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Public-private partnerships

European Parliament resolution on public-private partnerships and Community law on public procurement and concessions (2006/2043(INI))

The European Parliament,

- having regard to the Commission Green Paper on public-private partnerships and Community law on public contracts and concessions (COM(2004)0327),
 - having regard to the Treaty establishing the European Community, particularly Article 5(2) thereof on the principle of subsidiarity and Articles 43 to 49 thereof on freedom of establishment and freedom to provide services, and to the principles derived therefrom of transparency, equal treatment, proportionality and mutual recognition,
 - having regard to the directives on public procurement currently in force,
 - having regard to the Council of Europe's European Charter of Local Self-Government of 15 October 1985,
 - having regard to Article I-5 of the Treaty establishing a Constitution for Europe,
 - having regard to Rule 45 of its Rules of Procedure,
 - having regard to the report of the Committee on the Internal Market and Consumer Protection and the opinions of the Committee on Economic and Monetary Affairs, the Committee on Transport and Tourism and the Committee on Regional Development (A6-0363/2006),
- A. whereas numerous public-private partnerships (PPPs) have been created in many Member States over the past decade,
- B. whereas there is as yet no definition applicable throughout Europe, nor are there any specific provisions in current Community law, to cover all the different forms of PPP,
- C. whereas a PPP can be described as a long-term, contractually regulated cooperation between public authorities and the private sector to carry out public assignments, in which the requisite resources are placed under joint management and project risks are apportioned appropriately on the basis of the risk management skills of the project partners,
- D. whereas PPPs are often legally, financially and commercially complicated structures, bringing together private undertakings and public authorities for the purpose of jointly carrying out and managing infrastructure projects or providing public services,
- E. whereas in the main, local and municipal authorities have sought to enter into PPP projects; whereas, however, there is also a need for such projects at European level, not

least to implement the trans-European transport networks,

- F. whereas PPPs are not a first step towards the privatisation of public tasks,
- G. whereas the purpose of PPP contracts is to enable public authorities to benefit from the design, construction and management skills of private enterprises and, if necessary, from their financial skills,
- H. whereas cooperation between public authorities and industry can produce synergies and public benefits, enable public funds to be used more efficiently, serve as an alternative to privatisation in times of scarce budgetary funding and help public administrations to modernise by acquiring know-how from the private sector,
- I. whereas PPPs come as a matter of principle within the scope of the Treaty's internal market provisions, particularly the principles of transparency, equal treatment, proportionality and mutual recognition, as well as within the provisions of secondary Community law on public procurement,
- J. whereas private investors must be provided with guarantees that the terms of a contract will not be altered during its lifetime,
- K. whereas any legal regime for PPPs should respect the right of local and regional self-government, in so far as it is enshrined in the Member States' national laws,
- L. whereas PPPs represent a possible way of organising the fulfilment of public sector tasks, and whereas the public sector must continue to be able to determine whether it fulfils a task itself or does so through its own undertakings or through third parties from the private sector,
- M. whereas citizens' awareness of the impact of PPPs should be increased,

General comments

1. Welcomes the fact that the Commission produced the above mentioned Green Paper on public-private partnerships and Community law on public contracts and concessions, a report on the public consultation on the Green Paper and, finally, a communication on possible follow-up measures in the field of PPPs (COM(2005)0569);
2. Considers it premature to assess the effects of the public procurement directives and therefore is against a review of these directives; opposes the creation of a separate legal regime for PPPs but considers that there is a need for legislative initiatives in the areas of concessions, respecting the principles of the internal market and threshold values and providing simple rules for tendering procedures, and for clarification with regard to institutionalised public-private partnerships (IPPPs);
3. Calls on the Commission, in regulating future PPPs and in the current impact assessment of the legal provisions on concessions, to give serious consideration to regional self-government interests and to involve representatives of regional as well as local interests in drawing up future rules;

4. Favours transitional periods for existing contracts that have been concluded in good faith in accordance with national law, in order to avoid legal uncertainty;
5. Rejects every means of circumventing the law on public procurement and concessions;
6. Considers that as a matter of principle the law on public procurement should be applied whenever a private partner is to be selected;
7. Considers that the outsourcing of the provision of services of general interest requires the contracting authority to award the contract on the basis of public procurement procedures;
8. Is of the opinion that when tasks have been satisfactorily carried out with the assistance of private partners, restoring them to the municipal sphere of responsibility cannot constitute a sound alternative to PPPs which is consistent with competition principles;
9. Considers that municipalities and their subsidiaries should be permitted to be exempted from the competition principles only when they are carrying out their purely local tasks which bear no relation to the internal market;
10. Draws attention to the importance of transparency, respect for which must be evident whenever public funds are involved, and which should entail the right of elected representatives to inspect agreements and documents;
11. Recommends that the Member States create transparent mechanisms guaranteeing that private investors' legal and financial interests are protected during the whole lifetime of a contract;
12. Takes the view that transparent rules on the award of public contracts serve to enhance effective competition and protection from corruption in the interests of citizens;
13. Emphasises that the expression 'conflict of interests' should be defined at EU level in the interests of establishing a fair and equitable sharing of risk;
14. Recommends that in the implementation of PPPs, there should be provision for binding requirements to account to citizens, so as to ensure safety, efficiency and quality standards;
15. Recommends that the Member States alleviate the task of the public sector by improving the training of decision-makers with the task of selecting private partners for PPPs;
16. Expects the Member States to make arrangements to ensure that the consequences for local authority employees are handled sensitively and in good time, and that fair agreements about the transfer of (public or private sector) employees and their employment conditions are promoted and respected, in line with Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses¹;
17. Expects the provisions of Directive 2001/23/EC to be complied with by the public authorities in the Member States;

¹ OJ L 82, 22.3.2001, p. 16.

18. Opposes the establishment of a European agency for PPPs, but welcomes other ways of sharing experience concerning best and worst practices, such as the networking of national and regional authorities responsible for the management of PPPs;
19. Encourages the Commission and the European Investment Bank to gather together their expertise and disseminate it, especially in those Member States where the public authorities are not familiar with PPPs;
20. Emphasises that accumulated experience of PPPs helps to prevent the repetition of mistakes and of failed methods;
21. Opposes the creation of rules on the award of public procurement contracts beneath the threshold values at EU level, underlines the responsibility of the Member States to implement in an efficient way the Treaty principles of transparency, non-discrimination and the freedom to provide services in relation to public procurement contracts beneath the threshold values and confirms its position that the creation of public procurement rules at EU level is a prerogative of the Council and Parliament;
22. Calls on the Commission to ensure, by exercising Community-level control over state aid, that the granting of subsidies does not involve any discrimination between operators, whether private, public or a mixture of the two;

PPPs as public contracts

23. Shares the Commission's view that in the award of public construction or service contracts, the selection and commissioning of the private partner should as a matter of principle be governed by the public procurement directives if that selection and the award of the contract are concurrent;
24. Takes the view that the public body must be able to choose between the open and the restricted procedure;
25. Takes the view that on grounds of transparency, the negotiated procedure should be confined to those exceptional cases which are provided for in the relevant provisions of the public procurement directives;
26. Favours, on the grounds of flexibility, awarding contracts by means of a competitive dialogue where a contract entails 'legal and financial complexity', and calls on the Commission to clarify the condition of 'legal and financial complexity' in such a way as to allow the maximum possible room for negotiation; takes the view that legal and financial complexity can be assumed to be present where typical PPP features such as a life-cycle concept and a long-term transfer of risk to private operators are present; takes the view that in a competitive dialogue procedure the risk of confidential information being published outside the procedure must be eliminated;

PPPs as concessions

27. Takes note of the fact that after carrying out a detailed impact assessment the Commission would like to take legislative action; considers that if such legislation is proposed by the Commission, it should allow public authorities, through flexible, transparent and non-discriminatory procedures, to choose the best partner according to

criteria which are defined in advance;

28. Expects any legislation clearly to define concessions as distinct from public contracts and to lay down objectively verifiable criteria for selection;
29. Takes the view that concessions should be of limited but variable duration, depending on the length of time taken for the amortisation of the private investment, so that competitors are not excluded from competition for an unnecessarily long time; takes the view that the duration of partnership relations should be established so that free competition is as a matter of principle restricted only to the extent needed to ensure the amortisation of the investment and an appropriate return on the capital employed and to refinance future investments;
30. Takes the view that the principle of transparency requires the factors on which the determination of the duration of the contract is based to be published in the tender documents, so that tenderers can take this into account when drawing up their tenders;
31. Considers that a comprehensive approach to procurement (the life-cycle concept) and competition between tenderers in terms of innovation result in efficiency gains if, when projects are carried out jointly, risk-sharing is optimised and there are functional specifications and a highly incentivising payment mechanism;
32. Asks the Commission to draw conclusions from experience gained of competitive dialogue in order to make recommendations as to an appropriate procurement procedure in the field of concessions, as the flexibility of competitive dialogues is as a rule suited to the complexity of concessions, without jeopardising respect for the principles of transparency, equal treatment and proportionality;
33. Supports the Commission in its efforts to ascertain whether standard procurement rules should be created for all PPPs on a contractual basis, irrespective of whether the PPPs concerned qualify as a public contract or a concession;

IPPPs and 'in-house relations'

34. Supports the Commission's efforts to take action in the field of IPPPs in view of the clear signs of existing legal uncertainty;
35. Acknowledges the fact that practitioners want clarity about the application of procurement law to the creation of public-private undertakings in connection with the award of a contract or concession, and calls on the Commission to provide the relevant clarifications at the earliest opportunity;
36. Does not believe that 'in-house relations' without award procedures should be further extended in scope as this would dispense certain sectors from the need to comply with internal market and competition rules;
37. Considers it necessary, in view of the transparency requirement and the ban on discrimination, for procurement law to be applied when an IPPP is set up and in the event of a transfer of a share to a private partner in connection with an IPPP, in so far as the act of setting it up or the transfer is related in time and substance to the assignment of a public contract;

38. Understands, in view of the proliferating case-law, the widespread legal uncertainty that has grown up as to the application of in-house criteria and therefore calls on the Commission to devise criteria, based on the current case-law of the Court of Justice, that establish a stable frame of reference for public authority decision-making, and to consider the possibility of incorporating these criteria into Community legislation;
39. Considers that a threshold value, however defined, for the minimum stake of a public contracting authority in an undertaking whose capital is held jointly with private partners would result in certain permanent protected stakes and that any limit put forward for discussion consequently poses problems;
40. Takes the view that, if the first invitation to tender for the establishment of a public-private undertaking has been precise and comprehensive, a further tendering procedure is unnecessary;
41. Calls for a more precise definition of the concept of 'similar control', which the organising public authority exercises over the service provider, particularly in cases where public-private undertakings provide, on behalf of the organising public authority and in connection with the performance of its tasks, services that are mainly funded or underwritten by the organising public authority;

Cooperation between public authorities

42. Welcomes as a general principle, in the interests of local self-government and efficient administration, some form of cooperation at local authority level, not least to bring about synergies, as long as this does not enable abuse leading to market closure;
43. Considers it necessary that the Commission clarify the legal uncertainty regarding cooperation between public authorities which has arisen as a result of the jurisprudence of the Court of Justice;
44. Shares the view of the Court of Justice expressed in its judgment in Case C-84/03 *Commission v Spain*² that cooperation agreements between public authorities cannot be exempted from procurement law across the board by means of the use of a legal form under national law; takes the view that there is a need for demarcation between measures which are purely administrative and/or organisational in nature and procurement contracts between administrative authorities;
45. Considers that cases of cooperation between public authorities are not relevant with regard to procurement law if:
 - the cooperation is between local authorities,
 - the tasks, the performance of which was assigned to these local authorities, are to be considered a matter of administrative reorganisation or if the supervisory powers of the local authorities concerned are similar to those which they exercise with regard to their own departments, and
 - the activities are essentially performed for the local authorities concerned;

² [2005] ECR I-139.

46. Rejects the application of procurement law in cases where public authorities plan to carry out tasks within their territory in conjunction with other public authorities as a measure of administrative reorganisation, without offering the provision of the services concerned to third parties on the open market;
47. Considers that the transfer of responsibilities for public sector tasks from one public authority to another does not come within the scope of Community procurement law;
48. Considers, however, that procurement law always needs to be applied when public authorities offer services on the market as private undertakings in the context of cooperation between such public authorities or arrange for public tasks to be carried out by private undertakings or other public authorities outside the scope of this cooperation;

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49. Instructs its President to forward this resolution to the Council and the Commission, the European Economic and Social Committee and the Committee of the Regions.