

PPP LAW VERSION 2.1: MUST KNOW LATEST AMENDMENTS TO THE PPP LEGISLATION

In recent years, implementation of the projects via public-private partnerships (hereinafter – “PPP”) became more popular in the market of Kazakhstan. The legislation in this industry is constantly being improved due to the development of world practice and the growth of the economy of Kazakhstan.

Hereby, we provide an overview of the most significant amendments to the Law No. 379-V dated October 31, 2015 “On Public-Private Partnership” (hereinafter - the “PPP Law”) and the Law No. 167-III dated July 7, 2006 “On Concessions” (hereinafter – the “Law on Concessions”) stipulated by the Law No. 399-VI dated January 2, 2021 “On Amendments and additions to certain legislative acts of the Republic of Kazakhstan on the recovery of economic growth”.

In particular, the amendments affected the matters such as conceptual framework, the introduction of auction mechanism, PPP project implementation period, reimbursement of costs in PPP, qualification requirements for a potential private partner/concessionaire and other.

Below, we provide a more detailed overview of the latest amendments to the PPP legislation in Kazakhstan.

1. Main principles

Both amended Laws are supplemented by the so-called principle of “values for the population”. The PPP Law provides a wider definition of the principle. It states that the objective of the principle is “ensuring development of social infrastructure and life support systems for the population, increasing the level of availability and quality of goods, works and services, as well as creating jobs within the framework of PPP projects”. Accordingly, the state highlights the importance of the population and its role in the implementation of PPP and concessions projects in Kazakhstan.

2. Main concepts

Grantor

One of the most considerable amendments to the Law on Concessions is the new definition of the term “grantor”. In the previous edition of the Law on Concessions, the concept of a grantor was stated as follows: “the grantor is the state authority of the Republic of Kazakhstan that has concluded concession agreements in accordance with this Law and (or) a direct agreement with the creditors of the concessionaire”. This wording misled investors as to who the grantor is and by what means the grantor will secure its obligation, whether it will be the state as a whole or individual state authority. This negatively affected the concession projects’ implementation.

The current edition of the Law on Concessions states that: “grantor is one or more state authorities of the Republic of Kazakhstan, acting on behalf of the Republic of Kazakhstan or the Government of the Republic of Kazakhstan, concluding a concession agreement in accordance with this Law, or a local executive authority of the Republic of Kazakhstan concluding a concession agreement in accordance with this Law on behalf of an administrative-territorial unit (region, or city of republican significance, or the capital)”. The new definition clearly indicates that the state as whole for republican projects or administrative-territorial unit for local projects are regarded as the grantor. This amendment is aimed to increase the confidence of potential investors in the stability and financial reliability of the grantor. It is worth noting that this amendment has a retroactive effect and shall apply to the republican concession projects since December 17, 2017.

Direct agreement

The definition of a direct agreement in the Law on Concessions has been amended. Now, direct agreements can be signed and executed in all concession projects. Previously such an opportunity was provided only for “significant” projects. However, we would like to point out that the wording of Article 26-2 of this law which actually governs the conclusion of direct agreements has not been amended accordingly. As a result, it still contains a reference to the “significance” of the project when it comes to the conclusion of a direct agreement. Thus, it does not correspond to the definition of a “direct agreement” given in Article 1 of the Law on Concessions. We believe that in order to avoid potential controversial situations on the ground of this contradiction, it is necessary to bring these provisions of the Law on Concessions in line with each other.

3. PPP project implementation period

In accordance with the new amendments to the PPP Law, the minimum period for the implementation of PPP projects has been increased from 3 to 5 years. We note that the maximum implementation period remains unchanged - 30 years, depending on the specifics of the project.

4. Reimbursement of costs in PPP

According to the new amendments, full reimbursement of the private partner’s costs will be provided by the state, if the operation of the social infrastructure and life support facility does not provide a return of investments of the private partner. Such facilities include complexes used for public needs, which are entrusted to state bodies in accordance with the legislation of the Republic of Kazakhstan.

5. Introduction of an auction mechanism

According to the new edition of the PPP Law and the Law on Concessions, the concessionaire or private partner can be determined based on the results of an auction. In Kazakhstan, auctions are also used in the field of subsoil use. Despite the introduction of the auction mechanism on the legislative level, there are still no by-laws that would describe in detail the procedure for holding such auctions. In this regard, at this moment it is not clear how exactly PPP and concessions auctions will be conducted.

6. Qualification requirements for a potential private partner/concessionaire

The qualification criteria for a potential private partner and concessionaire have been supplemented by the new requirements. New qualification requirements both for potential private partners and concessionaires are the following:

- potential private partner/concessionaire shall be solvent and have no tax debts exceeding six times the MCI¹;
- founders, managers of a potential private partner/concessionaire should not be included in the list of organizations and persons associated with the financing of terrorism and extremism;
- a potential private partner/concessionaire should not be included in the register of unfair participants in public procurement².

A potential private partner also should have its own assets not less than 20% of the value of the PPP object.

¹ 1 MCI from January 1, 2021 is 2,917 tenge (about 7 US dollars)

² According to the Law of the Republic of Kazakhstan dated December 4, 2015 No. 434-V “On public procurement” (with amendments and additions as of January 16, 2021), unfair participants in public procurement is a person who provided false information on qualification requirements and/or documents in the procurement process, who avoided concluding a public procurement agreement and who have not fulfilled or improperly fulfilled their obligations under the public procurement agreement.

In turn, the qualification requirements only for potential concessionaire have been supplemented by the following:

- potential concessionaire must not be under bankruptcy or liquidation procedure;
- assets the balance value of which exceeds 50% of total fixed assets of the potential concessionaire shall not be arrested;
- financial and economic activities of the potential concessionaire shall not be suspended in accordance with the legislation of the Republic of Kazakhstan;
- the potential concessionaire must have civil legal capacity (for an individual entrepreneur) and legal capacity (for legal entities).

7. Features of PPP for the development of production (industrial) infrastructure

The PPP Law was supplemented by a separate article 44-1, which regulates the implementation of PPP projects for the development of production (industrial) infrastructure. PPP for the development of production (industrial) infrastructure will be aimed at providing engineering and communication infrastructure for projects related to the creation of the new production facilities or modernising and expanding of existing production facilities.

8. Grounds for amendment and termination of the PPP contract

Article 49 of the new version of the PPP Law provides that the parties may enter into an addendum to the PPP contract only upon approval by the related state authorities. Moreover, now on it is not allowed to introduce amendments to the PPP contract entailing a change in the amount of state obligations without consideration of such an amendment by the relevant budget commission.

© 2021 Unicase Law Firm

Юридическая фирма Unicase благодарит Вас за внимание и надеется, что данная информация окажется полезной для Вас. Информация, содержащаяся в данной публикации, предоставлена в сокращенной форме и предназначена лишь для общего ознакомления Клиентов. Просим обратить внимание, что она не может рассматриваться в качестве правового анализа и служить основанием для вынесения профессионального суждения. Юридическая фирма Unicase не несет ответственности за ущерб, причиненный каким-либо лицам в результате действия или отказа от действия на основании сведений, содержащихся в данной публикации.

© 2021 Unicase Law Firm

Unicase Law Firm thanks you for your attention and hopes that this information will be useful to you. The information contained in this publication is provided in an abbreviated form and is intended only for general familiarization of customers. Please note that this information cannot be considered as a legal analysis and serve as the basis for professional judgment. Unicase Law Firm is not liable for damage caused to any person as a result of an action or refusal of action based on the information contained in this publication.