

THE PUBLIC-PRIVATE  
PARTNERSHIP  
LAW REVIEW

SEVENTH EDITION

Editors

Patrick Mitchell and Matthew Job

THE LAWREVIEWS

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PARTNERSHIP  
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# PREFACE

We are very pleased to present the seventh edition of *The Public-Private Partnership Law Review*. Since the publication of the previous edition, there have been considerable developments in the design and use of public-private partnerships (PPPs) throughout the world, and the purpose of this volume is chiefly to report on those.

PPPs have been under examination in a number of jurisdictions, particularly in countries that have long-established and relatively mature relationships with PPPs. Questions have been asked over the past few years about significant issues including value for money, flexibility and, not least, the validity of the fundamental element of partnership within that model. In addition, attention has been given in many places to the most appropriate contractual model for PPPs and industry consultations have been undertaken as to the extent to which those models remain best suited for the purpose.

Of course, one topic dominated the news agenda during 2020 (and continues to do so during 2021), namely the covid-19 pandemic. The pandemic had significant and immediate effects on PPPs throughout the world and will continue to have an effect in terms of the use – or otherwise – of PPPs as affected countries seek to recalibrate their economies and transition from crisis mode to economic recovery.

Covid had an immediate impact on many construction phase projects, affecting availability of labour and materials. The issues were chiefly caused by social distancing on construction sites and facilities for the production of materials, the closure of hotels and other workers' accommodation, and the closure or curtailment of public transport to bring workers to site. Such factors inevitably resulted in additional time and costs. Throughout the world, there have been mixed responses by the public sector. Some jurisdictions provided for enhanced definitions of force majeure to provide additional relief to contractors. This was seen, for instance in certain states in the US, the Czech Republic and the UK (in Wales). In addition, France provided additional subsidies, relief remedies and state guarantees. Taiwan specifically provided for temporary relief from obligations to make land payments under PPP contracts. The Infrastructure and Projects Authority in the UK issued guidance providing that the provision of services under PPPs was to be viewed as the provision of essential public services, thereby giving contractors some protection in continuing their activities through lockdown and asking their employees to continue to come to work.

In a number of jurisdictions, the consequences of covid-19 were particularly pronounced. For instance, in Argentina, financing difficulties caused by the pandemic led to the cancellation of a number of PPP projects, with the suggestion that non-PPP models will be used more in the future. Mexico, likewise, saw a number of PPPs cancelled because of the financial impact of covid.

As regards operational PPPs, clearly the most severely affected by the covid-19 pandemic were those in the transport sector, in particular aviation and passenger rail. Projects with usage or demand risk, such as toll roads or some user-pay public transport infrastructure, have seen revenues fall materially as a result of reduced public use. In many cases the popular view is that this is unlikely to continue beyond the period of the pandemic as travel restrictions lift; however in other cases the impact on usage (and so on revenue) is likely to be longer lasting. In countries like the United Kingdom, which has a well-established record of PPPs and collaboration in passenger rail, the future structure of the passenger rail industry is uncertain, so badly has it been impacted by covid. At the time of writing, publication of the Williams Report on the future of the GB passenger rail industry is awaited. It is anticipated that the Williams Report will recommend wide-ranging reform. The long-term prospects for regional airports and some airlines are similarly uncertain.

Generally, however, PPPs have appeared resilient, indeed robust, throughout the pandemic. There seems to have been sufficient goodwill and pragmatism on all sides to enable the public sector and the private sector to continue fulfilling their obligations.

That is one of the more gratifying notes from 2020.

As you will see from the following chapters of this book, many governments intend to use PPPs to drive their economies out of the economic crisis caused by the covid-19 pandemic. Many governments see infrastructure as an absolute cornerstone of recovery and, at a time when public finances are stretched, PPP offers a way to stimulate the economy in the short term while deferring the cost of new infrastructure to its operating phase.

Turning from covid to more 'business as usual' developments, we have seen continued and, indeed, increased use of PPPs in many jurisdictions. Active jurisdictions since the previous edition include France, Australia, Norway, Slovakia, the Czech Republic, certain states of the US, Thailand and Pakistan. Poland appeared to have turned its back on PPP for major road procurements during 2020, but there are recent reports that PPP is now back under consideration. We have also seen the expansion of PPPs out of what might be called classical or core infrastructure into new sectors and sub-sectors; of particular note is the increased use of PPPs in areas such as district heating, broadband, cable and fibre communications, renewables, water and, more recently, electric vehicle charging. This diversification of PPP has brought with it new revenue models and technologies, with a consequent evolution of the traditional PPP risk profile. We anticipate that this is a trend that will continue and, indeed, grow apace in coming years.

We have also seen certain oil-rich states using PPPs not just to enhance investment in infrastructure but also to diversify their economies. Subject to the prevailing oil price, we again anticipate that this is a trend that will continue.

A further significant development in 2020 was the increasing introduction of foreign direct investment (FDI) regimes. These FDI measures typically give a government body the ability to intervene in and, ultimately, block acquisitions of interests in critical infrastructure. Such intervention is typically exercised on the grounds of national security or some other national interest test. We have seen measures introduced in the past year or so, partly in response to covid (to protect nationally critical infrastructure at a time when countries were particularly vulnerable and also when the relevant assets could be viewed as being particularly 'cheap' to acquire) but also, in the longer term, on the basis of geopolitical considerations. Such measures have existed for some time in a number of jurisdictions, including Australia (which strengthened its own tests during 2020), but have now been or are being introduced in the United Kingdom and also at a pan-European Union level.



As we note above, the use of PPPs and their relative structures were under review in a number of jurisdictions before the covid-19 crisis commenced. For instance, the UK government had previously indicated its intention to cease using PFI and PF2. That was confirmed formally with the publication of the National Infrastructure Investment Strategy in November 2020. The government has not committed to a specific replacement for PFI and PF2, but it is important to note that, while PFI and PF2 have been consigned to history, there is no suggestion that PPPs in their wider sense will not continue to be used significantly. Indeed, the government has noted the possible use of the Regulatory Asset Base model (the model used to provide for an appropriate return on capital to investors in regulated utilities and currently being used for the first time in a major greenfield project on the Tideway Super Sewer) in other projects, including civil nuclear. In addition, the Contract for Difference model is likely to see application outside its traditional sector of renewable power generation.

A number of jurisdictions have continued to promote and encourage the use of unsolicited proposals, where the private sector is encouraged to design and come forward with schemes for new infrastructure. Such proposals have been used extensively in Australia and, increasingly, in some of the states in the US. During 2020, the Italian government brought forward new regulations to provide for institutional investors to develop unsolicited proposals. Likewise, Pakistan is developing a new law to accommodate unsolicited proposals. Unsolicited proposals are also seen in emerging market jurisdictions, where there is a high demand for new infrastructure and governments may not have the bandwidth to prepare extensive pipelines of PPP tenders.

Various jurisdictions, including Italy and South Africa, have taken measures either to develop further model form PPP contracts (in Italy, effectively by a DBOT concession) or to create more unified, single PPP frameworks (in the case of South Africa). Other jurisdictions that have subjected their PPP regimes to detailed examination include the Netherlands, where a study was undertaken into the efficacy and value for money of the DBFM model, concluding that it has proved efficient where it has been used.

As legal practitioners with more than 50 years' combined experience working with PPPs, we continue to believe that PPPs are and, where used appropriately, will remain, an important tool for creating the most financially advantageous development, financing, operation and maintenance of infrastructure assets.

The use of the PPP model, in addition to financial benefits, imports additional scrutiny, rigor and arm's-length contracting practice, which ultimately benefit both the public and private sector and, most importantly, the consumer and taxpayer.

In this, the seventh edition of *The Public-Private Partnership Law Review*, our contributors are drawn from the most renowned firms working in the PPP field in their jurisdictions.

We hope that you will enjoy and find useful this seventh edition of *The Public-Private Partnership Law Review*. We look forward to hearing any thoughts or comments that you may have on this edition and any thoughts for the content of future editions.

**Patrick Mitchell and Matthew Job**

Herbert Smith Freehills LLP

London

March 2021

# SERBIA

*Jelena Gazivoda*<sup>1</sup>

## I OVERVIEW

Public-private partnerships (PPPs) were introduced in Serbia through the enactment of the Law on Public-Private Partnerships and Concessions<sup>2</sup> (PPPCL) in 2011.<sup>3</sup> In 2016, the Law was twice amended to account for several highly complex, challenging and high-value projects being undertaken. The enactment of these amendments significantly helped with the completion of these PPP projects in 2017 and 2018. The projects initiated since then have required additional amendments to the PPPCL, which are expected to be proposed and adopted in 2021.

In 2012, the government formed the PPP Commission<sup>4</sup> to provide professional support to PPPs in Serbia. The PPP Commission is composed of nine members (i.e., representatives of the government, the Ministry of Economy, the Ministry of Finance, the Ministry of Construction, Transportation and Infrastructure, the Ministry of Mining and Energy, the Ministry of Public Administration and Local Self-Government, the Ministry of Environmental Protection, the representative for autonomous provinces and the representative for Belgrade) and oversees:

- a* PPP or concession proposals;
- b* consultations on various matters related to PPPs and concessions;
- c* opinions with regard to the approval procedure of PPPs;
- d* implementation of best international practices; and
- e* cooperation between competent state authorities, professional associations and the organisations involved in the preparation and implementation of PPPs in Serbia.

The National Alliance for Local Economic Development<sup>5</sup> and the Permanent Conference of Cities and Municipalities<sup>6</sup> are also active in providing support for PPPs in Serbia, from raising awareness of the advantages of PPP projects to giving practical support to PPPs.

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1 Jelena Gazivoda is a senior partner at JPM Jankovic Popovic Mitic.

2 The Official Gazette of the Republic of Serbia, Nos. 88/2011, 15/2016 and 104/2016.

3 Concessions were regulated in Serbia since the 1990s by the Concession Law, amended several times, and finally supplemented by the PPPCL in 2011, which currently regulates both PPPs and concessions.

4 Decision on Forming the Commission for Public-Private Partnerships, Official Gazette of the Republic of Serbia, No. 13/12.

5 <http://naled.rs/en/o-nama>.

6 <http://www.skgo.org/strane/60>.

Since the enactment of the PPPCL, the PPP Commission had approved 169 projects as at the end of 2020, of which 103 approved projects were PPP projects and 66 were concession projects.<sup>7</sup> The PPP Commission has also received thousands of PPP or concession project proposals since 2012.

PPP and concession contracts are public contracts registered through the registry of public contracts under the Public Procurement Portal. Pursuant to the publicly available data on registered public contracts, 76 out of 169 approved PPP or concession contracts had been executed by the end of 2020.<sup>8</sup>

At the time of writing, the value of contracted PPPs and concessions in Serbia exceeds €3 billion, with up to 10 projects representing more than 90 per cent of this value. The majority of these projects involve the central government or the city of Belgrade, and the city of Belgrade has the highest overall number of contracted PPPs and concessions.

Most PPP or concession project proposals have so far been prepared by municipalities or cities, or public companies under the ownership of municipalities or cities.

The majority of PPPs or concessions relate to the reconstruction and maintenance of public lighting and transport; production and distribution of heat from renewable energy resources; and processing, treatment and disposal of communal waste. There have been very few contracted PPPs or concessions in the domain of public garages, road infrastructure, telecommunication and optical fibre, and water and sewage infrastructure.

On average, excluding Belgrade, at the time of writing, 25 municipalities or cities have entered into one PPP or concession contract in total.

PPPs and concessions under the PPPCL represent the majority of sustainable, stable and long-term investments in Serbia, attracting world leaders in their respective industries, and continuing to attract foreign investments to aid the development of the economy and implementation of best practices in business operations.

Despite a huge potential for complex and valuable PPP or concession projects, the number of projects realised under the PPP or concession model in Serbia is still relatively modest compared with that of the leading economies and neighbouring countries.

Government institutions, non-government bodies and associations are taking different steps to raise public awareness concerning the importance of these projects for the overall development of the economy and society, especially with regard to the competitive advantages of PPPs or concessions over traditional public procurement, which, without the PPPCL, would be a risk-heavy model.

## **II THE YEAR IN REVIEW**

The year 2020 has been very peculiar in respect of the initiation and implementation of already commenced PPP projects.

The global outbreak of coronavirus affected Serbia as well, and resulted in the proclamation of a state of emergency in mid-March 2020. The government passed a set of regulations aimed at mitigating the effects of covid-19 that resulted in the control of the prices of essential goods as well as in the restriction of free movement of persons within the country. The global lockdown affected almost all the industries whereby infrastructure projects were mainly affected, as a vast majority of them required the supply and delivery of

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7 <http://www.ppp.gov.rs/misljenja-komisije>.

8 <http://portal.ujn.gov.rs/JavniUgovori/Ugovori.aspx>.

materials, long-lead items, raw materials, machines and spare parts from imports, which were consequently delayed. In respect of already commenced projects, the effects of covid-19 raised the issues of force majeure, suspension events and relief events and opened a discussion on, inter alia, the effects of delays to availability payments, requirements deriving from insurance resulting in potential increases of costs and amendments to signed PPP contracts.

PPP projects in the domain of communal activities demonstrated a slightly different trend: even during the covid-19 crisis, several communal PPP projects have received approval from the PPP Commission, while those commenced before the crisis showed slight but not significant delays in implementation.

In spring 2020 circa €300 million-worth of PPP projects for the design, construction, operation and maintenance of waste treatment facilities and the provision of other related services (including the acceptance, handling, management, processing, treatment and disposal of certain types and quantities of waste) in the city of Belgrade, executed for a 25-year period, reached financial close.<sup>9</sup>

Interest in the initiation and implementation of PPP projects in respect of the construction of public garages, the reconstruction of schools and social care facilities, and the reconstruction and modernisation of facilities contributing to energy efficiency has continued in 2020.

### III GENERAL FRAMEWORK

#### i Types of public-private partnership

Pursuant to the PPPCL, PPPs may be contractual or institutional. Depending on the subject matter of the project and relevant industries, a PPP may or may not include elements of concession; the PPPCL applies to PPPs regardless.

A contractual PPP is where all the rights and obligations of the parties are solely regulated by a public contract, the mandatory content of which is prescribed by the PPPCL. A public PPP contract that has the elements of a concession project could additionally regulate other matters relevant to the respective industry in which the project is realised.

An institutional PPP is based on the relationship between the public and private partner being the shareholders of a joint venture company, which could be established by the public and private partner either by the subscription of respective pecuniary or non-pecuniary contributions in the company, or by a capital increase by the private partner in the company owned by the private partner. In the case of an institutional PPP, upon the selection of a private partner, public and private partners enter into the public contract (with or without the elements of concession) and the agreement on the incorporation of a joint venture company, which will be the company in charge for the realisation of the respective PPP project.

Pursuant to the PPPCL, the concession represents a contractual or institutional PPP with the elements of concessions governing the commercial use of a natural resource or publicly owned assets in general use owned by the public partner. The private partner is contractually assigned the right to use the assets in the ownership of the public partner for an agreed period. The private partner bears the risk of commercial usage of the subject of

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9 As at December 2018.

concession. The concession always assumes payment of a concession fee, which is commonly paid by the private partner to the public partner. The PPPCL recognises concessions for public works and public services.

Concessions may be used for:

- a* the exploration and exploitation of natural resources and operations in protected areas, as well as for use of other protected natural resources;
- b* energy projects;
- c* infrastructure projects (e.g., ports, public roads, public transportation, airports and railways); and
- d* development projects in the fields of sports and education, culture, community, health and tourism.

## **ii The authorities**

Pursuant to the PPPCL, public authorities are entitled to independently initiate the procedure of realisation of PPP projects from their respective competence. These authorities are:

- a* the state authority, organisation, institution and other direct or indirect users of budgetary funds, as well as the social security organisation;
- b* the public company;
- c* the legal entity conducting the operation of general interest, which must meet at least one of the following conditions:
  - at least 50 per cent of members of the management of the legal entity must be the representatives of the public authority;
  - over 50 per cent of voting rights in the legal entity must belong to the representatives of the public authority;
  - the public authority must supervise the operations of the legal entity;
  - the public authority must hold more than 50 per cent of shares in the legal entity;or
- more than 50 per cent of financing of the legal entity must come from the public authority; and
- d* the legal entity established by the public authority that performs an operation of general interest and meets at least one of the conditions set out in the sub-items of (c).

Pursuant to the PPPCL, the concession grantor could be:

- a* the central government;
- b* the government of the relevant autonomous province;
- c* the assembly of the relevant local self-governance unit;
- d* a public company; or
- e* the legal entity authorised for awarding the concession by a separate law.

The PPP project proposal is submitted to the PPP Commission for its evaluation and opinion on whether the respective project could be realised in PPP form.

If the PPP project is proposed by Serbia or a public authority, and if the estimated value of the respective project exceeds €50 million, the PPP Commission mandatorily requests the opinion of the Ministry of Finance.

The Ministry of Finance, competent authority of the autonomous province or local self-governance unit performs the supervision of the implementation of public contracts. Apart from the reporting supervision, the aforementioned authorities are entitled to initiate supervision through respective inspections and the competent tax authority.

### **iii General requirements for PPP contracts**

PPP contracts are executed for a term of between five and 50 years. If the subject of the PPP contract is a concession, the term of the respective PPP contract is determined within the above time frame unless a different deadline is set out by a separate law governing the respective industry in which a concession may be granted.

The term of the PPP contract must not hinder competition more than necessary to procure the amortisation of the investment of the private partners and reasonable return of the investment. If additional time is needed following the lapse of the term of the PPP contract, a new PPP contract may be entered into with the election of private partners in the manner and under the procedure set out by the applicable law.

The PPPCL does not recognise any value thresholds for contracts, services and projects contracted or not contracted through a PPP structure. With regard to contracted PPP projects, the project value ranges between several million euros to several hundred million euros. The most important criteria for approving a PPP project by the PPP Commission is not purely the value of the proposed project but predominantly other criteria, such as:

- a* public demand for the operation or services;
- b* the resources or competences of the public partner to independently realise the respective project;
- c* the efficiency and effectiveness of the proposed investment;
- d* testing the advantages and disadvantages of a make-or-buy decision;
- e* determining and testing the project's value for money;
- f* assigning a public sector comparator to the respective project;
- g* an investment analysis (i.e., financial and economic flow);
- h* analysis of vulnerability and sustainability of the proposed project; and
- i* risk analysis and a distribution of risks review.

The evaluation of the PPP project proposal is conducted by the PPP Commission, which, on the grounds of the above, issues an opinion on whether the PPP project proposal could be realised through a PPP structure, as well as which model of PPP would be the most suitable model. The public authority is obliged to submit the PPP project proposal for adoption to the following authorities: central government; the government of the relevant autonomous province; or the assembly of the relevant local self-governance unit.

Only PPP project proposals that pass the above tests and are approved by the competent authorities and the PPP Commission will be selected for implementation.

## **IV BIDDING AND AWARD PROCEDURE**

The PPPCL sets out the principles for PPPs, which include the principle of equal and fair treatment of all parties' participation in the process of selecting the private partner, prohibiting any form of discrimination in the process of selection or award. This principle also obliges the public partner to ensure that all the bidders are provided with complete and accurate

information about the award procedure, and standards and criteria for selecting a private partner. No bidder can be subject to favouritism or advantage over another bidder in respect of time, information or access to the public authorities that are awarding the public contract.

The selection and award procedures must be based on objective and publicly announced criteria known in advance, and the grounds and merits for rendering a decision must be provided to each bidder that participated.

Pursuant to the PPPCL, the selection of the private partner is conducted either through the procedure governing public procurements regulated by the Public Procurement Law (Official Gazette of the Republic of Serbia, No. 91/2019) (PPL) or the procedure for awarding concessions regulated by the PPPCL, elaborated in more detail below.

If the PPP is to be granted as a concession, the tender documents must contain:

- a* the form, content and term of the bid;
- b* a description of the subject of the concession;
- c* a draft concession agreement or the main elements of the concession agreement;
- d* conditions and proofs that the bidders must meet and document during the process; and
- e* a specification of other requirements the bidders should meet.

The tender documentation must be prepared in a manner enabling the comparison of received bids for the concession award.

#### **i Expressions of interest**

The procedure of awarding a public contract is initiated by a public announcement in the Official Gazette of the Republic of Serbia on the public authority's website and on the Portal of Public Procurement. Public invitation is, when necessary, announced on the Tenders Electronic Daily website, the internet edition of the appendix to the Official Gazette of the European Union. This is a mandatory requirement under the PPPCL when the value of the PPP project exceeds €5 million.

Pursuant to the PPL, the procedures of public procurement are as follows:

- a* an open procedure in which all interested parties may submit a bid;
- b* a restrictive procedure;
- c* a competitive procedure with negotiation;
- d* competitive dialogue;
- e* a negotiation procedure with a public invitation announcement;
- f* a partnership for innovation; and
- g* a negotiation procedure without the announcement of a public invitation.

The most common procedure for the awarding of PPP contracts to date has been the restrictive procedure. However, in highly complex projects in which open or restrictive procedures cannot be implemented, the public partner conducts a competitive dialogue until it recognises the solution or solutions to enable the efficient realisation of the PPP project. Competitive dialogue has been applied in several PPP projects recently in Serbia, owing to their complexity and the necessity to determine the best technical solution.

In the case of a concession, before preparing the concession proposal, the public authority appoints an expert team to determine the value of the concession, prepares the feasibility study and undertakes all other necessary actions preceding the awarding of the concession.

Based on economic, financial, social and other parameters, as well as the environmental impact assessment study, the competent public authority submits the concession act proposal to the above-mentioned authorities at the national, provincial or local level.

After the adoption of the concession by the relevant competent authorities, the concession must obtain the approval of the PPP Commission and subsequently of the Ministry of Finance.

Awarding a PPP with concession elements is initiated by the announcement of a public invitation, which must contain:

- a* data on the concession grantor;
- b* the subject of the concession and term of the concession;
- c* the deadline for the submission of bids;
- d* technical, financial and other conditions that the bidders must meet and relevant supporting evidence;
- e* criteria for selecting the best bid;
- f* the date of submission of information on the outcome of the selection process;
- g* an authority competent to decide upon the requests for protection of rights; and
- h* other relevant data.

The public invitation should state whether the procedure of selection of the best bidder is conducted with or without prequalification.

If the estimated concession value exceeds €50 million, the public authority may decide that the concession is awarded in phases, if this is envisaged in the concession.

## **ii Requests for proposals and unsolicited proposals**

Expression of interest and bids are submitted within the deadlines set out by the public authority, bearing in mind the complexity of the public contract and the time necessary for the preparation of a bid.

If the procedure of electing a private partner is conducted in accordance with the PPL, the following deadlines are considered reasonable and cannot be shorter:

- a* in an open procedure, the shortest deadline for the receipt of bids is 52 days from the date of announcement of the public invitation;
- b* in a restrictive procedure, following negotiation with the announcement of the public invitation and competitive dialogue conducted by the public partner:
  - the shortest deadline for the receipt of bids, or the receipt of expressions of interest or qualification, is 37 days from the sending of the public invitation; and
  - the shortest deadline for the receipt of bids is 40 days from the date of announcement of the public invitation.

The deadline for the submission of bids for PPPs with concession elements is at least 60 days from the date of the announcement of the public invitation in the Official Gazette of the Republic of Serbia.

The PPPCL recognises the concept of an unsolicited proposal. The public authority may consider and accept the unsolicited proposal of a private partner if the unsolicited proposal does not relate to the project for which the procedure of award of a public contract or invitation has already been initiated or announced. Following the submission of an unsolicited proposal, the private partner will inform the public authority on the value of



the prepared documentation, which value the public authority shall reimburse to the private partner in the event of an award of a public contract to a private partner not being the one that submitted an unsolicited proposal.

Within 90 days of the date of receipt of an unsolicited proposal, the public authority shall determine whether the project serves the public interest. The public authority is entitled to discuss all aspects of the proposed project, including the justification of the costs and expense of the preparation of the project. If the public authority determines that the unsolicited proposal serves the public interest and decides to start the procedure of awarding the PPP contract, the public authority is obliged to initiate either the public procurement procedure or concession award, as elaborated above. If the procedure is initiated based on an unsolicited proposal, this must be stated in the public invitation.

A private partner that has submitted an unsolicited proposal is entitled to take part in the procedure of awarding the public contract if its participation does not hinder competition. If the private partner that has submitted an unsolicited proposal has competitive advantages over the other bidders, the public authority must provide all other bidders with information that could level the playing field. If the competitive advantage of the private partner that has submitted an unsolicited proposal cannot be neutralised, the public partner must exclude this private partner from the procedure of the awarding of the public contract.

### **iii Evaluation and grant**

The best bidder is selected in accordance with the selection criteria, set in advance in the invitation for the submission of bids and tender documents. The best bidder is selected in a competitive and non-discriminatory manner. The criteria for the evaluation of bids are economically most favourable or the lowest offered price. The criteria of an economically most favourable offer includes:

- a* offered price, being the net present value related to overall costs in the agreed term without value added tax;
- b* offered discounts;
- c* deadlines for providing respective services or operations;
- d* expenses;
- e* cost efficiency;
- f* quality;
- g* technical and technological advantages;
- h* environmental advantages;
- i* energy efficiency;
- j* technical support;
- k* guarantee period and type of guarantees;
- l* spare parts commitments;
- m* terms of maintenance;
- n* number and quality of engaged personnel;
- o* functional characteristics;
- p* social criteria;
- q* costs of life cycle; and
- r* other respective criteria.

The decision to select the bid relies on:

- a* the data on the best bidder;
- b* the subject of the PPP project;
- c* the venue and term of the PPP project;
- d* the type of procedure of selection of the best bidder;
- e* the applied criteria;
- f* the deadline within which the best bidder should enter into a public contract with the public partner;
- g* elaboration of the criteria for the choice of the best bidder; and
- h* other elements required by the law or by the tender documents.

Upon rendering this decision and before entering into the public contract, the public authority is obliged to submit the final draft of the public contracts to its competent authorities for consent. The relevant authority checks the compliance of the final draft of the public contract with the PPPCL and tender documents and gives its consent to the final draft of the public contract within 30 days of its receipt. The public contract can be executed only upon completion of the above procedure and obtaining the consent of the relevant authorities (state government, government of autonomous province or assembly of local self-governance unit, as elaborated above). The same procedure applies to possible amendments of the public contract during its term.

The public contract is entered into within the deadline set out upon selecting the best bidder. The public partner is obliged to take over from the selected private partner on the date of entering into the public contract all required securities for the payment of concession fees or any other fees under the contract, as well as securities for compensation of possible damage in accordance with the estimated value deriving from the rights given under the public contract (e.g., pledge statements, guarantees and promissory notes).

## **V THE CONTRACT**

### **i Payment**

Depending on the subject matter of the PPP project and more specifically on the demand for the respective works or services during the term of the public contract, the forms of payment could be:

- a* made to the project company or SPV by the end users of the works or services subject to the PPP project, with no involvement of the public partner and no payments by the public partner (usually agreed where the project company or SPV comes into direct contact with the final users);
- b* made to the project company or SPV by the public partner, usually agreed in PPP projects;
  - that assume either the public partner being the principal client of the project company or SPV;
  - where the collection of the fees is conducted by the public partner; or
  - that envisage payment of guaranteed prices for the services provided by the project company or SPV, such as in the case of a power purchase agreement and similar projects including the payment of respective subsidies or guaranteed prices under feed-in tariffs, etc.; or

c made to the project company or SPV by the end users of the works or services in combination with the respective payments made by the public partner (usually agreed in PPP projects where the demand for the works or services during the term of the public contract is not high, and it is important to ensure the repayment of debts and reasonable return of the investment by the private partner).

As the PPP works and services should meet the respective contracted criteria and standards, the payments to be made under the public contract could be deducted in the procedure set out in the public contract if the works and services do not meet the respective criteria or standards.

The public contracts may differ in the context of payment dynamics. Most commonly, the payments are performed monthly or quarterly.

## **ii State guarantees**

As PPP projects are related to the off-balance sheet obligation of the public partner, the government refrains from issuing state guarantees as a security of payment by the state. In particular circumstances, owing to strict requirements of the International Monetary Fund and the state budget, the government has not issued any state guarantees for any PPP projects in the past. This was one of the reasons why such PPP projects failed in the award process: Serbia was not willing to meet the requirements of sponsors in respect of state guarantees.

On the other hand, some PPP projects envisaged other mechanisms of securing pecuniary obligations of the public partner, such as an availability payment, or escrow account, whereby respective funds are deposited for their respective purpose and beneficiary (i.e., the private partner), which serves as security for the payment of the public partner under the public contract.

It depends on the approach and mechanism of providing security for the payment by the state to the sponsor for the pecuniary obligations of the state or other public partners that have entered into the public contract whether these could be qualified as state aid and subject to the respective procedure of state aid control.

The public partner is obliged to compensate the private partner (to make payments to the private partner) if events under the public contract occur that require compensation or if early termination of the contract by the private partner occurs owing to public partner default. As these obligations are not secured, the lack of such security (or inadequate financial security) represent a huge risk for a private partner as there is no security or very limited security guaranteeing the private partner that it will be paid, reimbursed or compensated in full.

## **iii Distribution of risk**

The distribution of risks between public and private partners represents the cornerstone of each public contract, subject to the most complex and demanding negotiations over the public contract. In practice, each party wishes to pass as much risk as possible to the other party, believing that a good contract for them is one with limited risks, but a good risk allocation is one where each party handles the risks that it could better handle or mitigate.

The risks in domestic practice may either occur before the financial close of the PPP project (i.e., most commonly treated as the closing of the public contract) or after the financial close and until the lapse of the term of the public contract. The risks at the stage before the financial close are usually shared between the public partner (usually in charge of the transfer

of the public assets to the project company or SPV in good standing and properly inscribed in the relevant land registries) and private partner (most commonly in charge of obtaining necessary permits, consents or regulatory approvals).

After financial close, the larger burden of risks passes to the project company or SPV. The stage after financial close usually encompasses designing, construction or reconstruction. As a general rule, the risks associated with designing and obtaining necessary permits, consents or regulatory approvals required at this stage, and construction risks, are borne by the project company or SPV. However, depending on the peculiarities of the PPP project and characteristics of the area in which the project is to be realised (i.e., historical environmental liabilities and the probability of archaeological findings), the risks could be shared so that the public partner shoulders the risk for a limited period of time, and afterwards the risk is passed on to the project company or SPV. The most common risks for the private partner (financial procurement, controlling of the costs of sub-contractors and risks related to meeting construction deadlines) are borne by the project company or SPV. The risk of a change in law or force majeure is usually treated as a shared risk, with peculiarities depending on the subject matter of each public contract.

Understanding proper risk allocation is crucial for sustainable public contracts whereby such understanding is commonly misinterpreted in practice.

#### **iv Adjustment and revision**

Upon the request of the public or private partner, the lenders or other financial institution, the public contract may be amended. The amendments of the public contract cannot affect the following elements of the public contract, which thus remain unchanged:

- a* the subject of the public contract;
- b* the term of the public contract; and
- c* in the case of public contracts with elements of concession, the amount offered for the concession fee.

If the amendments of the public contract are performed upon the request of the financiers, in addition to the above restrictions on amendments, these amendments cannot jeopardise the balance of risk distribution to the detriment of the public partner; nor can the value of the public contract exceed more than 3 per cent.

The request of the financiers must be economically justifiable, legally documented and acceptable for the public partner. In the case of amendments of the public contract upon the request of the financiers, the opinion of the Ministry of Finance must be obtained for all the projects in which the opinion of the Ministry of Finance is required in the preparation of the PPP project and the awarding of the public contract.

All amendments of the public contract require the whole procedure applicable for entering into a public contract, such as the consent of the relevant authorities of the public partner (as listed above).

In the case of concessions, the concession grantor may, without conducting a new concession award procedure, award to the concessionaire the additional works that have not yet been involved that are necessary owing to the occurrence of unforeseeable circumstances, in accordance with the requirements and constraints set out in the PPL. In the case of a change in law after entering into the public contract that negatively affects the project, the public contract may be amended without the application of the above-mentioned restrictions

to restore the private or public partner to the position held at the time of entering into the public contract. The term of the public contract cannot be extended to exceed the maximum term of the public contract, namely 50 years.

**v Ownership of underlying assets**

Upon the termination or lapse of a public contract, all facilities, equipment and other assets falling under the scope of PPPs or concessions come under the ownership of the state, autonomous province, local self-governance unit, public company or legal entity empowered by a separate law governing the concession award, unless differently regulated in the lenders' direct agreement (LDA).

The private partner or concessionaire hands over all facilities, equipment and other assets under the scope of the PPP or concession as well as all other facilities subject to the public contract that are in the ownership of the state, autonomous province, local self-governance unit, public company or legal entity empowered by a separate law governing the concession award. Facilities constructed under the public contract meeting the criteria set out in the PPPCL that are not the subject of the public contract (public facility, public service, public infrastructure, etc.) remain in the ownership of the private partner, whereby the public partner is entitled to obtain these facilities from the private partner in accordance with the conditions and criteria set out in the public contract.

Public contracts regulate the respective notifications, time or deadlines, and handover procedure of the facilities, equipment and assets from the private partner to the public partner both in the case of early termination of the public contract and lapse of the term of the public contract, as well as the role of respective experts in the event of any dispute between the private and public partner in the subject process.

**vi Early termination**

The PPPCL regulates cases of early termination of a public contract triggered by a breach of the public contract either by the private partner or by the public partner. The public partner may terminate the public contract if:

- a* in the case of a concession, the private partner has not paid the concession fee more than twice in sequence or it continuously unduly pays the concession fee;
- b* the private partner does not provide the services or conduct the works in accordance with the agreed standards for subject services or works set out in the public contract;
- c* the private partner does not undertake the measures and activities necessary for the protection of the assets in general use, public assets, natural resources, cultural heritage or assets under protection;
- d* the private partner has provided incorrect data that was decisive in the evaluation of its qualifications as the best bid;
- e* the private partner does not commence with the implementation of the public contract within the agreed deadline;
- f* the private partner's conduct contradicts its responsibilities as set out in the public contract;
- g* the private partner has assigned to a third party its right from the public contract without prior consent of the public partner; and
- h* there has been any other breach of the public contract or terms regulated under the general rules of the law governing contracts and torts, and accepted rules applicable to the respective type of contract.

Before the early termination of the public contract by the public partner, the private partner should be warned in writing of the intention to terminate the public contract, and the public partner should also grant the private partner a reasonable deadline to remedy its shortcomings or breach and provide a defence. If the private partner does not remedy the breach, the public partner is entitled to terminate the public contract.

In the event of early termination due to private partner default (breach of contract), the public partner is entitled to damages under the Law on Contracts and Torts.<sup>10</sup> The consequences of early termination of the public contract due to private partner default are regulated by the public contract and under the Law on Contracts and Torts.

On the other hand, the private partner is entitled to early termination of the public contract due to public partner default, according to the rules set out in the public contract and under the Law on Contracts and Torts. The reasons for early termination of the public contract must be set out in said contract. Public partner defaults include:

- a* the expropriation, deprivation or takeover of the assets or shares of the private partner by the public partner;
- b* a breach of the payment of due obligations of the public partner towards the private partner; and
- c* a breach of the obligations of the public partner under the public contract where material aspects hinder or prevent the private partner from meeting its obligations.

The consequences of early termination of the public contract due to public partner default are regulated by the public contract and under the Law on Contracts and Torts. In addition, the PPPCL regulates cases when the public contract ceases as follows:

- a* upon the fulfilment of legal obligations (in the case of a lapse of the public contract, or in the case of liquidation or bankruptcy of the public partner);
- b* following the termination of the public contract owing to public interest;
- c* following the consensual termination of the public contract; or
- d* upon a final judgement annulling or rescinding the public contract.

The PPPCL sets the requirements for regulating the causes and consequences of early termination, including the minimal amount that must be paid to the public or private partner, the manner of payment of the respective compensation and the funds from which such compensation is to be paid.

In practice, public contracts contain very similar provisions regulating the consequences of early termination of the public contract (private partner default, public partner default or prolonged force majeure). In general, the amount of compensation includes the aggregate outstanding debt the project company owes to the lenders, and equity (registered capital and shareholder's loans) excluding permissible deductions. Depending on the grounds of termination, some elements differ.

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10 Official Gazette of SFRJ No. 29/78, 39/85, 45/89 – decision of the Constitutional Court of Yugoslavia and 57/89, Official Gazette of SRJ, No. 31/93 Official Gazette of SCG No. 1/2003 – Constitutional Charter.

## VI FINANCE

PPPs are typically financed through a combination of equity and debt, including structured project finance, without limitation, provided by commercial banks or financial institutions (i.e., the lenders). The ratio of equity to debt differs by project and depends on the risks associated to it. Generally, the ratio is up to 20 per cent equity and at least 80 per cent debt.

With the magnitude of recent PPP projects in Serbia, no Serbian bank has yet been able to provide the necessary debt or project financing for these projects. This has resulted in cross-border financing, most commonly both from international commercial banks and international financial institutions, such as the European Bank for Reconstruction and Development, the International Finance Corporation, the World Bank and the European Investment Bank.

The project company or SPV is entitled, with the prior consent of the public partner, to constitute the pledge, burden or lien of any of its rights from the public contract, and respective proceeds deriving from subject rights, as well as any assets resulting from the project, in favour of the financiers as a security for repayment of the loans.

Upon the request of the financiers and private partner, the public partner may accept to provide reasonable securities or undertake reasonable liabilities necessary for the private partner in respect of its obligations under the public contract, only under the proviso that these requests do not affect the distribution of risks determined in the respective PPP or concession contract.

A request of the financiers or private partner may include entering into an LDA between the public partner, private partner and financiers, pursuant to which the public partner may agree, *inter alia*:

- a* that the financiers are entitled to step-in rights into the public contract, and temporarily perform the contract instead of the project company and remedy any deficiency of the private partner, and that the public partner must accept these actions as undertaken by the private partner;
- b* that the private partner shall not, without the prior consent of financiers, accept the termination of the public contract upon the request of the public partner;
- c* that, pursuant to the public contract, the public partner shall not submit the request in respect of the deficiencies in performing of the private partner's undertakings without prior written notification made to the financiers in that respect, giving to the financiers, as well as to the private partner, the opportunity to remedy the determined deficiencies in performing the private partner's undertakings; and
- d* that the public partner shall obtain consent in advance on the temporary or permanent assignment of a contractual position or any right of the private partner from the public contract, and that it will give the necessary approvals for strengthening the securities given to the financiers by the private partner.

All other customary provisions that are reasonable for the purpose of providing adequate security for the interests of the public partner and financiers may also be agreed.

The public partner is obliged to obtain the necessary consent from the authorities specified above before any amendments to the public contract as well as before entering into the LDA. The consent issued in respect of the LDA assumes the right of financiers to conduct the activities and protect their rights gained by entering into the LDA without any subsequent consent by the public partner and its respective authorities.

Although the LDA is recognised in the Serbian legal system through the PPPCL and it is commonly executed in PPP projects, the enforceability of the LDA has still not been tested in domestic circumstances.

## **VII RECENT DECISIONS**

Pursuant to the PPPCL, disputes arising from or in connection with public contracts may be resolved by domestic or international arbitration. International arbitration may be agreed if the private partner or its direct or indirect shareholder is a foreign legal entity or individual or, in the case of a consortium, if at least one member of the consortium or its direct or indirect owner is a foreign legal entity or individual. If the parties have not agreed to arbitration, the courts of Serbia are exclusively competent.

Public contracts are drafted and interpreted in accordance with Serbian law. Owing to the fact that all registered public contracts have been entered into recently, there is still no jurisprudence with regard to public contracts. PPP projects that failed in the past all collapsed before public contracts were entered into.

With regard to the small number of concessions entered into under the previous legal framework, few envisaged international arbitration, such as the International Chamber of Commerce in Paris. One concession project in which a concession contract was entered into (2007–2008) ended in arbitration proceedings with burdensome obligations for the state.

## **VIII OUTLOOK**

Following lockdown and respective delays in the implementation of already commended PPP projects, 2021 is expected to result in more PPP contracts being entered into, mainly for the construction of car parks in several key cities in Serbia, energy efficiency projects, the construction or reconstruction of schools, hospitals and early childhood education facilities, public electricity and public transport. The number of contracted PPP projects shows there is still a predominance of PPPs without the elements of concession over PPPs with the elements of concession, and this trend is expected to continue in the future.



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