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Is it possible to park correctly without having to reverse?

Developments in the past few years have shifted the relationship between the public and private sectors from a simple one of customer and supplier to one involving cooperation aimed at optimising a certain end product. In this case the end product is not a material requirement defined by the public sector (e.g. a specific school building), but a requirement of an abstract nature (e.g. the provision of educational facilities for 600 students). Each side is responsible for that part of the project which it can best define or manage – the public sector addressing the number of students, the requirements as to the standard of the facilities and the education itself and the private sector addressing the most effective and efficient way of creating those facilities and ensuring their operation.

should not be identified only with concessions, as often occurs. The key problem of the new legislation is not that it differentiates between a classic public contract and a concession, which is perfectly legitimate and entirely in accord with European legislation, but the possible consequences of entirely separating the ways of awarding these two types of cooperation between the public and private sectors. During initial discussions concerning the recent Public Procurement Bill and the need for a special Concession Act, two differing viewpoints clashed regarding the actual award process; one view supported a uniform award procedure for public contracts and concessions (with certain modifications for concessions, where necessary) (represented, for instance, by the Ministry of Finance and the Ministry of Justice) while another view sup-



In order to find the best solution to the public sector's requirements, it is necessary to concentrate on defining the project at its very inception, particularly in the case of pilot projects where practical experience in project implementation is lacking, the ideal form of which is an active dialogue (whether formalised or not) between the public and private sectors. The objective of this kind of dialogue is to find a way of crystallising the "abstract requirements" of the public sector while avoiding formalities such as the procedural process in respect of selection of a given solution. For this reason, the selection process should be neutral as regards the project's goals and should not limit possible alternative solutions. In this respect, actual experience with the new regulations governing the awarding of public contracts and concessions indicates that the selection of a private partner according to these new rules may not be as neutral as might be desired, which may lead to complications and unwelcome delays in the implementation of PPP projects.

ported different procedures for public contracts and concessions (represented by the Ministry for Regional Development). The second viewpoint found its way into the Concession Bill which was presented to legislators for approval, the reasoning running that significant special features of concessions necessitate the creation of the free-standing and self-contained institution of concession contracts, including the manner in which they will be awarded. From a theoretical point of view such independent regulation can undoubtedly be justified, however, in a practical sense this route is distinctly unhelpful with regard to the usual principles of implementing PPP projects.

From the point of view of the procuring authority, it is necessary to bear in mind that in PPP projects the procuring authority defines its "abstract requirements", which are then crystallised by the private sector into the best solution. The existence of two award procedures, one for public contracts and one for concessions, however, forces the procuring authority to anticipate in the initial phase of project development the method for fulfilling its abstract requirements and thus partially crystallise them itself.

In this regard it is necessary to emphasise that the award of a public contract on the one hand and a concession on the other are merely two different routes leading to the implementation of a PPP and that PPP

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An interesting case from abroad regarding the issue of a failed PPP project



► Jiří Štěrba

The ideal transfer of risks between the public granting authority and the concessionaire is one of the fundamental prerequisites for the success of each PPP project. The transfer of risks is important not only with individual occurrences during the functioning of a project (a change in the financing price of the project, etc.), but also and particularly if the project gets into trouble or in the event of a failure of such project. In accordance with the requirements on the transfer of risks, in a case like this, the private investor should incur the major share of damage and the public sector should be affected as little as possible.

It is obvious that this can only be accomplished if the project is well prepared and there is an appropriate legal environment. An ideal model of risk transfer will be sought even in the Czech Republic not only in connection with specific projects, but also due to the new regulations regarding insolvency in the Czech Republic. One of the elements that will have considerable meaning in connection with this will certainly be the issue of the ownership of assets pertaining to PPP projects, particularly in connection with the bankruptcy of the concessionaire. The fundamental question will be if the owner of the funds and properties pertaining to a specific project will be the public granting authority or the concessionaire; whether or not these kinds of funds and properties will be dealt with as if in bankruptcy proceedings (as property) or in some other manner.

Nevertheless, in this article I am not setting an analysis of this issue as my objective. Rather, I would like to point out an interesting case from abroad that deals with the issue of a failure of a PPP project, the transfer of risks and assessing value for money in the most general way.

Re: *Neath Port Talbot*

The town of Neath Port Talbot (county of Glamorgan, Great Britain), as the public granting authority in cooperation with a private investor, implemented the PFI project, the subject of which was the building and operating of a facility that sorts and processes waste (the "Project"). The town and the investor concluded a contract for 25 years of operation for the Project. However, due to repeated breaches of the contract on the part of the private investor, the town terminated the contract in October 2005 and bankruptcy proceedings were initiated on the funds and properties of the concessionaire.

The Project was financed by the Bank of Scotland, whereas during the failure of the Project, the concessionaire had a debt with the bank in the amount of approximately 40 million pounds. The bank had a chattel mortgage on the assets of the Project and other forms of securities. Under standard procedures, the bank would have the right to decide when and in what manner the Project would be sold in order to satisfy its claims

to the greatest extent. However, the town council made an objection; as a result of withdrawing from the concession contract, they claimed the ownership rights to the Project belonged to the town and not the concessionaire, i.e. the bank's rights to the Project ceased to exist. A court dispute was commenced regarding the matter.

Two opposing interests came into conflict within the scope of the dispute. On one hand there was the town's interest in continuing the operations of the Project. That is why the town council demanded that it wanted to quickly sell the Project again in a new tender. Among the main arguments of the town was the need to ensure the necessary level of public services, which, if not fulfilled, meant sanctions for the town, and also the fact that a significant grant from European funds was promised for the further growth and development of the Project. Thus, a timely sale of the Project to a new concessionaire would significantly reduce the risk of the town incurring damage. However, it was necessary for the new investor to acquire the Project without any disputed right of lien because a new tender without clearing up ownership relations regarding the Project would not be possible.

On the other hand, the bank was interested in having the bank's right of lien recognized and that its claims be satisfied to the maximum extent via the standard implementation of this right of lien. The bank demanded that it have the right to decide when and in what manner the Project would be sold, exclusively in accordance with its creditor interests.

The decision of the court (*High Court of Justice*), in the matter of *Governor & Co of the Bank of Scotland v Neath Port Talbot County Borough Council*, during the autumn of last year, ruled that the town council of Neath Port Talbot had the right to sell the assets that are part of the PFI Project, which failed as a result of bad management by the concessionaire. The issuance of such a decision is allowed to the courts in Great Britain if it is suitable to quickly sell funds and properties that are the subject of a dispute.

The fact of the matter of whether the bank's right of lien on the Project existed or not was never judged within the scope of the dispute. The court was completely inclined to favour the town, whose obligation was to ensure the acquisition of the greatest value for money in connection with the Project, and enabled the immediate sale of the Project to a new concessionaire without the burden of the right of lien of the Bank of Scotland. The bank only retained the right to financial settlement. This decision is directly in accordance with unvarying judicature. When enforceability of securities on public funds and property is hung up in litigation, courts always judge this from the point of view of public interests, and, according to which, they give preference to public interests, whose task is to provide public services, over the protection of the interests of private entities.

> Jiří Štěrba / Brzobohatý, Brož & Honsa