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## **Lessons Learned in Delivering the First PPP Project in Kyrgyzstan: What are the Key Elements of a Successful PPP Project?**

Public-private partnership (the “PPP”) is a long-term (up to 50 years) arrangement between the public and private partners whereby the public partner involves the private partner in the design, financing, construction, rehabilitation, reconstruction, or management of existing or new facilities, including infrastructure. Such a definition of the PPP is given in the Public-Private Partnership Act of the Kyrgyz Republic dated February 22, 2012 No. 7 (the “PPP Act 2012”).<sup>1</sup>

On August 15, 2017, for the first time in the history of Kyrgyzstan, the Kyrgyz Ministry of Health and the famous German company Fresenius Medical Care signed the public-private partnership agreement as part of the project on the organization of hemodialysis services in Bishkek, Osh and Jalal-Abad (the “Project”). The preparation, review and approval of the feasibility study report (the “FSR”) and the Project by the Ministry of Health, the Ministry of Economy and other public authorities of the Kyrgyz Republic, the development and approval of tender documents, the holding of tender to select a private partner, and the signing of the PPP Agreement with the successful bidder took about 2 years.

Today, owing to the Project, there are 4 new dialysis centers opened in Bishkek, Osh and Jalal-Abad, equipped with the most modern equipment and providing hemodialysis services to 283 publicly funded patients.

This Project made clear to the government and people of Kyrgyzstan that the PPP is an effective and useful tool for developing economic and social infrastructure<sup>2</sup> by involving the private sector. In situations where the government has limited financial resources to satisfy the public needs in various infrastructure facilities/services such as healthcare, education, transport, etc., the PPP serves as an important mechanism for promoting the economic and social development, particularly in developing countries, such as the Kyrgyz Republic.

Experiences from implementing the first PPP project in Kyrgyzstan show that the PPP is a rather complex and time-consuming process requiring systematic and coordinated action and constant interaction of the expert team with various public authorities and key stakeholders. What lessons are we taught by the first PPP project implemented in Kyrgyzstan? What is necessary for a PPP project to be successful and serve as an example of effective teamwork between government and business? All these and more are discussed below.

So, in our opinion, which is subjective and may differ from those of others, *the key elements of a successful PPP project* are as follows:

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<sup>1</sup> The PPP Act 2012 will cease to be effective on October 26, 2019, i.e. from the date of entry into force of the new Public-Private Partnership Act of July 22, 2019 No. 95 (the “New PPP Act”). Under the New PPP Act, the maximum duration of a PPP project is 30 years instead of 50 years prescribed under the PPP Act 2012.

<sup>2</sup> According to the APMG PPP Certification Guide, there are two main types of public infrastructure: economic infrastructure that makes business activity possible (utilities’ networks, and systems and plants such as in water, waste and energy supply systems, etc.) and social infrastructure (schools, hospital, social housing, etc.).

- 1) *Project team.* The project team is the foremost factor contributing to the success of any project. The project team should consist of technical,<sup>3</sup> financial, legal, social and other experts, namely, all those who will be involved in appraising the project and preparing the FSR or other analytical document which will have a decisive effect on the project depending on its quality and completeness.
- 2) *Indication of interest and support from the public partner.* No matter how good the project team is, in practice, it won't do much to promote the PPP project without the support of the public partner. Specifically, with the support of the Ministry of Health, despite all the difficulties, the hemodialysis project reached its logical conclusion and the so-called commercial close – that is, when the government has selected and signed the PPP agreement with a private partner.
- 3) *Clear game rules.* The regulatory framework that is clear and easy to understand is undoubtedly one of the key elements of a successful PPP project. Without clear and easy-to-understand game rules, i.e. laws and regulations governing the PPP matters, there will be no interest shown from private companies, and respectively, no projects.
- 4) *Sound preparation and identification of relevance (necessity) of the project by appraising its technical, financial, commercial, and legal feasibility.* Sound preparation is vital to the success of the project and helps identify its relevance and viability by developing a FSR or at least a pre-FSR containing an overview of the technical, financial, commercial, social and legal aspects of the project. A public partner may engage an expert team to develop a FSR. The thoroughness of the technical, financial, and legal feasibility evaluation depends, in each particular case, on the complexity of the project. Without careful preparatory work and subsequent review of the FSR by the concerned public authority – the prospective public partner, there is little chance for the complex PPP project to be successful. That said the PPP is not a panacea or universal tool applicable to every public infrastructure project. First of all, a project must meet the criteria for being procured as a PPP. For example, the PPP is not the right choice for small-scale, short-term projects, which would be more efficiently implemented through public procurement contracts (in respect of goods, works or services purchased to satisfy public needs) or short-term lease agreements (in respect of public buildings, e.g. the movie theater building transferred to the private partner for rehabilitation and subsequent operation for the period of 5-6 years).<sup>4</sup>

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<sup>3</sup> Technical experts mean persons having expertise in particular areas related to the proposed PPP project, for example, health professionals in health services projects, construction and operation experts in infrastructure services projects (e.g. railways, airports, toll roads, hydroelectric power plants, water supply systems), etc.

<sup>4</sup> While there is not a universal consensus about when one may properly talk about the long term, contracts below 5 years are generally referred to as short term. Ten years is commonly regarded as long term, but 7 years and above may be regarded as a sufficient term (Section 2.3, APMG PPP Certification Guide). Given that PPP projects are quite complex and the required duration of the tender to select a private partner is at least a year, which is associated with the review of tender documents by the Ministry of Economy and the Ministry of Finance, it might be unreasonable to apply the PPP, for example, to one-time purchases of certain goods or services, in which case it would be more appropriate to use the public procurement mechanism, which is not so complicated in terms of its approval and, on the contrary, is short-term in nature (up to 1 year) taking into account the requirements for budgeting in the Kyrgyz Republic, whereby the budget and economic outlook for the next 2 years must be approved annually.

- 5) *Legitimate and transparent selection process.* This is a very important element. Compliance with the requirements for selecting a private partner, firstly, demonstrates the government's commitment to the rule of law and thereby increases trust in government by businesses, especially foreign ones, and, secondly, reduces the risk of challenging the results of a public tender by unsuccessful bidders and the likelihood of such claims being upheld by the court, should they be filed. In addition, competitive bidding to select a private partner promotes greater efficiency of infrastructure services as it allows the government to ensure higher quality at lower cost.<sup>5</sup>
- 6) *Effective communication strategy used during the preparation and implementation stages.* As practice has shown, one of the necessary elements of a successful PPP project is ensuring timely public notice of the proposed activity, especially the projects which may be of particular interest to specific social groups (for example, hemodialysis patients). It is important to promote engagement of interested groups through participation in decision-making, where possible, or at least in the working groups established by the public partner at the project preparation stage to discuss the results of the feasibility study and make a decision to approve and initiate a particular PPP project. For example, among the members of the Hemodialysis Project working group established by the Kyrgyz Ministry of Health were the representatives of the Kyrgyz Hemodialysis and Kidney Patients Association. The effective communication strategy helped to keep the general public and hemodialysis patients updated on what was happening from the outset of the preparation stage and to ensure necessary feedback allowing to address their concerns to the maximum extent possible, to gain public support for the Project and to soften tension and opposition from interested groups.
- 7) *Follow-up work.* Such work should be undertaken after each PPP project, at least in the first years, to remove the problems, gaps or inconsistencies in the law identified during the PPP project preparation stage, so that the next project can be implemented more efficiently, quickly and successfully than the previous one. Follow-up work may include the development of proposals for the amendment of the law. For example, based on experiences from the first PPP project, the Kyrgyz Ministry of Economy developed a proposal for the amendment of the PPP Act 2012. As a result, on July 22, 2019, the New PPP Act was signed into law, which removed many barriers and contradictions identified during the practical application of the PPP Act 2012; for example, it introduced a broader definition of the term "public partner", simplified and unified requirements for tendering in line with the internationally accepted standards and practices understandable for foreign investors.<sup>6</sup>

In addition, the New PPP Act introduced a provision allowing a consortium formed by several companies with a view to participating in the tender, to sign the PPP agreement entered into between the public partner and the project company established by this consortium, should it be selected as the successful bidder. There was no such provision in the PPP Act 2012, and this situation created uncertainty and unjustified barriers to the participation of consortia in tenders,

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<sup>5</sup> The APMG PPP Certification Guide defines the term "value for money", i.e. the relationship between price and quality. Competition is central to value for money, which means that in case of direct negotiations, the government may win in terms of price but lose in terms of quality.

<sup>6</sup> In particular, the New PPP Act has introduced an internationally accepted 2-stage bidding process where: *the first stage* of the process involves qualification of interested parties (the Request for Qualification) and *the second stage* involves submission of financial and technical proposals by the prequalified bidders (the Request for Proposals).

though forming a consortium by the interested parties for the purpose of bidding for the project is a widely used practice around the world when it comes to large-scale infrastructure projects, as the combination of human and financial resources increases the consortium's chances of winning the tender on the one hand, and the government's assuredness that the PPP project will be successfully implemented due to the joint efforts of the companies, on the other hand.

- 8) And the last but not the least, *effective performance monitoring by the public partner*. As practice has shown, for the public partner, the end of the tender and award phase represents the start of the work on the project. As a matter of fact, in the course of implementing the PPP project, the private partner may face a number of various issues ranging from the registration of a local subsidiary (project company) to the acquisition of various licenses, permits, or approvals of regulatory authorities, and rights over plots of land on which they intend to construct an infrastructure facility (hospital, school, kindergartens, airport, etc.). In practice, to resolve such issues on time, especially when it concerns interaction with the government and local self-government authorities, the private partner may need support and assistance from the public partner. Experience has shown that such support is extremely important in the context of Kyrgyzstan; thus the key word in the phrase "PPP" is "PARTNERSHIP" in the sense of interaction between government and business. If, after reaching commercial close, the public partner leaves the project unattended and turns its back on the problems encountered by the private partner in practice, even a very well-prepared and properly structured PPP project will be fated to fail.<sup>7</sup>

Although the main risks during the PPP project are generally borne by the private partner, especially when it comes to public infrastructure projects financed by the private partner, the government represented by the public partner cannot and should not be indifferent to the problems of the private partner, since the PPP is not the same as public procurement, when the government is required under the contract simply to pay a private company for the goods or service supplied. In the PPP projects, the government serves as a partner throughout the term of the PPP agreement and should provide certain safeguards of the private partner's operations, such as, for example, financial compensation for wrongful official acts causing damages to the private partner, mechanisms to mitigate foreign exchange risk,<sup>8</sup> inflation risk, risk of changes in law adversely affecting the PPP project and/or the private partner, etc. Based on this, the PPP success is largely determined by equitable risks allocation and balance of interests between the private and public partners.

Thus, the PPP is a legal form of interaction between the public and private sectors aimed at building new or improving existing public infrastructure facilities and/or services. The demand for PPP projects

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<sup>7</sup> It is important to note that the public partner needs to develop certain skills and competencies (the so-called capacity) necessary for the effective monitoring of the PPP project. It would be good to have at least one PPP expert, or, even better, the PPP unit (division, department) within the public partner's organizational structure responsible for monitoring the PPP projects and having expertise in PPPs, economics, finance and, of course, in the area of proposed activity (healthcare, education, etc.).

<sup>8</sup> This applies to the projects the funding for which is obtained through bank loans in the foreign currency (US dollars or euros) and the revenues are collected from user charges in the national currency. In such projects, the foreign exchange risk is quite high, considering the long-term nature of PPP projects, and should be mitigated by requiring the public partner to pay compensation in case of the national currency devaluation or by granting the right to the private partner to proportionally increase the cost of infrastructure services provided, subject of course to user affordability requirement.

is higher in countries with limited financial resources, whereas the countries with a developed market economy, representing a small minority in the world, are not so interested in PPPs,<sup>9</sup> as they have enough resources to cope with their tasks, while the developing countries have to attract private investments to develop public infrastructure and satisfy the need for new kindergartens, schools, hospitals, rehabilitation centers, roads, transport etc. Kyrgyzstan has just embarked upon the PPP mechanism to develop its economic and social infrastructure and is taking the first steps in this direction. The PPP potential is huge and the main thing is to use this potential in the right way and for the benefit of Kyrgyzstan toward improving the quality of life of people.

### ***About the Author and Kalikova & Associates***

*Magomed Saaduev is Partner at Kalikova & Associates and Head of PPP practice, with more than 15 years of practical experience in the field of law. Magomed is a licensed attorney, arbitrator and member of various expert working groups set up by the public authorities of the Kyrgyz Republic.*

*Kalikova & Associates (K&A) is one of the leading full-service law firms in Kyrgyzstan. K&A is ranked as a Band 1 law firm by a number of international legal directories, such as Chambers Global, Chambers Asia Pacific, Legal 500, Who's Who Legal.*

*One of the main and dynamically developing areas of practice in K&A is public-private partnership (PPP). The team of lawyers developing the PPP practice is unique in the sense of being pioneers in this field. K&A lawyers were the first in the history of the country to prepare and implement the first PPP project for organizing hemodialysis services in the Kyrgyz Republic providing support at all stages of the process: from feasibility appraisal and tendering to commercial close. Currently, the firm's lawyers are engaged in other PPP projects in the field of healthcare, education and transport. The K&A team is ready to offer professional legal services at any stage of the PPP project, from identification and preparation to monitoring. In addition, our PPP lawyers are actively involved in the legislative activities, in particular, the PPP Act 2012 and the new PPP Act 2019 were drafted with their direct support.*

*For more information about K&A services visit our website: [www.k-a.kg](http://www.k-a.kg) or office at the following address: AURORA Business Center, 7th floor, 1A Igemberdiev Street, Bishkek, phone: + 996 (312) 976843, e-mail: [lawyer@k-a.kg](mailto:lawyer@k-a.kg).*

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<sup>9</sup> According to the IMF World Economic Outlook report, 34 member countries of the IMF are considered developed. The remaining 154 countries are considered emerging markets and transition economies.