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## WHAT'S NEW IN THE NEW PUBLIC-PRIVATE PARTNERSHIP ACT OF THE KYRGYZ REPUBLIC?

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*The new Public-Private Partnership Act of the Kyrgyz Republic will enter into force three months after its official publication (July 26, 2019), i.e. on October 26, 2019. How is the new PPP Act different from the current one? Will the new PPP Act become an impetus for the development of public-private partnership (PPP) in Kyrgyzstan?*

PPP is a long-term cooperation between public (state and municipal authorities and organizations) and private (investors) partners in the construction and operation of state and municipal infrastructure facilities (roads, airports, train stations, hospitals, sports facilities and others) by attracting private investment.

### ***Reasons for passing the new PPP Act***

The government has been trying to introduce PPP in Kyrgyzstan for a few years now. The current PPP Act was enacted in 2012 and some secondary legislation was adopted in subsequent years. The PPP Development Program 2021 was approved by the Government in 2016. The Program announced a goal to attract at least KGS 20 billion of private financing in infrastructure development by 2021. Currently (as of mid-2019), less than 5% of this amount have been raised with only three PPP agreements signed, specifically the hemodialysis centers, cinema theater reconstruction and Bishkek public transport e-ticketing projects.

Why is PPP not developing in Kyrgyzstan? This is explained by a number of factors such as lack of political will among state and municipal officials who consider PPP projects to be too complicated and time-consuming to prepare; lack of public and private sectors' knowledge and experience in PPP projects; legal gaps and inconsistencies in regulation of PPP.

Legal gaps and inconsistencies became evident in the process of preparing the first PPP project in Kyrgyzstan related to the organization of four hemodialysis centers in Bishkek, Osh and Jalal-Abad cities. It took almost two years to prepare a feasibility study for the project, obtain approvals, hold a tender and sign a PPP agreement between the Ministry of Health of the Kyrgyz Republic and the winner of the tender. This can be explained both by the lack of PPP experience and by legal gaps. Despite procedural difficulties, the Ministry of Health brought the project to its logical conclusion and signed the PPP agreement. Today, all four hemodialysis centers have been launched and 183 patients have the opportunity to receive the highest quality hemodialysis services that meet the best international standards.

Although the legislation generally allowed the use of PPP mechanisms, the first project revealed a number of difficulties associated with the project and tender document preparation procedures. Practice has also revealed gaps in regulation of document approval procedures and time limits,

inconsistencies between primary and secondary legislation, unenforceability and inefficiency of some legal requirements. These and other reasons have led to the need to review PPP legislation.

In mid-2017, the Ministry of Economy initiated revision of the current and adoption of the new PPP Act. In April 2018, the Government approved the new draft law and submitted it to the Parliament for consideration. The discussion of the draft lasted more than a year with dozens of comments being received from parliamentarians many of which were taken into account. Today, we have a new PPP Act simplifying procedures for initiating and preparing PPP projects and eliminating a number of contradictions. It will hardly be a perfect law and it is most likely that its practical application will reveal certain shortcomings, but in any case it is a step forward to having the working PPP model in Kyrgyzstan.

## **So, what's new in the new PPP Act?**

### ***The definition of “public partners” is broadened***

The new PPP Act broadened the definition of public partners, i.e. state and municipal authorities and organizations entitled to initiate PPP projects, including *public executive authorities such as ministries, state committees, administrative agencies and local state administrations, as well as executive bodies of local self-government authorities, state-owned and municipal enterprises, to cover state-owned and municipal institutions and joint-stock companies where the government owns 50% of voting shares or more.*

In practice, this means that PPP projects may be initiated by a wider range of persons. For example, most of organizations engaged in such areas as health, education, sports, culture and other social areas are state-owned or municipal institutions, and now they became eligible for resorting to PPP model in their activities. The same applies to joint stock companies where the government owns more than 50% of voting shares.

### **Approval procedure for tender documents is simplified**

The new PPP Act simplified procedure for obtaining government approval. Instead of all initiated PPP projects/ tender documents, the Ministry of Economy and the Ministry of Finance must approve only projects receiving financing from the public budget or attracting investment worth more than KGS 700 million. In all other cases, the public partners must only notify the Ministry of Economy about the project initiation.

Facilitation of approval procedures will expectedly result in growth of public sector initiatives and acceleration of procedures for preparing PPP projects.

### **Limitation on the number of bidders is lifted**

The new PPP Act eased requirements for minimum number of bidders, allowing the tender to be conducted if at least one tender proposal is submitted. This does not apply to “large-scale projects” which are supposed to attract investment worth more than KGS 700 million (about USD 10 million). For such projects, the tender will be conducted if at least two tender proposals are submitted,

otherwise, the tender will be declared invalid. At the same time, there is a rule that the repeated tender for a large-scale project will be conducted if at least one tender proposal is submitted.

This provision is very important for Kyrgyzstan. Kyrgyzstan does not have a large market; therefore, it is rather difficult to attract large investors and large volumes of investment. Practice has shown that for many tenders the no-less-than-two-tender-proposals requirement is an insurmountable barrier and many tenders are being declared invalid for this reason. Removal of this requirement will facilitate access to tender for private investors and thereby make them more interested in participating in tenders for PPP projects.

### **New provisions are introduced to regulate unsolicited proposals**

The new PPP act introduced more clarity in relation to unsolicited proposals. Private sector initiative (defined in the new law as unsolicited proposal) must be accepted or rejected on reasonable grounds within the legally established time limits. If the unsolicited proposal is accepted, the public partner must announce tender, but it will be subject to both general (the no-less-than-one-tender-proposal requirement described above) and special requirements applicable to such situation.

For example, if other interested person submits better proposal for the public partner, the unsolicited bidder will be given the right to bring its tender proposal into compliance with the conditions of the better tender proposal; and if the unsolicited bidder fails to use such right, the person who submitted better tender proposal will be declared as the successful bidder. Apart from that, in case the person other than the unsolicited bidder is declared as the successful bidder, the unsolicited bidder will be reimbursed by the successful bidder for expenses incurred to prepare the unsolicited proposal indicated therein.

This approach is based upon best international practices existing in a number of countries. Such rules create more transparent, predictable and secure environment for private investors in the process of initiating PPP projects. In some countries, up to 50% of all PPP projects are initiated by private investors, but for this, the government must ensure the clear and fair rules of cooperation.

### **Legal gaps and inconsistencies are removed**

In addition to the above, the new PPP Act introduced a number of other innovations such as streamlined PPP processes, clarified requirements for mandatory provisions of the PPP agreement, amended tender procedures and others. Most of the proposed changes are aimed at facilitating and accelerating tender procedures, but there are also some limiting provisions. For example, the term of the PPP agreement is reduced from 50 years to 30 years, some types of government financial and economic support are excluded. However, in our opinion, these reductions and exclusions do not detract from the progressive nature of the new PPP Act.

## **New PPP Act is a step in developing PPP in Kyrgyzstan, but this is only the visible part of an iceberg**

Undoubtedly, the new PPP Act will significantly facilitate and accelerate the PPP processes, encourage the public partners to attract private investment in the construction and operation of public infrastructure. But single law is not enough. Apart from the law, it is necessary to ensure the following measures for the systematic and effective development of PPP:

- **Standardized procedures and rules for identifying, evaluating, and preparing PPP projects, conducting tenders and managing PPP agreements.** The law establishes general principles and approaches, but they will work in practice, if standardized procedures and rules are in place for public partners. Such documents will help public partners save time, increase transparency and efficiency, which, in turn, will raise confidence of private investors and encourage them to invest in PPP projects.

- **Effective functioning of the PPP Center.** The PPP Center was established in June 2019 as a subdivision of the Ministry of Economy to promote PPP projects for the development of state and municipal infrastructure. The development of PPP will largely depend on the quality performance and effective functioning of the PPP Center, which, in turn, will depend on professionalism of its expert team.

- **List of ongoing and potential PPP projects.** To date, the list of ongoing and potential PPP projects includes 23 projects <http://www.ppp.gov.kg/en/proekty2/>. At the moment, the list is fragmentary as there is no single system and methodology for searching, identifying and evaluating PPP projects. The role of the project list is highly significant as it is a primary quality indicator for project preparation and implementation in the country. The better the quality of the list, the greater the chances of attracting private investment in PPP projects for the government.

- **Training courses for specialists in PPP.** Qualified specialists in PPP issues are the driving force behind the development of PPPs. At the same time, it is necessary to provide training not only to state and municipal employees, but also to representatives of business, civil society and the media. In June 2019, more than 40 government and municipal employees underwent training and received certificates as part of the APMG PPP Certification Programme. This is a great start, and it is necessary to continue training and expand the range of students. It is necessary to launch national training programs and to conduct training on a regular basis.

- **New PPP Development Program.** The current PPP Development Program 2016-2021 does not correspond to reality as the goals are unattainable and the action plan is no longer relevant. It is necessary to develop a new Program setting realistic and measurable goals, as well as concrete actions, deadlines and responsible persons for its implementation.

The new PPP Act opens a new page in the development of PPP in Kyrgyzstan. With a systematic and consistent government approach, PPP can open the door to a mutually beneficial and effective partnership between the public and private sectors to improve the country's infrastructure.

