

Opinion of the Committee of the Regions on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions

(2007/C 51/05)

THE COMMITTEE OF THE REGIONS,

Having regard to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on *Public-Private Partnerships and Community Law on Public Procurement and Concessions* (COM(2005) 569 final);

Having regard to the decision of the European Commission of 15 November 2005 to consult the Committee on this matter, under the first paragraph of Article 265 of the Treaty establishing the European Community;

Having regard to the decision of its President of 22 February 2006 to instruct its Commission for Economic and Social Policy to draw up an opinion on this subject;

Having regard to its opinion on the Green Paper on *Public-Private Partnerships and Community law on public contracts and concessions* (COM(2004) 327 final CdR 239/2004 fin);

Having regard to the opinion of the European Economic and Social Committee on the Green Paper on *Public-Private Partnerships and Community law on public contracts and concessions* (COM(2004) 327 final CESE 1440/2004 fin);

Having regard to the opinion of the European Economic and Social Committee on the role of the EIB in public-private partnerships (PPPs) and their impact on growth (CESE 255/2005);

Having regard to its Draft Opinion CdR 41/2006 rev. 2 adopted on 3 July 2006 by its Commission for Economic and Social Policy (Rapporteur: **Mrs Bożena Ronowicz**, Mayor of Zielona Góra, PL/UEN-AE);

Whereas:

1. economic globalisation and the accompanying intensification of competition which public and private sector enterprises are exposed to, one of the issues which the Lisbon strategy was intended to address, clearly call for close cooperation between the public and private sectors in the form of public-private partnerships, benefiting both sides and above all the public, the users of the services provided;
2. through public-private partnerships, public-sector (national, regional or local government) and private-sector partners participate in mutually beneficial joint activities, using their own resources not only for commercial purposes but also to achieve the social objectives of the project, in particular the delivery of higher-quality services;
3. local and regional authorities should become more involved in public-private partnerships, bearing in mind that grassroots involvement in partnership projects in keeping with the principles enshrined in the Treaties, will primarily benefit the people for whom the services are provided;

adopted the following opinion at its 66th plenary session of 11–12 October 2006 (meeting of 12 October):

1. The Committee of the Regions' views

The Committee of the Regions

1.1 **given** that a precise definition of a public-private partnership does not yet exist, that adequate legislation is not yet in place, and — most importantly — the new Member States in particular lack experience in the field, considers that there is a need to develop an interpretative communication covering all forms of PPP agreements;

1.2 **points out** that local and regional authorities are closest to the people who will use public services, and that they determine how services are to be financed, the form to be assumed by a public-private partnership, or alternatively whether to provide the services themselves;

1.3 **notes** that when opting for a public-private partnership, the primary consideration must be to improve the quality of public services in the context of a specific project; it does not automatically follow that such partnerships will always be chosen as the best solution;

1.4 **notes** that public-private partnerships tend to shift risk to the party which is best able to manage such risk, while providing appropriate safeguards in the event of unfavourable conditions arising from the completion of a particular project;

1.5 **points out** that public-private partnerships are based on the public sector assuming responsibility for the provision of appropriate infrastructure and a particular type of service, while actively cooperating with the private sector on the implementation of a particular project; as for the private sector, its role is to secure financing for work on the project, to ensure technology transfer and to perform tasks in order to achieve public-sector goals; on completion or modernisation of the facility in question, the private sector operates it, providing a public service in return for remuneration. Thus, the aim of public-private partnerships is to define relations between the two parties in such a way as to ensure that the risk associated with a given aspect of a project is borne by the party best able to monitor it;

1.6 **points out** that public-private partnerships can be an advantageous option for providing infrastructure or services to the public. However, only a detailed analysis of the specific aims

of a particular infrastructure or service can determine whether local or regional authorities should undertake tasks themselves or contract them out to third parties, in compliance with the public procurement legislation of the Member State concerned, perhaps by awarding concessions or through an institutionalised public-private partnership;

1.7 **is** of the opinion that public-private partnerships should be acknowledged as an issue which must be approached not only from a legal, economic or technical angle, but also from a political perspective, given that decisions on cooperation between the public and private sectors are subject to democratic voting procedures, as well as monitoring by supervisory bodies, as a result of which such decisions are publicised and evaluated by members of the public who are actual or potential users of the services concerned;

1.8 **points out** that in some cases the following benefits may accrue to the public-sector partner from the execution of a particular project through a public-private partnership (provided that such a partnership is identified as the best option for the provision of services or infrastructure to the public):

- involving private capital in financing projects for the public good, thus generating budget savings and reducing investment costs;
- transferring aspects of investment risk which the private partner is better able to deal with than the public partner;
- accelerating planned investment and the associated provision of public services, due to the greater flexibility and speed of the private sector;
- expanding the range of financing sources for the local public sector;
- guaranteeing reliable completion of projects, given that the facility which has been designed and constructed or renovated will be run or maintained by a private operator, who should therefore have an interest in reliable and punctual completion of the project concerned, under the supervision of the public partner;
- ensuring long-term provision of quality public services, based on multi-annual contracts;

1.9 **emphasises** that in public-private partnerships mutual trust between the partners and transparency in their dealings with one another are necessary, in order to ensure free and unfettered development consistent with the fundamental principles of the European Treaties, such as the principles of equal opportunities, mutual recognition and proportionality; the following are essential conditions for the compliance of public-private partnerships with these principles:

- there must be a stable local and regional government system;
- there must be confidence on the part of the financial markets and the respective partners;
- the public and private partners must be in sound financial condition;
- the terms of the contract must be transparent, specific and include a review mechanism and provisions for cases of force majeure;
- there must be an accurate financial estimate of the project;
- legal protection must be in place for both partners.

1.10 **highlights** the fact that both contractual PPPs and institutionalised PPPs must make it a priority to guarantee citizens high quality, safe and continual facilities or services. To this end, the public authorities cannot fail to prioritise the provision of services above the provider's economic interests and must retain certain powers, such as that of imposing quality and safety standards, amending these unilaterally in the public interest throughout the duration of the partnership, being able to save the facility or service, and once the partnership has ended, receiving the resources from the provider that the public authority considers necessary to the maintenance of the facility or service;

1.11 **considers** that even though most of the agents consulted by the Commission have not supported the Community initiative to clarify and harmonise the rules on subcontracting in public-private partnerships, the Community institutions must not forget that the citizen who uses these services is the main beneficiary of this partnership and that the success of a PPP project can be jeopardised if the holder of the PPP does not respond appropriately to the subcontractors and suppliers carrying out part or all of the provision of services. Furthermore, local and regional bodies are interested in boosting small and medium-sized businesses which, most of the time, act as subcontractors or suppliers. Therefore, it must be made compulsory for the contractor or the concessionaire to fulfil their economic obligations to subcontractors or suppliers under the same economic conditions as those governing the fulfilment of the contracting authority's economic obligations to the contractor or concessionaire.

2. The Committee of the Regions' views

The Committee of the Regions

2.1 **should** the Commission **retain** the idea to launch a legislative proposal on service concessions, the Committee of the Regions pleads for the recognition of the specificity of service concessions or of services of general economic interest concessions. Any Commission proposal should ensure flexible, transparent and non-discriminatory procedures on how to select the service provider combined with a flexible set of horizontal criteria for the final award;

2.2 **considers** that the debate on public-private partnerships should be continued at Commission level, given that cooperation between municipalities/regions and the business world has become increasingly important in the European Union;

2.3 **calls** for a precise definition of public-private partnerships and a clarification of the terminology, such as the precise meaning of terms like 'contractual PPP' or 'institutionalised PPP', and a possible distinction between European level PPPs from national and sub-national PPPs;

2.4 **considers**, following on from the previous point, that the terms 'public services' and 'services of general interest' should be avoided, since they are defined differently in different legislation. A valid concept that could be studied in order to define institutionalised PPPs, which are being covered by European legislation, would be that of partnerships which are designed to carry out a project or to provide services to citizens in return for payment in full or in part by users;

2.5 **encourages** moves to also address the question whether the necessary financial instruments are available at European level to guarantee European-wide PPPs (re-insurance, public guarantees);

2.6 **values** the efforts of the Commission to safeguard at EU level the fundamental principles of the Treaty establishing the European Community, such as transparency, equal opportunities, proportionality and mutual recognition, in the award of public contracts and concessions;

2.7 **considers** that competitive dialogue can be effective for complex public contracts but that there is still little experience of the implications of competitive dialogue;

2.8 **recommends** that Member States develop concessions award procedures based on transparent and consistent rules taking account of any common European-level definitions and standards which might be proposed by the European Commission;

2.9 **considers** that, in order to ensure greater legal certainty for public-private partnership initiatives, public service providers could be established with public and private-sector participation;

2.10 **points out** that only in the case of bidders (contractors) which (1) are subject to supervision by the public body awarding the contract as departments of that body and (2) simultaneously carry out the majority of their activities in that public body need the public procurement procedure not be applied. In view of the CoR, 'internal operator' means a legally distinct entity over which the competent authority exercises control similar to that exercised over its own departments. For the purposes of determining whether such control exists, factors such as the degree of representation on administrative, management or supervisory bodies, specifications relating thereto in the articles of association, ownership, effective influence and control over strategic decisions and individual management decisions have to be taken into consideration. The status of internal operator precludes all participation by a private undertaking in the capital of the service provider of more than 33 %; in particular, the CoR believes to be erroneous the assumption that directly awarding concessions to joint public-private enterprises incorporated by means of public procedures results in all cases

in direct or indirect advantages for these enterprises; it therefore refutes the idea that direct awards automatically constitute a competitive advantage which is in conflict with the provisions of the Treaty, and also the principle that any additional constraint on operating on the market would be incompatible with the above framework;

2.11 **points out** that interpretive communication on the award of concessions or institutionalised PPPs could provide further guidance on how to comply with the principles set out in the TEC concerning equal treatment, transparency, proportionality and mutual recognition, thus enhancing the prospects of PPP projects and facilitating the completion of more projects in future on the basis of European Investment Bank (EIB) loans;

2.12 **emphasises** that high-quality public services are guaranteed by the democratic system in each EU Member State, which puts citizens first and provides protection by the authorities which manage — or provide input into management, supervise and monitor the provision of services;

2.13 **considers** that when granting EU funding, priority must be given to the financing of PPP projects.

Brussels, 12 October 2006

The President
of the Committee of the Regions
Michel DELEBARRE
