

New PPP Law: Analysis of Implementation Practices

Over the last 30 years of independence, Kyrgyz law on public-private partnership (the "PPP") has changed several times. The first PPP law was enacted in 2009, but it was rather theoretical with not a single PPP project implemented under it in practice. It was repealed and replaced with the second PPP law in 2012 with only one PPP project successfully implemented under it, namely, the Project on the Organization of Hemodialysis Services in the Cities of Bishkek, Osh and Jalal-Abad. Based on the lessons learned from the first PPP project, the third PPP law was enacted in 2019, which was more advanced and focused on the practical aspects of the preparation and implementation of PPP projects. Finally, the fourth PPP law was enacted on August 11, 2021 (the "New PPP Law") and repealed the previous PPP law of July 22, 2019 (the "Old PPP Law").

Thus, over the period from 2009 to 2021, there were enacted four PPP laws in total, with each subsequent law being more advanced and conforming to, among other things, international best practices in the field of preparation and implementation of PPP projects. Such interest in the PPP issues indicates that the government has been and continues to be paying great attention to the PPP model as a tool for attracting private sector investors to infrastructure projects of Kyrgyzstan and tries to create attractive conditions for businesses interested in entering the infrastructure services market of our country.

The purpose of this article is to provide legal analysis of the provisions of the New PPP Law and to outline the problems encountered by the consultants and public authorities of the Kyrgyz Republic while implementing the PPP projects in practice.

To begin with, the New PPP Law, unfortunately, lacks transitional provisions (unlike the Old PPP Law) that would govern the fate of the PPP projects launched under the Old PPP Law but not completed by the time the New PPP Law was enacted. This fact gave rise to a number of questions in respect of the implementation practices and was the cause of delay in finalizing the ongoing PPP projects. The author of this article encountered in practice a situation when a PPP project that passed the project initiation and preparation phases and reached the tendering phase under the Old PPP Law, turned up in an uncertain situation as by the time of approval of the whole package of tender documents (e.g. request for qualifications, request for proposals, PPP agreement) and pending the announcement of the tender for selecting the private partner, the New PPP Law was enacted, which introduced different rules for initiating a PPP project, preparing tender documents, obtaining approval thereof, holding a tender (or "competitive selection" under the New PPP Law) or direct negotiations, etc. Had there been the transitional provisions in the New PPP Law that would, for example, make it possible for the ongoing PPP projects to be concluded through a final phase under the Old PPP Law, then such problems would not have occurred, but unfortunately, such transitional provisions are not in place in the New PPP Law.

The key novelties of the New PPP Law distinguishing it from the Old PPP Law are discussed below.

First. The New PPP Law requires holding direct negotiations for large-scale PPP projects with an investment value of over KGS 1 billion.¹ Thus, it is no longer required to hold competitions for large-scale PPP projects, which now may be awarded through direct negotiations to the private partner provided that it meets all qualification requirements. However, the New PPP Law lacks provisions regulating direct negotiations, so it is not clear what public authority is eligible to hold direct negotiations on behalf of the government under the New PPP Law?

It is understood that the main criterion for selecting the private partner in the process of direct negotiations must be compliance with qualification requirements; however, the New PPP Law says nothing about the document regulating such qualification requirements, timing and procedures for holding direct negotiations.

Apart from that, there are questions about transparency as it is not clear how the private partner can be selected when several applicants show interest in participating in direct negotiations over the same project. Would it be possible to hold negotiations with all interested persons simultaneously? Perhaps, in such case, competition would be a more logical and reasonable solution ... Would the law-enforcement authorities or the Accounts Chamber have questions to the public authorities and officials involved in direct negotiations process about transparency and objectivity of selecting a particular private partner for the large-scale PPP project?

Based on past experience with the PPP projects, it can be supposed that such questions might arise and this, certainly, will not contribute to the development of PPPs in Kyrgyzstan since the state and municipal officials, in the first place, will worry about personal liability and will be reluctant to take responsibility for implementing the PPP projects. In this context, competitive selection process seems safer and more preferable both for the interested persons as it ensures competition and transparency and for the public partner as it is supposed to be conducted by the selection commission which will identify the winner after evaluating the tender and financial proposals of the bidders. But for some reason, under the New PPP Law, the private partner for large-scale projects worth over KGS 1 billion will be selected through direct negotiations, and for other projects with a lesser value and responsibility, through competitive selection process.

¹ According to Article 11.3 of the New PPP Law, if the investment value is over KGS 1 billion, the PPP project may be awarded through direct negotiations, provided that the potential private partner satisfies the qualification requirements.

Second. The New PPP Law introduced gradation of PPP projects depending on their size, which in turn determines who may hold competitive selection of the private partner. Thus, under the New PPP Law, for projects worth over KGS 100 million, competitive selection will be held by the designated PPP authority, currently, the Ministry of Investment, and for projects worth KGS 100 million or less, competitive selection will be held by the government or local self-government authorities, state or municipal enterprises or institutions, joint-stock companies where the government owns 50 percent of the voting stock or more.

Besides, literal interpretation of the provisions of the New PPP Law leads to the conclusion that for projects worth over KGS 100 million, it is mandatory to have 2 public partners who will jointly execute the PPP agreement with the private partner: (1) the first public partner will be the designated PPP authority, currently, the Ministry of Investment of the Kyrgyz Republic, (2) the second public partner will be a public authority in the relevant industry, or local self-government authority, or state-owned or municipal enterprises or institutions, or joint-stock companies where the government own 50 percent of the voting stock or more. It is not quite clear why it is required to have 2 public partners or what is the practical need for introducing such requirement, or whether the Ministry of Investment will have enough specialists and time to act as the public partner in all PPP projects which will be implemented in the Kyrgyzstan. At the same time, for small-scale PPP projects², it is enough to have 1 public partner and it is not required to have the Ministry of Investment as the second public partner.

Third. The New PPP Law lacks provisions on government financial/economic support and government guarantees for the public partner. In contrast, the Old PPP Law had several articles describing government financial/economic support and government guarantees. In particular, government financial support defined in Article 7 of the Old PPP Law included: (a) guarantees of performance of the public partner's obligations; (b) partial funding of the PPP project; (c) guarantees of minimum profitability of the PPP project to ensure its financial viability; (d) measures to curb possible volatility of exchange and/or interest rates on the loans attracted for the PPP project, etc.

Government economic support defined in Article 8 of the Old PPP Law included: (a) granting the rights to movable and immovable property in addition to infrastructure rights granted to the private partner under the PPP agreement; (b) granting the right of easement over the state or municipal immovable property; (c) charging preferential rent for state and/or municipal property in accordance with the laws of the Kyrgyz Republic; (d) providing assistance in obtaining permits and licenses, etc. It should be noted, however, that the list of types of government economic support was not final, which means that the PPP agreement between the public and private partners could include other measures of government economic support for the private partner.

² According to Article 5.7 of the New PPP Law, small-scale PPP projects are PPP projects with the value of KGS 100 million or less.

Besides, Article 9 of the Old PPP Law had provisions on government guarantees for the private partner such as: (a) the right to free possession, use and disposal of investments made in the PPP project and income and profit generated therefrom for the purposes not prohibited by the laws of the Kyrgyz Republic; (b) the right to compensation for losses incurred as a result of illegal acts or omissions of government or local self-government authorities, or their officials, which inflicted damage on the private partner, in accordance with the terms of the PPP agreement and the Laws of the Kyrgyz Republic; (c) the right to revision of the terms of the PPP agreement or early termination of the PPP agreement and to compensation for damages inflicted by the enactment of normative legal acts entailing worse terms of the PPP project for the private partner compared to the terms provided by the PPP agreement etc.

Unfortunately, the above provisions are not reflected in the New PPP Law, except that Article 5 thereof provides a definition of the term "government support" which means the government financial/economic support³, but any further provisions on such government support are not found in the text of the New PPP Law. It remains unclear why the term "government support" is defined in Article 5 of the New PPP Law, if it is not further mentioned in the text of the law.

Fourth. In view of the lack of transitional provisions in the New PPP Law, which would govern the ongoing PPP projects, it remains unclear whether the PPP Project initiation proposal (the PPP project proposal under the New PPP Law) and tender (competitive selection) documents (request for qualifications, request for proposals, PPP agreement) should be redrafted and reapproved (under the New PPP Law)? It should be noted that such question arose in practice in connection with one PPP project: shortly before the entry into force of the New PPP Law, the tender documents were drafted and approved by the public partner, i.e. the project initiation and preparation phases were completed under the Old PPP Law in force at that time, but by the time a tender (competitive selection) was announced, the New PPP Law was enacted.

According to the New PPP Law, the PPP project proposal should be drafted by the public partner and approved by the designated competitive selection authority (instead of the public partner as it was under the Old PPP Law). But in case of direct negotiations, there shouldn't be any designated competitive selection authority (since there wouldn't be any competitive selection in principle), nor should there be mandatory PPP project proposal at the PPP project preparation phase. In this regard, the question arises as to what public authority should approve the PPP project proposal under the New PPP Law, since without the approved project proposal it would be impossible to continue the project. As such, this public authority, is not, unfortunately, described in the New PPP Law, which indicates a legal gap that may be

³ Government support means government financial/economic support aimed at creating favorable and mutually beneficial conditions for implementing the PPP projects and ensuring the performance of obligations of public partners under the PPP agreements (Article 5.1 of the New PPP Law).

filled only by amending the New PPP Law or by laying down the respective provisions in more detail in the secondary legislation which is not yet in place.

Fifth. The New PPP Law lacks provisions on the maximum term of the PPP agreement, which allows concluding that currently, the PPP agreement can be executed for an unlimited term (previously, it was limited to 30 years with the possibility of extension). However, the New PPP Law has a provision that contributions to the PPP project can be made for a term of 49 years, but it is not quite clear whether this means that the PPP agreement may be executed only for the term of up to 49 years. Thus, it is clear that this provision also needs clarification or amendment.

Sixth. Finally, the New PPP Law has a provision that may seem quite attractive to potential investors as it protects the private partners involved in the PPP project from regulatory and compliance audits, in particular, by imposing a ban on such audits for 3 years after signing the PPP agreement, however, it does not apply to tax audits which may be conducted before expiration of 3 years after signing the PPP agreement. Considering that from January 1, 2019 the tax authorities may also administer the state social insurance contributions, it is presumed that audits will include the review of the accurate and timely payment of not only taxes but also of social insurance contributions for the employees of the private partner, i.e. in fact, a rather wide range of the private partner's economic activities will be audited during the first 3 years after executing the PPP agreement.

Clearly, the New PPP Law was intended to give impetus to the development of PPPs in Kyrgyzstan, to facilitate the PPP project preparation procedures and to attract the private investors in the areas where the government has insufficient resources and where the improvement of public infrastructure and infrastructure services is necessary. Various PPP models may be used to undertake the projects for the construction/reconstruction of schools, hospitals, kindergartens, roads, bridges, logistics terminals, airports, etc. Therefore, the government reasonably counts on PPP as an effective tool for solving the infrastructure problems currently existing in Kyrgyzstan. Worldwide, PPP represents an important and widespread tool for supporting interaction between government and business, and, undoubtedly, has great potential anywhere, including in our country. Also, among the factors of great importance to businesses are the clear and understandable rules, transparency in the competitive selection of and direct negotiations with the private partner, understandable and adequate legal framework. In this regard, it is hoped that the legal gaps and implementation problems discussed in this article will be considered by the respective public authorities and the necessary measures will be taken to address them.