

PUBLIC - PRIVATE PARTNERSHIP IN CONSTRUCTION PROCESS

Abstract

The principles of public-private partnership in construction process as a form of cooperation between a public entity and a private entity based on the agreement of a commercial nature is presented in the paper. It is the opening of the public administration to market mechanisms. Public-private partnership is an institution that facilitates the optimization of investment processes, allowing for proper identification and risk management. This institution was created in response to the economic crisis of the welfare state.

Having in mind the variety of forms of public - private partnership that institution may be considered to be adapted to the turbulent environment.

INTRODUCTION

The tendency to transmit complex public projects to private entities [1], privatization of services, that customary in developed countries were considered public, has become the driving force behind the development of public-private partnerships [2]. In many cases, this was due to the rising cost of the welfare state. In addition, the projects implemented by private entities have greater economic efficiency, minimizing costs and better risk management, which in turn translates into economic calculations [3]. In countries with stable economies, earlier based on free activities, the liberal model with developed control function is becoming more common, especially in public services [4].

Construction projects, which were implemented in Poland, according to the formula of public-private partnership were: the construction of roads, water and sewage, water parks, swimming pools, ice rinks [5], [6].

1. DEVELOPMENT OF PUBLIC – PRIVATE PARTNERSHIP

The first forms of public-private partnership date back to the sixteenth century and related the licence, which earned Adam de Craponne to build a canal in France and in the seventeenth century when the US private investor - the company Water Works Company built a water supply system that provided drinking water for residents. Further intensive development of public-private partnerships took place in the 60s of the twentieth century, in connection with the crisis of the welfare state, when in market economy countries there were problems, particularly in meeting the needs of society. Investments and utilities managed and implemented by public entities were expensive and inefficient. Cost-effective and efficient solutions were sought and the model were activities taken by private companies, which have become a partner of public entities. An example of the further development of this type of initiative in France was the development of large private companies providing public services, such as Vivendi and Suez Lyonnaise des Eaux. Thanks to initiatives of public-private partnerships in Western Europe and the US in the 80s and 90s many commercial investments were created.

At this time in the UK public-private partnership developed under the Private Finance Initiative. This initiative was based on the realization of projects controlled by a public entity, but a private entity was involved in the implementation, financing and investment management.

In the countries of the former socialist bloc, public-private partnership began to develop along with the political changes and transformation from a centrally controlled economy to a market economy, eg. in 1992 French group SAUR signed a lease contract for the management of water supply network in Gdansk. In 2001 in Tczew company Connex, part of Veolia (formerly Vivendi) took a 51% stake in the Department of Public Transport, managing urban transport.

2. TYPES OF PARTNERSHIP

Value in use of public - private partnership, higher than in traditional procedures, results from a risk-sharing partnership between the parties, contribution of know-how, technology and management skills on the type of project by the private partner. In the framework of public - private partnership stands out several schemes based on the mechanism of cooperation functioning between public and private partners and the responsibilities and powers of the private partner. These schemes are discussed below.

2.1. Design – Build (DB)

In this scheme, a trader is responsible for designing and constructing of the building intended to provide services by the public according to a specific standard. Upon completion the object becomes the property of a public entity that will be responsible for its operation and maintenance. The scheme can be used in case of realization of roads, sewage treatment plants, swimming pools, etc.

The main advantages of this type of partnership are among others: the ability to implement innovation and reduce costs, shortening construction time, less contentious issues in comparison with the ordinary contract for construction works. The disadvantage is a kind of petrification of project, which under construction in principle can not be changed (or it is at least very difficult), the complicated process of choosing a contractor, as well as reducing capital expenditure, which in the future may involve the need to incur higher operating costs and maintenance (if the assessment of profitability does not include the entire expected lifetime).

2.2. Design - Build – Operate (DBO)

A public entity entrusts the entrepreneur designing, construction and operation of the facility during the contractual period remaining owner of the object at the time of its exploitation and financing facility. The scheme can be used in all cases in which the public sector, in order to maintain the rights of the owner, is also interested in using the experience of the entrepreneur in the construction and operation of the facility. In addition to the matters listed above,

scheme is sometimes used for government buildings. All risks associated with the construction shall be borne by the entrepreneur, and besides the requirement to exploit the object can affect the growth quality of construction. The disadvantages are similar to those described in the case of DB scheme. The difficulties arising in connection with the reduction of the possibility of changes in the design also apply to the principles of its operation.

2.3. Build - Operate – Transfer (BOT)

Entrepreneur builds and finances the object, is responsible for its maintenance and operation, manages and collects fees from users for a specified contract period to achieve the intended returns. Then the object's ownership is transferred to the public entity. Entrepreneur freely determine the fees (unless it receives grants from the municipality). BOT scheme is also referred to the acronym BOOT (Build - Own - Operate - Transfer) to emphasize that powers of private entity to income from investments result from ownership. Variants of the scheme BOT include DBOOT (Design - Build - Own - Operate - Transfer) where the trader is also responsible for developing the concept of using investments to provide certain services (designing it) and BOOST (Build - Own - Operate - Subsidize - Transfer) in which public administration bears part of the cost of the investment operation, and many other applications in which the obligation of building can be replaced, for example, by the duty of the modernization of the facility or its restructuring. A feature connecting all of these variants is to establish by many private investors, the company called the company BOT, which is a party to all contracts concluded with the relevant administrative body, representing the state or a local government. The share of shareholders' own capital in the project, usually does not exceed 20-30%, so the company BOT is also a tool to raise adequate funds from investors - third party and the banking sector.

At another of emphasis abbreviation MOT (Modernize - Operate / Own - Transfer), is sometimes used. This can also be a formula of BLT or RTD (Build - Lease / Rent - Transfer).

A variation of the discussed scheme is also BOR (Built - Operate - Renew), which indicates the need to restore the value of the object before returning it to public entity.

2.4. Build - Transfer – Operate (BTO)

Trader commits to build and finance the facility. After the completion of construction trader transfers ownership of facility to a public body, from which it leases the property for the time necessary to achieve the assumed rate of return. A public entity retains control over service delivery standards and the level of fees. In the event of non-performance commitments by the entrepreneur it may be easier to resolve his contract than in the BOT scheme.

2.5. Design - Build - Finance – Operate (DBFO), Design - Create - Manage – Finance (DCMF), Build - Own – Operate (BOO), Renew - Own – Operate (ROO)

This scheme is close to full privatization of the service. The trader is responsible for the design, construction, financing and operation, also has a complete freedom in setting charges. The public entity is to fulfill the role of the regulator of operating conditions for a monopolist. ROO scheme may well check in the protection of monuments.

This overview shows the diversity of patterns of public-private partnerships, which are after all a product of practice and needs, rather than legislation. The law must only allow cooperation between sectors in the performance of public duties. Polish Act of 2005 was open to a wide range of possible patterns of partnership. Proper choice of form of cooperation is the responsibility of a public entity, which to carry out a public task is looking for a private part-

ner. In turn, for the private partner cooperation with the public entity is usually interesting and profitable transaction, but realized under the strict control of both the administration and the public.

2.6. Rent (sales), modernization, operation

Entrepreneur leases (or buys) the object of a public entity, makes its modernization and operates it until the assumed rate of return. A public entity not only does not fund the modernization, but receives income from the sale or lease of the object. On the other hand, the existing building is difficult to measure, beyond the question may arise whether an object whose construction was financed with a grant might be sold.

2.7. Periodic privatization

In the scheme the property of the object is transmitted to the entrepreneur, which carries out its modernization or expansion. Then the entrepreneur operates the facility for a period specified in the contract or necessary to achieve the assumed rate of return. In this way, while maintaining oversight of the standard of services, public body gets rid of the costs associated with the ownership and operation of the facility. The basic difficulty is the need to replace the trader in the event of the bankruptcy or failure to comply with the agreement, the risk of an increase in fees for services, downsize and other problems associated with the change of status of the building.

In February of 2003 the European Commission has issued guidelines entitled *Guidelines for Successful Public-Private Partnerships*. These guidelines summarized the experience of Member States in the implementation of projects involving the private sector and described the types of contracts, binding partners. The second document in the EU was the Green Paper on public-private partnerships *Green Paper on Public-Private Partnership and Community Law on Public Contracts and Concessions*, developed in April 2004 which was a consultative document of the European Union on PPP and Community Law on Procurement public contracts and concessions, and sought to know the positions of EU Member States concerning their work on the regulation of this issue in the law (during the work on the Law on Privatization also Poland reported its position). The concept of public-private partnership has not yet been regulated in Community law.

3. PUBLIC-PRIVATE PARTNERSHIP IN POLAND

The development of public-private partnerships in Poland in the 1990s was held by two legal regimes: specific provisions, eg. of the 1994 Act on toll motorways and National Road Fund and on general principles, (ie. within the contractual capacity of public bodies - Law of 1997 on municipal management), based on the Civil Code and the regulations on public procurement, where necessary, taking into account the special administrative regulations (eg. the Law of 2002 on collective water supply and discharge of wastewater).

The adoption in 2005 of Law on public-private partnership does not close these mechanisms. The introduction of a legal framework in the form of the Act results in law and favors the development of this institution. The biggest benefit is the introduction to the budget law long-term planning and long-term obligations of public and private entities that arise from the idea of public - private partnership. The public entity faces new challenges involving a risk assessment of projects carried out, economic efficiency and social impact of such activities on the public debt and the possibility of its reduction.

Remuneration of private operator under a PPP can be done in two ways. In the first variant, a private entity is entitled to payment

for services rendered. In the second case, the salary or income will benefit from the project.

Expenditures related to the investment borne by a private entity, in some cases with a public entity. The problem for the private partner is to raise funds for investments in the period when the project is not yet generating revenues or is generating them at a lower level than the one that ensures the viability of the project. These measures come mostly from accumulated savings, loan or securities issued.

Public - private partnership as a modern way of implementation of projects associates with the analysis on the basis of risk assessment of its economic aspects and comparing the benefits associated with the implementation of the project in various forms. An example is the cost-benefit analysis (Costs Benefits Analysis), a socio-economic analysis. During this analysis one identifies benefits and social and environmental costs expressed in monetary.

Adopted on 19.12.2008. Law on Public - Private Partnership replaced the previously applicable in this respect Act of 2005, which has not found practical application due to too rigid regulatory framework. Its provisions, in places too detailed, did not allow to fully customize specific contract to the nature of the project and its accompanying circumstances. The new law implements five basic principles:

- a. giving players the greatest freedom to shape partnerships
- b. protection of most important public interests
- c. protection of legitimate private interests
- d. protection of public debt
- e. compliance with EU law

Partnership cooperation of entities of public and private can take various forms, ranging from a loose cooperation under the agreement to set up a special purpose company, in which partners are a public entity, a private partner, as well as funders venture that do not engage in the ongoing management partnership or SPV. SPV (Special Purpose Vehicle) being formed for the implementation of the agreement and limited to that objective. Form of the company allows this entity as a legal person, able to acquire rights and incur obligations, eg. when applying for funds from the European Union funds or other external sources of financing.

For selecting the private partner, the procedural rules set out in the Public Procurement Law and the Law on concessions for construction works or services, will apply.

The essence of public - private partnership is cooperation and sharing of risk in the project in a way that best uses the strengths of each party. Before concluding an agreement regulating public - private partnerships parties to the contract, especially public partners can perform risk analysis and categorize the types in order to develop the best possible division of tasks and risks [7], [8]. It seems that such analyzes will be of great importance especially in the implementation of major projects by public - private partnership.

A public entity under the Act is a unit of the public finance sector or other legal entity, established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character if public sector entities finance it in more than 50% or have more than half of shares or supervise their management or have the right to appoint more than half of the members of their supervisory or management and trade entities mentioned above. The private partner is an entrepreneur or foreign entrepreneur. The subject of public - private partnership is a project for the construction or renovation of a building, provision of services, execution of works, in particular the equipment of an asset in the unit increasing its value or usefulness or any other provision. The project must be

linked to the maintenance or management of an asset that is used to implement the project of public - private or is related to it.

Information about the planned public - private partnership shall be published in the Public Procurement Bulletin or the Official Journal of the European Union as well as in the Public Information Bulletin. Then you select the most advantageous offer, that is, one that presents the best balance of remuneration and other criteria relating to the project. Evaluation criteria include the division of tasks and risks associated with venture between a public entity and a private partner, timing and amount of expected benefit payments or other public entity if they are planned. Tenders may also be assessed in terms of other criteria, in particular the distribution of income from the venture between a public entity and a private partner, relation of own contribution of the public entity to own contribution to the private partner, the efficiency of project implementation, including efficient use of assets, the criteria relating directly to the subject of the project, ie. the quality, functionality, technical parameters, the level of technology offered, the cost of maintenance and service.

In the framework of the public - private partnership, the private partner undertakes to implement the project for consideration and incur all or part of the expenses for its implementation or they will be incurred by a third party. The public entity agrees to cooperate in the achievement of the objective of the project, in particular by giving their own contribution. Own contribution is a provision involving the incurring some expenditure for the project, including financing subsidies for services provided by the private partner in the operation or bringing the asset. Own contribution in the form of an asset may occur in particular through the sale, lending, use or lease. Each of the parties to the agreement on public - private partnership bear part of the risk of success of the project. The nature of the remuneration of the private partner is specific, as it depends on the actual use of the subject of partnership or actual availability. It is therefore impossible to predict or determine in advance the amount of the salary. In order to strengthen the protection of the interests of the public finance law imposes, regardless of parties' to the agreement thrift, the obligation to include in the contract sanctions for non-performance or improper performance of an obligation by the private partner or a special purpose vehicle, in particular penalties or reduction in salary.

The public entity has the right to control the current implementation of the project by the private partner.

A special form of the agreement on public - private partnership is to establish by a public entity and a private partner the SPV. This may be a limited company, partnership or joint - stock company. The public entity can not be the general partner. The objective and scope of activity of the company can not go beyond a certain agreement of public - private partnership. In the case of establishing such a company sale or encumbrance of real property or business requires the consent of all shareholders. The public entity shall have the right of first refusal of shares of a private partner in the company.

The new law on public - private partnership of 19.12.2008 is more flexible than the 2005 Law and its regulations, less formal and more generally, may be better suited to the specific expectations of the parties of contract for public - private partnership. Thanks to this new law has a chance to better realize the role of this institution not only as a means of financing investment but also as a form of demopolisation of public administration by providing fulfill its tasks to private entities.

CONCLUSIONS

According to the opinion of author's of this article, public-private partnership should evolve towards further broadening the scope of

operation of facilities constructed in accordance with that procedure to private entities, while maintaining the appropriate scope of control by the public entity. There are many areas of the economy, to which the development of public-private partnership would undoubtedly make a great contribution. Housing, energy based on renewable energy sources, investments in infrastructure, including the development of high-speed railways, are examples of areas of unmet social needs and also areas requiring high technology in the investment and management of these realizations. In connection with the development of civilization and the development of forms of social life social needs in the above mentioned areas will further increase. Worthy of consideration is to entrust to private parties in the framework of public-private partnership the execution of these projects which are strategic for the state, municipalities and which therefore should not be controlled by private entities

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PARTNERSTWO PUBLICZNO – PRYWATNE W PROCESIE BUDOWLANYM

Streszczenie

W artykule przedstawiono zasady funkcjonowania partnerstwa publiczno-prywatnego, które jest formą współpracy jednostki publicznej i podmiotu prywatnego opartej na umowie o charakterze komercyjnym. Jest otwarciem administracji publicznej na mechanizmy rynkowe.

Partnerstwo publiczno-prywatne jest instytucją ułatwiającą optymalizację procesów inwestycyjnych, pozwalającą na właściwą identyfikację i zarządzanie ryzykiem. Instytucja ta powstała w odpowiedzi na zmiany gospodarcze, kryzys państwa socjalnego.

Biorąc pod uwagę różnorodność form partnerstwa

publiczno – prywatnego instytucja ta może być uznana za przystosowaną do turbulencji otoczenia.

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