

Position Paper on the award of Public-Private Partnerships (PPPs) for project delivery

1. Background

1.1. Introduction

“Public-Private Partnerships” (PPPs) are forms of project delivery in which the private sector substantially contributes to the financing of the project and undertakes the construction and operation for a particular period. The financing, construction and operation may be undertaken by one or separate joint ventures, herein referred to as concessionaires. In PPP projects, the remuneration of the concessionaire will be made mainly during the operation of the project; this remuneration may come from its users and/or the government itself; the mix will depend on the nature of the project, e.g. for a transportation project users may contribute significantly, while for a school project the government will undertake to pay the instalments. The contributions from the government may be associated with the (degree of) availability of the project for operation or the demand for the project and with the quality of the delivered project and/or operation.

In view of the above, the concessionaires assume the risk associated with the construction costs (commonly referred to as *construction risk*) and fully or partly the risks associated with the operation of the project, i.e.:

- the risk associated with part or whole of the project not being available at any given time e.g. due to delays in the project construction, commonly referred to as *availability risk*, or
- the risk that the demand for the project will be less than envisioned in the project setup, commonly referred to as *demand risk*.

The concessionaire may comprise wholly of private enterprises, in which case the partnership between the public and private sector is solely based on contracts, commonly referred to as a *contractual PPP* – or, alternatively, of a company jointly owned by the public and private sector for the particular project, commonly referred to as an *institutional PPP* or *IPPP*.

Public-Private Partnerships, in addition to drawing on private funding, capitalize on the innovation, drive and efficiency of the private sector for project delivery and operation; however, due to their complexity, such projects require substantial investment for their preparation and award from both the public and private sector.

1.2. Legal framework

The applicable law for award of PPP projects in the EU includes:

- the principles of non-discrimination, equality of treatment, transparency, mutual recognition and proportionality of the E.U. Treaty
- for projects considered as public works contracts, the detailed provisions of the Directive (Title II)¹, and
- for public works concessions, the provisions of Directive 2004/18 (Title III).

The detailed provisions of the Directive for public works contracts (Title II) adequately define the award process. However, the provisions of Directive 2004/18 for public works concessions (Title III) are restricted to the publication of notices advertising such projects and awarding of additional works to the concessionaire; issues such as methods of project award, criteria for assessment of the personal situation of the candidates, selection and award criteria are not defined. Moreover, the criteria by virtue of which the projects are considered as public works contracts or, alternatively, public works concessions, have not been clearly defined².

In the case of IPPPs for the construction and operation of a project, the selection of the private partner should follow the principles of the E.U. Treaty; procedures to do so are not specified in E.U. legislation³.

1.3. Project preparation

The degree of technical preparation of the project prior to its tendering is a matter of economic significance; in general, the higher the degree of project preparation, the higher the degree of project definition but the lower the degree of freedom that can be extended to the candidates in technical matters. For projects where the provision of such freedom is not necessary, the design (and the associated permitting) can be prepared to an advanced stage prior to tendering of the project.

For particularly complex projects or projects involving new technologies, for which the contracting authority is not objectively able to define the performance requirements or the legal & financial setup, it may according to Directive 2004/18 deploy the competitive dialogue procedure, whereby it consults selected candidates - to one of whom the project will eventually be awarded. Moreover, according to the Explanatory Note of European Commission [2005], competitive dialogue can also be used for the investigation of alternative solutions. As such, competitive dialogue is intended as a tool offering flexibility to the contracting authorities.

¹ It should be noted that the award of service concessions, and the award of public works concessions by entities operating in the water, energy, transport and postal services sectors are specifically excluded from the provisions of Directive 2004/17 and 2004/18.

² According to the Interpretative Communication of the European Commission [2000], public works projects are those for which (i) the construction cost is essentially borne by the contracting authority and (ii) the contractor does not receive remuneration from fees paid directly by the users.

³ For the selection of private partners to IPPPs for the delivery of projects considered as public works contracts, the detailed rules of Directive 2004/18 (Title II) should be applicable.

2. EFCA's interest

EFCA is concerned that the lack of provisions for award of concessions and for the selection of the private partner for IPPPs on the one hand and the lack of clarity regarding the applicable legislation on the other, will result in widely differing procedures within the E.U. and questionable adherence of such procedures to the principles of the E.U. Treaty, thus inhibiting the use of PPPs for project delivery.

EFCA is moreover concerned that the flexibility afforded to contracting authorities for the definition of performance requirements and/or the investigation of alternative solutions through competitive dialogue:

- will have an unsustainably high cost to candidates due to the substantial input that is required from high level staff of all of them for preparation and discussions with the contracting authority, and
- may result in the transfer the best ideas from some candidates to others (commonly referred to as "cherry-picking"), which acts as a counter-incentive for meaningful contribution to the process and could provide ground for unequal treatment.

EFCA is furthermore strongly interested in the acknowledgement from all partners of PPP of:

- the significant potential to contracting authorities of consulting engineers for project preparation and management
- the value of the consulting engineering input and innovation to PPP projects, which is not reflected in the associated fees - especially so for the project design, and
- the relatively large proportion of work that consulting engineers undertake for candidates during the pre-award phase, where their remuneration is marginal

Moreover, EFCA would like to emphasize the importance of the quality of the pre-award design for the success of PPP projects, on the basis of which candidates are bound for issues relating to both the construction and operation of the project.

Finally, EFCA is concerned that the liability of consultants in the context of PPPs may be disproportionate with their size and financial strength.

3. EFCA's position

In view of the above, EFCA considers that:

1. The provisions of Directives 2004/18 and 2004/17 for the award of public works contracts should be adhered to for the award of all contractual PPPs - including concessions - as well as for the selection of the private partner in IPPPs, in order to ensure consistency with the principles of the E.U. Treaty and uniformity between the award procedures for various types of projects; this may be achieved by means of an amendment of these Directives and/or an Interpretative Communication.
2. The required project preparation should depend on the degree of required technical innovation sought in the project; for projects with limited scope for innovation, contracting authorities should consider preparing the design (and the associated permitting) to an advanced stage prior to tendering of the project.
3. Contracting authorities should refrain from using competitive dialogue for the definition of performance requirements or the investigation of alternative solutions of PPP projects. EFCA recommends that, where the contracting authority requires external assistance in these respects, it should engage appropriately qualified consultants to do so prior to the procurement of the project.
4. In order to ensure the quality, reliability and success of the design in the PPP proposals, consulting engineers should be afforded adequate time and financial resources for the preparation of the project design in the pre-award stage.
5. The selection criteria for the candidates for PPP projects should explicitly include the technical and/or professional ability of the consulting firms that will undertake the design of the project. Moreover, the contractual liability of consulting firms should be limited to the value of reasonable professional indemnity insurance.
6. The financial participation of the engineering consultancy firms in PPPs, especially those engaged for design of the project, should be a multiple of their fees, in order to accurately reflect the significance of their input in the project and the fact that a large proportion of their work is undertaken with marginal remuneration in the pre-award phase.
7. Consulting engineers should be engaged by contracting authorities for the assessment of the conformity of the works constructed with the proposal and the terms of the contract and/or the compliance of the project with the performance or functional requirements during operation.

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