A Light Touch Regime?

What are the Market Needs in Terms of Procedural Requirements for Managing Concessions Contracts in Practice?

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Why Would We Need a New Regime?

• The directive is clearly an attempt
  • To clarify the rules of the game
  • To reduce uncertainty for operators
  • To reduce public authorities’ discretionary power

• Competitive tendering in order to increase competition and welfare
Why Would We Need a « Light Regime »?

- A recent literature on *incomplete contracts* (O. Hart ; O.E. Williamson)
- One consequence: Difficulty to select an operator through rigid auction procedures
- Auction are adapted for simple services but not for complex ones
  - Strategic biddings
  - Winner’s curse, ...
- Auctions vs. Negotiations (Bajari-McMillan-Tadelis 2009)
  - Empirical test on a data set of contracts awarded in the building construction industry in Northern California from 1995-2001
  - Buyers should rely on past performance and reputation to select a contractor for negotiations.

*This suggests to let open the possibility to negotiate to a certain extent especially for concessions that are complex and may be not to rely systematically on weighted criterias (Best economic offer).*
Why Would We Need a « Light Regime »?

• A recent literature on *incomplete contracts* (O. Hart ; O.E. Williamson)

• Another consequence : Difficulty to avoid renegotiations: renegotiation is the rule in LT complex contracts
  
  • 1 000 concession contracts signed in Latin America between 1980 and 2000 – more than 40% renegotiated less than 2 years after their signature on average (Guasch [2004]).
  
  • Renegotiation rate of 121 PFI contracts signed before 2000 in the UK has been estimated at 55% (NAO [2001]) but the House of Commons (2011) pointed out the fact that one drawback of English PFIs is their rigidity.
  
  • A recent study on Car Park concessions in France found out that the frequency of renegotiation is once every two years on average and seems to be profitable to consumers (De Brux & al 2011).
  
  • Engel, Fisher, et Galetovic (2011) note concerning transport concessions signed since 1991 in the United States that “six out of twenty projects have undergone a major change in the initial contractual agreement, favouring the concessionaire, and two additional projects have pending renegotiations” ((2011), page 11).

• Renegotiation can be justified as soon as you need to adapt the contract to unanticipated events. They can also reflect opportunism and/or corruption!
Main conclusion: Introducing (More) Competition in Concessions is not a Free Lunch!

• The theory suggests that in accordance with the necessary discretionary power of the buyer (at the selection stage and at the execution stage), there should be more transparency concerning his choices. The public authority should
  • Motivate his choices
  • Motivates renegotiations in order to be sure that it is a win-win-win situation

• A new authority in charge of this?
  • To my knowledge no authority and very few data available on those issues. Renegotiations (but not only) are the hidden part of the iceberg.
To conclude (1)

• A new regime is clearly needed to set up clear rules of the game and foster competition
• A “heavy” regime is not desirable and might lead to unwanted results
• A “light” regime seems more suitable to the specificities of concession (LT agreements) to the extent that the discretionary power that will be let to public authorities is counter-balanced by more transparency concerning selection process and execution stage.

• Rk:
  • This regime would not be so far from the French « Sapin » law governing concessions in France
  • So far it has given mixed results – let’s look at the water sector
What could we expect? One example: Water contracts in France.

- Local authorities decide to organize the public service through direct public management or not
- If not, compulsory use of competitive tendering to select the private (and even semi-public) provider – Sapin law (Anti-corruption law): 1993
- Criteria to select offers are not an obligation
- Once offers are received, public authorities can negotiate with the selected bidder(s)
- Not so far from what the directive is proposing!
What could we expect? One example: Water contracts in France.

- What do we observe? Is the bottle half full or half empty?
  - Guérin-Schneider & al 2003 – Since the Sapin law:
    - Consumer Price decrease: -8% on average
    - Consumer Price decrease for big municipalities (>10,000): -15% on average
  
  But
  - Average number of offers: ~2.2
  - % of incumbents' renewal: 90%
To conclude (2)

- The devil is in the details. At the same time there is a need to keep the directive as simple as possible
- Still open questions
  - Duration?
    - Should not only be based on investments put in place
  - Risk sharing?
    - What about innovative contracts
      - LPVR – Case of the Viaduc de Millau
      - Risk sharing contract with provisions looking for sharing benefits and losses – Water contract of Dijon
  - Disqualify too low offers?
  - Exclusion of operator that are convinced of corruption or fraud?