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Healthcare Public-Private Partnerships (PPP): Is there a need for bidding?

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As the government vigorously promotes cooperation between government and social capital (Public-Private Partnership, PPP) in infrastructure and public services fields, interesting legal questions arise with respect to the operation of PPP projects. Among them, one question is whether PPP projects should be subject to bidding. In this article, we will discuss this issue by illustrating the example of the PPP project in the healthcare field.

Currently, based upon the way that social capital investors participate in healthcare PPPs, these PPP projects can be categorized into three forms. First, investors may participate in a hospital restructuring and ultimately hold equity in the hospital, either directly or indirectly. A second form is for investors to be entrusted by a hospital to manage the hospital and provide specific services to the hospital. A third form is for investors to participate in the construction or renovation of a hospital and to enjoy a contractual right to profits, and the investors would not directly or indirectly hold any equity in the hospital.

Two PPP Project Stages may Involve Bid Invitations

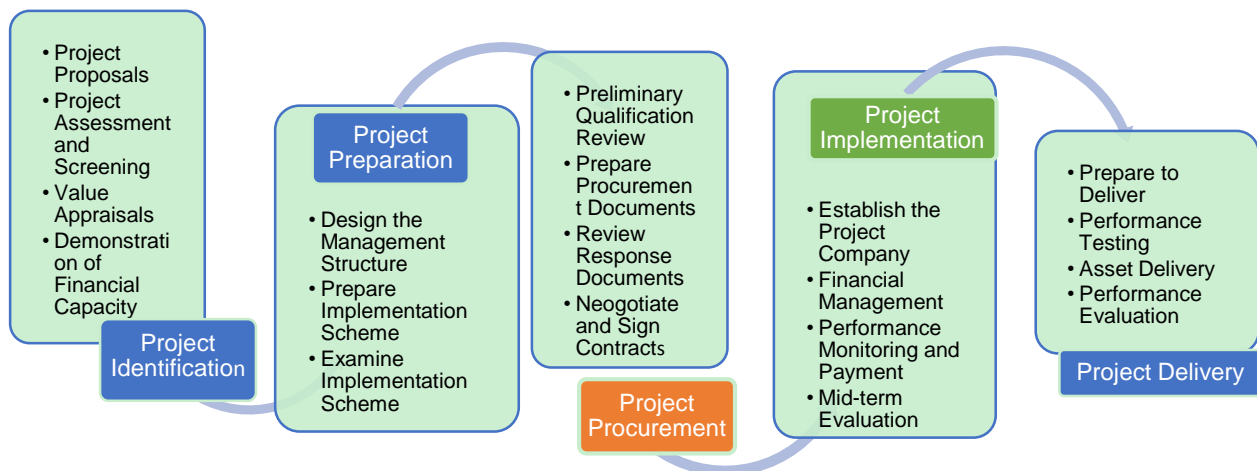
PPPs are mainly applicable to public service and infrastructure projects for which the government is the responsible provider and that are suitable for market-oriented operations. Municipal facilities, such as gas, electricity, water, heating, sewage and garbage disposal facilities, transportation facilities, such as roads, railways, airports and urban rail transportation, public service projects such as healthcare, tourism, education and training, medical treatment and elderly care, as well as the water conservation, and resource, environmental and ecological protection projects can all be operated as PPPs.¹

In fact, PPP projects can last for decades and involve multiple processes. So, the real question

¹ See Section 3 of *Guiding Opinions of the National Development and Reform Commission on Launching the Cooperation between Governments and Social Capital* (Fa Gai Tou Zi [2014] No.2724).

is which stages may involve open bidding? Taking the example of PPP projects in the healthcare sector, there are two stages which may involve bid invitations. The first stage is to select investors, which is common among all three forms of PPP projects as mentioned above. Second is the project implementation stage. This stage mainly relates to new construction projects and hospital renovation projects.

According to the *Circular on Printing and Issuing Operational Guidance on the Modes of Cooperation by Governments and Social Capital (for Trial Implementation)* (Cai Jin [2014] No. 113, hereinafter referred to as the "**Circular No. 113** ") promulgated by the Ministry of Finance and *Circular on Forwarding the Guiding Opinions of the Ministry of Finance, National Development and Reform Commission and People's Bank of China on Promoting the Public-Private-Partnership (PPP) Mechanism in the Public Services*, promulgated by the General Office of the State Council (Guo Ban Fa [2015] No. 42), the operation of PPP projects can be divided into five steps: project identification, project preparation, project procurement, project implementation and project delivery (as shown in the drawing below), of which the project procurement and project implementation may involve bid invitations.



Project Procurement – Selecting Investors

According to the *Circular on Issues Concerning the Promotion and Application of the Public-Private Partnership Model* (Cai Jin [2014] No. 76, hereinafter referred to as "Circular No. 76"), the PPP model is a type of long-term cooperative relationship established in the infrastructure and public service fields, which is in essence the government procurement of services. The project procurement process is actually the implementing agency's selection of investors, which is therefore based on the *Government Procurement Law (Revised in 2014)* and relevant laws and regulations. It follows then that the process of selecting investors for healthcare PPP projects is actually the process by which hospitals, as the public institutions making procurements with fiscal funds, select investors that will provide the services.

The project implementing agency shall choose the appropriate procurement methods depending upon the characteristics of the procurement requirements, including bidding procurement (including open bidding and selective bidding) and non-bidding procurement (including competitive negotiations, single-source procurement and competitive consultations). The specific content of the different procuring methods is detailed in the following table:

Bidding or Non-bidding	Method of Procurement	Content	Applicable Laws
Bidding	Open Bidding	The procuring unit shall invite unspecified suppliers to submit bids by issuing a bid invitation announcement.	Administrative Measures for Tendering and Bidding in Government Procurement of Goods and Services
	Selective Bidding	The procuring unit shall randomly select three or more suppliers from the qualified suppliers and invite them to submit bids by issuing them a bid invitation letter.	
Non-bidding	Competitive Negotiations	The negotiating team shall negotiate with the qualified suppliers with respect to procurement matters. Subsequently, the suppliers shall submit responsive files and the final price offer in accordance with the requirements of the negotiation documents. Finally, the procurer shall choose the final supplier from the candidates proposed by the negotiating team.	Administrative Measures for the Non-Bidding Procurement Process in Government Procurement
	Single-source Procurement	The procurer shall procure goods or services from a specific supplier.	
	Competitive Consultations	The consultation team shall consult with the qualified suppliers with respect to procurement matters. Subsequently, the suppliers shall submit responses and final price offers in accordance with the requirements of the negotiation documents. Finally, the procurer shall choose the final supplier from the candidates proposed by the consultation team after evaluation.	

Notes: According to the *Government Procurement Law*, procurement methods shall also include price inquiries. Since price inquiries only apply to the procurement of goods, it is not listed as a PPP project procurement method.

Section 26 of the *Government Procurement Law* clearly stipulates that “open bidding shall be the main procurement method in government procurement.” However, does this mean that PPP projects must first choose to adopt open bidding? In our opinion, it is better to analyze the question on a case-by-case basis and not to draw a broad conclusion in this regard. In fact, considering the complexity of PPP projects, different projects may subject to different

procurement methods depending on their specific operating methods and characteristics. The specific content is shown on the following table:

Method of Procurement	Applicable Cases
Open Bidding	<ul style="list-style-type: none"> (1) Procurement projects that reach the open bidding threshold amount, unless other procurement methods are approved before procurement begins by the financial departments of governments above the level of districted cities and autonomous prefectures. (2) It mainly applies to projects whose core boundary conditions and technical and economic parameters are clear and complete and consistent with state laws and regulations and government procurement policies, and which will not be changed during the procurement process.
Selective Bidding	<ul style="list-style-type: none"> (1) The goods or services are of a special nature and can only be procured from a limited number of suppliers; or (2) The ratio of expenses to the total value of the government procurement will be too large if the goods or services are procured by open bidding.
Competitive Negotiations	<ul style="list-style-type: none"> (1) After bidding, there is no supplier tender or qualified tender or re-bidding is not possible; (2) The detailed specifications or requirements for the project cannot be determined due to the project's complex technology or specialized nature; (3) The time limit cannot meet the demands of users if open bidding is adopted; or (4) The total price of the goods or services cannot be determined beforehand.
Single-source Procurement	<ul style="list-style-type: none"> (1) The commodities or services can only be procured from a single supplier; (2) Procurement from other suppliers is impossible due to the occurrence of an unexpected critical situation; or (3) Additional procurements should be made from the original suppliers in order to keep consistency with the previous procurements or to meet the needs of supportive services, and the total amount of the additional procurement does not exceed 10% of the original contract value of the procurement.
Competitive Consultations	<ul style="list-style-type: none"> (1) Government-procured service projects; (2) The detailed specifications or requirements of the project cannot be determined due to the project's complex technology or specialized nature; (3) The total price cannot be determined in advance due to uncertainty regarding time and quantity with respect to artwork to be procured, patents, proprietary technology or services. (4) Scientific research projects that have insufficient market competition and the scientific and technological achievement transformation projects that need government support; or (5) Construction projects other than those that must be subject to open bidding in accordance with the <i>Tendering and Bidding Law</i> and its implementing regulations.

Project Implementation – Selecting Project Contractors by Open Bidding

In addition to the procurement stage that may involve open bidding, the project implementation stage for construction projects may also invite bids from project contractors. PPPs for new construction projects and hospital renovations are required to involve construction project bidding at the project implementation stage.

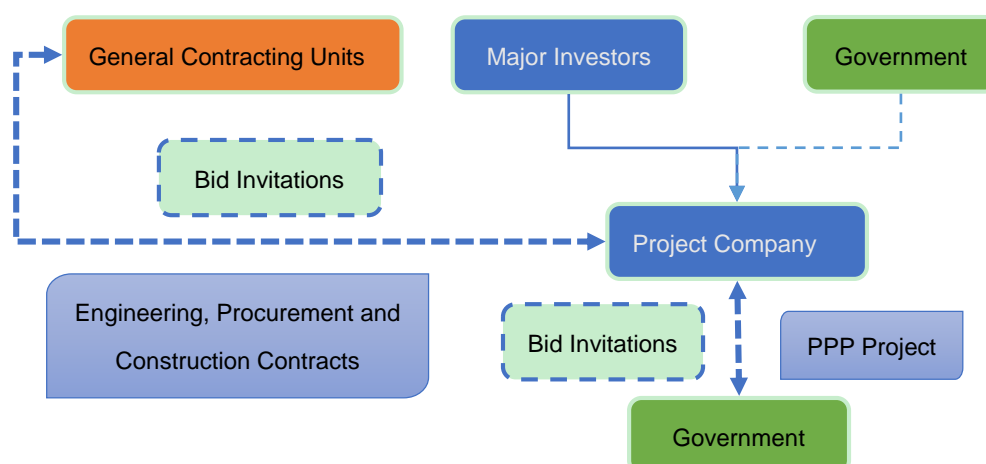
According to Section 3 of the *Tendering and Bidding Law*, the following construction projects conducted in the territory of the People's Republic of China must be subject to bidding, including surveying and prospecting, design, engineering and the supervision of such projects as well as the procurement of major equipment and materials related to the construction thereof:

- a. projects such as large-scale infrastructure and public utilities involving social and public interests and public security;
- b. projects that are wholly or partly invested with state-owned funds or funded through State financing; and
- c. projects using loans or aid funds from international organizations or foreign governments.

As described above, the PPP model mainly applies to the infrastructure and public service sectors. As long as the projects are “large-scale infrastructure and public utilities projects that involve social and public interests and public security,” such projects must be subject to open bidding according to the laws. The specific scope and standards for these projects reference the *Provisions on the Scope and Scale Standards of Construction Projects for Tendering (Order of State Development Planning Commission, No.3)*.

“PPP + EPC” Model – Saving the Trouble of “Second Bidding”?

As described above, there are two stages in the process of PPP project operation that may involve open bidding, as shown in the chart below:

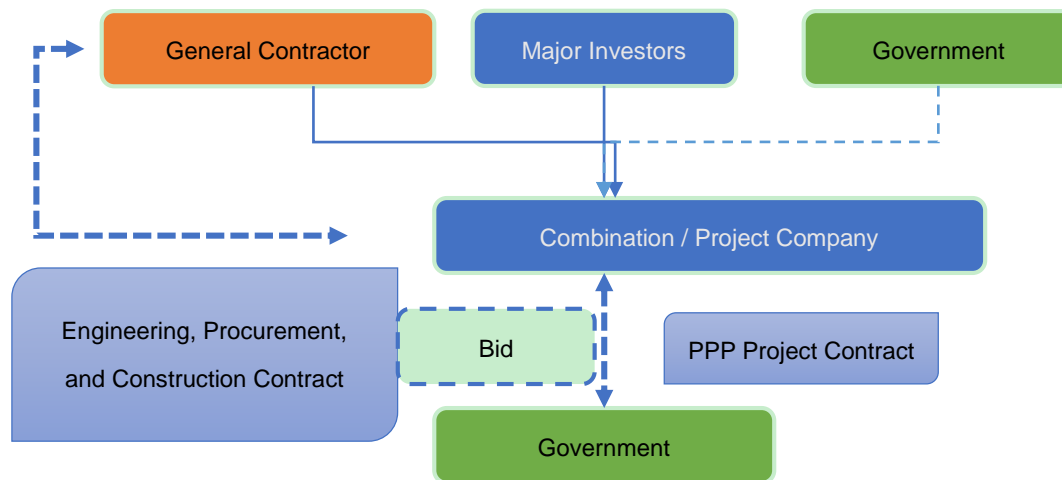


- Notes: 1. The project company is normally founded after the successful bidder is chosen/ the social investors are selected;
2. As the case may be, the government may invest in the project company but the shareholding ratio is normally not high.

In order to avoid "second bidding," the "PPP + EPC (engineering, procurement and construction contract)" model is usually adopted in practice. That is, the agency implementing the project chooses the social investors for the PPP project in accordance with the law, while at the same time determining the general contractor for the PPP construction project.

According to Section 9 of the *Implementing Regulations of the Tendering and Bidding Law of the People's Republic of China*, "if the investors of concession projects selected by means of bid invitation can construct, produce or provide the project, goods or services on their own, open bid invitations may not be carried out," and the construction company may join the major investors to form a combination to submit a bid for the PPP project. After winning the bid, the combination of the construction company and the major investors (and the subsequently established project company) shall together sign a PPP project contract with the government while the construction company shall separately sign an EPC contract with the project company as the general contractor. For example, in May 2011, after China Communications Construction Company ("CCCC") won the bidding for the East Coast Park development in Shantou, Guangdong under the "PPP+EPC" model, CCCC Investment Company Ltd., which was subordinate to CCCC and CCCC Mechanical & Electrical Engineering Co., Ltd. jointly set up the CCCC (Shantou) East Coast Park Investment Construction Co., Ltd. to jointly promote the implementation of the project.

The "PPP + EPC" model is shown as below:



However, PPP + EPC model is not universal in all cases. After all, Section 9 of *Implementing Regulations on the Tendering and Bidding Law of the People's Republic of China* only applies to investors that are selected through open bidding. In fact, in practice, competitive negotiations and competitive consultations have become the most common means to select PPP project investors.

Additionally, the “concession projects” referenced in Section 9 of the *Implementing Regulations of the Tendering and Bidding Law of the People's Republic of China* cannot be equated to “PPP projects” either. In fact, the relationship between “concession projects” and “PPP Projects” directly reflects the conflict of the regulations issued by NDRC and the Ministry of Finance, which has been a long-lasting puzzle to PPP practitioners.

It is noted that, according to Section 9 of *Opinions on Deepening the Reform of Investment and Financing Systems* issued by CPC Central Committee and State Council on July 18, 2016, “The government encourages the cooperation of the government and social capital. Various departments of various regions may seek to expand the supply of public goods and services by granting concessions and the government procurement of services in the form of a single project, a combination of projects and contiguous development in the areas of transportation, environmental protection, healthcare, elderly care, etc.” This is the first time the central government has categorized “government and social capital cooperation (PPP)” into two models: concessions and the government procurement of services, which also challenges the expression referenced in Circular No. 76, namely that “PPPs are in essence the government’s procurement of services.” In order to better coordinate the powers of the two ministries and resolve the conflicts of their respective regulations, it is necessary to promulgate a superior law, the *Government and Social Capital Cooperation Law*, and its implementing regulations as soon as possible. We’ll further discuss this issue in another article.

● **Important Announcement**

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