

THE PUBLIC-PRIVATE
PARTNERSHIP
LAW REVIEW

FOURTH EDITION

Editors

Bruno Werneck and Mário Saadi

THE LAWREVIEWS

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PREFACE

We are very pleased to present the fourth edition of *The Public-Private Partnership Law Review*. Notwithstanding the number of chapters in various publications in *The Law Reviews* series on topics involving public-private partnerships (PPPs) and private finance initiatives (in areas such as projects and construction, real estate, mergers, transfers of concessionaires' corporate control, special purpose vehicles and government procurement), we identified the need for a deeper understanding of the specific issues related to this topic in different countries.

In 2014, Brazil marked the 10th year of the publication of its first Public-Private Partnership Law (Federal Law No. 11,079/2004). Our experience with this law is still developing, especially in comparison with other countries where discussions on PPP models and the need to attract private investment in large projects dates from the 1980s and 1990s.

This is the case for countries such as the United Kingdom and the United States. PPPs have been used in the United States across a wide range of sectors in various forms for more than 30 years. From 1986 to 2012, approximately 700 PPP projects reached financial closure. The UK is widely known as one of the pioneers of the PPP model; Margaret Thatcher's governments in the 1980s embarked on an extensive privatisation programme of publicly owned utilities, including telecoms, gas, electricity, water and waste, airports, and railways. The Private Finance Initiative was launched in the United Kingdom in 1992, aiming to boost design-build-finance-operate projects.

In certain developing countries, PPP laws are more recent than the Brazilian PPP law. Argentina was the first country in Latin America to enact a PPP Law (Decree No. 1,299/2000, ratified by Law No. 25,414/2000). The Argentinian PPP Law was designed to promote private investment in public infrastructure projects that could not be afforded exclusively by the state, especially in the areas of health, education, justice, transportation, construction of airport facilities, highways and investments in local security. In Mozambique, Law No. 15/2011 and Decree No. 16/2012 govern the Public-Private Partnerships Law and other related PPP regulations, which establish procedures for contracting, implementing and monitoring PPP projects. In Paraguay, a regulation establishing the PPP regime has been enacted (Law No. 5,102) to promote public infrastructure and the expansion and improvement of services provided by the state; this law has been in force since late 2013.

In view of the foregoing, we hope a comparative study covering practical aspects and different perspectives regarding PPP issues will become an important tool for the strengthening of this model worldwide. We are certain this study will bring about a better dissemination of best practices implemented by private professionals and government authorities working on PPP projects around the world.

With respect to Brazil, the experience evidenced abroad may lead to the strengthening of this model in our country. In our last preface, we called your attention to one specific

feature of the PPP law in Brazil: state guarantees. This feature permits that the obligation of the public party to pay a concessionaire be guaranteed by, among other mechanisms authorised by law: (1) a pledge of revenues; (2) creation or use of special funds; (3) purchase of a guarantee from insurance companies that are not under public control; (4) guarantees by international organisations or financial institutions not controlled by any government authority; or (5) guarantees by guarantor funds or state-owned companies created especially for that purpose.

The state guarantee pursuant to PPP agreements is an important innovation in administrative agreements in Brazil; it assures payment obligations by the public partner and serves as a guarantee in the event of lawsuits and claims against the government. This tool is one of the main factors distinguishing the legal regimen of PPP agreements from ordinary administrative agreements or concessions – one that is viewed as crucial for the success of PPPs, especially from a private investor's standpoint.

Nevertheless, the difficulty in implementing state guarantees on PPP projects has been one of the main issues in the execution of new PPP projects in the country. This is made worse by the history of government default in administrative contracts.

In other jurisdictions, however, state guarantees are not a rule. Unlike PPP projects in developing countries, government solvency has not historically been a serious consideration in other jurisdictions. That is the case in countries such as Australia, France, Ireland, Japan, the United Kingdom and the United States.

We expect that the consolidation of PPPs and the strengthening of the government in Brazil may lead to a similar model, enabling private investments in areas where the country lacks the most.

Brazil must adopt cutting-edge models for awarding PPP agreements. The winner is usually chosen based solely on the price criterion (offering of lower prices or highest offers), which sometimes leads to projects lacking advanced or tailor-made solutions. Despite the legal provisions on the role of technical evaluation of offers, they are becoming less relevant. However, some ongoing discussions regarding amendments to the Brazilian procurement legislation and new criteria, which are based on the international experience, could (fortunately) be approved.

In last year's edition, we highlighted some discussions regarding the amendment to the Federal Procurement Law (Federal Law No. 8,666/1993), which is expected to expedite public procurement in Brazil. One of the main innovations proposed in this debate is the competitive dialogue, a type of bid in which the authority engages with bidders to discuss and develop one or more solutions for the tendered project. After the conclusion of the dialogue phase, the authority will establish a term for the submission of bids.

The competitive dialogue is a reality in many jurisdictions (e.g., Australia, Belgium, China, France, Ireland, Japan and the United Kingdom). In Japan, for example, some projects are procured through the competitive dialogue process. This process may be adopted if a relevant authority is unable to prepare a proper service requirement, in which case it proposes a dialogue with multiple bidders simultaneously to learn more about the specific service it seeks to implement. As another example, in France a dialogue will be conducted with each bidder to define solutions on the basis of the functional programme. At the end of the dialogue period, the procuring authority will invite the candidates to submit a tender based on the considered solutions. After analysis of the tenders, a partnership contract will be awarded to the bidder with the best price in accordance with the criteria established in the

contract notice or in the tender procedure. We hope the importance of this tool is recognised in Brazil and reflected in our legislation.

In this edition, we wish to call your attention to the creation of the Investment Partnerships Program, as established in Federal Law No. 13,334/2016. The Investment Partnerships Program is a legal plan regarding infrastructure development in the country, providing conditions for the attraction of investments in infrastructure projects and creating environments for greater integration between public and private sectors. According to information recently released by the federal government, PPI figures are impressive, particularly concerning the total value of projects that have been concluded: 142 billion reais. The expectation is that investments of this size will bring more employment and income in the coming years, ensuring the continuation of Brazil's development.¹

In the fourth edition of this book, our contributors were drawn from the most renowned firms working in the PPP field in their jurisdictions. We would like to thank all of them for their support in producing *The Public-Private Partnership Law Review*, and in helping with the collective construction of a broad study on the main aspects of PPP projects.

We strongly believe that PPPs are an important tool for generating investments (and development) in infrastructure projects and creating efficiency not only in infrastructure, but also in the provision of public services, such as education and health, as well as public lighting services and prisons. PPPs are also an important means of combating corruption, which is common in the old and inefficient model of direct state procurement of projects.

We hope you enjoy this fourth edition of *The Public-Private Partnership Law Review* and we sincerely hope that this book will consolidate a comprehensive international guide to the anatomy of PPPs.

We also look forward to hearing your thoughts on this edition, and particularly your comments and suggestions for improving future editions of this work.

Bruno Werneck and Mário Saadi

Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados

São Paulo

March 2018

1 Information available online: <http://www.avancarparcerias.gov.br/-lquote;avancar-parcerias-rsquo;-concrete-results-and-retake-of-economic-growth-?PortalMessage=Status+Alterado>.

BELGIUM

Christel Van den Eynden, Frank Judo, Aurélien Vandeburie, Jan Vreys and Maurits Arnauw¹

I OVERVIEW

While the development of infrastructure projects and the provision in general of public services in Belgium in the form of public-private partnerships (PPPs) is not new, its importance in government policy has grown rapidly over the past two decades. Historical underinvestment in qualitative infrastructure, the demand for better quality projects to be realised more quickly for the same price, and, importantly, a lack of available public funding necessitating spreading out investment needs over time, have all made for the strong revival of PPP projects in recent years.² This has largely occurred at a federal level but to an even greater extent in the Flemish Region, where PPP was one of the pillars of the government's investment policy during the 2009–2014 administration. However, the evolving views on ESA-conformity have inspired the Flemish government to adopt a more reserved position during the 2014–2019 administration.

At the federal level, prominent examples of large PPP projects include the development of a new railway connection between the City of Brussels and the national airport (the Diabolo Project, completed in 2012), the construction of a tunnel underneath the river Schelde and extension of the R2 freeway (the Liefkenshoektunnel, completed in 1991) and the construction of a prison complex in Haren (Brussels) that will become the largest prison complex in Belgium.

In the Flemish Region, major investments were made in the creation of the Flemish PPP Knowledge Centre to further boost the introduction and implementation of PPPs. As a result, a large number of PPPs have been tendered in various sectors, including transport and related infrastructure projects, renewable energy infrastructure and social infrastructure.

So far, PPPs have been less of a factor in the Brussels and Walloon Regions. Nevertheless, some large investments have been made through PPP projects in these regions, including transport, social infrastructure and, more recently, shopping malls comprising leisure facilities and apartments.

1 Christel Van den Eynden and Frank Judo are partners, Aurélien Vandeburie is counsel, and Jan Vreys and Maurits Arnauw are associates at Liedekerke Wolters Waelbroeck Kirkpatrick.

2 M Van den Hurk, S Van Garsse and K Verhoest, 'Ten years of PPP in Belgium: an overview', FOE, 2013, 157–173.

II THE YEAR IN REVIEW

i Major awards granted

In 2017, the eco-district project (Coronmeuse) in Liège for the construction of 1,325 houses and apartments was awarded to the Neolegia Consortium. In Flanders, a DBFM Agreement was entered into on 31 August 2017 between Vlaamse Waterweg NV and Via T Albert relating to the design, building, financing and maintenance of seven bridges over the Albert Canal. On 24 January 2018, the Brussels Capital Region signed a contract with the consortium CIRCUL2020: a DBFM Agreement for the renovation and maintenance of the Leopold II tunnel. The renovation component of this contract is valued at €264 million.

The construction and operation project of a new national football stadium in the Heysel area reached 'preferred bidder' stage in 2015. Meanwhile, the project was refused a construction permit and has thus come to a standstill. The construction and maintenance of various sports facilities (Flemish Sports Cluster 3) and that of a new tramline through northern Antwerp (Brabo 2) are in building phase. The A11 motorway (a project of €797 million) was completed and opened for traffic in September 2017.

ii Procedures initiated

Other major PPP projects currently under tender include the construction of 500 rental accommodations in Brussels, the construction of a congress centre and a hostel in the northern part of Brussels (NEO 2), the construction of the administrative centre of Verviers, the installation of LED street lights across the Walloon motorway network, the new tram line in Liège, the refurbishment of the Belgian military airbase in Melsbroek and a school cluster infrastructure project.³

iii Significant legal changes

The Belgian legislation on public procurement was recently amended pursuant to the final transposition of the Public Procurement Directives 2014/24⁴ and 2014/25⁵ and the Concession Contract Directive 2014/23,⁶ and the adoption of the implementing Royal Decrees of the Public Procurement Law of 17 June 2016⁷ and the Concession Agreement Law of 17 June 2016.⁸ These new rules entered into force on 30 June 2017⁹ and apply to all public procurement contracts or contracts that have been published or, in the absence of any publication requirements, for which from that date onwards an invitation to participate has been sent.

3 AGION – Agency for Infrastructure in Education, €550 million (www.agion.be).

4 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance.

5 Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

6 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.

7 Law of 17 June 2016 on public procurements, Official Gazette, 14 July 2016.

8 Royal Decree of 25 June 2017 on the award and the execution of concession contracts, Official Gazette, 29 June 2017.

9 Royal Decree of 18 April 2017 relating to the award of the public procurement in the classic sectors, Official Gazette, 9 May 2017.

The entry into effect, on 1 September 2014, of the ESA 2010 Rules¹⁰ (replacing the less stringent ESA 95 Rules)¹¹ is also key and has had and will have an impact on the structuring of pending and future PPP projects. The ESA 2010 rules retroactively apply to the entire period between 1995 and 2014, so that the ESA neutrality of some existing PPP projects suddenly raised budget neutrality issues. Some of these lost ESA neutrality and had to be shifted onto the government's balance sheet.¹² In addition, for those PPP projects that are currently being negotiated,¹³ the risks associated with the contractual obligations of the contracting authority have been or are being scrutinised.

The new ESA rules are stricter than the 1995 version in that they set forth additional requirements in order for PPP assets to be deemed 'non-government assets', which may be booked on the private partner's balance sheet. In addition to requiring that the private partner take on the construction risk and either the demand or the availability risk (as under ESA 95), the new ESA Rules consider that the risks associated with a PPP project are deemed not to have transferred to the private partner, to the extent that:¹⁴

- a* during the construction phase, the termination clause requires the contracting authority to refund the capital cost without any penalties being due by the private partner and, during the operating phase, the compensation due to the private partner exceeds the current market value of the assets, which is to be assessed by an independent expert;
- b* the distribution of risks under the contract is significantly shifted;
- c* in case the contracting authority has a stake in the special purpose vehicle (SPV), it bears more than 50 per cent of the total capital cost of the project or the contracting authority has a controlling (minority) stake in the SPV; and
- d* all or part of the debt service transfers to a public body as a result of a guarantee provided by it, the guarantee covers more than 50 per cent of the capital cost of the project or there is a change of the economic ownership of the assets resulting in a transfer of the risks when the guarantee is called upon.

The ESA 2010 rules have been clarified in the Guide to the Statistical Treatment of PPPs drawn up by Eurostat and the European PPP Expertise Centre (part of the advisory services of the European Investment Bank). The Guide was published on 29 September 2016 and

10 Regulation (EU) No. 549/2013 of the European Parliament and of the Council of 21 May 2013 on the European system of national and regional accounts in the European Union, Official Journal, 26/06/2013, L 174. All EU Member States are required to comply with the rules on the European System of National and Regional Accounts (the ESA Regulation). The ESA Regulation is the system of national and regional accounts and defines the accounting standards/framework for all EU Member States, allowing each EU Member State to calculate its annual budget (deficit) and the total government debt.

11 Council Regulation (EC) No. 2223/96 of 25 June 1996 on the European system of national and regional accounts in the Community, Official Journal, 30 November 1996, L 310.

12 The ESA Regulation provides that certain long-term debts contracted by the authority can be ESA-neutral, which means that – except for the actual costs made in a given financial year – the investments made will not increase the annual budget deficit and the outstanding government debt. For instance, owing to the regularisation of some PPP projects in 2013, Belgium's annual budget deficit increased by €50 million and the total government debt by €500 million.

13 Such as the tram line PPP project in Liège and the Haren prison complex PPP.

14 According to Eurostat, where the usual approach based on risks and rewards is inconclusive, the control criterion should be used to assess the degree of government involvement in the definition of the PPP assets and the services to be delivered from them.

applies to projects in which financial close takes place after the said date. The Guide offers a three-step approach in the assessment, whether a contracting authority has to include a PPP project as an on- or off-balance sheet item:

- a* Step 1 is identifying all the provisions of the relevant PPP contract (and related documents and underlying law) that influence the statistical treatment and to list these according to their category of importance (i.e., on balance sheet, very high, high or moderate).
- b* Step 2 consists of analysing the degree to which each of the influential provisions identified in Step 1 has an impact on the economic substance of the project.
- c* Step 3 concludes the statistical treatment assessment. Once all influential provisions have been identified (Step 1) and their importance (i.e., very high, high or moderate) has been analysed (Step 2), a conclusion on the statistical treatment of the relevant PPP can be reached

The Guidelines state, by way of example, that there would be a strong presumption that the PPP is off the balance sheet for government if, after Step 2, it has no more than one very high importance provision, no high importance provisions and no more than two moderate importance provisions.

The analysis must take place at financial close and at any time during the course of a PPP project where a contract change may affect the risk or reward allocation.

The Guidelines help PPP stakeholders better understand the impact of a PPP project on the government's balance sheet and, therefore, offer increased legal certainty on statistical treatment of a PPP project.

Finally, the Decree of the Flemish Region of 25 November 2016 permits educational establishments located in Flanders that own real estate or have a long-term real right of use of such real estate – with support from the Agency for School Infrastructure – to set up small, local PPP projects to build or transform schools, whereby the school itself appoints the DBFM contractor and receives from the Flemish Ministry of Education a DBFM subsidy, in other words, a (significant) part of the availability payment that the school is due under the DBFM Agreement. At the end of the DBFM Agreement, the school infrastructure that was the object of the DBFM Agreement will be transferred for free.

III GENERAL FRAMEWORK

i Types of public-private partnership

PPPs in Belgium can take many forms. Because of the complexity of its political and administrative context, Belgium does not really have a unified policy or a true Belgian PPP model. A basic distinction is that between 'contractual' PPPs and 'participative' PPPs. While the contractual variant still bears a resemblance to an employer–contractor relationship, the participative variant implies the setting-up of an SPV by both the authority and the private partner. Combinations of both variants are also possible, but the participative variant has recently come under pressure following the entry into force of the ESA 2010 Regulation.

Various contractual structures are used, including: (1) a more traditional (more basic) contract setting forth specific performance criteria with limited PPP characteristics; and (2) a more integrated contract approach with either a design and build contract (DB), a design, build and finance contract (DBF) or a design, build, finance and maintain contract (DBFM),

possibly combined with an operating contract (DBFM(O)). Another model introduced in Belgium is the DBM + F, whereby the DBM and the finance tenders are split at bidding phase and merged afterwards.

In other structures, long-term lease agreements, building rights agreements, concession contracts, other *sui generis* contracts, or a combination thereof are used.

ii The authorities

Each public body, whether at national, regional or local level, can initiate a PPP. No previous authorisation is required, except in the Flemish Region, where the Flemish PPP Knowledge Centre has to give its 'advice' before a project of a Flemish public body can formally be accepted as a Flemish PPP.

The responsibility for structuring, awarding and implementing PPPs remains a task of the relevant administration, but the supervising authorities (at the relevant regional, community or national level, as applicable) can always repeal or reform the decisions of the lower public bodies.

In Flanders, the Flemish PPP Knowledge Centre advises and guides the PPP policy¹⁵ of all public bodies and supports PPP projects in the Flemish Region. It assumes an advisory role (both in general and with regard to the specific project) and collects and shares PPP knowledge, experience and models with all parties involved. It has contributed substantively to standardising the contractual approach to PPPs in the Flemish Region.

There is no equivalent public body at federal level or in the Brussels Region.

In the Walloon Region, the government has established the Financial Reporting Cell, an entity of the Walloon administration that provides advice on PPPs for the Walloon Region, the French Community and for related public bodies before the adoption of a decision to implement PPP projects. It also has a role in the follow-up and assists these entities with the implementation of a PPP.

The Court of Audit exercises external scrutiny of the budgetary, accounting and financial operations of the federal state, the communities, the regions, and the public service institutions depending upon them. As part of its audit, it also reviews PPP projects involving any of the aforementioned institutions.

iii General requirements for PPP contracts

There are no specific legal constraints or requirements that apply to all PPPs. General public procurement rules (as interpreted by case law) or concession contracts rules apply.^{16,17} The Flemish and Walloon Regions have also adopted additional regulations with a view to facilitating PPPs in their respective regions.¹⁸

15 Article 4 of the Decree of the Flemish Region of 18 July 2003 on public-private cooperation (Decreet betreffende publiek-private samenwerking).

16 The Law applies for concession of works and only for concession of services of which the value is equal or greater than €5.548 million.

17 See Section IV, below with respect to the rules applicable to the award of contracts.

18 The rules applicable in the Flemish Region concern the various PPP projects, while the rules applicable in the Walloon Region and the French Community are sector specific. For instance, the Decree of the Flemish Region of 18 July 2003 concerning public-private partnerships, by means of which certain constraints in the public procurement rules were addressed, such as, under specific conditions, the participation of public bodies in PPP projects and the granting of security rights on public domain, the Ministerial Decree of

Public contracts, including PPP contracts, remain equally subject to general administrative law¹⁹ and the Civil Code, as well as to more specific legislation such as the Companies Code, tax legislation and insurance legislation, except to the extent explicitly provided otherwise.

From a contractual point of view, the competent authority is free to organise its projects as it sees fit,²⁰ no value threshold applies and, except for traditional services and missions of the state, such as the police and the army, all types of public works, supplies and services can be contracted through a PPP structure.

Two important modifications included in the 2016 Public Tenders Law specifically affect the general requirements that the contracting authority must observe while concluding PPP contracts. First, the contracting authorities must apply, on top of the principles of equality and of non-discrimination, the principle of proportionality. For example, this implies that minor irregularities committed by a candidate regarding facultative exclusion grounds can justify his or her exclusion only in extraordinary circumstances. Second, environmental standards play a more prominent role. Indeed, authorities are able to take into account environmental labels during the bidding and award procedure and the failure to respect such environmental obligation by the contractor or one of his or her subcontractors during the execution of the contract may be considered as a breach of contract and could therefore lead to the termination of the contract.

IV BIDDING AND AWARD PROCEDURE

To the extent the PPP contract falls within the scope of the Belgian public procurement rules,²¹ the general public procurement rules apply. In accordance with the EU Public Procurement Directives, Belgian public procurement rules cover all contracts in writing for consideration between a contractor, a supplier or a service provider and a public purchaser for the undertaking of works, supplies and services. The Concession Contracts rules will apply if the economic operators receive the right to exploit the works or services that are the subject of the contract as consideration and the award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both.

Belgian public procurement legislation distinguishes between the following types of procurement procedures:

- a* open procedure: all economic operators can participate;
- b* restricted procedure: only selected operators can participate;
- c* negotiated procedure;
- d* competitive dialogue; and
- e* innovation partnership.

the Walloon Government concerning the establishment of a reporting cell for alternative financing and financial statements of independent public authorities (Official Gazette, 13 April 2005) and the Ministerial Decree of the French Community regarding the establishment of a reporting cell for alternative financing and financial statements of independent public authorities (Official Gazette, 5 April 2006).

19 Including the principles of equality upon award, transparency, due motivation, fair play, etc.

20 This being said, the Flemish PPP Knowledge Centre evaluates whether a proposed project is suitable to be structured as a PPP and the Walloon Financial Reporting Cell examines the legal, financial and accounting aspects of a contemplated PPP project.

21 See, for more details, Lindemans, Judo, Vandeburie and Maeyaert, 'Belgium', *The Government Procurement Review*, Law Business Research, London, 2016, pp. 26–37.

The negotiated procedure with prior notification, based on Article 26.4(a) iii, of the Public Procurement Directive 2014/24/EC,²² is, until now, the procedure most commonly used to award DBFM contracts.²³ It was also often applied to award concessions for public works,²⁴ but less for build and finance contracts.²⁵ More recently, however, some PPP projects have been awarded under the competitive dialogue procedure.²⁶ The conditions for using the negotiated procedure and the competitive dialogue are those provided in the Public Procurement Directives. The awarding authority must substantiate its choice for one procedure over the other. According to the Directive 2014/23, the public authorities have the freedom to organise the procedure leading to the choice of concessionaire, with respect to the principles of equal treatment, non-discrimination and transparency.

It is important to note that the new legal regime brought some minor changes as to award procedures for PPPs. As competitive dialogue has proven itself to be effective in complex projects, European and national legislators wished to further enhance its use. Hence, the 2016 Public Tenders Law considerably widens the cases in which contracting authorities are authorised to make use of this procedure. Competitive dialogue is, therefore, subject to the same conditions as for the negotiated procedure.

In a similar manner, ‘innovation partnership’ has been set up in the law as a new award bidding procedure. Therefore, when a public authority’s needs do not meet the existing market, it can decide to conclude an innovation partnership in order to develop products, services or pioneering work, which can later be purchased by the same authorities. The 2016 Public Tenders Law now gathers in one award bidding procedure two formerly distinct procedures of development and purchase.

Additionally, even if a contracting authority is still authorised to start a bidding procedure only on the basis of the price criterion, there is no longer be a formal distinction between the quote request and adjudication; the general criterion of the ‘most advantageous offer’ will be the applicable criterion in all tendering procedures.

i Expressions of interest

The invitation of interested parties and the assessment of expressions of interest are governed by the public procurement or concession contract rules, provided that the project falls within their scope. All public contracts, whatever their value,²⁷ must be advertised in advance in the Belgian Public Tender Bulletin, which is an annex to the Belgian Official Gazette. If contracts meet the European threshold level, a notice should also be published in the Official Journal. The negotiated procedure with prior notification and the competitive dialogue are restricted procedures, which means that only the preselected tenders are invited to submit an offer.

22 Contracting authorities may award public contracts by negotiated procedure, after publication of a contract notice, in the following cases: ‘the contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial make-up or because of the risks attaching to them.’

23 This procedure was used for projects including the prison complex in Haren, the Bus Depots Cluster II, the Project N60 Ronse and the cluster of school infrastructure projects in the Flemish Region.

24 This procedure was used, among others, for a complex public parking in Liège, a rest home in Moerbeke and typically also for gas stations along the highway such as the concession in Nazareth.

25 For example, for the Belgian Embassy in Kinshasa, social housing and the Design Centre in Liège.

26 Such as the Neo project, the tram route in Liège and the ‘Ecoquartier de Genappe’.

27 Except for concessions of services under €5.448 million.

As long as the principles of transparency and equal treatment are respected, the tendering authority is allowed to contact the candidates to ask for clarification or to complete their expression of interest.

For PPP contracts that fall outside the scope of the Belgian public procurement rules, such as land agreements and service concessions under €5.448 million, appropriate advertising is also required.²⁸ In the absence of any specific rules, the awarding of such contracts is subject to the basic standards regarding advertising and contract award that are mentioned in the European Commission's Communicative Interpretation on the Community Law.²⁹ The contracting entities are responsible for deciding the most appropriate medium for advertising their contracts. Other adequate and commonly used means of publication include the internet, national journals specialising in public procurement announcements, newspapers with national or regional coverage and specialist publications. The awarding authority can set criteria for qualitative selection, again, as long as the principles of transparency and equal treatment are respected. It is also allowed to contact the tenderers to ask for clarification or to complete their expression of interest, under the same conditions.

ii Requests for proposals and unsolicited proposals

The use of e-tendering to solicit or submit a bid is permitted, required or prohibited, depending on the public procuring body involved. The federal authorities have developed IT tools to process public contracts electronically, which are also made available to the authorities of the other levels.

If a bidder has not been selected during the selection phase, he or she cannot submit an offer, except together with another bidder who has been selected.

With the 2016 Bill, however, the exclusion of a bidder is no longer be irrevocable. Bidders excluded during the selection phase are indeed able to take 'corrective measures', in order to correct the irregularities of their offer.

iii Evaluation and grant

In the context of the negotiated procedure with prior notification and the competitive dialogue, the contracting authority may provide that the procedure is conducted in stages, by applying the award criteria in the contract documents so as to reduce the number of tenders to be negotiated. Bidders are invited to submit a second offer or a best and final offer. The same procedure can be organised for the concessions and the contracts that fall outside the scope of the public procurement rules.

During the negotiation procedure, as long as the object of the contract remains the same and the principles of transparency and equal treatment are respected, the offers can be amended, except for the best and final offers. There are no specific legal provisions regarding changes at the preferred bidder stage. It is, however, generally accepted that 'substantial' changes to the contract are no longer possible at that stage.

During the competitive dialogue, the alternatives proposed by the candidates can be amended as long as the bidders do not deviate from the 'essential' elements mentioned in the

28 ECJ, 14 November 2013, C-221/12, *Belgacom*; Council of State, 26 May 2014, No. 227.535, *Belgacom*.

29 Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (2006/C 179/02), Official Journal, 1 August 2006, C-179.

contract notice and contract documents. Also, once they have been submitted, the essential elements of the final offers cannot be modified. After the selection of the most economically advantageous tender, only minor changes to this offer are still allowed.

On the basis of the award criteria, the contracting authority shall designate a preferred bidder. Normally, but not always,³⁰ the other candidates are placed in a 'waiting room' in case the negotiations with the preferred bidder fail, which allows the contracting authority to designate another preferred bidder without having to organise a new tendering procedure.

Once awarded, all awards of contracts meeting the European threshold levels are to be published in both the Public Tender Bulletin and the Official Journal, with the exception of contracts that fall outside the scope of the public procurement rules.

V THE CONTRACT

i Payment

The payment mechanism is modelled in such a way that it allows the private partner to cover its costs and realise a 'normal' return on investment, while simultaneously providing for the desired quality at the lowest possible price.

In the majority of Belgian DBFM contracts, the payment consists of periodic payments made by the authority, usually starting at provisional acceptance, namely, the availability date of the entire assets or works, or a specific part thereof. Those payments are intended to cover the design, build, finance and maintenance and their amount is fixed. However, as a rule, the amount of the payment for the facility services, if any, is variable and takes into account the volume and frequency of the services to be provided (number of meals, number of users, etc.). To ensure that the private partner offers the required quality, a penalty point system typically applies and the payments to be made are abated with availability deductions or performance deductions. Sometimes, a bonus system is provided, for instance, in case of early availability.

A DB contract will typically involve milestone payments, namely, one-off payments usually made upon the provisional acceptance of (a specific part of) the assets or works. A combination of both payment mechanisms is also possible and will largely depend on the budget that is available to the contracting authority.

Payments in the context of other contract forms, such as a long-term lease agreement or a buildings rights agreement may be structured differently and may, for instance, merely consist of an indemnity corresponding to the value of the works upon termination.

ii State guarantees

State guarantees play an important role in the financing of PPP projects as they allow the private partner to optimise the financial part of its offer since the risk premium that the debt providers charge will decrease.

30 For the prison complex to be built in Haren, the other candidates were not put in the waiting room.

- a State guarantees have been institutionalised in the Flemish Region with the adoption of the Decree of the Flemish Region of 7 May 2004 relating to provisions with respect to cash, debt and guarantee management of the Flemish Region;³¹ the value of this guarantee is somewhat limited since it only applies to the principal amounts (while interests are capped) and can only be called upon in the last resort (i.e., after all personal and real securities given by the debtor have been exhausted³²); and
- b the Decree of the Flemish Region of 24 April 2009 relating to the refinancing guarantee and the continued payment guarantee with respect to the availability payments and certain termination payments in the framework of certain Flemish PPP projects of the Flemish Transport Company (De Lijn).³³

Often, depending on the contracting authority, a combination of *ad hoc* ‘guarantees’ is offered consisting of, for example, subsidy agreements,³⁴ reservations in the budget and guaranteed loan agreements.³⁵

As stated, the amount and the nature of the state guarantee that is provided may impact the ESA neutrality of a project.

iii Distribution of risk

Although the 2016 Public Procurement or Concession Contracts Rules³⁶ generally apply to PPP projects, typically the (major) Belgian PPP projects will have detailed risk allocation provisions in the project contracts, which will specifically exclude the application of the 2016 Public Procurement/Concession Contracts Rules in many respects.³⁷

A typical PPP contract will distinguish: (1) ‘risks of the authority’ (i.e., risks borne by the contracting authority); (2) force majeure events (i.e., risks more or less equally borne by

31 Official Gazette, 16 July 2004. The guarantee was, for instance, already applied in the context of the Bus Depots Cluster I PPP project of De Lijn.

32 Article 6, §4 of the Decree of the Flemish Region of 7 May 2004.

33 Official Gazette, 4 June 2009. This guarantee was already applied, among others, in the context of the Bus Depots Cluster I and Cluster II PPP projects of De Lijn.

34 Such as the Ministerial Decree of the Walloon Government of 24 November 2005 concerning the grant by the Walloon Housing Company of assistance to public service housing companies to promote the installation, development and implementation of PPPs (Official Gazette, 16 December 2005); the Ministerial Decree of the Walloon Government of 19 June 2008 concerning the grant to real estate operators of a subsidy to encourage the installation, development and execution of partnership operations (in the social house sector) (Official Gazette, 14 July 2008) and Article 404, 14° and 1490 of the Walloon Code of Social Action and Health (Rest Homes) (Official Gazette, 30 August 2013).

35 Such as the Decree of the French Community of 24 November 2008 on exceptional financing programmes for renovation, construction, reconstruction or extension of school buildings through public-private partnerships (Official Gazette, 3 March 2009).

Also, for example, the case in the Brabo II PPP project (construction of tram infrastructure and renewal of adjacent streets and urban spaces in Antwerp), the ‘national’ football stadium in Brussels, the cluster of school infrastructure projects in the Flemish Region and the A-11 Bruges–Zeebrugge.

36 See footnote 12, above.

37 See Article 9 of the Royal Decree of 14 January 2013 on Public procurement rules.

the contracting authority and the private partner); and (3) all other risks (i.e., risks borne by the private partner). The risks of the authority and the force majeure events are, generally, exhaustively listed in the DBFM agreement (or similar).³⁸

Generally speaking, the exact allocation of risks will differ from project to project and is subject to, among others, the cost allocation, the nature of the project or the existence of special circumstances, but there are signs of a market standard trend towards uniformity. The current preoccupation with the requirement of ESA neutrality³⁹ has led to private partners having to accept a shift of risks.

In PPP projects with a shorter duration, or in case of ancillary works to the 'main' DBFM agreement (for example, in a separate DB or DBF agreement), the risk allocation principles set out in the 2016 Public Procurement Rules are more often applied without providing exceptions. In such cases, if the private partner encounters delays or suffers a prejudice resulting from circumstances attributable to the contracting authority or its personnel, the private partner is entitled to apply for an extension of the execution periods, a revision or termination of the contract or damages.

iv Adjustment and revision

Any amendments to the PPP contract during its term should respect the transparency of procedures and the equal treatment of bidders, meaning that the amendments should not come down to a renegotiation of the essential terms of that contract.⁴⁰

In PPPs using the DBFM model, the procedure for amendments, as well as the financial consequences of those amendments, are addressed in the contract. The private partner will only be compensated for additional costs in case of amendments upon request of the authority or due to a relevant change in law.

In contractual structures subject to the 2016 Public Procurement Rules (DB agreement, long-term lease agreement, etc.) a revision of the contract will only be possible upon request of the private partner in case it suffers a very important prejudice, while the contracting authority can request such revision if the private partner has realised a substantial advantage pursuant to external factors.⁴¹

Price revision constitutes a special case of revision and is built into the contract to allow flexibility and to lower the price; the price revision mechanism usually works both ways and is normally realised through a formula based upon indexation. Price revision is subject to some conditions.⁴² Often, it is limited to the maintenance and operation costs as the design

38 Authority defaults, interruption of the works due to the authority (or any affiliated persons), third-party interference (for instance, protests, vandalism, social conflicts), permitting issues, loss of ESA neutrality and a change in relevant law are generally deemed to be at the risk of the contracting authority.

Natural disasters, war, terrorism, radioactive contamination, etc., blockades or embargoes in Belgium or the European Union and other circumstances of an abnormal nature resulting in a party being unable to fulfil all its obligations, insofar these circumstances could not reasonably be foreseen or were unavoidable are generally deemed force majeure events.

39 See Section II, above.

40 Article 38/5 of the Royal Decree of 14 January 2013 on public procurement rules; Article 68 of the Royal Decree of 25 June 2017 on the award and execution of concession contracts.

41 Articles 38/9 and 38/10 of the Royal Decree of 14 January 2013 on public procurement rules.

42 Article 38/7 of the Royal Decree of 14 January 2013 on public procurement rules.

and construction period is relatively short. To ensure that the services performed are always remunerated at market prices, a benchmarking mechanism or market testing mechanism is sometimes built into the contract.

Such contractual revision principle has been especially established in the 2016 Rules, which state that the execution provisions organise a ‘mechanism of revision for the cases wherein the contractual equilibrium is breached due to unforeseen circumstances’.

v Ownership of underlying assets

Whether the authority or the private partner is the owner of the underlying assets will depend on the type of contract that is entered into.

Typically, in cases where the PPP project is structured on the basis of a long-term lease agreement or a building rights agreement, the private partner will temporarily be the owner of the infrastructure. At the end of the contract, and in some cases of early termination, the private partner will be entitled to compensation by the authority, in principle, on an asset market value basis at the time of termination. Special requirements with respect to the condition of the assets upon transfer may apply.

If the private partner erects the constructions on the land owned by the authority on the basis of a *sui generis* right, the ownership will automatically vest with the authority as the works progress through accession. In a DBFM Agreement, the private partner will remain responsible for the maintenance of the asset, typically for 10–30 years. Although the authority will be the owner of the asset, the responsibility for the asset will only transfer to it upon the expiration of the term of the DBFM agreement. Special requirements with respect to the condition of the assets upon expiration of the contract will apply.

In a DB agreement, typically a one or two-year guarantee period after provisional acceptance will apply during which the private partner has to execute the works necessary to maintain the good condition of the infrastructure, make repairs and replace parts as necessary, allowing for the use of the infrastructure in accordance with the output specifications.

Granting of security over the assets will only be possible if the contractual framework allows for a transfer of real estate rights, which is normally not the case in DBFM structures, but is more often the case in other PPP structures.

vi Early termination

In PPP structures governed by public procurement rules, the provisions on early termination set out in Article 38 and following of the Royal Decree of 14 January 2013 on Public Procurement Rules will, in principle, apply, allowing either party encountering a substantial delay or suffering a substantial prejudice as a result of an omission, delay or other facts attributable to the other party, to request the termination of the agreement, damages, or both. In addition, the private partner can also terminate the agreement in case of *force majeure*.⁴³

However, in the majority of PPP projects in Belgium, the parties will negotiate specific termination clauses. Typically, in DBFM agreements, the following early termination clauses can be found:

- a* Generally, the contract will contain an exhaustive list of events, which, upon their occurrence, allow the contracting authority to ‘immediately’ terminate the contract,

⁴³ Insofar as this *force majeure* event results in a significant prejudice for the contractor, equalling at least 2.5 per cent of the amount of the contract.

such as not reaching financial close, bankruptcy of the private partner or poor performance. In addition, the contracting authority will also be able to terminate the project agreement in case of a default of the private partner that is not remedied within a reasonable period of time.

In case of termination, the contracting authority will generally compensate the private partner for the works that have already been carried out after deduction of certain amounts.⁴⁴

- b* The private partner will be entitled to terminate the project agreement in case of serious shortcomings by the contracting authority with regard to its obligations under the contract, such as the repeated failure to pay the availability payments.

The private partner will typically be compensated up to the outstanding amount under the financing agreements (including any breakage costs) and will also receive a (partial) compensation for the loss of profits.

- c* Where a force majeure event or a risk of the authority (see footnote 30) occurs and the contract cannot be pursued, usually either party will be entitled to terminate the agreement with immediate effect.

Due to the nature of this cause for termination, both parties will bear some of the financial consequences of the termination.

- d* In case of voluntary termination by the contracting authority, whether or not specifically provided for by the contract, the private partner will usually be compensated as if a default on the part of the authority had occurred.

Finally, PPPs that fall outside the scope of public procurement rules are subject to general rules of contract law unless the parties mutually agree upon termination provisions.

VI FINANCE

Usually, PPPs are financed through long-term debt ranging from 70–90 per cent of the total investment cost, while the remaining part is financed through equity (shareholder loans, equity bridge facilities, etc.).

Market practice reveals that, especially for larger projects (above €200 million), sponsors and lenders are looking for alternative solutions with medium-term debt to be refinanced, ranging from seven to 10 years ('mini-perm' loans),⁴⁵ bond issuance solutions,⁴⁶ third-party subsidies,⁴⁷ alternative investment strategies,⁴⁸ etc., since funding for the whole life cycle of a PPP project is both expensive and difficult to obtain. For larger PPP projects, cross-border finance is also available. Furthermore, a secondary market has developed, where international funds and investors acquire existing SPVs or running management and operation contracts.

⁴⁴ Compensation for additional costs, insurance payments received, etc.

⁴⁵ The Flemish schools project (2010) was financed by means of a six-year mini-perm loan for the construction phase and refinanced by a long-term debt upon completion, combined with a guarantee from the Flemish government.

⁴⁶ The A11 highway (Bruges-Zeebrugge) has, for instance, been financed with EIB-supported project bonds.

⁴⁷ For instance, subsidies from the European Union.

⁴⁸ Such as the participation of insurance companies or institutional investors like pension funds.

Lenders can take security over, *inter alia*, subcontracts, receivables, bank accounts and shares. In this respect, it is worthy to note that a new law⁴⁹ entered into force on 1 January 2018, which permits all creditors (and not only financial institutions) to take a pledge over a business. The new law permits to pledge movable goods (with the exception of vessels) and clarifies that a registered pledge on movable goods remains effective, even though these goods become immovable as a result of incorporation. Granting of security over real estate will only be possible if the PPP contract provides for and allows a transfer of real estate rights. Lenders may also have step-in rights, but those should be contractually provided.

VII RECENT DECISIONS

In 2016, the Belgian Council of State ruled that the award of the DBFM contract for the Neo project was not illegal⁵⁰ and thus confirmed the validity of this PPP contract that was based on the competitive dialogue procedure. Nevertheless, the negotiated procedure with prior notification remains the procedure most commonly used for PPP projects. Case law has also confirmed the validity of PPP contracts based on this provision; in two decisions of 2014, the Council of State indeed confirmed that the negotiated procedure with prior notification can be used for DBFM contracts for PPP projects such as for a major prison⁵¹ and for an office building.⁵²

VIII OUTLOOK

Although the implementation of ESA 2010 initially gave rise to serious discussions as to the future of PPP projects, market practice reveals that PPPs have a future beyond ESA 2010, although their appearance has changed: on the one hand a number of ongoing projects are being or have been renegotiated,⁵³ while new projects are being structured in line with ESA 2010 to guarantee budget neutrality⁵⁴ and, on the other hand, projects are carried out despite being 'on balance sheet'.⁵⁵

49 Law of 11 July 2013 on the amendment of the Civil Code with regard to collateral on movable properties and the deletion of various provisions relating to this matter.

50 Council of State, 5 January 2016, Nos. 233.376 to 233.379, *Uplace*. For a similar conclusion on the Neo project and competitive dialogue procedure, see also Council of State, 18 July 2016, No. 235.523, *BAM Contractors & Galere*.

51 Council of State, 8 July 2013, No. 224.298, *Besix Group*.

52 Council of State, 27 June 2014, No. 227.922, *Fedimmo*.

53 For example, Brabo 2; the Flemish public transport operator De Lijn was originally slated to hold a 26 per cent stake in the project, but this has been 'significantly reduced' as a result of a contract restructure to make the PPP compliant with ESA10.

54 For example, the Albert canal bridges PPP; under the terms of the contract, the project will involve no equity contribution from the public sector because the government wants to avoid the risk that the project is classified as a public sector asset in light of ESA10.

55 Such as the Antwerp police PPP project.

As the ability of respective governments to invest directly is still limited, cooperation with the private sector, especially for infrastructure projects, still takes a prominent place in the Belgian PPP market. In this respect, it is interesting to note that listed regulated real estate investment funds are now authorised by law⁵⁶ to make investments in PPP projects.

The European Fund for Strategic Investments (EFSI)⁵⁷ has been up and running since autumn 2015, keeping the ambitious timetable set by President Jean-Claude Juncker to implement the Investment Plan for Europe. The future of PPPs in Belgium will, among other things, depend on the funds that will be made available by the EU for investment in infrastructure projects, as a means to support economic growth, and the ability of Belgian authorities to secure the necessary European subsidies through the European Investment Bank and the European Fund for Strategic Investments.⁵⁸ Tax incentives endorsed by the federal government with regard to construction of school premises have allowed to broadly strengthen PPPs, especially in Flanders where many public schools are refurbished or constructed in this way (e.g., the ‘Scholen van Morgen’ project, which was resumed after the application of these tax incentives). Furthermore, the release of the Guide to the Statistical Treatment of PPPs by EPEC and Eurostat has delivered some clarity with regard to the ESA rules applied to PPPs. Both events kick-started the PPP market again, after it had suffered a significant decrease during 2015–2017.

56 Law of 22 October 2017; the Law expands the asset classes in which listed regulated real estate investment funds may invest and expressly lists infrastructure and (renewable) energy installations.

57 The EFSI is a €16 billion guarantee from the EU budget, together with an allocation of €5 billion of the European Investment Bank. These amounts (together €21 billion) should allow the EFSI to unlock €315 billion of investments. See Regulation (EU) 2015/1017 of the European Parliament and of the Council of 25 June 2015 on the European Fund for Strategic Investments, the European Investment Advisory Hub and the European Investment Project Portal and amending Regulations (EU) No. 1291/2013 and (EU) No. 1316/2013 – the European Fund for Strategic Investments.

58 The Flemish government has already identified six priority sectors for which it shall examine the possibility to apply for support from the EFSI including infrastructure and mobility, renewable energy, schools and social housing. The Flemish government has also set up an EFSI work group that is responsible for the coordination of the construction sites and the contacts with the EIB.

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