

## Position Paper on the set-up of Institutional Public-Private Partnerships (IPPPs)

### 1. Background

Public-private partnerships for the construction and/or operation of public works may be effected through mixed capital entities – referred to as institutional PPPs or IPPPs – and consisting of (i) entities of the public sector and (ii) private partner(s); the private partner(s) may include consultants, contractors, financial institutions and lawyers. The public partner may choose such a form of cooperation for the purpose of:

- retaining a relatively high degree of control over the project, and
- enhancing his experience through the cooperation with the private partner(s).

The scope of the IPPP may be:

- the construction and/or operation of a project, or
- the management of the construction and/or operation of a project.

In the latter case, the construction and/or operation of the project may be delivered by conventional public procurement or design and build, DBO or a separate PPP.

IPPPs can be set-up by entities of the public sector for the provision of works, supplies and/or services:

- either by setting up a new entity in joint venture with (one or more) private partners
- or by transferring shares (or ownership rights) of public companies to the private sector.

The Member States are responsible for defining the conditions for the IPPP and selecting the set-up to adopt in each case.

The Commission has provided the following guidance to date concerning the set-up of IPPPs [Green Paper on Public-Private Partnerships, 2004]:

#### (a) For the case of IPPPs set-up as new entities in joint venture with a private partner

When the set-up of an IPPP is accompanied by the award of tasks that can be designated as a public contract, or even a concession, there should be compliance with the rules and principles arising from public procurement law (the general principles of the Treaty or, in certain cases, the provisions of the Directives), i.e. competition between candidates.

Moreover, the selection of a private partner called on to undertake such tasks while functioning as part of a mixed entity can therefore not be based exclusively on the quality of its capital contribution or its experience, but should also take account of the characteristics of its offer – the most economically advantageous – in terms of the specific works, supplies or services to be provided. The conditions governing the creation of the entity must be clearly laid down when issuing the call for competition.

(b) For the case of IPPPs set-up through the transfer of ownership rights of the public entity

Regarding the transfer of ownership rights where they have the effect of entrusting to the private partner tasks falling within the scope of the law on public contracts which had been previously exercised, directly or indirectly, by the public authorities, the provisions on freedom of establishment require compliance with the principles of transparency and equality of treatment, in order to ensure that every potential private partner has equal access to performing those activities which had hitherto been reserved. In addition, good practice recommends ensuring that such a capital transaction does not in reality conceal the award to a private partner of public contracts or concessions.

In the above the Commission identifies that if the private partner(s) will undertake the provision of works, supplies or services through the IPPP, then the principles of public procurement should be complied with and, to some (undefined) extent, the relevant legislation, i.e. Directives 2004/18 and 2004/17. It should be noted here that 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, i.e. do not adequately define the award process.

Moreover, according to recent jurisprudence [Teckal case], the award of works, supplies and/or services cannot be made to an entity without a public procurement procedure, unless it is considered as in-house, i.e.:

- the control that the awarding public authority exercises over it is similar to that which it exercises over its own departments, and
- it carries out the essential part of its activities (e.g. 85%) with the awarding public authority.

It may thus be concluded that, since an IPPP is not normally under the full control of the public authority, the award of any works, supplies and/or services to it should involve a public procurement procedure.

From the above it is apparent that the Commission has provided some guidance to date on the legal background for the set-up of IPPPs involving the provision of works, supplies and/or services; there is however, limited guidance on how legislation, which has been developed for the award of public works, supplies and services, can be used to select the private partner(s) in an IPPP involving the provision of works or services.

## **2. EFCA's interest**

EFCA is concerned that the lack of clarity on the legal background for the set-up of IPPPs and especially on the application of existing legislation for the selection of the private partner(s) may result in widely differing procedures within the E.U. and questionable adherence of such procedures to the principles of the E.U. Treaty, with a negative impact on consulting engineers taking part in these procedures.

### 3. EFCA's position

EFCA's proposals regarding PPPs in general are included in the "Position Paper on the award of Public-Private Partnerships (PPPs) for project delivery".

Regarding IPPPs in particular, EFCA proposes that the Commission should provide detailed guidance in the set-up of IPPPs and that such guidance includes the following provisions:

1. If the IPPP will undertake the provision of works, supplies or services, public procurement should in every case take place for the selection of the private partner(s), according to the provisions of Title II of Directive 2004/18 and Directive 2004/17. This will guarantee transparency and equality of treatment with other forms of public procurement.

EFCA considers that the abovementioned provisions for the award of public procurement contracts are applicable for the selection of the private partner(s) for IPPPs, the primary objective of the tender being the provision of the required services, supplies and/or works; in this case, the participation in the IPPP is the secondary objective, since it reflects the means by which the primary objective will be met.

2. In order to ensure equality of treatment of the candidates, if the IPPP is being set up for the provision of works, services and/or supplies, it should refer to a specific project, the scope, location and characteristics of which should be clearly defined in the documents available to all interested parties.

Moreover, the legal and financial conditions of the IPPP<sup>1</sup> should be clearly defined in the tender documents or be the subject of competitive dialogue, in accordance with the provisions of Directive 2004/18.

3. After the public procurement for the selection of the private partner(s) for the provision of works, supplies and/or services, no further tendering is necessary for:
  - the award of the procured contract(s) for the provision of works, supplies and/or services from the public authority to the IPPP, or
  - the subcontracting of the procured works, supplies and/or services by the IPPP to the selected private partner(s).
4. If the IPPP will undertake the provision of works, supplies of services, it should be established as an entity governed by public law<sup>2</sup>, in order to retain its public character; thus the public sector should retain a reasonable control over the IPPP in terms of shares and management.
5. After its establishment, the IPPP should not undertake any works, supplies or services not directly related to its scope, since this would amount to the direct award of further contracts that normally should have been tendered; the clear definition of its scope as proposed in point 2 is significant in this respect.

---

<sup>1</sup> including (but not limited to) its duration and the provisions for its dissolution at its end.

<sup>2</sup> i.e. as a contracting authority according to the definitions of Directive 2004/18

6. The IPPP should not award any works, supplies or services to its private partner(s) that have not been procured, i.e. included in the original notice; any additional work, supplies or services should be the subject of a public tender according to the abovementioned Directives. This is significant for IPPPs established for the purpose of managing projects, where the required services, supplies or works should be publicly tendered.

Moreover, in order to ensure that distortion of competition is avoided in such cases, the candidates for such additional works, supplies or services should be independent from the private partner of the IPPP<sup>3</sup>.

Compiled for the Project Financing Committee  
by Panos Panagopoulos, Member of the Board & Acting  
Chairman

---

<sup>3</sup> Two firms are deemed as dependent if the one exercises a dominant influence over the other or if a third legal entity exercises a dominant influence over both of them. Dominant influence shall be presumed between two legal entities, without prejudice to proof of the contrary, when one of them [Directive 94/45]:

- holds a majority of the other's subscribed capital, or
- controls a majority of the votes attached to the other's issued share capital, or can appoint more than half the members of the other's administrative, management or supervisory body.