the investment and services as well as other economic liabilities including derivative instruments, if any, in the event that the PPP contract, in which built/lease/transfer method is stipulated, with a minimum contract price of TRY 500,000,000.00, is terminated prior to expiration of contract term and the administration takes over the facility.

The Council of Ministers determines also the scope, content and payment conditions of assumption of liabilities. Assumption of liabilities may be *complete* or *partial* and the Law on Central Administration Budget determines the limit of the assumption. Undersecretariat's conformity opinion is obtained regarding the assumption of liability provisions under project agreements prior to publication of tender specifications and execution of the project agreement.

However, it is also cited under Article 13 that the conformity opinion of the Undersecretariat and similarly, partial assumption of liabilities tendered are not sought for the project agreement drafts tendered as of the date of entry into force of this very Article

Finally, the provisions under this Article 13 regarding assumption of liabilities limits, which stipulates that such limits may be increased by one time by the Council of Ministers, are also not applicable in terms of project agreement drafts tendered as of the date of entry into force of this very Article.

### *7. Application and Entry Into Force*

Provisional Article 1, paragraph 1 states that projects tendered in accordance with thereby annulled Provisional Article 7 of the Law numbered 3359 will be concluded according to the

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already existing tender specifications. However, paragraph 7 of Article 3 of this Law (restricted tenders) will be applied to the tenders in process.

According to Provisional Article 1, paragraph 2, the provisions governing transfer of immovables outside the health campus to contractor for the purposes of operation thereof for economic purposes will not be applied; therefore, **immovables outside the health campus may not be transferred to contractor; and any agreements including provisions in this respect will be performed without the validity of their relevant provisions.** This Article undoubtedly affects the already tendered projects with provisions and granted rights as above and therefore should be carefully considered.

The Law entered into force on March 9, 2013, the date of its publication. However, the provisions on the assumption of liability limit under Article 13, inserting Article 8/A into the Law numbered 4749 will enter into force on January 1, 2014. Other amendments of Article 13 and 14 entered into force on March 9, 2013 as applicable as of December 1, 2012.

Such wording in the Law creates an ambiguity as to the application of Article 13 of this Law. Accordingly, it may be presumed that the sole relevant excerpts of Article 13 on the limit of the assumption liability will be entering into force as of January 1, 2014 and the rest of Article 13 will enter into force as of March 9, 2013. According to the last sentence of Article 13 however, the opinion of the Undersecretariat will not be requested for the already tendered projects, the partial assumption will not be possible and the provision of the same Article on the limit to the assumption will not be applicable. A regulation determining the procedures and principles of this Law will be issued within six months after the entry into force of this Law; and such regulation will hopefully clarify especially the entering into force provisions.