

Public-Private Partnership as a Form for Public Investments Financing

The public-private partnership is one of possibilities to finance long-term investments of the public sector, due to the cooperation between public authorities and the private sector. The largest group of projects implemented in this formula comprises investments related to car parks, sport-recreation facilities, railway stations or roads. Concluding an agreement on public-private partnership, the private partner commits to implement the project at a remuneration and to incur the entire or part of expenditure on its implementation or to incur them by a third party. Instead, the public entity undertakes to cooperate in order to complete this project. The object of partnership consists of common project implementation based on division of tasks and risks between the public entity and the private partner.

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The implementation of a project under the public-private partnership can comprise the construction or renovation of a building, provision of services, performance of a piece of work, in particular provision of the equipment for an asset, increasing its value or usability or other benefits. Projects carried out on a model of public entity cooperation with the private sector comprise the fields and types of tasks, to the provision of which public sector units are obliged.

The public-private partnership is an opportunity to increase the quality and effectiveness of services rendered to the public and to improve the standard of the available infrastructure. Because of the private sector support it is possible to implement tasks frequently going beyond the financial capacities of public entities. Public entities initiating the implementation of tasks under the public-private partnership include government administration authorities, local governments (municipality, district, voivodeship), and also public companies. The scope of parties performance can take various forms, most frequently

the private partner shall finance and implement the project's object (with its maintenance or management further on), and the public entity shall provide its own contribution.

Legal grounds

In Polish legislation the public-private partnership framework is regulated in three acts: *The Act on Public-Private Partnership, the Act on the Concession Contract On Building Works And Services, and the Public Procurement Law*.¹

The new Act on the Concession Contract On Building Works And Services implements to the Polish legislation the regulations of the *Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts*² and repeals the *Act of 9 January 2009 on the Concession On Building Works or Services*. As the concession contracts make more than 2/3 of concluded PPP agreements, the provisions of the new concession act, introducing changes intended to improve the conclusion and implementa-

Streszczenie

W artykule dokonano dogłębnej analizy partnerstwa publiczno-prywatnego (PPP) – jednej z możliwości finansowania długoterminowych inwestycji sektora publicznego, dzięki współpracy pomiędzy organami publicznymi a sektorem prywatnym. W naszym kraju to wciąż nowe zagadnienie, traktowane przez wiele podmiotów publicznych z rezerwą (szczególnie w samorządach lokalnych). W polskim stanie prawnym ramy partnerstwa publiczno-prywatnego uregulowane zostały w trzech ustawach: ustawie o partnerstwie publiczno-prywatnym, ustawie o umowie koncesji na roboty budowlane lub usługi oraz ustawie *Prawo zamówień publicznych*. Artykuł omawia m.in. nowelizacje tych dokumentów prawnych, które mają ułatwić wdrażanie PPP w naszym kraju na szerszą skalę.

▶ **Słowa kluczowe:** *Prawo zamówień publicznych*, partnerstwo publiczno-prywatne, inwestycje w sektorze publicznym

Summary

Public-private partnership as a form of funding public investment

The paper thoroughly analyses the public-private partnership (PPP) – one of possibilities to finance long-term investments of the public sector, due to the cooperation between public authorities and the private sector. In our country this is still a new issue, treated by many public authorities with reserve (especially in local governments). In the Polish legislation the public-private partnership framework has been regulated in three acts: Act on Public-Private Partnership, Act on the Concession Contract On Building Works And Services, and Public Procurement Law. The paper discusses among other things amendments to those pieces of legislation, which are to facilitate the PPP implementation in our country on a larger scale.

▶ **Keywords:** Public Procurement Law, public-private partnerships, investments in the public sector



Dąbrowa Górnicza, Aleja Róż roundabout, the Sanctuary of the Blessed Virgin Mary of Angels in the background

tion of concession contracts, are of particular importance for initiatives carried out on this model. The provisions of the concession act are applied to concession contracts, which estimated value is equal to or exceeds the equivalent of EUR 30,000 expressed in Polish zloty. So the triviality threshold is identical with that in the case of obligation to apply public procurement law procedures³. The value is determined applying the average PLN against EUR exchange rate, specified in regulations issued based on Art. 35 para 3 of the PPL. Pursuant to Art. 3 para 1 of the concession act, based on the concession contracts the contracting entity entrusts the concessionaire to perform building works or to provide services and manage those services at a remuneration.

The contracting entity concludes the concession contract with the selected contractor based on the tender evaluation criteria, if the following conditions are altogether satisfied:

- 1) *the tender meets the minimum requirements specified by the contracting authority, if defined;*
- 2) *the contractor is not subject to exclusion;*
- 3) *the contractor meets the qualification criteria.*

The concession act introduces a number of changes in the field of concession contracts on building works and services. The contractors seeking the conclusion of a concession contract can appeal to the National Appeals Chamber with a possibility to challenge the NAC settlement to courts of general jurisdiction. The President of the Public Procurement Office was awarded the competence of the competent authority in the case of concession contracts on building works and services.

The new solution includes also three new concessionaire selection procedures, being modifications of restricted tendering, open tendering, and negoti-

ation. In the past concessionaires could be selected only through negotiations.

Like in the public procurement law, the concession act introduces facilitation related to the public-public contracts conclusion, where the regulations on the *in-house* procurement are effective from 1 January 2017. The act includes also social clauses. The contracting entities will be capable of reserving, that the conclusion of the concession contract can be sought only by protected labour establishments or other contractors, for whom the social and professional integration of disabled persons is a statutory objective.

The most important changes, introduced by the new concession act, include those related to the contract amendment principles. The legislator specified a catalogue of circumstances, which occurrence enables the amendment of the concluded contract. An amendment made with a breach of statutory conditions shall be annulled – the annulled provisions shall be replaced with the provisions in the original wording. The parties to the concluded concession contract can make insignificant changes in the concession contract.

The legislator introduced also the definition of the change 'significance'. So a contract change is significant, if as a result of this change the nature of the concession contract differs from its original nature, in particular if:

- the change introduces conditions, which – if specified in the procedure for the concession contract award – would allow to the procedure other contractors than those allowed or other tenders would have been accepted than the accepted, or could have resulted in the participation in the procedure



Gliwice, intersection of Jagiellońska street and Piastów square

- for the concession contract award of other contractors than those which did participate;
 - the change affects the economic balance of the concession contract in favour of the concessionaire in a way originally not anticipated in the contract;
 - the change substantially expands the scope of services and obligations resulting from the concession contract;
 - a new concessionaire substitutes the hitherto concessionaire in other cases than those specified in the concession act.

It is also worth emphasising that in the new concession act there is no definition of the catalogue of provision, which shall be included in the concession contract. The repealed Act of 9 January 2009 on the Concession On Building Works or Services indicated that the maximum contract duration as a rule could be 30 years for the concession contracts on building works and 15 years for the concession contracts on services, where the return of the concessionaire expenditure should have been considered. The concession act does not define the maximum concession contract duration, but the legislator reserved that the concession contract shall be concluded for a specified period of time. In the case of contracts concluded for a period longer than 5 years, it cannot exceed the period, in which the concessionaire can legitimately expect recovering the capital expenditure on the performance of building works or on the provision of services including the return of the invested capital, taking into account the initial investments and the investments made during the concession duration. The concession contracts shall be public and shall be made available pursuant to rules specified in the legislation on the access to the public information. The concession contract must be made in writing unless null and void, unless separate regulations require a specific form. The concession act introduces also the premises to terminate and to annul the concluded concession contract.

Selection of the private partner

The PPP act does not specify in a comprehensive way the procedures to select the private partner. These

procedures are specified in two acts – in the concession act and in the PPL. The selection of the private partner depends on the form of its remuneration.

In the case of entrusting the contractor, with whom the concession contract was concluded (concessionaire):

- 1) performance of building works – the remuneration is only the right to operate the building being the contract object or such right together with a payment (concession contract on building works);
- 2) provision of services and management of those services – the remuneration is only the right to provide services being the contract object or such right together with a payment (concession contract on services),

the provisions of the concession act in the field not regulated by the provisions of the public-private partnership shall apply to the selection of the private partner and to the agreement on public-private partnership.

In other cases than those specified above, provisions of the *Public Procurement Law* in the field not regulated by the provisions of the public-private partnership shall apply to the selection of the private partner and to the agreement on public-private partnership. In the cases, to which the concession act and the PPL are not applicable, the private partner shall be selected in a way that guarantees fair and free competition as well as observation of principles of equal treatment, transparency and proportionality, taking into consideration the provisions of the PPP act, and in the case of contributing by the public partner of its own contribution being a real property, also provisions of the Act of 21 August 1997 on Real Property Management.

Hybrid projects

The public sector demand for capital intensive and long-term investments, and also limited possibilities of private partners create the need to look for additional sources of financing. Hybrid projects may be a solution, i.e. infrastructural projects implemented on the public-private partnership model, which are financed from the funds of a public entity, of a private partner, but also from other subsidies, in particular from the European Union funds. The definition of a hybrid project, i.e. project implemented in the PPP formula and co-financed from the EU funds, was introduced by so-called implementation act in Art. 34⁴ In accordance with the provision quoted: *'A hybrid project consists in a common implementation of a project via public-private partnership as defined in Art. 2 para 24 of the general regulation, established to implement an infrastructural investment'*⁵. In accordance with the quoted definition the essence of hybrid project consists in financing *infrastructural investment understood as construction, reconstruction or renovation of a building or provision the equipment for an asset increasing its value or usability, combined with the investment object maintenance or management at a remuneration*, when the private partner funds are insufficient.

For Poland the period of 2014-2020 is already the third financial perspective, under which we obtain financial support at the amount of approx. EUR 82.5 billion from the EU cohesion policy budget. The funds will be implemented through structural and investment funds, which budget in the 2014-2020 period is EUR 454 billion. In Poland hybrid projects are financed from regional programmes funds, but also from programmes implemented on the national level.

Projects carried out in the formula of hybrid projects should be considered especially complex, because they require the observation of principles applicable to both public-private partnership and also those related to the EU funds acquisition and implementation. Special requirements translate into a relatively small number of projects implemented on the hybrid model.

It is worth emphasising that in the light of the general regulation it is possible to acquire the EU funds before selecting the private partner, the private partner may become also a beneficiary of EU funds support. The general regulation introduces a number of changes in the Polish system of EU funds management, which are aimed at improving the process of hybrid projects implementation. The new solutions comprise a possibility to change a beneficiary (the private partner) during the project implementation, admissibility to conclude the contract on project financing before selection of the private partner, or a change of the PPP project beneficiary. For potential beneficiaries the regulations included in the *'Guidelines in the field of issues related to the preparation of investment projects, including revenue generating projects and hybrid projects for the years 2014-2020'* are of crucial importance. In accordance with the guidelines a public entity makes a potential decision on the project implementation in the public-private partnership based on the carried out pre-implementation analyses, related to the legal, economic-financial and technical aspects. The guidelines emphasise also that the market research shall be an element of pre-implementation analyses for projects planned to implement on the PPP model. Taking into account the national legislation regulations it is possible to consider, that a technical dialogue pursuant to Art. 31 of PPL will be such a form of consultation.

Amendment

The formal-legal restrictions for the initiation of projects on the public-private partnership model have been noticed by the legislator. The legislation work aimed at the amendment of the public-private partnership law is carried out. The basic objective of the amendment is to increase the flexibility of provisions related to the private partner selection and thereby the promotion of PPP as a method to raise private capital for public investments. The necessity to adapt the PPP act to the *Act of 22 June 2016 on Amendment of the Public Procurement Law and Certain Other Acts (Dz. U. of 2016, item 1020)* is an equally important aspect of change.



Katowice, Kościuszki street,
intersection with Miarki square

The scope of planned changes is very broad, the bill considers a few dozen changes in the PPP act and in other acts, the most important ones include:

- strengthening the role of the minister for regional development in the PPP market development in Poland;
- facilitation in the process of the private partner selection;
- possibility to establish a public-private partnership in the form of a company;
- facilitation to acquire the financing of public investments;
- increased protection of subcontractors in the PPP contracts.

In the light of the currently binding law the tasks of the minister competent for regional development include in particular: dissemination and promotion of the public-private partnership, performance of analyses and evaluations of public-private partnership functioning, including the state and prospects of financial involvement of the private sector. However, the regulation in force is not sufficient and does not enable efficient activity of the minister competent for regional development (now the minister of development and of finance). Therefore the bill of the PPP act specifies, that the tasks of the minister for regional development shall include:

- dissemination and promotion of best practice from the field of PPP, in particular those being hybrid projects,
- preparation and dissemination of examples of PPP contract patterns, guidelines and other documents used at PPP planning and implementing,
- keeping a database of public-private partnerships;
- performance of analyses and evaluations of PPP functioning, including the state and prospects of financial involvement of the private sector,
- monitoring the market of public-private partnership.

In accordance with the prepared bill, a public entity to select a private partner and to a public-private partnership contract shall apply the public procurement law. The application of the concession act will be optional. The planned change shall protect public entities and private partners against repeating procedures in a situation, where the procedure has been

started pursuant to the concession act procedure and the negotiated contract cannot be considered a concession contract. In the current state of legislation the procedure carried out in the concession act mode must be completed with the concession contract conclusion. If a public entity carried out the procedure pursuant to PPL, then it is authorised to conclude only a contract on public procurement. As it results from the wording planned in Art. 4 para 2a of the PPP act, the start of proceeding in the PPL procedure, i.e. a stricter one, ensures the compliance with the law of the private partner selection, with whom the concession contract was concluded.

The bill introduces regulations facilitating the PPP implementation in the form of a joint venture with the private partner. The suggested solutions enable allowing a private partner to join an existing company, also through taking hold of stocks or shares in the increased equity. The binding provisions of the PPP act enable, in Art. 14 para 1, the implementation of a PPP project in the form of a company established for this purpose by the public entity and the private partner. However, implementation of a common project between a public entity and a private partner through allowing access of a private partner to the existing company of a public entity is not possible. As it results from the planned Art. 14A of the PPP act, the company – referred to in Art. 14 para 1 of the PPP act – shall be established for a specified period of time, not longer than the PPP contract duration, extended by maximum a year.

In the PPP act binding now, pursuant to Art. 13 para 1, significant changes of the contract provisions as against the tender content, based on which the private partner has been selected, are forbidden. The exception is a situation, where the public entity anticipated a possibility to introduce changes in the partnership announcement or in the documentation of the procedure for the private partner selection and specified terms and conditions of such change.

The amended provisions of the public procurement law introduced more flexible solutions in the field of public procurement contracts modification, and also new premises enabling to make changes in the contractual provisions. Art. 144 para 1 of the PPL specifies a general principle that it is forbidden to change provisions of the concluded contract or the framework contract as against the content of the tender, which was the basis to select the contractor. This ban is annulled in the cases specified by the provisions of the act. It is also worth adding, that the act on the concession contract in Art. 46 anticipates similar provisions to the new wording of Art. 144 of the PPL.

Taking into consideration the above regulations, the bill of the new act on the public-private partnership anticipates annulling Art. 13 of the PPL, the provisions of Art. 144 of the PPL and of Art. 46 of the act on the concession contract shall apply.

The planned law contains numerous suggestions adapting the provisions of the act on public-private partnership to the amended *Public Procurement Law*.

Summary

The planned act on public-private partnership implements postulates of the document *Strategy for Responsible Development*, which was adopted by the resolution of the Council of Ministers on 14 February 2017, such as:

- increase in the scale and effectiveness of investments financed in the public-private partnership system,
- introduction of changes friendly to the PPP development,
- creation of a list of planned PPP projects, comprising the central and local governments investments, which may be implemented within the PPP, including the linking of the above list with the governmental socio-economic programmes,
- dissemination of the PPP formula use and adaptation to the current market needs.

The prepared bill is also one of elements of the ‘Government’s policy on the public-private partnership development’ – the document programming a number of actions – aimed at liquidation of systemic obstacles to PPP projects implementation and at the increase in the public spending effectiveness due to increased involvement of capital, knowledge and experience of the private sector in public projects.

The planned regulations make effort to meet the market expectations. We shall hope that they will become inspiration to implement tasks in the public-private partnership formula. ■



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¹ The Act of 19 December 2008 on Public-Private Partnership (i.e. Dz.U. of 2015, item 696 with amendments), hereinafter PPP; the Act of 21 October 2016 on the Concession Contract On Building Works And Services (Dz.U. of 2016, item 1920), hereinafter the concession act; the Act of 29 January 2004 on Public Procurement Law (i.e. Dz.U. of 2015, item 2164, with amendments), hereinafter PPL.

² Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94, 28.3.2014, p. 1.

³ Art. 4 para 8 of the PPL.

⁴ The Act of 11 July 2014 on Implementation Principles of Programmes in the Field of Cohesion Policy Financed in the 2014-2020 Financial Perspective (so-called implementation act); i.e. Dz.U. of 2016 r., item 217 with amendments.

⁵ Regulation of the European Parliament and of the Council (EU) No 1303/2013 of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, OJ L 347, 20.12.2013, p.320, hereinafter general regulation. Art. 2 para 24 of the regulation defines the public-private partnership as ‘a form of cooperation between public bodies and the private sector, which aims to improve the delivery of investments in infrastructure projects or other types of operations, delivering public services through risk sharing, pooling of private sector expertise or additional sources of capital.’