

GEDİK & ERAKSOY

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NEW LAW AMENDING THE HEALTHCARE PPP LEGISLATION

Speed Read

The Parliament has enacted on a new law (the **Law**) which amends the certain provisions of Law No 6428 on Construction and Renovation of Healthcare Facilities and Procurement of Services by the Ministry of Health under PPP Model and Amendment of Certain Laws and Decrees (the **Healthcare PPP Law**). According to the amendments in cases where (i) force majeure, extraordinary circumstances or other events affecting the implementation of project agreements and schedules thereof occurs or; (ii) the provisions of project agreements and schedules thereof contradict with each other, then project agreement or schedules may be amended, except for the contract amount, upon the approval of the Minister of Health (the **Minister**).

Moreover; if, it is understood that project may not be completed with the existing terms and conditions due to force majeure, extraordinary circumstances or any other reason which is not attributable to contractor then, the remuneration amount will be adjusted taking into account the date of the final bid and project agreements will be amended accordingly. The Minister will approve these amendments.

The Law also requires a new High Planning Council (*Yüksek Planlama Kurulu*, the **HPC**) authorization where the cost of investment established in the tender specification has increased beyond the thresholds in prefeasibility study. After the HPC re-authorizes the MoH, project agreement and schedules will be amended.

The Law envisages the implementation of these provisions to both continuing tenders and already signed project agreements.

Main Changes

The Law amends the certain provisions of the Healthcare PPP Law on the following issues:

Amendments in Project Agreements for Clarity and Applicability

The Law empowers the **Minister** to modify project agreements and schedules thereof in order to ensure clarity and applicability in case where any discrepancy or contradiction exists between project agreements and schedules. This authority excludes any changes in the contract amount.

The practice of Ministry of Health (the **MoH**) was preparing standard draft project agreement and its schedules before tendering. Draft project agreements were not subject to negotiations and project agreements were signed before schedules were negotiated. However, the most important issues from a lender's perspective such as payment mechanism, compensation on termination, construction right agreement, dispute resolution procedures and direct agreements were left to be detailed in the schedules. There was, therefore, limited flexibility for parties to negotiate and the negotiations of schedules could be conducted within the boundaries settled in project agreements. In addition, negotiating the schedules after signing of project agreement caused discrepancies and contradictions between project agreement and schedules.

The Law aims to extend necessary flexibility to MoH to be able to make changes in standard project agreements and schedules. This authority would enhance the bankability of projects from lender's

perspective which tries to manoeuvre within the limits of project agreements. The parties are now able to freely negotiate the terms and conditions of schedules as well as to adapt the project documents to the market conditions.

Downside of extending the MoH the power to alter the project documents is the risk of distorting the tenders which have been already awarded. Considering the law suits pending before administrative courts for the cancellation of tendering of all projects, it is likely that new lawsuits would follow including the claims that the terms and conditions settled in the tendering are being changed in favour of the preferred tenderer during negotiations.

Amendments for Adaptation to Market Conditions

According to the Law, if, due to force majeure, extraordinary circumstances or any other reason which is not attributable to contractor, it is understood that project may not be completed with the existing terms and conditions; then the remuneration will be adjusted taking into consideration the date of final tender and project agreements will be amended accordingly. As known, the remuneration comprises of the total of the amounts to be paid to contractors for utilization of healthcare facilities and provision of services.

The prefeasibility studies of almost all healthcare projects in the market were completed between 2009 and 2011. The MoH concluded the tendering of thirteen projects up to date. It is highly likely that the financial estimations and costs in tender specifications do not represent the current costs of projects due to the recent economic developments as well as to the period of time elapsed between prefeasibility studies and tendering stages. Although not explicitly mentioned, this provision would pave the way for MoH to alter the tendering and project documentation to cope with unforeseen cost increases. However, the Law does not elaborate on how and by which means the remuneration will be adjusted.

Nevertheless, such an adjustment may face claims regarding distortion of tenders because one of the criteria in healthcare PPP tenders is the amount of remuneration to be paid to contractor.

Re-submission to High Planning Council

The Law also includes a provision regarding the changes in investment costs. Accordingly, if, after the High Planning Council's (*Yüksek Planlama Kurulu*, the **HPC**) authorization of the MoH, feasibility studies and project alterations requires an increase in the investment cost beyond the limits envisaged in tender specifications or project agreements, then feasibility studies and other project documentation will be re-submitted to the HPC. Upon the HPC's new approval, draft project agreement and schedules thereof will be amended.

It is not clear from the Law as to whether the HPC may decide not to authorize the MoH to further progress in a specific project in which the investment cost has increased beyond the limits. It is also not clear what will happen if the HPC does not authorize the MoH. In such a case an on-going tender is most likely to be aborted, as MoH will not have the authority to further progress.

Construction Rights

The Law extends the implementation of the provisions of Healthcare PPP Law on construction rights to all on-going tenders and to projects for which project agreements are already signed.

With the enactment of the Law, construction rights in favour of project companies will be vested for a period not exceeding 30 years excluding the investment period. Furthermore, the scope of construction right will be expanded. Contrary to previous regulations, under the Healthcare PPP Law the construction rights are vested for the construction of facilities and commercial service areas whereby under the previous regulation construction rights were vested for healthcare facilities only.

It is likely that this change would create legal discussions regarding the distortion of tenders for the projects in which the project agreement is already signed.

Continuance of Projects for Which Stay of Execution is Ordered

The Law also addresses the ambiguities related to the projects for which the Council of State issued stay of execution. Since 2011, the Union of Turkish Doctors (*Türk Tabipler Birliđi*) has brought actions before the Council of State for the cancellation and for the stay of execution orders related to all the projects tendered. To the extent of our knowledge, the Union managed to obtain stay of execution orders for Ankara Bilkent, Ankara Etlik and Elazığ projects. The project agreements of these projects were already signed.

Upon these developments the Healthcare PPP Law was enacted and the Additional Article 7 of Law No 3359, under which these projects were awarded, was abolished. The MoH attempted to carry out Bilkent, Etlik and Elazığ projects according to the Provisional Article 1 of the Healthcare PPP Law. Pursuant to Provisional Article 1, projects launched under Additional Article 7 of Law No 3359 and projects, which are in the tendering process, are going to be completed according to their existing tender specifications. However, Provisional Article 1 did not encompass discretion to the MoH to amend tender specifications or project agreements.

The Law envisages that the tender specifications and project agreements which were launched before the enactment of the Law in accordance with the Additional Article 7 of Law No 3359 will be modified to comply with the decisions of the Council of State and projects will be carried out accordingly. Thus, the MoH will not cancel projects for which the Council of State issues stay of execution or cancellation and will progress with those projects after changing their tender specifications and project agreements.

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