

Point 2

Even PPP competitive dialogue procedures may prove to be inadequate in cases where the participation of a large number of economic operators is made impossible due to the technological or technical complexity of the project. At times, those technological solutions that would best be suited to address innovative high-tech problems do not fully emerge because of the need to protect intellectual property since not every component is covered by some sort of guarantee (copyrights, patents etc.). Despite significant incentives, optimal combinations of different contributions (technical, infotech, financial, organizational, etc.) will seldom surface since some participants will be reluctant to disclose non-protected technical and/or organizational solutions.

Greater cooperation might result from converting incentives and payments payable to proponents of innovative project contributions (as per SS 29(8) of EC Directive 2004/18/04) into scores that would give them an advantage over other competitors in the contract award procedure. Due to balance sheet constraints and the practice of disbursing financings only when significant progress has been made at the design stage, in Italy it is difficult to obtain appreciable funds at the early stages of a project. As a result, this sort of non-pecuniary remuneration might not only be well received but also help disseminate the procedure and a project quality culture of some sort.

Evidently, for this to happen, access to the dialogue procedure should be as wide as possible and the procedures for appraising the value added inherent in project contributions (savings for the public authorities, greater public benefits and/or lower expenses) will have to be transparent and predetermined.

Point 3

Another obstacle to effective competition which is inherent in applicable Community legislation and will be difficult to sidestep is the objective disparity (mostly territorial) of the situations from which economic operators start off. Let us mention just one example: when assisting a municipality draft a public PFI proposal for a convention centre (under SS 19(2) of Italian law 109/94), we surmised that economic and financial equilibrium would only be achieved provided the convention centre acted as an agency entering into ad hoc agreements with most of the players of the local hotel industry.

Paradoxically, even a one hundred per cent open procedure will prove inadequate to vouchsafe fair and effective competition since those economic operators (specifically the building industry and agencies that organize conventions) who enter into agreements with the local hotel business at the project development stage will clearly have a competitive edge over the rest.

A greater degree of genuine competition might come from a two-step procedure. In particular, in objective and closely controlled situations de facto incompatible with the abstract principle of free competition, the first step might be a negotiated procedure between public authorities and "indispensable" economic operators such as the hotel industry (possibly calling into play institutional representatives such as Chambers of Commerce or trade/industrial associations), while the second step would envisage the enlargement of the private sector component i.e. the inclusion of more easily interchangeable economic operators (e.g. the building industry and agencies that organize conventions).

Point 7

There is no doubt that a homogeneous public procurement and concession legislation would favour public works and services contracts which make for high quality public services as well as an optimal use of public resources.

Point 9

Specific Community initiatives aimed to help, if not indeed oblige, public authorities to exchange experiences are doubtlessly useful (see also **Point 22**) as is the use of incentives for private sector initiators of a PPP project.

Experience in Italy has highlighted the need to provide guarantees and financial and other incentives to operators who submit valid innovative projects. In this connection, it is perhaps appropriate to set up independent entities called upon to certify the validity of the proposals and protect the private partner's innovation from the risk of being copied. In general terms this need is closely related to the comments under point 2 concerning the opportunity to grant intellectual property rights of some sort and have due regard both to the innovative content of a project and the related private investments.

The provisions of article 37 bis of the Italian PFI regulations (law 109/94) whereby only design expenses borne by the project initiator are reimbursed by the contract awardee discourage operators from initiating projects, while the possibility for the initiator to present an offer in line with the best economic proposal submitted in respect of the tender (article 37 quarter) is a limitation to genuine competition in the tender procedure.

It follows that rules should be put in place to determine the value added of projects submitted by private sector initiators.

Point 13

A major problem for the Italian business community is the banking industry's request for guarantees whenever a loan application is filed. The various forms of personal and collateral (mortgages) security still required in connection with most medium/long-term loans today are incompatible with the very concepts of PPP and PFI and irreconcilable with the very long term timeframes they involve.

Consequently, we deem it indispensable that "step-in" type clauses continue being envisaged as also other mechanisms that guarantee the financing entity in terms of budgeted cash flows and, generally, compliance with the terms of the concession. Suitable standard contract clauses should be drafted to guarantee service quality and the qualifications of the substitute concessionaire that would "step in" (without a new involvement of public authorities which the financing entity might view as an additional risk).

In our opinion, if PPPs are looked upon as an important engine of growth, competition must be made compatible with the requirements and protection of the financing bodies.

There can hardly be any doubt that standard terms and conditions and/or procedures "extending competition to step-in contract clauses themselves" might help prevent distortions and misuses of the current legislative framework.

These standard terms and conditions should clearly distinguish between economic operators and financing entities. Step-in clauses should be applied only to initiatives with an adequate equity/debt ratio and provided that business risks be mainly incurred by the economic operators while the financing entities' return should be in the form of financial interest.

By "extending competition to contract clauses" we mean that during the contract awarding procedure, the procuring public authority may include amongst its appraisal parameters its greater/lesser involvement in the event a substitute concessionaire steps in.