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PPP in Healthcare System: Kazakh law perspective

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WHY KAZAKHSTAN?

- There is lack of budget financing and high demand for investments in public infrastructure
- Strategic geographical location (e.g. China's Belt and Road initiative, a door to the Eurasian Economic Union, a single market of 183 million people)
- Generally good legal framework (special PPP Law and Concession Law)
- Strong political will of the President and Government to support PPPs
- Kazakhstan's climbed the World Bank's Ease of Doing Business index and is now ranked 28th
- Strong support of Kazakhstan by MDBs (EBRD, ADB, IFC, IDB, EABR, AIIB) attracting private and international financial investment

WHAT IS LEGAL FRAMEWORK FOR PPPs?

- Please refer to general overview of the legal framework of PPPs in Kazakhstan:

http://www.gratanet.com/up_files/PPP_Kazakhstan.pdf

- Please refer to unofficial translations of the PPP Law and Concessions Law:

[http://www.gratanet.com/up_files/\[GRATA\]%20PPP%20Law%20English%20Translation%20\(As%20of%204%20July%202018\).pdf](http://www.gratanet.com/up_files/[GRATA]%20PPP%20Law%20English%20Translation%20(As%20of%204%20July%202018).pdf)

http://bit.ly/GI_Concessions_law

Concession Law v PPP Law

(assuming “special importance” status is granted)

Bankability Requirement	Concession Law	PPP Law
Legislative certainty - limited service	✗	✓
Ability for a consortium to nominate SPV	✓	✗
Access to tax concessions	✓	✗
Clear right to terminate without Kazakh court	✓	✗
International arbitration by Kazakh SPV	✓	✗
Protection against currency exchange risk	✓	✓
Direct negotiations (no tender required)	✗	✓
Ability to have University as a third party to a PPP agreement	✗	✗

Case Study - Karaganda and Asfendiyarova University Hospitals

- Integrated Model, Clinical Service Model and, arguably, Infrastructure Model can be implemented under the PPP Law. Only Integrated Model, evidently, can be implemented under the Concession Law.
- Because Concession Law provides more advantages over the PPP Law, both projects have been structured as BTO under the **Concession Law**. Both projects follow **Infrastructure Model** so that respective Universities will be appointed as **medical services operators** to provide education and medical services at the relevant new hospitals
- Both Karaganda and Asfendiyarova Universities, however, recently have been transformed from republican state enterprise into a non-profit 100% state-owned joint-stock company legal form, that created additional legal impediments for implementation of these two projects per structure as they initial envisaged
- **The key issue now is, therefore, how to grant the legal right of use the concession facility to the University to provide medical services within the existing legal framework?**

Possible Solution #1- Change the law

Make amendments to the Concession Law , State Property Law and other relevant laws and bylaws to:

1. enable to structure “limited service” concession projects and, thereby
2. to allow to the grantor to appoint legal entities with 100% state participation to act as “functional operators” for functional operation of the concession facility and for that to use state property (i.e. hospital) under the gratuitous use agreement without holding a tender.

Problems:

1. lawmaking activity is a very time-consuming process
2. Ministry of National Economy and other state authorities, apparently, are rather hesitant to make any changes in the laws

Possible Solution #2 - to structure as BOT under current legislation

To structure the Project as **Built-Operate-Transfer (BOT)** so that concessionaire builds and **owns** the facility, and carries out technical operation under the Concession Agreement, while the University provides medical services on the basis of a lease contract between Concessionaire and the University. Upon expiry of the concession term the Concessionaire transfers the facility to the state ownership.

Two sources of Concessionaire's revenue:

1. Compensation of Investment Cost and Rent Fee from the state budget under the concession agreement
2. Payments from the University to compensate labor, utilities, waste disposal and other operational costs of the concessionaire under the lease contract between the University and the Concessionaire (i.e. University, hopefully, shall be able to pay using revenues from its medical services)

Problems:

1. Proposed BOT structure may be in practice not bankable
2. Not tested and there is so far no “official blessing” of the State Property Committee or the Ministry of National Economy or the PPP Center
3. Universities may disagree with prospects of not having legal title over the facility and compensate operational costs of the concessionaire.



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