



GRATA
INTERNATIONAL

PPP in Azerbaijan: recent legal developments, major issues and opportunities.

2021

Umami Jalilova, Managing Partner
GRATA International, Azerbaijan

Why Azerbaijan?

- **Government is keen to attract more investors than before to infrastructure construction in the country;**
- **In 2020 Azerbaijan released its territories (Nagorno Karabakh region) from almost 30 year occupation and currently massive construction works are being carried out in the region;**
- **Legislation provides for some privileges and exemptions for PPP projects plus more changes to the law are under way to create more attractive conditions for investors in projects of public importance**
- **The law does not forbid unsolicited PPP initiatives by investors**
- Authorized bodies – Ministry of Economy, Ministry of Finance and other ministries
- It should be noted that application of the Law of the Republic of Azerbaijan “On Public Procurement” is explicitly excluded by BOT Law (Art. 13.1).



LEGAL FRAMEWORK

- **Law of the Republic of Azerbaijan No. 177VQ, dated 15 March 2016 "on implementation of investment projects related to construction and infrastructure facilities on the basis of special funding"**
- **Decree of the President No. 867, dated 20 April 2016 on the application of the Law of the Republic of Azerbaijan "On the implementation of special financing of investment projects related to construction and infrastructure facilities"**
- **Decree of the President of the Republic of Azerbaijan No. 1149, dated 07 December 2016. On the Rule on the implementation of the infrastructure projects by investors under the BOT model, requirements to the investors, as in accordance with type of construction and infrastructure projects, terms and conditions of contracts, and determination of the value of the goods and services obtained as a result of investment" (hereinafter "BOT Rules")**



LEGAL FRAMEWORK

- **Decision of the Board of the Ministry of Finance No. Q-06, dated 22 May 2017 on "Approval of the Rule on Methodology for Calculation of Cooperation Assistance and Guarantee Commitment Charges under Contracts signed within "Build-Operate-Transfer Model" (hereinafter "MOF Rules")**
- **The Law "On Protection of Foreign Investment"**
- **Civil Code of the Republic of Azerbaijan, approved by the Law No. 779-IQ, dated 28 December 1999 (hereinafter "Civil Code")**
- **Law on State Debt No. 334-IIIQ, dated 22 May 2007**



LEGAL FRAMEWORK

- - **Law on Valuation activity No.510-IQ, dated 25 June 1998**
- - **the Law on Investment Activity No. 952, dated 13 January 1995**
- - **Law on Licenses and Permits No. 404-VQD, dated 11 November 2016**

PPP Models available

- Build-Operate-Transfer (BOT) only

According to Art. 2.0.2 of the BOT Law, “BOT Model” is the payment of investment expenditures (including profit earned) in connection with investment projects related to construction and infrastructure facilities by purchasing of goods and services by consumer or MOEc in accordance with contracts.

- Authorized bodies – Ministry of Economy, Ministry of Finance and other ministries
- It should be noted that application of the Law of the Republic of Azerbaijan “On Public Procurement” is explicitly excluded by BOT Law (Art. 13.1).

BUILD – OPERATE - TRANSFER

The Law establishes the legal basis for investing in the construction (construction, current and capital repairs, reconstruction, restoration), management and transfer of construction and infrastructure facilities and similar facilities under the BOT model:

- Bridges, tunnels;
- Water reservoirs, water treatment plants, irrigation, drinking and domestic water, as well as sewage systems, main gas pipelines, underground gas storages, intra-urban gas networks;
- Press and conference centers as well as education, health, culture and tourism facilities;
- Commercial premises, wholesale markets, factories and factories;

- Sports centers, hostels, recreational and amusement parks;
- Industrial parks, high-tech parks, aquaparks, high-tech automated management systems and other systems in the field of information technology;
- Agricultural products storage facilities and other similar facilities;
- Geothermal and waste heat-generating facilities and heating systems, electricity generation, transmission, distribution and sale;
- Highways, highways, railway and rail systems, bus stations, stations, funicular and lifting systems, logistics centers, underground and overground parking, metro lines and stations;
- Special economic zones, maritime and airports used for civil purposes, cargo, passenger and yacht harbors.

Important

- The term of the agreement concluded with investor shall not exceed 49 years
 - At least 20% of the funds must be available from an investor
 - Legislation of RA (including BOT Legislation) does not provide for tax exemption.
-

Incentive for investors/financial support

- State guarantee for implementation of obligation of MOEc vis-a-vis investor (Art. 10, BOT Law)
- Non-applicability of state duties and charges (Art. 11, BOT Law)
- As per agreement of the parties, MOEc can also provide guarantees on purchase of goods and services produced by investor (Art. 7.2, BOT Law).
- Cooperation support - defined as financial assistance determined by the agreement of the parties and provided by MOEc in case if expenses incurred by investor with respect to investment project cannot be repaid fully or partially by consumers in the form of service fees by taking into account paid service fees and investor's losses (Art. 2.0.5, BOT Law).

Constraints / practical issues

- Step-in rights of lenders are not provided under the Azerbaijani legislation
- Ownership over constructed facilities and land is not clearly regulated by the law
- In accordance with Art. 3.6.3 of BOT Rules investor is obliged to provide guarantee in connection with operation and transfer as determined by contract.
- Winner of the bid shall establish separate legal entity for the purpose of implementation of investment project. BOT agreement, however, should be signed with an investor
- Disputes over property rights, rent or mortgage where the case relates to real estate located on the territory of Republic of Azerbaijan fall under exclusive jurisdiction of local courts (art. 444 CPC)



RECENT LEGISLATIVE and INSTITUTIONAL DEVELOPMENTS

Small and Medium Business Development Agency

Increasing the role of the private sector in economic development through public-private partnership (PPP) modalities is set as a priority target in strategic roadmaps and other conceptual papers on socio-economic development of Azerbaijan approved by the President of the Republic of Azerbaijan. Hence, the Public-Private Partnership development Centre has been established under the Small and Medium Business Development Agency of the Republic of Azerbaijan in order to ensure systemic approach in promoting and supporting PPP projects. Model Charter on Public - Private Partnership Development Centre was approved by the Decision of the Board of the Ministry of Economy of the Republic of Azerbaijan dated July 16, 2019.

Main areas of activity of the Public-Private Partnership development Centre are as following:

- - making proposals on development of legislative base and institutional infrastructure of public-private partnerships
- - preparation, implementation and coordination of programs and projects on public-private partnerships;
- - ensuring and broadening the participation of SMEs in public-private partnership programs and projects;
- - raising awareness and capacity building for all stakeholders in in publicprivate partnerships; -
- analysing and screening of projects in accordance with the criteria of public-private partnership and taking relevant measures for their implementation/

Amendments to the Rules

The Rules now allow, in the following cases, to determine the investor by the reasoned decision of the authorized body by the method of direct engagement without holding a competition:

- there is an urgent need to implement any investment project in connection with an emergency that has resulted in loss of life, damage to human health or the environment, significant material losses and deterioration of living conditions, and the and the inexpediency of organizing and conducting the competition in this regard;
- implementation of an investment project is possible only from a particular investor, or a particular investor has exclusive rights in respect of the subject matter of the investment project, such that no reasonable alternative or substitute exists.

Amendments to the Rules

- Before the law required at least 3 participants in order for the first tender among all or certain bidders to be valid, now according to the changes, even with 2 bidders the tender is considered valid
- If it is not possible to determine the winner of the competition held among all or certain candidates or if the competition is considered invalid, the investor is determined by the method of direct engagement by making a reasoned decision of the authorized body without reference to the cases provided for in paragraph 2.7-1 of this document. Such a decision must substantiate the compliance of the investor's experience, technical, financial and other indicators with the characteristics of the project, as well as the need for any changes to the terms and conditions of the competition. (Article 2.9 of the Rules)

Amendments to the Rules

- Amendments to the Rules also introduced a requirement to pay a participation fee to get bidding documents. The fee for participation in the competition is determined by the tender committee, provided that it does not exceed the costs of the competition (announcement, printing of documents, sending notifications, business trips, involvement of experts). The participation fee is not refundable to candidates. The authorized body shall transfer the remaining part of the participation fee to the state budget in excess of the competition expenses.
- Agreement is concluded between authorized body and winner within 30 (thirty) business days based on minutes of tender committee.



THANK YOU!

Ummi Jalilova,
Managing Partner

ujalilova@gratanet.com

www.gratanet.com

