

11 December 2015

*To our clients and friends*

## **INFORMATION MEMORANDUM New Public-Private Partnership Law**

On 23 November 2015, Kazakhstan put into effect the new Law "On Public-Private Partnership" (the "Law").

The steps to develop the said Law were taken back in 2012 in the framework of reforming the concession legislation for the purpose of introducing new public-private partnership (the "PPP") forms and extending the spheres of their application, as well as for bringing the national legislation in line with the international practice.

The new Law became an independent normative act regulating PPP relations and is intended to implement the Plan of the Nation "100 Specific Steps to Implement Five Institutional Reforms."

The key purpose of PPP is to develop infrastructure in public interests by way of uniting resources and experience of the state and private economy sectors in industries, which have been traditionally referred to the sphere of the state responsibility, under the condition of balanced distribution of risks, benefits and costs, rights and obligations.

Please see below key provisions of the Law.

### **1. PPP Concept. Making Terminology More Specific**

The Law defines PPP as a specific form of cooperation between the state partner and private partner, which corresponds to the features defined by the Law. Such features include: building of relations between the state partner and private partner through entering into PPP contract, medium-term or long-term PPP project implementation (from 3 to 30 years depending on peculiar features of PPP project), joint participation of the state partner and private partner in PPP project implementation, combining resources of the state partner and private partner for PPP project implementation.

The Law elaborates on many concepts and terms, which were previously not defined in legislation or which were not clearly defined. Specifically, the Law defines PPP itself and describes its features. This is a significantly important circumstance, since it simplifies the selection of the required legal regime to a certain form of cooperation with the state in the commercial sphere.

### **2. More PPP Types**

The Law provides for a greater number of contract types of PPP, which may be implemented using concession agreements, state property trust management agreements, state property lease agreements, as well as contracts concluded for process engineering, pilot-line production, pilot testing and small-scale production, including life cycle contracts, service contracts and other contracts corresponding to PPP features.



### **3. Establishing New Forms of Participation in PPP**

As compared with the Concession Law, the Law explicitly provides for different forms of participation of the state and private partners and quasi-public sector entities in PPP projects.

The form of participation of the private partner has been extended to the maximum extent and provides for participation in financing, designing, creation, reconstruction, and operation of PPP facilities, and transfer of property and property rights for the purposes of PPP implementation.

The form of participation of the state partner implies granting of land plots, right to use state property objects, participation in the establishment and activities of PPP companies, provision of PPP facilities with engineering infrastructure and provision of state support.

The Law provides for the following forms of participation of quasi-public sector entities in PPP projects:

- shared participation in PPP projects via establishing legal entities or acquiring (alienating) shares (participation interests in the charter capital) of legal entities;
- transfer of exclusive rights to intellectual property items;
- service support, including services on transfer of technologies, support of innovations, consulting, engineering, staff education and advanced training;
- provision of services of industrial parks, business incubators, special economic and industrial zones;
- construction, creation, reconstruction, modernization and/or operation of facilities;
- export promotion and other.

Furthermore, the Law secures the forms of participation of the National Chamber of Entrepreneurs in PPP.

### **4. Decentralization of State Management**

The Law determines the Kazakhstan Government together with the authorized agencies in its structure, specifically, in respect of the budget implementation, an authorized agency of respective industry, local maslikhats, National Chamber of Entrepreneurs and Kazakhstan Public-Private Partnership Center JSC as the bodies regulating relations in the framework of PPP.

A peculiar feature of the new Law is an attempt to give more independence to local authorities with respect to PPP projects implementation, for which purposes the Law stipulates a possibility to implement such projects on the basis of a set of standardized documents. According to the developers' opinion, such measure is to generally enhance PPP development and attract investments in creation of facilities of local significance.

### **5. Securing Rights and Obligations of PPP Partners**

Beside base guarantees of protection of the rights and legitimate interests defined by the Kazakhstan's legislation, the Law explicitly provides for such rights of a private partner as the right to change PPP contract conditions for the purposes of ensuring its property interests existing as of the date of signing the contract, right to claim for payments and compensations in cases and in accordance with the procedure established by the contract, exercise rights in respect of PPP facility, and use, in its sole discretion, net profit gained from carrying out activities in the framework of PPP.

It is worth mentioning that the Law also provides for more detailed regulation of the state partner's rights, specifically, the right to conduct audit of financial-and-economic activities, right of unimpeded access to PPP facility (including documentation), right to claim for elimination of violations and compensation for losses incurred through the private partner's fault.

## **6. Ways to Select a Private Partner**

Unlike the Concession Law stipulating a unified procedure for concession of facilities, the Law provides for a possibility to select a private partner via holding a tender (open / closed, two-stage / simplified) or on the basis of direct negotiations.

The simplified procedure for the competitive selection is stipulated for the tenders held using model tender documentation and model agreements for local projects.

In addition to requirements specified with respect to procedure for selecting a private partner, the Law also determines general qualification requirements to a private partner. The said requirements are also reflected in the Concession Law.

According to the general rule, it is contemplated that a private partner will be selected via holding an open tender. In exceptional cases determined by the Government, a closed tender may be used in respect of facilities relating to the RK defense, state security or environment.

## **7. Securing Requirements Specified to PPP Contracts**

Almost none of the key requirements to the concession agreement have been amended by the Law, except for the local content obligations and obligation to provide annual procurement program in respect of goods, work and services, which are not reflected in the Law. The absence of such requirements is conditioned by the Kazakhstan's obligations in connection with joining the WTO.

The Law establishes that a PPP contract is to secure provisions distributing risks between the state and private partners and measures required to eliminate them.

The Law provides that, beside general requirements specified to a PPP contract, an institutional PPP contract is to additionally contain, as follows: procedure for the formation of PPP company bodies, procedure for the formation and making contributions to the charter capital of PPP company, provisions regulating relations between the participants (shareholders) of PPP company and procedure for the corporate disputes resolution.

A PPP contract is to be concluded in writing. Failure to comply with the PPP contract form entails its invalidity. Unlike the Concession Law, the Law does not explicitly provide for an obligation to perform state registration of PPP contracts.

## **8. Securing Legal Regime of Property Used to Implement PPP Project**

The Law establishes that in case of signing off a PPP facility and other property to the private partner's balance, such facilities are to be separated from the private partner's property and be reflected in a separate accounting.

## **9. General Comments**

As a result of toughening the national legislation over the past fifteen years Kazakhstan now lacks outward investment. Fall in prices for many natural resources, dependence on the Russian economy suffering significant economic difficulties and other current factors force the

Government to search for the new solutions to overcome the crisis. The new Law is one of a number of the recently adopted normative legal acts intended to make the economy more attractive for investments and lighten the state's burden of creating and maintaining socially important facilities.

The new Law sets forth less cumbersome and bureaucratized PPP access system. Nevertheless, it does not solve each and every problem due to which private capital does not strive to find its way to the traditional spheres of responsibility of the state. For example, the following issues still remain unsolved: limit on state support of a concessioner, possibility to index long-term rates, establishing privileged prudential norms in respect of the banks' funds allocated to finance PPP projects, use of international arbitration for disputes involving immovable property, and other. Accordingly, the issue of improving legislation with respect to regulation of relations in the framework of PPP remains to be topical, as well as the problem of absence of the portfolio of projects attractive for investment.

Furthermore, PPP is a risky sphere for investment, which is also an objective constraining factor. The following risks are traditionally distinguished in the sphere of PPP projects: political and judicial, force-majeure, market and currency risks, risk of changes in the interest on borrowed funds, operational and management risks, possible raw shortcomings, financial risks, risk of introducing amendments into legislation, etc. Fair distribution of risks in the course of implementing PPP projects may make PPP more attractive to a certain degree for investors, financial institutions, state and society. Time will show how the new and fairly progressive Law will stimulate PPP development in Kazakhstan.

In conclusion, it is worth mentioning that the term of the Program for PPP Development in the Republic of Kazakhstan for the Years 2011-2015 expires this year. PPP Development Program for the Years 2015-2020 is currently being developed.

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On 10 July 2015, AEQUITAS and Public-Private Partnership Center entered into a partner agreement. Cooperation based on the partner agreement contemplates implementation of joint research projects in the PPP sphere, work on improvement of regulatory framework and exchange of specialists.

Uniting the experience, knowledge and qualification of the Center's specialists and AEQUITAS lawyers will allow to better respect the private business interests and to provide potential investors wishing to take part in PPP projects with the legal services and advantages of higher quality.

Best regards,  
AEQUITAS