04.12.2020

**PPP (PUBLIC-PRIVATE PARTNERSHIP) PROJECTS**

**PREPARATION AND IMPLEMENTATION:**

**PRACTICAL ASPECTS**

**Final Written Assignment**

**Background/ Facts/ Circumstances**

**(to be amended, if necessary)**

You are lawyers of the L&W law firm, PPP, Infrastructure and Public Procurement practice, which (in consortium with other technical and financial specialists, with International Finance Corporation (the “**IFC**”) as a transaction adviser) provides consulting services for the Ministry of Health of the Kyrgyz Republic (the “**MoH**”) on preparation of the PPP project on organization of dialysis services[[1]](#footnote-1) in Bishkek (the “**PPP Project**”).

You have prepared the Feasibility Study Report of the PPP Project and now you are preparing the tender documents for the tender to be held by the MoH.

According to Article 1.23 of the Law of the Kyrgyz Republic “On Public-Private Partnership” No. 95 of 22 July 2019 (the “**PPP Law 2019**”) the tender documents include the following:

1. Request for Qualifications (the “**RfQ**”);
2. Request for Proposals (the “**RfP**”);
3. Draft PPP Agreement (the “**Draft PPPA**”) (to be concluded with the winning bidder).

The instructions for RfQ and RfP are to be provided additionally.

Please see below the general provisions of the Draft PPPA. The provisions are to be amended (if necessary) and terms are to be clarified in relevant sections of the Draft PPPA.

**THIS PUBLIC-PRIVATE PARTNERSHIP AGREEMENT on organization of dialysis services in Bishkek** (the "**Agreement**") is executed on [DATE] (the "**Execution Date**") in Bishkek, Kyrgyz Republic, by and between:

**Ministry of Health of the Kyrgyz Republic**, acting in accordance with the Law No. 95 of the Kyrgyz Republic on Public-Private Partnership of July 22, 2019 and the Regulation on the Ministry of Health of the Kyrgyz Republic approved by the KR Government Resolution No. 118 of February 20, 2012, hereinafter referred to as the "**Public Partner**", represented by [NAME], [TITLE], on the one hand, and

**[Name of the Company]**, a legal entity organized and existing under the laws of [Name of the Country] and the charter hereinafter referred to as the "**Private Partner**", represented by [NAME], [TITLE], on the other hand.

The Public Partner and the Private Partner shall be hereinafter referred to jointly as the "**Parties**" and individually as the "**Party**".

**SUBJECT MATTER, ENTRY INTO FORCE AND TERM OF AGREEMENT**

**Subject Matter of Agreement**

The subject matter of Agreement includes the organization and provision of Dialysis Services in Bishkek. In order to organize and provide Dialysis Services, the Private Partner shall undertake *inter alia* the following responsibilities:

1. managing the Project Investments to ensure the Establishment of Facility and Operation of Equipment;
2. providing the Dialysis Services to the persons included in the Patient List (the "**Patients**") starting from the Commissioning Date; and
3. transfer the Transferred Assets to the Public Partner at the time and in the manner required in Clause […];

in each case, according to the provisions of this Agreement and its Annexes.

**Entry into Force and Term of Agreement**

The Agreement shall enter into force on the date on which all Conditions to Effectiveness have been satisfied or waived in accordance with Clauses […] (the "**Effective Date**") except for the provisions set out in Clause […], which entered into force and are valid from the Execution Date) and shall be valid during ten (10) years from the Effective Date (the "**Term of Agreement**").

The Agreement may be terminated early on the grounds and in the manner provided in Clause […] and/or Legislation.

The Term of the Agreement may be extended by the Parties by executing an amendment agreement to this Agreement in accordance with Clause […].

**Conditions to Effectiveness to be satisfied by the Public Partner**

As a condition precedent to the effectiveness of the Agreement, the Public Partner shall set up Liaison Committee.

**Conditions to Effectiveness to be satisfied by the Private Partner**

As conditions precedent to the effectiveness of the Agreement, the Private Partner shall:

1. pay to the IFC a fee in the amount of US Dollars […] (USD […]) (the "**IFC Fee**"); the IFC Fee shall be paid to the bank account notified by the IFC to the Private Partner on or before the Execution Date;
2. nominate the representatives of the Private Partner in the Liaison Committee;
3. provide the Bank Guarantee in the form corresponding to *Annex […]*; and
4. provide the Public Partner with the documents evidencing the availability of the Project Investments in monetary funds or in form of irrevocable commitments from lenders and/or investors.

The Parties confirm the fulfillment of Conditions to Effectiveness by signing a respective confirmation letter.

The Public Partner may at its own discretion waive the fulfillment of any Condition to Effectiveness by the Private Partner, except the condition on payment of the IFC Fee.

If any Condition to Effectiveness has not been satisfied and has not been waived on the date that is two (2) months after the Execution Date, subject to Clause […], the Agreement shall be deemed not to have entered into effect, except for the provisions of Clause […].

If the Agreement does not enter into force (except for the provisions specified in Clause […]) due to the failure of Private Partner to satisfy all or some of Conditions to Effectiveness in accordance with Clause […], the Public Partner may retain the Bid Bond in full. To the extent amounts available under the Bid Bond are not sufficient to compensate the Public Partner for losses, expenses, costs and other liabilities incurred by the Public Partner as a result of the failure of the Agreement to enter into force, the Public Partner shall not be prevented from claiming damages for such additional amount.

**Conditions of Agreement entering into force on Execution Date**

The following provisions of Agreement shall enter into force on the Execution Date:

1. provisions of this Clause […];
2. provisions of Clauses […];
3. provisions of Clauses […].

**PRIMARY OBLIGATIONS OF PARTIES**

**The Private Partner shall, inter alia:**

1. Subject to and on the terms and conditions of this Agreement and in accordance with the Technical Proposal, at its own responsibility and expense, procure financing for and undertake the lease (or purchase) and upgrade of adequate premises, engineering, procurement, equipment, operation and maintenance of the Facilities and observe, fulfil, comply with all its obligations set out or arising under this Agreement.
2. Provide Dialysis Services to Patients according to the standards and requirements of this Agreement and Legislation.
3. Implement the Project in accordance with the Technical Proposal and within the timelines set out in the Project Implementation Schedule.
4. Observe the provisions of the Acts of Public Partner and Legislation.
5. Unless expressly required by the terms of this Agreement to be paid by the Public Partner, bear all expenses arising out of and/or in connection with the performance of Obligations of Private Partner, including, but not limited to, expenses arising from establishment of Facility and Operation of Equipment, procurement of expendables, payment of salary of Personnel, development of software, insurance, etc.
6. Regularly, but not less than every six (6) months, to conduct a patient satisfaction survey among the Patients to assess the quality of Dialysis Services by completing the form attached as *Annex […],* and provide the Public Partner, at its request, with the copies of the completed evaluation forms and/or summary of the survey results.
7. Undertake support for transplantation as specified in the Technical Proposal.
8. Timely notify the Public Partner about any circumstances that prevent performance of Obligations of Private Partner and create the risk of full and/or partial non-performance of Obligations of Private Partner.
9. Not allow the liquidation of the Private Partner during the Term of Agreement.
10. Submit recommendations to the Liaison Committee to establish and facilitate service level agreements between the Private Partner and public hospitals, when required.

**The Public Partner shall, inter alia:**

1. Before Commissioning Date provide the Private Partner with the Patient List and obtain the Patients' consents for their transfer to the Private Partner.
2. Give written notice to the Private Partner of any revisions to the Patient List as soon as reasonably practicable.
3. Inform the Patients on the Patient List that following the Commissioning Date, Dialysis Services will be provided by the Private Partner and facilitate such Patients' reorientation to the Private Partner.
4. Give written notice to the Private Partner of any revisions which have been adopted to the Acts of Public Partner as soon as reasonably practicable.
5. Pay for Dialysis Services in the manner and on the terms set out in the Agreement.
6. Provide State Support to the Private Partner.
7. Subject to Clause […], not interfere in the business of Private Partner except as provided by Agreement and Legislation, nor undertake any actions and/or omissions that may, in the Public Partner's reasonable judgment, have the effect of preventing the performance of Obligations of Private Partner.
8. Issue the License to the Private Partner within three (3) months of receipt, by the Public Partner, of all duly completed documentation from the Private Partner, provided that the Private Partner has taken all necessary steps and meets all relevant requirements under the Agreement and Legislation for obtaining the License.
9. Provide all necessary assistance reasonably requested by the Private Partner for the purposes of obtaining the Applicable Permits.
10. Set up a budgetary account in the treasury system of the KR Central Treasury at the Ministry of Finance, which will be used for the payments to the Private Partner, and deposit into such account an amount equal to [three (3) Nominal Monthly Payments].

**FACILITY AND EQUIPMENT**

**Facility**

The Private Partner shall acquire, at its own expense, Rights to Facility. The Facility means premises appropriate for the provision of Dialysis Services for the full Term of Agreement (the "**Facility**"). The Private Partner shall undertake works such as, where necessary, designing, construction, refurbishment, renovation, commissioning, utilities connection, defects elimination, possession, use and management of Facility, and shall maintain Facility in proper condition required for the provision of Dialysis Services, in each case, in accordance with Technical Requirements, Legislation and IFC Performance Standards (the "**Establishment of Facility**"). The Private Partner shall undertake works related to Establishment of Facility within the timelines set out in the Project Implementation Schedule.

**Equipment**

The Private Partner shall, at its own expense, acquire ownership rights or lease rights to the equipment meant for the provision of Dialysis Services (the "**Equipment**"), and ensure the import, registration, certification, declaration, installation, maintenance, repair, spare parts and elements replacement, use and management of Equipment, and shall maintain Equipment in proper condition consistent with the requirements of Legislation (the "**Operation of Equipment**").

**Obligations specific to Facility and Equipment**

Throughout the Term of Agreement, the Private Partner shall:

1. keep and maintain the Facility in proper condition consistent with the Technical Requirements and keep and maintain the Equipment in condition appropriate for the provision of Dialysis Services;
2. prevent the creation of any encumbrance, pledge, lien or other security interest over the Rights to Facility or Rights to Equipment other than as required to secure the Private Partner’s repayment obligations to any provider of debt financing for the Project;
3. not transfer the Rights to Facility, Rights to Equipment or permits (including Applicable Permits) for the Operation of the Equipment to any third parties without the prior written consent of the Public Partner, which shall be permissible only in restricted circumstances if at all;
4. not inflict any damage on the Facility and/or Equipment and/or rights therein and do its best to protect Facility and/or Equipment and/or rights therein against all and any claims of third parties;
5. in case of occurrence of circumstances jeopardizing the Rights to Facility and/or Rights to Equipment, immediately notify the Public Partner and the Liaison Committee in writing for the purposes of enforcing the Rights to Facility and/or Rights to Equipment.

The Private Partner shall ensure access to Facility and Equipment for the Public Partner to check their compliance with Technical Requirements, requirements of Legislation and IFC Environmental, Health, and Safety Guidelines for Health Care Facilities according to *Annex […]* during normal business hours subject to prior notice of the date of such visit to Facility by the Public Partner.

At the written request of the Public Partner, the Private Partner within 15 calendar days shall provide it with copies of all documents and information confirming that Facility and Equipment are consistent with Technical Requirements, Legislation and IFC Performance Standards.

If the Private Partner does not possess ownership rights to the Facility and/or Equipment, the Private Partner shall ensure that the respective lease contracts (or other contracts with the owner(s) of the Facility and/or Equipment, on the basis of which the Private Partner acquires the Rights to Facility and/or Rights to Equipment) allow for assignment to the Public Partner of such Rights to Facility and/or Rights to Equipment.

Within ten (10) days from the execution of any contract stipulated in Clause […] the Private Partner shall provide to the Public Partner the copy of the respective contract.

**Conditions to Commissioning**

Within nine (9) months following the Effective Date, the Private Partner shall satisfy the following conditions to Commissioning (the "**Conditions to Commissioning**"):

1. provide the Public Partner with the documents confirming the Rights to Facility;
2. submit to the State Agency for Environmental Protection and Forestry of the Government of the KR the design, detailed equipment plan and environmental plan (as stipulated in *Annex […]* and *Annex […]*) and present them to the Liaison Committee. The above documents should correspond to the Legislation, the National Dialysis Standards and the Agreement;
3. fulfil the Alternative Employment Plan to the extent permitted under Legislation as far as the procedure, terms and conditions of transfer/takeover/employment of some personnel of Public Dialysis Units by the Private Partner are concerned. To facilitate such obligation of the Private Partner, the Public Partner shall provide to the Private Partner, on its request, a list of the personnel providing dialysis services to Patients prior to the Commissioning Date along with details about such persons' qualifications, period of employment and copies of such persons' employment contracts. For these purposes, the Public Partner shall also obtain personnel's consent for transfer of their personal data as required by the Legislation;
4. obtain the Insurance;
5. obtain all Applicable Permits;
6. install the Equipment and document the maintenance manual and contracts as specified in *Annex […]*, as well as perform all other steps necessary for Commissioning (if any) as specified in *Annex […]*.
7. propose to the Public Partner a detailed takeover plan to treat the Patients from the Patient List.
8. install the software in accordance with Clause […];
9. propose to the Public Partner the E&S Management System which is in full compliance with the Legislation and [IFC Performance Standards].

**Acceptance Certificate**

Once the Private Partner has satisfied all Conditions to Commissioning, it shall submit to the Public Partner a written confirmation thereof. Within one (1) week from its receipt, the Public Partner shall either issue the Acceptance Certificate, or convene the Liaison Committee to confirm that the Conditions to Commissioning have been met. The term for such review by the Liaison Committee shall not exceed three (3) weeks following the day when the Private Partner has submitted the written confirmation.

The Public Partner shall issue the Acceptance Certificate within two (2) weeks from the date of obtaining a confirmation from the Liaison Committee that the Conditions to Commissioning have been met. The date of the Acceptance Certificate shall be deemed as the Commissioning Date.

If the Private Partner has not satisfied the Conditions to Commissioning within nine (9) months following the Effective Date (except (i) for the Conditions to Commissioning waived in accordance with Clause […], and (ii) delays in the receipt of the Applicable Permits which are recognized hereunder as a Special Event within the meaning of Clause […], it shall pay to the Public Partner [three hundred fifty (350) USD] for each day of the delay.

If it is allowed by the Legislation, the Public Partner may at its own discretion waive the fulfillment of any Condition to Commissioning by the Private Partner.

**PROVISION OF DIALYSIS AND OTHER SERVICES**

**Dialysis Services**

The Private Partner shall provide Dialysis Services starting from the Commissioning Date in the scope, in the manner and on the terms set forth in *Annex […]*. The Private Partner shall ensure that the Dialysis Services are provided in accordance with international quality standards but in any case, up to the standards set out in the National Dialysis Standard.

The Private Partner shall provide Dialysis Services in compliance with the National Dialysis Standard.

If the Private Partner does not comply with the National Dialysis Standard, the Public Partner may send a notice of non-compliance to the Private Partner with a demand to undertake actions and eliminate and prevent the non-compliance with the National Dialysis Standard, including provision by the Private Partner of a detailed up to three (3)-month action plan with actions, measures and other activities to be undertaken by the Private Partner to eliminate such non-compliance.

If the Private Partner fails to eliminate non-compliance with the National Dialysis Standard to the extent and pursuant to procedures satisfactory to the Public Partner, and/or fails to provide an acceptable action plan, and/or provides an acceptable action plan but fails to resolve non-compliance within the timeframes stated in the action plan, the Public Partner may issue a preliminary notice of intention to terminate the Agreement in accordance with Clause […]. Such notice shall contain the final, updated timeframe for the Private Partner to resolve non-compliance. If the Private Partner fails to do so within such timeframe, the Public Partner may terminate the Agreement in accordance with Clause […].

By mutual agreement the Parties may modify and/or revise the scope, types, time and manner of provision of Dialysis Services to improve their quality, efficiency and safety, and to increase the number of covered Patients. Modifications and/or revisions to Dialysis Services may be made by the Parties in the manner provided in Clause […].

**Payments for Dialysis Services**

From the Commissioning Date, Public Partner shall, within thirty (30) calendar days from receiving any Monthly Payment request from the Private Partner, make payments for Dialysis Services in the amount, in the manner and on the terms set out in *Annex […]*. The Parties may revise the amount, manner and terms of payment for Dialysis Services by making revisions to the Agreement in accordance with Clause […].

The price for Dialysis Services shall be subject to indexation in case of the growth of inflation and/or in case the foreign exchange rate fluctuations between Kyrgyz som and US dollar in the manner and on the terms set out in *Annex […]*.

In case of non-performance or delay in performance by the Public Partner of its obligations in respect of the payments for Dialysis Services in accordance with *Annex […]*, the Private Partner may demand from the Public Partner a default interest equal to the amount of the KR National Bank monetary policy rate, plus a default interest for using the overdue amount in accordance with Article 360(3) of the Civil Code of the KR equal to five (5) per cent per annum. These default interests shall accrue on the overdue amount on an annual basis commencing with the date which is sixty (60) calendar days following submission of the invoice.

To ensure performance by the Public Partner of its obligations in respect of the payments for Dialysis Services, the Public Partner shall, on a yearly basis, create category in its annual budget for expenses related to the provision of payments for Dialysis Services, State Support and other payouts under Agreement. The Public Partner shall use its reasonable best efforts to create a category in the republican (national) budget for such expenses and shall, not less than once a year, receive from the Ministry of Finance a written confirmation of creating the category in the republican (national) budget for such expenses, and provide the copy of such confirmation to the Private Partner within fifteen (15) days following receipt of written confirmation from the Ministry of Finance.

**Budgetary Account**

To ensure the performance by the Public Partner of its obligations in respect of the payments for Dialysis Services, the Public Partner shall set up a budgetary account in the treasury system of the KR Central Treasury at the Ministry of Finance, which will be used for the payments to the Private Partner.

The Public Partner shall ensure the availability of funds in budgetary account during the Term of Agreement in the amount of not less than three (3) Nominal Monthly Payments for Dialysis Services to be paid to the Private Partner in accordance with *Annex […]*.

**Optional Services**

To the extent that the Dialysis Services are provided properly and in accordance with the Agreement, the Private Partner shall be authorised to provide additional services (the "**Additional Services**") such as:

1. Additional Services offered to the Patients, apart from the Dialysis Services, to the extent that the Patients are free to accept or decline such Additional Services; and for the avoidance of doubt, the Private Partner acknowledges and agrees that the price per session ("**Session Price**") of Dialysis Services includes the cost of all drugs related to kidney failure (with the exception of diabetes and cardiac disease drugs), consumables and tests as specified in the National Dialysis Standard that may be required for providing dialysis session, and the Private Partner shall not levy any additional charge in excess of the Session Price;
2. Dialysis services, which may be offered to persons other than Patients, provided the Private Partner gives priority treatment to Patients. Availability of treatment of Patients shall conform to the National Dialysis Standard and a written and publicly available internal procedure of the Private Partner.
3. Payments for Additional Services of the Private Partner shall be made by the Patients or other persons on their own. The Public Partner shall not pay for the Additional Services.
4. Prices, manner and other terms of offering Additional Services shall be established by the Private Partner at its discretion. Information about the Additional Services shall be included in the reports of the Private Partner submitted to the Public Partner. The Public Partner may require and Private Partner must suspend the provision of Additional Services in case of improper and untimely provision of the Dialysis Services due to the fault of the Private Partner.

**Related services, software and patient records**

The Private Partner shall ensure at its own expense the provision of services related to Dialysis Services, including, patient registration, data collection and database management services related to Patients, Facility, Equipment and Dialysis Services.

For the purposes of efficient and timely management of databases as well as timely and accurate reporting and analysis of information about the Dialysis Services and Additional Services provided, the Private Partner shall ensure the development, maintenance, management and regular renewal of the software allowing, among other things, to regularly collect and deliver to the Public Partner the data specified in *Annex […]*.

The Private Partner shall hand over all patient records to the Public Partner upon termination of the Agreement.

**Annex**

**What Is Dialysis?**

Dialysis is a treatment for kidney failure that rids the body of unwanted toxins, waste products and excess fluids by filtering the blood. When kidneys fail, the body may have difficulty cleaning the blood and keeping the system chemically balanced. Dialysis can take the place of some kidney function and, along with medication and proper care, help people live longer.

**Who needs dialysis?**

When a person with chronic kidney disease (CKD) reaches end stage renal disease (ESRD), also known as kidney failure or stage 5 CKD, the kidneys are no longer functioning to filter and clean the blood the way healthy kidneys normally would. Without treatment, life-threatening waste and toxins will build up in the body. At this point, dialysis treatment or a kidney transplant is needed to prolong life.

Doctors use a number of kidney function tests when determining kidney health. Early diagnosis of CKD and regular monitoring can help people keep kidney function for as long as possible — and allow them and the doctor to plan for ESRD treatment when necessary.

**How does dialysis work?**

Dialysis works by filtering toxins, waste and fluid from the blood through a semipermeable membrane. The 2 types of dialysis, hemodialysis and peritoneal dialysis, use different methods to filter blood. With hemodialysis, the filtering membrane is called a dialyzer and is inside a dialysis machine. The blood is circulated through the dialysis machine and cleaned before being returned to the body. With peritoneal dialysis, the filtering membrane is the natural lining of the peritoneum or abdomen and blood never leaves the body. Both types of dialysis also use a dialysate solution in the filtering process to remove unwanted substances from the bloodstream.

**What are the 2 types of dialysis?**

Hemodialysis and peritoneal dialysis are the 2 main kinds of dialysis. Both types of dialysis filter unwanted waste from the bloodstream. Depending on which type of dialysis people choose, they may also have options for treating in a center or at home.

**Hemodialysis**

Hemodialysis filters the blood through a dialysis machine. Once people are connected to the machine via the hemodialysis access, blood flows into the machine, gets filtered and is returned to the body. There is a choice in where people do hemodialysis and who performs the treatment. In-center hemodialysis is performed by a trained team of nurses and technicians. At-home hemodialysis can be performed in the comfort of people’s own home, either with the help of a care partner or on their own.

**Peritoneal dialysis**

Peritoneal dialysis uses the blood vessels in the lining of the abdomen – the body's natural filter—along with a solution called dialysate to filter blood via a peritoneal catheter. With this method, blood never leaves the body. At-home peritoneal dialysis can be done with a machine or manually at home, at work or even while traveling.

Dialysis treatment is prescribed by the doctor. Together, people and their doctors will discuss treatment options and determine what's right for them. If they decide to go on dialysis, the doctor will prescribe the treatment time and frequency based on the unique health needs. It's important to complete the dialysis treatment exactly as prescribed to feel people’s best.

**What is dialysis: the facts at a glance**

Kidney dialysis is a treatment that can help people live well with ESRD.

* Dialysis can take the place of many healthy kidney functions.
* Dialysis empowers people with kidney failure to live full, productive lives.
* There are 2 types of kidney dialysis: hemodialysis and peritoneal dialysis.
* More and more people are choosing home dialysis, which can offer greater flexibility and better outcomes.
* The best dialysis option for people is the one that best fits their lifestyle and health needs.
* Many people switch dialysis types to fit a changing lifestyle at some point during long-term treatment.

<https://www.freseniuskidneycare.com/ckd-treatment/what-is-dialysis>

1. Please find the definition of dialysis services in the Annex to this Assignment. [↑](#footnote-ref-1)