

Public Private Partnerships (PPP) – what can we expect in 2007?

2007 is likely to be an exciting year for those involved with PPP. The recent high level of activity in PPP across Europe shows no sign of slowing down. The pressures driving the use of PPP are as strong as ever ie the need to modernise infrastructure, the budgetary pressures on public administrations and the demands of citizens for better quality public services. Public authorities are likely to need to use PPP, when they are the most appropriate solution, for the delivery of a wide range of public services for the foreseeable future.

As PPP are a form of public procurement, they are subject to EU law. When implementing PPP public authorities must ensure that they comply with the EU Public Procurement Directives and the fundamental principles of the EU treaties. So one of the key factors in ensuring that PPP are a viable option for public authorities is the legal framework within which they are awarded and implemented.

The latest update of the EU Public Procurement Directives occurred in March 2004. The deadline for their transposition into national law was 31 January 2006. But this process has been followed by two developments with potential implications for the legal framework for PPP.

In April 2004 the European Commission launched a consultative process on the application of EU law on public contracts and concessions to PPP. This led in November 2005 to the publication of an Interpretative Communication by the Commission, which envisaged a possible future legislative initiative on concessions, as many PPP are.

In May 2006 the European Commission proposed amendments to the Public Procurement Remedies Directives. These Directives set out how those dissatisfied with the conduct of a public procurement exercise can gain legal redress.

Those familiar with EU decision-making processes will not be surprised to learn that the final outcome of these initiatives is yet to be decided. The Commission is undertaking a further impact study on the need for and possible shape of a legislative initiative on concessions before taking further action. The proposed amendments to the Public Procurement Remedies Directives are currently the subject of debate with EU Member States. But conclusions are likely to be reached in 2007 in these areas.

So how should those keen to use PPP as a form of public service delivery judge the emerging conclusions of this process?

The nature of PPP suggests that there are three tests which could be applied.

- Do any proposed changes lead to greater legal certainty for public bodies and their private partners? Legal certainty – the assurance that the process will, if conducted according to known and well defined rules, lead to an outcome which is unlikely to be successfully challenged – is particularly important in attracting interest in PPP. This is because they are long term, high value contracts which usually call for high levels of

investment by service providers and long term financial commitments by public authorities

- Do any proposed changes provide greater clarity for public authorities about how to conduct a transparent and competitive procurement process? Transparent and competitive procurement processes are needed to ensure that value for money, defined by the Treasury as "the optimum combination of whole– life cost and quality (or fitness for purpose) to meet the user's requirement", can be achieved. Public administrations cannot afford anything else, since otherwise the massive scale of infrastructure investment needed will simply become even larger
- Do any proposed changes in the remedies regime act effectively to reduce barriers to cross– border bidding? Because of their high value PPP have the potential to attract Europe–wide competition. But bidders are more likely to bid if they know that they can obtain redress if things do go wrong in a procurement process and understand the process for obtaining redress. The European Commission has referred to the unsatisfactory situation brought about by the diversity of national review procedures. Updating of the Remedies Directives provides an opportunity to reduce this diversity.

How much of this is likely to happen? Will there, for example, be standardisation of the award procedure for all types of public contracts and concessions within the Public Procurement Directives? Will service concessions be brought within the scope of the Public Procurement Directives? And how will the revised Remedies Directives reduce diversity in remedies procedures within the EU and thus provide greater certainty for Contracting Authorities and bidders?

There will probably not be too much argument about the aims of promoting legal certainty and transparent and competitive procurement and improving the effectiveness of the remedies regime. The debate will be about the means – a very necessary debate to ensure that the legal framework for PPP keeps pace with needs of both public and private partners.

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