

ANCE

ASSOCIAZIONE NAZIONALE COSTRUTTORI EDILI

Direzione Legislazione Opere Pubbliche

Note

Re: Green Paper on Public-Private Partnerships and Community law on public contracts and concessions

Following due examination of the text in question, ANCE considers it appropriate to give answers to the questions raised by the Commission, explaining more precisely certain aspects involved in the phenomenon of Public-Private Partnership which are considered particularly important for the building sector.

Regarding the questions raised, hereafter please find the following considerations, concerning specifically the sector of **public works**.

QUESTION NO. 1

The Italian set-up recognises and governs fundamentally two types of PPPs:

- The **concession** of construction and running, in the two different variants: ordinary, in which the public administration issues a call for bids for entrusting the carrying out and running of a work and the concessionaire recovers the funding relative to the work through payments collected from third party users; and the procedure of the promoter (*project financing*), in which initiative for the project is taken by the private promoter, who may be entrusted on a basis of concession with the carrying out and running of the work itself.
- The **General Contractor**, which constitutes implementation of the “execution by any means”, foreseen by the Community directives. In fact the services entrusted to the general contractor comprise not only the planning and execution, but also the partial financing of the work and other activities of administrative back-up.

However, in addition to these patterns of award, the Italian legislation in particular sectors, such as that of prison building, foresees further forms of search for a private partner by the adjudicating bodies, which may cause some perplexity. For example, reference could be made to those cases of what is termed financial leasing of real estate “undergoing construction”, by means of which a competition is called for determining the “financial lessee” (banks or financial subjects) which then have to see to the carrying out of the work which will be leased to the administration by means of direct and discretionary awarding to the executor subjects in possession of the qualification requirements prescribed for contractors by the rules on public works.

These perplexities pertain to the compatibility of such operations with Community law: in fact, in ANCE's opinion, choice of the executor by the financing lessee adjudicating the competition must respect the rules on competition.

QUESTION NO. 2

As regards competitive dialogue, it is considered that this particular procedure may be used for certain forms of PPP, providing the rules pertaining to advertising are complied with and confidentiality is ensured regarding the solutions provided by the competing firms.

QUESTION NO. 3

As a general rule, no particular problems arise regarding such contracts, apart from choice of the tendering procedure.

QUESTION NO. 4

We are not in a position to answer this question.

QUESTION NO. 5

We consider that the fundamental rules relative to advertising, transparency and non-discrimination are sufficient to guarantee the participation of foreign competitors in the competitions for the awarding of concessions. However, we would stress that particular attention must be paid on the subject of real competition to the need to ensure reciprocity between the member States in the field of treatment of workers.

QUESTION NO. 6

As far as concessions are concerned, we do not consider that a Community legislative initiative is necessary. We would prefer to see the adoption of a new interpretative communication which takes account of the observations made in the Green Paper and which spells out clearly the specificities of the individual procedures.

QUESTION NO. 7

Not applicable, since we gave a negative answer to the previous question.

QUESTION NO. 8

The Italian set-up envisages and lays down a procedure on private initiative, which is that of project financing. The general rule is that the administration makes known the fact that in the framework of approved programming there are works which may be carried out in project financing, by publishing an indicative notice according to the procedures of publication proper to competition announcements. It is considered that such publicising is appropriate for guaranteeing the participation of foreign subjects.

Once more in the phase of choice of who will carry out the project initially proposed by the promoter, the presentation of other offers is ensured, by calling a competition aimed at singling out those subjects due to compete in a subsequent phase with the promoter of the initiative.

With the appropriateness of the procedure foreseen by the Italian legislation for guaranteeing maximum competition continuing to hold good, the Association underlines the importance, if the financing project is to find concrete application in the Italian market, of ensuring that the promoter receives the advantages foreseen by the rules (and in particular the right to adjust his own proposal to that adjudicated as more acceptable by the administration – the so-called right of pre-emption). In this connection, it is considered that guarantee of respect of the rules on competition and equality of treatment of national and foreign competitors derives from the publicising of such advantages, by means of explicit indication in the indicative notice published.

QUESTION NO. 9

In our opinion, the development of private initiative PPPs may be ensured precisely by offering advantages for those taking the initiative, as foreseen by the Italian legislation: in the case of the administration considering the tender of some other competitor more profitable, the right of pre-emption, described heretofore, or alternatively, if the latter should not be exercised, ensuring that the promoter receives remuneration implying partial coverage of the costs sustained in proposing the initiative.

QUESTION NO. 10

We are not in a position to answer this question.

QUESTION NO. 11

We are not aware of cases such as those described in the question.

QUESTION NO. 12

We are not aware of cases such as those described in the question.

QUESTION NO. 13

We are of the opinion that clauses of “step-in” type may be necessary in certain contractual situations encompassed in the phenomenon of the PPPs, without however presenting problems in terms of transparency and equality of treatment. Reference is made to situations in which the financing subject could call for replacement of the concessionaire by a subject taking over from him having equivalent technical financial suitability to that of the previous subject and who guarantees completion of the works. Such a possibility should be permitted in specific cases, such as that of bankruptcy of the awardee subject or serious non-performance of the contract, precisely for the purpose of avoiding rescission of the latter.

QUESTION NO. 14

To our mind a Community intervention, in the form of interpretative communication, aimed at clarifying the nature and definition of the different typologies of contractual PPP would be quite appropriate.

QUESTION NO. 15

As far as we know, subcontracting in the framework of operations of PPP has not given rise to any particular problems.

QUESTION NO. 16

We do not consider it appropriate to foresee any further rules, since discipline relative to concession foresees the faculty for the administration to rule that part of the work should be entrusted to third parties.

QUESTION NO. 17

See the previous point.

QUESTION NO. 18

There have been cases in which a single competitive procedure aims at choice of the private partner, who at the same time is adjudicated the works that the company now being set up will be required to carry out, as its exclusive or main purpose.

In fact, in cases of this kind, the possibility of adjudication of the works is made subordinate to the necessary acquisition of the status of partner of the promoter, which as a rule does not seem to correspond to the interests and operative procedures of entrepreneurs operating in the constructions field.

Secondly, where it is admitted that the same juridical person may at one and the same time assume the role of shareholder of the promoting company and of contractor for the same, in fact this leads to a confusion of roles, with partial identification between promoter and executor, and accordingly between controller and controlled.

Finally, approval of such a methodology may lead to the serious risk of a sort of monopoly on the part of the private partner in all the contracts (or at least a large part of them) that the joint venture, in the course of its activity, will be carrying out.

QUESTION NO. 19

With reference to the hypothesis laid down in the previous paragraph, it would be advisable to clarify by interpretative communication (that is, if such a procedure should be considered expedient, also through a specific Community directive on the institutionalised PPP) that in any case the procedure for choice of the private partner should be kept distinct from the procedures which, downstream, the joint venture will be carrying out for awarding of the works. In other words, it should be clarified that the public subject must carry out a first and autonomous competitive procedure for choice of the private partner, which thereafter, once the joint venture has been set up would lead on to autonomous competition procedures open to all competitors possessing the prescribed requisites, without excluding in advance that the company holding quotas in the joint venture may also take part in such competitions, on an equal footing with the other competitors.

QUESTION NO. 20

We do not consider that there are any barriers to the introduction of PPPs in Europe, however on condition that clear clarification is provided that:

- a. the private partner is chosen on the basis of a competitive procedure; and
- b. once set up, the mixed company must act in full respect of the procedures ensuring public transparency, and accordingly proceed to contracts downstream of choice of the private subject.

QUESTION NO. 21

We are not in a position to answer this question.

QUESTION NO. 22

Any such initiative could not fail to have our approval.

29 July 2004