

European Public-Private Partnership Forum

TALKING POINT

PPP – an uncertain legal framework?

PPP should now be on the agenda of policy makers and those responsible for public service delivery. And not just because of the European Commission's imminent Interpretative Communication on PPP and concessions in Community law (expected before the end of 2005)

PPP are a dynamic field of activity. There are strong pressures both in old and new EU Member States driving public authorities to use PPP as a means of delivering public services eg budgetary pressures (in or out of the Euro zone) and pressures from citizens as consumers with ever higher service expectations. PPP are thus becoming ever more widely used - UK, Ireland Italy, France, Spain and Portugal already have high levels of activity in different sectors and other Member States are following. The list of services for which PPP have been used becomes ever longer.

But could all of this activity be constrained in future by lack of legal certainty, which is particularly important to the supplier market in the type of long-term high value contracts which PPP often are?

Firstly, the complexity of an increasing number of PPP mean that they do not fit very comfortably with the different definitions and different treatments in the new Public Procurement Directives of public contracts, works concessions and service concessions. In fact, the Commission has highlighted the fact that in some transactions it has not been possible at the start of an award process to be sure whether they are a public contract or a concession and that the initial definition might change as a result of negotiations. As is the case with the existing Directives, in the new Directives works concessions are less regulated than public works contracts and service concessions remain entirely outside the scope of the Directives and are governed only by the need to apply EU Treaty principles. But one of the reasons that there are Public Procurement Directives at all is to provide consistency of approach in a field which is key to the development of the EU Internal Market

Secondly, the new Directives introduced measures which prima facie look as though they will make the use of PPP easier ie a new contract award procedure known as Competitive Dialogue. It is meant to allow a Contracting Authority which knows what outcome it wants to achieve but doesn't know how best to achieve it to discuss possible solutions in the tender process with short listed bidders, provided they respect the confidentiality of the ideas of each bidder. Final bids will be based each bidder's own solution, which will be assessed using common evaluation criteria set in advance by the Contracting Authority within the overall context of an award based on the "most economically advantageous tender"

Competitive Dialogue is intended to be used more frequently and be easier to justify than the negotiated procedure in the existing Directives. It will be able to be used where a Contracting Authority considers that use of the open or restricted procedures (requiring pre-determined specifications) will not allow the award of the contract and thus unlike the negotiated procedure is not necessarily intended to be a procedure used only exceptionally.

The European Commission believes that the Competitive Dialogue procedure, clearly giving public bodies the freedom to negotiate the technical, legal and financial aspects of public contracts, is particularly well adapted to PPP and will provide the necessary legal certainty. But suppliers have some concerns about how the procedure will work in practice ie:

Whether in reality the confidentiality of bids enshrined in the new Directives will actually be protected in the dialogue phase

The way the dialogue phase of the process will be conducted in a manner consistent with the principles of equal treatment, non-discrimination and transparency, especially if there is more than one stage to the dialogue

How lenders, whose needs often lead to significant changes to projects at a late stage, will regard this process, in which negotiations are not permitted after the selection of the most economically advantageous tender. Will this lead in practice to Contracting Authorities seeking to stretch the limit of the meaning of clarification of tenders or confirmation of commitments included in the tender?

Competitive Dialogue has the potential to enable public purchasers to enhance their procurement procedures, combining the disciplines of competitive dialogue procedure with existing best practice in the negotiated procedure in a way that should be helpful for complex PPP. But if it is not applied with great care there is plenty of scope for legal challenges, thus leaving the development of PPP to be heavily influenced by the increasing number of cases dealt with in the field of public procurement by the European Court of Justice.

Thirdly, one feature of the consultation which the Commission undertook as part of the process leading to the Interpretative Communication is that it raises issues which go beyond award processes and which touch on contract execution and contract management. This goes beyond the scope of existing/new Public Procurement Directives and deals with matters particularly important to long-term transactions like PPP.

Where does all of this leave Contracting Authorities and private sector partners? It doesn't seem to have impacted yet on the pace of growth of PPP, but it remains to be seen whether any legal uncertainty will do so in the future

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