

# PUBLIC-PRIVATE PARTNERSHIP

## CURRENT SITUATION

Serbia has been active in promoting the need for investing in its infrastructure and public services, to which end public-private partnerships (hereinafter: "PPP") appear to be considered more and more as a potential option for realising such investments.

Despite the PPP Law having been adopted in 2011 and amended twice in 2016, its practical implementation has mostly been seen in the past several years, in relation to which it is noted that the Public Private Partnership Commission has to date approved 154<sup>1</sup> public private partnerships.

## COVID-19

The global outbreak of the newly uncovered corona virus-COVID-19 (hereinafter: COVID-19) triggered a round of measures Serbia undertook, among which the proclamation of a state of emergency as of 16 March 2020. A wide variety of legislation was adopted in an attempt to deal with the effects of COVID-19 ranging from measures aimed at controlling prices of essential goods, to restricting at times the free movement of persons within the country but also international transit.

Undoubtedly the effects of COVID-19 affected contract performance across many industries, and PPPs are not immune to this consequence. The global health crisis has raised various legal questions e.g. those related to force majeure, changed circumstances and hardship to name a few which could all have an impact on contractual arrangements under a PPP. Besides, COVID-19 has already seriously affected demand in many sectors/industries and due to its extended consequences carried-out through upcoming months it is expected to open serious questions in respect to availability payment, insurance affecting the costs, amending PPP contracts, etc.

## POSITIVE DEVELOPMENTS

2020 marks the coming into force of the new Public Procurement Law which in large part has been aligned with relevant EU legislation, which should bode well in terms of positive legislative amendments in Serbia.

The National Assembly of Serbia issued an authentic interpretation on the application of the Law on General Administrative Procedure stating that the provisions of the Law on General Administrative Procedure (LGAP) will not apply to contracts procured under other laws which do not expressly categorise such contracts as "administrative". The interpretation of the National Assembly helped relieve concerns as to the potential implications of the LGAP for PPPs.

In other positive developments, 2020 is also the year in which another large-scale PPP reached financial close, namely the PPP project for waste management in Vinca.

## REMAINING ISSUES

Achieving progress in several aspects that are outlined below would highly contribute to the further development of PPPs.

In terms of the legislative framework, the PPP Law needs to be improved. Aside from the PPP Law, which is the key law to regulate this area, intrinsic to a PPP project are the way in which public services are dealt with, public companies, public debt provisions and other sectoral laws and regulations which are not aligned amongst themselves, which ultimately raises the level of legal uncertainty associated with a PPP project. Overall, further regulatory harmonisation in aspects related to PPPs would bode positively on the perception of the legal environment in Serbia for this type of investment.

Accounting for the fact that launching a PPP project requires large resources as well as specific know-how to successfully launch, tender and deliver, focus should be drawn to the methodology development related to preparation of a PPP project, approving a PPP project proposal and equipping the public sector with the required know how. Currently the legislative framework is lacking in this respect, and the public sector is not sufficiently experienced to apply a tool set to identify which PPP project proposal provides for the best "value for money." It is crucial that the public sector is entirely familiar with the preconditions for the project to be realized pursuant to a PPP model, project implementation requirements and that a designated team is assigned this task on behalf of the public partner at very early stage.

Due to the lack of sufficient market practice in implementing PPP projects in different sectors, there is no agreed outline of key contracting principles that could be used

<sup>1</sup> List of approved public private partnership projects available on the website of the Public Private Partnership Commission of the Republic of Serbia at: <http://jppp.gov.rs/koncesijevesti/spisak>

as a starting point for any PPP project. Furthermore, the provisions of the PPP Law regarding the submission of the self-initiative proposal by a potential private partner creates dilemmas and perplexities with regards to the vaguely defined mandatory content of such a proposal and proven problems in recognition and collection of costs incurred by private partner in preparation of self-initiative proposal PPP when such private partner is not awarded a PPP contract.

Lastly, it is worth noting that a PPP will involve a public debt provisioning to a larger or smaller extent depending

on the size of the specific PPP project, which currently is not properly accounted for under Serbian budgetary and public debt legislation. Recognising the long-term nature and financial implications of a PPP (whichever way structured), further legislative fine tuning should be considered to ensure proper financial planning on the side of the public partner. This is of crucial importance in setting up the notion of bankability for any PPP project and providing comfort to any potential private partner, and by extension financiers wishing to participate in the delivery of a PPP project which will rarely be implemented without heavy external financing.

### FIC RECOMMENDATIONS

Systemic and organizational changes in the management of capital investments are necessary to assure an efficient implementation of public investments, irrespective of the model of provision. This issue has been recognized and certain efforts have been made by the Ministry of Finance, although with delays in implementation. Through the way they are structured, PPPs could resolve a number of issues, including a more efficient provision of public services and a higher level of transparency in the procurement process.

In particular:

- Better coordination among institutions dealing with PPP (better coordination and streamlined cooperation of all relevant PPP institutions with project initiators at all levels of government). (3)
- Institutional support to small local autonomies in demand of PPP projects of smaller scale and value which autonomies lack the funds to engage multidisciplinary experts. (3)
- Avoiding practice of having the same International Financial Institutions (IFIs) being engaged in support to public partner in preparation of PPP project and later procuring the financing to project company. (3)
- Raising PPP awareness (PPP promotion campaign illustrating its advantages and potential, possible inclusion of PPP in universities curriculum to enhance fairness, transparency and competition, increasing the average number of participants to a single tender to at least 3, to avoid the risk of cartels being formed and competition being restricted). (2)
- Raising the awareness of public partner of the importance of proper, fair and justifiable risk allocation and its embedding into PPP contract. (3)
- The institutional capacities of the PPP Commission have to be further improved and strengthened for more consistent project reviews, including an increase of its competences (to include project preparation and monitoring) and capacities (to have more people with sector-specific expertise). (2)
- Promote available and officially approved contract templates developed in accordance with the best international practice but in full compliance with Serbian law applicable to PPP contract, as well as investing resources in

training public sector partners to successfully navigate a PPP project from inception to realization. (2)

- Amending the rules of the LGAP so as to exclude or limit the applicability of its provisions relating to “administrative contracts” to PPP contracts. Further amendments to key legislation to align with legislation of the EU. And the legal framework has to be amended in order to eliminate identified deficiencies in relation to the self-initiated proposal and consequently, in order to make room for more proactive approach of the private sector in initiating PPPs. (2)
- Practical implementation of the rules relevant for determining the project value that are PPP-specific needs to be improved and the capacities of the public sector strengthened to fully delineate such projects from purely public procurement projects. (1)
- Take advantage of the International Financial Institutions’ (IFI) support for project preparation and their know-how on PPPs. Resources from the European Investment Bank’s (EIB) European PPP Expertise Centre (EPEC), the International Finance Corporation’s (IFC) advisory services in PPPs or the European Bank for Reconstruction and Development’s (EBRD) Infrastructure Project Preparation Facility (IPPF) can be used for project preparation. (3)
- Due attention be given to supervening events in future PPPs and the way in which parties will chose to deal with their consequences, as well as properly assessing the right risk allocation for such events. (3)
- Institutional capacity building and development that should be aimed at preparing the public sector for project implementation once the PPP contract is signed. (3)