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Public - Private Partnerships

by Alexandros Lykourezos

An abstract definition of Public-Private Partnerships (PPPs) would classify the PPP agreement as *any joint venture between a public body and a private company, typically involving the joint ownership of a special purpose vehicle (SPV) established under company law, to work in collaboration on a variety of projects.* PPPs are a type of public procurement akin to the traditional types of public contracts. What differ are the financial aspects of the agreement and the precise transfer of risk in the contractual relationship. This necessarily means that the PPP market is a totally new market *per se*.

The recent Greek Law (Law 3389/2005) introduces the first regulation on PPPs in Greece and opens the market to this new type of public procurement.

THE BASIC PROVISIONS OF THE NEW GREEK LAW

The New Greek Law is comprised of thirty-two articles divided into six chapters. In the preamble of the Law, it is specifically noted that the Law adopts the provisions of the recent EU secondary legislation on public procurement (i.e. Directives 2000/52/EC and 2004/18/EC).

The First Chapter of the Law (arts. 1-2) is titled "MEANING – SCOPE OF APPLICATION". It is notable that the Law provides a broad definition of PPP contracts ("written contracts for partnership with private sector entities for the execution of works or the provision of services") and enters into a more detailed description of the agreement in its special provisions. The cost of the project may not exceed the maximum amount of 200 million euros. The Law clearly excludes any form of PPP agreement with respect to services provided solely by the Greek State according to the Greek Constitution (e.g. police and judicial system).

Chapter Two of the Law (arts. 3-6), titled "MINISTERIAL COMMITTEE AND SPECIAL SECRETARIAT FOR PUBLIC-PRIVATE PARTNERSHIPS", establishes the competent governing bodies for the application of the provisions of the Law: (a) The Ministerial Committee, comprised of three Ministers under the *ex officio* chairmanship of the Minister of Finance and (b) The "Greek PPP Taskforce" which is a Special Secretariat with the Ministry of Finance. The public entity that wishes to enter into a PPP agreement, must apply, with the assistance of the PPP Taskforce, to the Ministerial Committee for approval of a PPP project.

The Third Chapter of the Law (arts. 7-16) is titled "AWARD PROCEDURES". The articles of this Chapter adopt the respective provisions of Directive 2004/18/EC. The general principles of the award procedure are outlined in Article 9 of the Law. The provided types of award procedure are the "open procedure", the "closed procedure", the "competitive dialogue" and the "negotiated procedure".

The Fourth Chapter of the Law (arts. 17-18) is titled "CONTRACTUAL FRAMEWORK" and provides that the PPP contract and all secondary agreements shall contain the terms and conditions of the announcement of the bid of the project, which shall be the sole contractual framework between the parties. The agreement is governed by the provisions of the Law and, supplementary, by the Greek Civil Code. Article 17 of the Law also lists a total of twenty-five categories of contractual provisions which should be included in the PPP contract.

Lastly, Chapters Five (arts. 19-24) titled "SPECIAL PROVISIONS" and Six (arts. 25-32) titled "LEGAL MATTERS" contain special provisions regarding the execution of public works on the basis of a PPP contract. Article 31 of the Law provides that all disputes concerning the PPP agreement shall be resolved by arbitration. The PPP agreement and all relevant matters or disputes shall be governed by Greek Law.

In conclusion, it can be noted that the New Greek Law on PPPs is successful in clearly avoiding the “gray areas” concerning the Public Procurement Law on PPPs.

Concisely, the Law:

- Adopts the recent EU Directives on Public Procurement in all occasions, therefore ensuring the set EU standards
- Adopts a middle approach of the creation of a new entity to perform the contract
- Adopts the Competitive Dialogue with flexible guidelines and proper State monitoring
- Respects the practical needs of the private sector by allowing step-in clauses and subcontracting, subject to agreement between the parties
- Creates a level playing field and ensures due process
- Finally, it is a simple, clearly written and practically oriented piece of legislation, as every commercial instrument should be.

However, the Law has not yet been practically tested. It should nonetheless be stressed that the practical difficulties surrounding the PPP contract can be mitigated and faced by shared better practice and by a good construction of the contract itself, rather than with the *in toto* intervention by the legislature. In general terms, it seems that the Greek Law adopts this approach.