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Taking counsel

By Reimo Hammerberg, a senior associate at Sorainen Law Offices in Tallinn.

Choosing a private sector partner in Baltic PPPs

In every PPP project a public sector partner must choose a private sector partner who will carry out the project and provide public services. In most of the projects the services and/or works contracted by the state or municipality from the private sector partner fall under the scope of public procurement legislation; therefore, the provisions of the public procurement regulation will apply while choosing a private sector partner.

Compliance with the mentioned provisions is very important, since a PPP contract that is concluded in violation of public procurement rules may be challenged and declared null-and-void. This in turn would deteriorate the interests of all project participants, since their contracts may become impossible to perform. Thus, knowledge about choosing the private sector partner is essential not only for the public sector partner (organizing the bidding) but also for all the project's participants.

According to the interpretation of the European Commission, public procurement procedure is also applicable (in addition to awarding new contracts) in cases when a private sector partner acquires a stake in the state or municipality owned company, if by such acquisition a private partner obtains the right to render public services.

Public procurement regulation is given such importance since it is aimed at ensuring the free movement of services, equal treatment, transparency, fair competition and effective use of public funds. So active supervision is also performed over compliance of the law.

In addition to local legislation on public procurement, one should also know respective provisions of EU law (directives and court practice) and interpretative sources (the Commission's communications), since the local law is drafted according to the EU legislation and interpreted in the light of that.

Once it has been established that it is necessary to choose the private sector partner through public procurement procedure, there are several issues to keep in mind, some of which are discussed below.

What is the type of the contract – i.e., ordering services/works or granting a concession? This is important because different procurement rules are applicable depending on the type of contract. Applying the wrong procedure may allow a challenge to the whole procedure and contract. There is no legal definition for the concession. Therefore, the content has been given to the term by court practice and the Commission, according to which the main features of the concession are that (i) instead of a payment in return for performing the works (e.g., constructing certain facility), the private sector partner is granted certain rights or rights combined with payment, and (ii) that the main risks related to operating the project are borne by the private sector partner (i.e., concessionaire).

Terms of the tender documents. The terms of the tender documents must ensure equal treatment of participants and transparency of the tender procedure. Thus, all the material terms of the PPP contract (e.g., division of risks, evaluation criterion of the performance, payment scheme, etc.) as well as grounds for amending the contract (e.g., indexation and its extent) must be provided for in tender documents. Also, the term of the contract must be fixed and justified. Amending the contract in the course of performing is allowed only in extraordinary cases. Material amendments as to the object of the contract are considered equal to concluding new contract, which should be awarded through new public procedure.

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Step in clauses in PPP contracts. Quite often lenders require that should the project company (often the borrower) be in breach of the financing agreement, then the financier has right to change the members of the management bodies or even replace the project company with another entity chosen by it. Such replacement may make it necessary to carry out a new public procedure for awarding the contract to another company.

These are just some of the issues related to choosing private sector partner in PPP projects from a public procurement perspective. However, since all the projects are unique and often very complex, every case needs an individual analysis.

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