



CONSTRUCTION FORUM

PRELIMINARY COMMENTS OF THE UEAPME CONSTRUCTION FORUM¹

regarding the

Commission working paper “Possible contents of a Communication on the application of public procurement law to iPPPs”

Introduction:

The UEAPME Construction Forum thanks the European Commission for the opportunity to comment on this paper. Due to the short deadline and the beginning holiday period, it was however not possible to launch a wide consultation of members.

Although these comments should reflect the opinion of members, they can only be considered as preliminary or unofficial.

As we have stated previously, the vast majority of SMEs see the increasing use of PPP as a threat and are therefore insisting on fair and transparent selection procedures at all levels and the limitation of the use of PPP to very complex projects. On the other hand, SMEs acknowledge the increasing use of PPP and therefore welcome the efforts of the Commission to ensure a level playing field.

SMEs will only rarely be the private partner of an iPPP, and practically never the financial investor. They are concerned by two facts:

- The iPPP may implement task which could also have awarded to purely private operators through a public tendering process;
- The iPPP may subcontract a part of its tasks to private operators.

Specific comments on the chapters of the document:

Background

We agree to the contents of this chapter.

¹ The UEAPME Construction Forum is a specialised discussion platform representing the interests of about 1,100,000 small and medium-sized construction enterprises across the European Union and beyond. It is formed by the following associations: Comité européen des équipements techniques du bâtiment (Génie Climatique International - Union internationale de la Couverture et de la Plomberie), European Builders Confederation, European Metal Union, European Federation of Chimney Sweeps, European window, curtain wall and door manufacturers, European Federation of Timber Construction, Federation of European Tile Fixers' Associations, International Association of Building Service Contractors, International Association of Roofing Contractors, Union Internationale des Entrepreneurs de Peinture

Chapter I.1.1. Principles

We support the principles governing the founding of an iPPP as outlined in the document. We fully agree to base the selection of the private partner of an iPPP on the principles of the EC Treaty and public procurement rules. It is clearly a public authority launching a selection for the implementation of certain tasks.

In-house contracts

SMEs see in-house contracts very critically. In numerous cases, they take work away from the private sector irrespective from considerations on quality and price. They may be (co-) financed by job promotion programmes they creating a “parallel” labour market. As a consequence, private operators, offering the same products / services and employing people from the “first” labour market may be obliged to reduce their staff. In-house contracts should therefore only be possible if the product / service cannot be procured from the private sector.

Hence, we welcome European case law (Teckal-Jurisprudence C-107/98, Stadt Halle-Jurisprudence C-26/03), which puts certain limits to in-house contracts. We fully support the exclusion of an in-house relationship between the contracting authority and the iPPP.

Chapter I.1.2. The founding process

We agree to the contents of this chapter. We also believe that one fair and transparent selection procedure is fully sufficient. We also support the position that the iPPP should be considered like every other competitor in the market for all tasks that go beyond the scope of the selection procedure.

Chapter I.1.3. The selection of the private partner

We have some doubts regarding the statement in chapter 1.3.4. saying that the “time for which the partnership is entered into should not exceed the duration of the public contracts or concessions awarded to this company”. While we understand the logic behind, we do not see the necessity of an automatic obligation. The private partner may be confirmed in a new selection procedure and the arrangements may be extended without major modifications. A mandatory dissolution and re-founding would lead to significantly higher costs.

We support the Commission’s interpretation according to which all tasks which go beyond those assigned to the iPPP through the initial selection phase, must be subject of a new selection procedure. Bidders might have submitted a different offer in the initial selection procedure if they had known that additional tasks would be assigned to the iPPP later on. Hence, for the sake of transparency and fairness, the iPPP’s tasks should not be extended at a later stage without a new selection procedure.

Chapter I.2.1. Award of additional contracts and extension or amendments of existing contracts

As already stated above, we support the prohibition of awarding in-house contracts from the public authority to the iPPP.

We also believe the private partner should not be automatically excluded from public tenders designed to amend or extend the contract which had initially been award to the iPPP. Logically, particular precautions must be taken in order not to discourage other private operators from participating in the selection procedure.

In practical terms it is however clear that the public authority and the iPPP would face significant difficulties if additional contracts were have to be awarded to another private operator requiring the establishment of a new iPPP with all the start-up costs involved. To avoid this, the public authority might be tempted to favour the existing partner through tailor-made requirements or abstain completely for extending existing assignments. Both solutions are not desirable. We therefore recommend that the Commission should launch a dialogue

with public and private stakeholders to identify practical solutions while respecting legal requirements.

Chapter I.2.2. Award of contracts by the iPPP

This chapter is of particular importance to SMEs.

We strongly support the obligation of iPPPs governed by public law as defined in the public procurement directives to respect public procurement rules when awarding public contracts or concessions. Given the long-term character of iPPPs, and the fact that they are often implementing public tasks (which should be controlled by the public), the rules applied must be clear, transparent and non-discriminatory.

Unless duly justified otherwise, iPPP should always award contracts to the economically most advantageous tender (EMAT), avoiding abnormally low bids.

The European Commission has recently launched a vast initiative on the greening of public procurement. If this is to be a success in terms of real environmental improvements, all iPPPs covered by the definition of the public procurement directives, should also be bound to requirements in the field of green public procurement. Only the award of contracts to the EMAT allows the inclusion of environmental criteria and life cycle costs.

We do believe that award procedures launched by iPPPs not covered by the public procurement directives should also respect minimum requirements in terms of transparency and non-discrimination. Otherwise, there would be a risk that public authorities increasingly "outsource" public tasks with a view to bypassing minimum public procurement rules. As it will not be possible to impose the use of public procurement rules to those iPPP, public authorities should fix minimum standards for contracts between iPPPs and subcontractors. The Austrian economic ministry is requiring the use of a specific contract between its suppliers and their subcontractors.

Chapter II. Questions relating to the choice of private partners not or not fully involved in the operation of the public contracts / concessions held by the iPPP

These questions are not relevant for SMEs as they will be very unlikely to become an investment or strategic partner.

Brussels, 13 July 2007