

21 June 2011

THE NEW IMPLEMENTATION DECREE OF THE BUILD-OPERATE-TRANSFER LAW NO. 3996

This article provides brief information on some important aspects of the new Implementation Decree¹ (the “New Decree”) of Law No. 3996 Concerning the Realization of Certain Investments and Services in the Build-Operate-Transfer Model² (the “BOT Law”), which replaced the previous Implementation Decree No. 94/5907³ (the “Repealed Decree”).

1. Scope

The New Decree is a more detailed regulation regarding the scope of Law No. 3996 as compared to the Repealed Decree. For example, the following projects are expressly stated to be within the scope of the BOT Law in the New Decree: “*waste collection-separation, recovery, recycle, incineration and disposal facilities; highways with heavy traffic, terminal complex, logistic centers, passenger and cargo terminals in the airports and their integral parts, cargo and/or passenger and marina ports and complexes; border gates, buildings and facilities in the plans of national parks, natural parks, environment protection areas, wildlife protection; and development zones except the ones subject to private laws.*” The Repealed Decree was silent regarding these projects and there was a debate as to whether the general scope provision of Law No. 3996 covered such projects.

2. Changes in the Roles of the Competent Authorities

The role and involvement of the Supreme Planning Board (“YPK”) in the approval and authorization process of the BOT projects have been lessened by the New Decree. Instead, the relevant Ministries are embodied with more authorities and duties in such processes. For example:

- Pursuant to the Repealed Decree, a YPK approval was required prior to signing of an implementation contract, whereas the New Decree provides that the relevant Ministry’s approval is sufficient. This change is an implementation of the recent change to Law No. 3996 made by Law No. 6111 dated 13 February 2011. The authorities of YPK at the initial authorization stage have been regulated in more detail by the New Decree by, for example, stating that YPK shall determine, at the

¹ Published in the Official Gazette No. 27961 (repeated edition) dated 11 June 2011.

² Published in the Official Gazette No. 21959 dated 13 June 1994.

³ Published in the Official Gazette No. 22068 dated 1 October 1994.

beginning of the project, the contribution fees and demand guarantees, if any, and the risk sharing principles.

- Pursuant to the New Decree, the authorization given to an authorized company may be transferred to a third party upon consent of the relevant Ministry, while YPK was authorized to give such consent under the Repealed Decree.
- Under both the Repealed Decree and the New Decree, at least three bidders must participate in an authorization process, with the exception of national borders' security, particularities of the customs services and other necessary cases. Under the Repealed Decree, an approval of YPK was required for conducting an authorization process with less than three bidders. Under the New Decree, however, the relevant Ministry's approval is both required and sufficient.

3. Changes regarding the Contents of the Tender Specifications and the Implementation Contract

Pursuant to the New Decree, unlike the Repealed Decree, the following issues, among others, must also be covered in the tender specifications and the implementation contract to be signed with the authorized company:

- (i) the necessary permits under the legislation and the party responsible for obtaining such permits;
- (ii) information on whether or not a contribution fee shall be payable by the administration;
- (iii) information on whether or not demand guarantee shall be given; and
- (iv) information on whether or not a treasury guarantee shall be given.

4. Authorization Methods

Under the Repealed Decree, there was no clear provision as to which method was to be used as the principal authorization method. The New Decree, however, clearly provides that the "closed bidding among all bidders" method is the principal method for selecting the authorized company to develop and operate a BOT model project. The "closed bidding among selected bidders" and "negotiations" methods are only available if the authorization cannot be given through the "closed bidding among all bidders" method.

5. Contribution Fee

The term contribution fee (*katkı payı*) was first added in Law No. 3996 in 2008. However, the Repealed Decree was not amended to reflect such addition prior to the New Decree, which includes such term and defines it as a partial or full payment by the administration to the authorized company for goods or services the prices of which cannot be met by the payments made by the beneficiaries of such services or goods. The New Decree provides that the payment of a contribution fee to an authorized company can only be agreed in exceptional cases where such intention is stated in a prefeasibility study and approved by YPK. For the

BOT projects where a contribution fee is envisaged to be paid, the affirmative opinion of the Ministry of Finance must also be obtained in addition to the YPK approval.

6. Demand Guarantee and Share of Proceeds

Demand guarantee (*talep garantisi*) and share of proceeds (*hasılat payı*) concepts were not included in the Repealed Decree. They were first included in Law No. 3996 by Law No. 6111 dated 13 February 2011. The New Decree implements the change in legislation and clearly provides that the relevant administration may give a demand guarantee to the authorized company. The New Decree also provides that the relevant contracts must also regulate as to how the proceeds will be shared between the administration and the authorized company in cases where the level of demand is higher than the guaranteed.

7. Bid Bond and Performance Bond

With respect to the amount of the bid bond to be submitted by the bidders, the Repealed Decree provided that its amount would be up to 1% of the investment amount, while the New Decree removes that figure and leaves it to the discretion of the relevant administration.

With respect to the amount of the performance bond to be submitted by the authorized company, the Repealed Decree provided that the amount would be up to 1% of the investment amount, while the New Decree provides that it must be exactly 1% of the investment amount.

8. Utilization of Immovable Properties

Pursuant to the Repealed Decree, in cases where a land is expropriated in favour of an authorized company and the expropriation fees are paid by the administration, then a utilization fee must be collected from the authorized company. The New Decree, however, provides that such utilization fee may not be collected from an authorized company (even in cases where the expropriation fees were paid by the administration) if the Ministry of Finance and the relevant administration so decide.

9. Treasury Guarantee

The New Decree makes express reference to Law No. 4749 regarding the Regulation of Public Finance and Debts Management, and states that the Council of Ministers is authorized to give a Treasury guarantee under both Law No. 4749 and the other relevant legislation. Under the Repealed Decree, the authority granting such a guarantee was the relevant Ministry (to which the Treasury is affiliated). Under the New Decree, it is the Council of Ministers that grants the guarantee. However, this change is only an implementation of a change in Law No. 3996, which was made in 2005, by which the relevant authority was determined as the Council of Ministers as opposed to the relevant Ministry.

The provision of the Repealed Decree, stating that no Treasury guarantee can be provided to Turkish lenders, is not included in the New Decree.

10. Liability of the Authorized Company

Pursuant to the Repealed Decree, the authorized company was liable for any damages that it would cause to third persons. The new Decree provides that the authorized company is liable for such damages “*even if the authorized company does not have any fault.*” Consequently, the New Decree envisages the third party damage liability of the authorized company as a strict liability (*kusursuz-objektif sorumluluk*).

11. Arbitration

The Repealed Decree states that in case the parties agree on arbitration as a settlement of dispute method, the arbitration shall take place in Turkey and that Turkish law shall be the governing law. In other words, the Repealed Decree accepted only domestic arbitration. However, the New Decree states that the Turkish substantive law shall apply to the disputes, and it does not bring any limitation regarding the venue of the arbitration. In other words, international arbitration is now available in BOT projects. ⊕