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France

VINCI and Nice Côte d'Azur Chamber of Commerce sign PPP contract

On 29 November, Dominique Estève, chairman of the Nice Côte d'Azur Chamber of Commerce and Industry (CCI), and Park Azur, a VINCI Concessions subsidiary, signed the contract for the business complex to be built for car rental firms at Nice Côte d'Azur airport. The signing ceremony was attended by Xavier Huillard, director and CEO of VINCI.

The contract calls for the financing, construction and operation of a three-storey building with a total surface area of 60,000 sq. metres. The building is designed to meet the needs of the anticipated growth of car rental business at Nice airport, which is already the market leader in France, on a par with Paris Charles de Gaulle airport. The project represents a total investment of approximately ?45 million for almost 2,500 parking spaces.

The 32-year contract is in the form of a French lease giving temporary authorisation to use public land and granting real property rights. VINCI's remuneration will come from the rental fees paid by the companies operating in the business complex.

Work will start at the beginning of 2008 and will take 28 months to complete. It will be carried out by a consortium comprising two local VINCI Construction France subsidiaries (Dumez Côte d'Azur, Campenon Bernard Méditerranée) and Miraglia. The architects of the complex are Georges Dikansky and Frédéric Génin.

The new contract confirms the relevance of VINCI's integrated concession-construction business model, as well as the spirit of partnership underpinning its drive to expand in the French airport activity sector. *David Hartmann*

Italy

Country Report on Italian PPPs re: update February 2008

This article aims to provide a brief update regarding PPPs in Italy, based on recent case-law developments.

Applicability of PPP to urban development projects

The Administrative Court of Brescia , in its judgment No. 7 of January 15, 2008, addressed the issues relating to the applicability of the principles governing PPPs to urban development projects carried out by Municipalities.

The statements contained therein are of a landmark importance as the Court expressly refers to the PPP as described in the Commission's Green Paper of April 30, 2004.

According to the Court, a project falls within the scope of application of the PPP, as described in the Commission's Green Paper of April 30, 2004, provided that:

(i) the project consists of a urban development plan along with project finance structure;
(ii) the private developer shall bear, even partially, the financial need of the project;
(iii) consideration of the private developer arises from the sale of the commercial premises;
(iv) private developer and the Municipality agree on the details of their cooperation with the view of implementing the project.

It follows that the private developer shall be selected as a result of a public tender procedure in compliance with the fundamental principles of the Treaty (e.g. Articles 43 and 49).

Alberto Fantini, Livio Esposizione

Portugal

The New Portuguese Public Contracts Code

1. Introduction

The Decree-Law 18/2008, from the 29th of January, has approved the new Portuguese Public Contracts Code (the "Code"), that will enter into force six months after its publication (this is, the 29th July, 2008). This new Code not only implements (in delay) the Directive 2004/17/CE of the European Parliament and of the Council and the Directive 18/2004/CE of the European Parliament and of the Council (the "Public Contracts Directives"), but is a small revolution in the Portuguese Administrative Law, and in particular in Public Procurement.

In fact, until this new Code the Portuguese legislation concerning public expenditure and public contracts was completely dispersed and old fashioned, therefore misleading and difficult to apply to the more sophisticated transactions, in special, Public Private Partnerships (the "PPP"). At the same time PPP are very common in Portugal[1] and therefore this new Code was not only expected for a long time as it was, in general, very well received among the juridical community.

The new Code, on the one hand, tends to cover all contracts celebrated by contracting authorities[2], even those outside the scope of the Public Contracts Directives (v.g. Partnership Contracts); on the other hand, the Code covers all the life of public contracts, this is, from the decision of a contracting authority to contract until the termination of the contract, passing trough the execution of the later or the choice of the Administration's contractor.

Notwithstanding the advantages of the new Code, considering the extent and differences of the areas covered (v.g. it joins the utilities directive and the traditional sectors directive and covers all aspects of public contracts), one can not find strange that this Code is rather big (473 articles) and complicated. Being impossible to cover all aspects of the new Code, we have decided to give the reader a general overview of the most relevant changes, and than focus on two aspects: (i) the pre-contractual procedures and (ii) the special rules concerning PPP.

2. General Overview

In general the new Code is in line with most of the modernizations introduced by the Public Contracts Directives as well as the recent case laws of the European Court of Justice. In concrete, the Code is opened, in several aspects, to the new opportunities concerning the use of the e-procurement as well as the possibility to take into account secondary policies in public procurement (namely the use of ecological technical specifications). However, the Portuguese legislator only preview, expressly, the possibility to consider ecological factors, though the European Court of Justice also acknowledges social aspects as a relevant secondary policy. Nevertheless, being the Code quite open it can be argued that a contracting authority can consider social aspects as a relevant item in the densification of the "most economically advantageous tender" if and when directly connected with the object of the contract.

Despite the fact that the Public Contracts Directives do not have any particular clause regulating in-house contracts (contrary to what the Commission had suggested accepting the amendments of the European Parliament[3]), the Portuguese legislator decided to specifically rule this matter, in terms very close to those that have been admitted by the European Court of Justice[4]. Therefore are not subjected to the strict rules of public procurement the contracts celebrated by a contracting authority if: (i) the later (on her own or jointly with other contracting authorities) exercises over the other contractor a control similar to those exercised over its services and if (ii) the contractor's activity is substantially developed towards those that exercise a similar control over the contractor.

With this new Code also the number of contracting authorities rises considerably. In fact, until this moment many bodies governed by public law (especially those created under civil law) were not covered by the national public procurement rules, although covered by the Public Contracts Direc-

1 According to PRICEWATERHOUSECOOPERS, Delivering the PPP Promisse, a Review of PPP Issues and Activity, pag. 37 although the UK has the most deals closed, Portugal has the greatest involvement with PPP when considered as a percentage of the GDP (more than 1,2%).

2 Notwithstanding, are subject to a specific statute the following contracts celebrated with contracting authorities: (i) labor contract (Law 23/2004, from the 22nd of June); (ii) contracts relating goods (Decree-Law 307/94, from the 21st of December); (iii) Public-Private Partnerships (Decree-Law 86/2003, from the 26th of April); (iv) contracts relating real estate (Decree-Law 280/2007, from the 7th of August).

3 Afterwards it was not possible to reach a consensus and the Public Contracts Directives do not have any mention to in-house contracts. About this discussions see: COMMISSION, Opinion of the Commission pursuant to Article 251 (2), third subparagraph, point (c) of the EC Treaty, on the European Parliament's amendments to the Council's common position regarding the proposal for a Directive of the European Parliament and of the Council coordinating the procedures for the award of public works contracts, public supply contracts and public service contracts, COM(2003) 503 final, and COMMISSION, Amended proposal for a European Parliament and Council Directive concerning the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts (presented by the Commission pursuant to Article 250 (2) of the EC Treaty), COM(2002) 236 final.

4 See Teckal Srl against Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emília, C-107/98 and more recently Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia against Administración General del Estado, C-220/06

tives[5]. Nowadays the Code, in obedience to the Public Contracts Directives, defines a body governed by public law in accordance with the following cumulative criteria (being indifferent its nature): (i) established for the specific purpose of meeting needs in the general public interest not having an industrial or commercial character; (ii) legal personality; (iii) financed, for the most part, by either the state, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by these bodies, or having an administrative, direction or supervisory board more than half of whose members are appointed, directly or indirectly, by the state, regional or local authorities, or by other bodies governed by public law.

Finally one should underline the will of the Portuguese legislator to adapt the Code to the most sophisticated practices of financing contracts (namely project finance, acquisition finance and asset finance). With a view to achieve that objective the Portuguese legislator has introduced some modernisations, seeming particular relevant and innovative the discipline concerning the exercise of rights of step in and step out, usually granted to the financial institutions.

3. Pre-Contractual Procedures

On what concerns the pre-contractual procedures, the most relevant difference is the substantial decrease of procedures, namely those that were not quite transparent or competition friendly. Nowadays the procedures recognised by the Portuguese law are: (i) private treaty[6]; (ii) negotiations with prior publication of a contract notice; (iii) public tender; (iv) restricted public tender; and (v) competitive dialogue[7].

The choice of the concrete procedure available is a rather delicate and complex process. In fact, the choice will not only depend on the value of the contract to be celebrated, but also of material criteria, type of contract and the contracting authority.

The freedom of the European legislators concerning contracts within the scope of the Public Contracts Directives, namely those which its value is higher than the relevant thresholds is not very wide, and therefore the Portuguese legislator just followed the competent Directives. Thus, in relation to contracts above the relevant thresholds the contracting authority can only chose between a public tender or a limited public tender.

Where problems may arise is in contracts outside the scope of the Public Contracts Directives, namely in concession contracts and contracts below the relevant thresholds. In fact, the Code admits, on the one hand, that concession contracts and partnership contracts to be adjudicated by private treaty for relevant reasons of public interest. Although one may admit that a public tender might not be adequate for the adjudication of a concession or partnership contracts, the eradication of competition (and transparency) may not be proportional; on the other hand, the Code also admits, on a wider range than the old legislation, the adjudication of works, services and supply contracts by private arrangements in contradiction to the recent interpretative communication from the Commission[8] and decisions form the European Court of Justice[9]. For instance, it is admitted that public contracts of works with a value until €1.000.000 may be adjudicated by private treaty.

Also worth of mention is the introduction by the Portuguese legislator of the competitive dialogue. Nevertheless the competitive dialogue is only available in rather specific situations. A contracting authority can only chose this procedure in particularly complex contracts, which are defined as follows: when it is, objectively, impossible for the contracting authority to: (i) define the most appropriate technical solution to its needs; or (ii) define the more appropriate technical specifications to concretize a technical solution; or (iii) define clearly and precisely the juridical or financial structure of the transaction. More, the legislator specifically establishes that the impossibility can not result of the lack of technical, juridical or financial support of the contracting authority acting with diligence.

5 Specially considering the jurisprudence of the European Court of Justice. See CHRISTOPHER BOVIS, EC Public Procurement: Case Law and Regulation, pag. 365 and following.

6 Although the Portuguese Legislator continues to call this procedure private treaty, it is similar to the concept of negotiations without the prior publication of a contract notice.

7 The Code also acknowledges frameworks agreements, electronic auction and dynamic purchasing systems. Nevertheless these are not autonomous procedures.

8 See Iinterpretative Communication from the Commission on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, C 179, of 01.08.2006

9 See Telaustria Verlags GmbH and Telefonadress GmbH against Telekom Austria AG, C-324/98.

Thus, considering the above mentioned set of cumulative criteria established, probably the competitive dialogue will not have the importance that one would first think.

4. Public Private Partnerships

As mentioned above, Portugal is, in percentage of the GDP, the most involved country in PPP of the UE. Despite the popularity (and advantages) of PPP projects in Portugal, some of them have resulted in substantial public expenditure due to badly negotiated contracts and, more substantially, badly managed contracts. Thus, it is not uncommon to see contracting authorities sentenced in arbitration to pay large-value indenisations. This is the leitmotive for the introduction of several articles in the new Code concerning specifically PPP projects in three different areas.

It should also be noticed that the definition of what is a PPP is not found in the Code but in an autonomous Decree-Law[10], that also establishes a set of rule concerning similar areas. Hence it will not be always clear if (and how) the two statutes are compatible.

The first special rule concerns the decision to contract a PPP. This decision must be, without prejudice of the Decree-Law 86/2003, from the 26th of April, approved by the sectoral Minister and by the Minister of Treasury, contrary to other public contracts that do not demand the approval by the Minister of Treasury as a rule.

One other difference before other public contracts concerns the tender specifications. In a PPP it must always be subject to competition the aspects relating to the public expenditure due for the execution of the contracts, as well as the risks to be transferred to the private partner.

The last difference is directly related to the execution of the contract and its follow up by the contracting authorities. The Code introduces a set of informations that the services should give the members of the cabinet if and when they become aware of any situation that can force the public partner to have additional spending, especially when arising from the actuation of other public authorities. Two particular moments are specially followed by the cabinet – any modification to a PPP and arbitral hearings.

More relevant is the introduction of a new article establishing, as a general rule, the share of benefits between the private and the public partner, eventually arising from the development of a PPP. However, this new article seems more restrict in the sharing of benefits than the Decree-Law 86/2003, from the 26th of April, what can be a eventual source of future litigation. In fact, while the Decree-Law 86/2003, from the 26th of April does not establishes any limit to share benefits occurred in the development of a PPP, the Code only recognizes this institute if the benefit does not result of the efficient management of the private partner or of the opportunities created by the later.

Needless to say that it is still very soon to ascertain whether the Code will bring along more efficiency to public contracts and public procurement as it seems, or not!

Diogo Duarte de Campos, ddc@plmj.pt

Turkey

Public Private Partnerships in Turkey

1. Introduction

Public-Private Partnerships (PPPs) may be identified as a framework term which includes specific models for the provision of goods and services to the public by the state and private sector in-cooperation with each other. PPP models appear in various forms depending on the quality of the service, levels of risk distributed among the parties and participation degrees of the public and private sector into the project.

Although PPP model has been developed for the areas where, until recently, were considered to be within the exclusive competence of state or where private sector was not deemed to be reliable enough, nowadays it is applicable to all economic sectors where public finance is still needed. Therefore, the major infrastructure projects such as building up and operation of energy power plants,

10 The Decree-Law 86/2003, from the 26th of April, defines PPP as the contract or union of contracts by which a private partner is, obliged in a lasting way, before a public partner for the development of an activity to facilitate a collective need, being the private partner, in part or in whole, responsible for the funding, investment and exploitation of that activity.