

Public-private partnership area

Development of the situation in the period November 2013 - May 2015

Summary

In terms of **public-private partnerships**, the development of the situation over the past year and a half was unexpected. After numerous announcements in the political plans (from 2012), it could have been expected that a significantly larger number of such arrangements would be concluded. However, in reality, the number of cases initiated on the basis of the Law on Public-Private Partnership and Concessions was extremely low. Thus, since its inception, the Commission for PPP has given a positive opinion to only 21 projects by April 2015. Out of all approved projects, most are from urban transport (seven) and waste management (four). Six large infrastructure facilities were approved, out of which five are not realized, and there is no confirmation whether the sixth is being implemented. With regard to PPPs that were concluded before the adoption of this law, there are often missing relevant data on the basis of which the effects could be judged.

The Rulebook on the Manner of Keeping and the Contents of the Registry of Public Contracts was adopted in June 2013. Its provisions provoked violent reactions, due to the restriction of access to information in the Public Contracts Registry. In December 2013, this policy was amended, but the **Registry until the end of the work on this report was not formed**, or at least not publicly available. The legal problem is also that one ministry is in charge of overseeing the implementation of public contracts, and the second is for the adoption of regulations in this area. Also, the application of public procurement rules to public-private partnerships is not sufficiently clearly regulated.

As with other types of legal affairs and PPPs, a significant problem is the arrangements in which the legal **procedures are circumvented by the application of interstate agreements**. This was also the case with the PPP project for "Belgrade on Water". The problem with such arrangements is the lack of competition, but also the absence of an analysis that would show that the PPP (with the selected or any other partner) is the best solution to the problem. As a positive example, the application of the Law in the case of a concession for the construction and maintenance of the highway (the so-called "corridor XI"), on the other hand, can be pointed out, for which the procedure is still ongoing. In any case, the activities on this project, especially in the area of PPP, have significantly stimulated the level of public debate on the legal nature and economic justification of this type of public funds.

U okviru projekata: „Povećana transparentnost i efikasnost javnog sektora u četiri oblasti“ koji sprovodi Transparentnost Srbija zahvaljujući podršci Delegacije Evropske Unije u Republici Srbiji i Kancelarije za saradnju sa civilnim društvom Vlade Republike Srbije.



The Law

The PPP Law and Concessions Act was adopted in November 2011 and came into force on December 2, 2011.

The most important novelties passed by the Law are compulsory competition in the selection of partners for public-private partnership, the obligation to explain why PPP or concession has been selected as a way of solving a specific need, a detailed regulation of the scope of supervision over the implementation of contracted obligations and the establishment of a PPP Commission that gives consent for PPP projects.

The Commission was established in February 2012, the adoption of by-laws was followed, and by the beginning of 2014, there was given a positive opinion for only seven PPP projects by the end of that year for another 11 projects, so that by April 2015, positive opinion for 21 PPP projects.

The law stipulates that the selection of a public partner is carried out through a public procurement procedure, in accordance with the Law on Public Procurement. This ensured competition, but the PPP system took over all the problems that exist in the public procurement system, otherwise identified as one of the most risky in terms of corruption. As it has been shown in some examples in the research, in practice, all the procedures and mechanisms prescribed by the PPP Law were respected, but problems (such as the suspicion of fitting tender conditions to the extent of certain bidders) occurred precisely in the application of the Law on Public Procurement.

Another major problem is the exclusion of partnerships based on international agreements concluded by the Republic of Serbia with one or more states since the implementation of the PPP Law. In this way, it is practically possible that the largest partnerships, such as the "Belgrade on the Water" project, are implemented without competition, in a non-transparent way. Until the end of the work on this report, no contract for the mentioned project was published and it was not possible to assess how the risks and obligations of the partners were shared and how the implementation of the contractual obligations will be monitored¹.

Supervision

The issue of supervision is well resolved by the Law on PPP and the Regulation on Supervision of the Implementation of Public Contracts on Public-Private Partnership. The law stipulates that the public partner is obliged to continuously monitor the work of the private partner and the fulfillment of his obligations under the contract, as well as the execution of all payments in accordance with the

¹ A special chapter in the report is dedicated to the project "Belgrade on the Water"

U okviru projekata: „Povećana transparentnost i efikasnost javnog sektora u četiri oblasti“ koji sprovodi Transparentnost Srbija zahvaljujući podršci Delegacije Evropske Unije u Republici Srbiji i Kancelarije za saradnju sa civilnim društvom Vlade Republike Srbije.



contract. The public partner shall, inter alia, be required, at least once a year, to request special periodic reports on his work, activities and fulfillment of obligations from the private partner, in accordance with the contract, to inform the Ministry of Finance, or the body of the autonomous province or the local self-government unit responsible for finance affairs, about the received periodical reports, that for the duration of the appointment the leader shall keep separate documentation relating to the business of the private partner, whereby he is obliged to keep records of all related companies of the private partner to whom the contract is awarded, to keep the documentation referring to a particular PPP until the expiration of the period for which the contract was concluded, and **to notify the competent public attorney on non-compliance procedures.**

The regulation stipulates that **the public partner is obliged to submit the first report within six months from the date of conclusion of the contract**, or from the date of establishing or acquiring the ownership stake of the private partner in the joint company and then every six months from the date of submission of the previous report, the report shall be submitted no later than six months after the expiration of the contractual time stipulated in the contract.

The supervision over the realization of public contracts is performed by the ministry in charge of finance affairs, or the autonomous province or local self-government unit responsible for finance affairs.

In practice, research has shown, there are problems with the implementation of supervision, and even with the recognition of the meaning of this term. None of the local authorities to whom we spoke on public-private partnerships gave the information regarding the supervision over the implementation of the PPP contract. It should be noted **that the majority of PPPs, for which the Commission for PPP has given a positive opinion, are not enforced.** Even this, however, the authorities did not want to confirm, for which reason we sent appeals to the Commissioner for Information of Public Importance.

The Feasibility Study

The PPP Law sets out the **obligation of the public body to develop a feasibility study on the granting of a concession and undertake all other actions that precede the concession giving procedure.** Subsequently, on the basis of economic, financial, social and other indicators and assessment of the impact of concession activity on the environment, the public body prepares a proposal for the adoption of a concession act and submits it to the Government of Serbia or the Government of Vojvodina or the assembly of the local self-government unit. In the process of issuing a concession act, the proposal of a concession act is also submitted to the PPP Commission

U okviru projekata: „Povećana transparentnost i efikasnost javnog sektora u četiri oblasti“ koji sprovodi Transparentnost Srbija zahvaljujući podršci Delegacije Evropske Unije u Republici Srbiji i Kancelarije za saradnju sa civilnim društvom Vlade Republike Srbije.



for giving opinions and assessing whether a concrete project can be implemented in the form of PPPs with elements of the concession.

The process is similar to PPP without the elements of the concession, where the feasibility study is not mandatory, but the PPP project proposal must include, among other things, a business plan, including PPP conditions, cost estimates and *value-for-money* analysis of the value obtained in relation to the invested assets, in accordance with the Methodology prescribed by the PPP Commission, the specifications on the financial feasibility of PPP for the public body, project financing specifications (from the budget, financing by international financial institutions, private financing and financing costs) and the availability of funds, the planned risk allocation, and the economic efficiency analysis of the proposed project.

In practice, feasibility study in the case of concessions for the allocation of activities the organization of public transport is interpreted as "the reason for giving a concession". "The reasons for granting the concession are contained in the legal obligation of the municipality to ensure the organization of urban and suburban passenger transport on the territory of the municipality". In one case (Municipality of Topola) there was a document that reminded of the feasibility study - it was listed what would be necessary in order for the municipality to provide line passenger suburban transport at its territory via a public company and stated (without showing the calculation) that the municipality can not allocate funds for the initial capital for the operation of this company from the local budget, so the only way is to entrust the activity.

In only one case, out of the observed 11 in the survey, (entrusting the concession for the organization of city transport in Niš), a full feasibility study was carried out, which showed that it is more profitable for the City to grant a concession than to organize transportation. What is specific for this PPP is that a city public company (JP Aerodrome Niš) participated in the contest and received a concession on one package of lines. Upon the completion of the competition, an audio recording appeared indicating that the terms of the tender were changed in order to adapt to the capabilities of that city public company.

What was happening in Niš later in connection with the concession granted to a city public company, questioned the meaning of the feasibility study and the meaning of the public company's participation in the PPP competition, which is announced by a public body that is the founder of that public company or which has the same founder as this public company.

Namely, in December 2014 (only four months after JP Aerodrome received a concession), the City decides that the Directorate of Niš, which is the bearer of the PPP project and who signed the PP contract with the Airport, to take over bus lines, vehicles and employees of JP Aerodrome from January 1, 2015.

U okviru projekata: „Povećana transparentnost i efikasnost javnog sektora u četiri oblasti“ koji sprovodi Transparentnost Srbija zahvaljujući podršci Delegacije Evropske Unije u Republici Srbiji i Kancelarije za saradnju sa civilnim društvom Vlade Republike Srbije.



Improving the PPPI system

And while the announces that the PPP Law will apply in practice encourage, non-implementation of the PPP obligations arising from the Anti-Corruption Strategy is a cause for concern.

The Action Plan for the implementation of the National Anti-Corruption Strategy, among other things, envisages that the Ministry of Finance will, within six months from the adoption of the Action Plan (1 September 2013), develop a program and a plan for public information campaigns on PPP, to conduct a risk analysis on corruption in the Law on Public Private Partnership and concessions and degree of compliance with other laws within 12 months, and to permanently work on establishing mechanisms for the control and transparency of the work of the PPP Commission.

According to the report of the Anti-Corruption Agency on the implementation of the Strategy and the Action Plan, the Ministry of Finance did not address any of these three obligations in its performance report.

Conclusions

Analyzing individual PPP cases, the ones which are implemented according to the Law on PPP, as well as the other that are concluded for many years before the adoption and the beginning of the implementation of the law, **we have not found evidence that the focus of the first partnerships was to satisfy the needs of citizens**, although it is always an explanation for joining the PPP. Namely, the impression is that it is often in the background, behind formal problem solving (such as, for example, the lack of a proper garbage collection system). We did not find evidence those citizens directly, through a public hearing, a poll, etc, participated in decision-making on problem solving through PPP. We did not find examples of citizen surveys on satisfaction with the services provided, although there were examples of local authorities that were aware of the dissatisfaction, but they have only used it as an element in negotiations with private partners on the price of services.

Within the research, a telephone survey was conducted with the local citizens of municipalities in Serbia in which PPPs were finalized for the regulation of collection and collection of garbage before 2011. Since the poll is unrepresentative, it is not thoroughly analyzed and presented by municipalities, but the summary results point to some of the basic characteristics - most citizens felt the progress in that area after the service was entrusted to a private partner (it should be noted that some municipalities before PPP conclusion did not have a proper garbage collection system), most respondents consider that the quality of the service is not in proportion to the price they pay, the vast majority were not informed at the time the contract was signed and none of the respondents knew how many years the contract was concluded and how much revenue Municipality (city) has by the contract. Given that a very small number of PPPs concluded in accordance with the PPP Law began to be implemented, and that the provision of services lasts relatively shortly, a similar survey

U okviru projekata: „Povećana transparentnost i efikasnost javnog sektora u četiri oblasti“ koji sprovodi Transparentnost Srbija zahvaljujući podršci Delegacije Evropske Unije u Republici Srbiji i Kancelarije za saradnju sa civilnim društvom Vlade Republike Srbije.



was not done for the new PPP from the period after 2011, but these results show the direction in which work should be done - involvement of citizens when deciding on PPP, informing citizens about the conditions and regular monitoring of satisfaction with services and price.

Significant, of course, is the question why **public-private partnership, and not some other method, is chosen for solving needs** (providing services, building an infrastructure facility). And in cases from before 2011 (when it was not an obligation), and after 2011 (when this is a commitment in the case of concessions), there are few examples of serious and comprehensive analyzes of whether PPP is the best way to solve the problem, or a need.

The British guidelines for PPP programs² point to the importance of initial planning: "A public authority needs to critically assess the need for investment in a particular sector, identify where improvements are needed and what kind of investments could lead to that improvement." The public authority should prepare "business plan "in which PPP or PP³ options are analyzed.

In contrast to this (foreign) theory, there is a (domestic) practice that puts the question of the meaningfulness of making an analysis that will show that PPP is the best (and incomparably cheaper) way of solving the problem; three months after the signing of the PPP contract, it was decided that the contract should be terminated by mutual agreement and that the public partner itself organizes the provision of the service (example of the city transport in Niš, line 4).

The position and functioning of the Commission for Public Private Partnerships can not be assessed as satisfactory. According to the Law, the Commission is "operatively independent" and practically consists of representatives of the Prime Minister, the ministries, the province and Belgrade. Although the mandate of the members of the Commission is five years, members have been replaced on several occasions, leaving only one person remaining from the original composition of nine members after three years. Therefore, it is justifiable to ask whether members of the Commission have the opportunity for professional development in this field. Greater independence and / or professionalization of the Commission with other legal changes regarding jurisdiction (monitoring of PPP implementation, education, more engagement in model selection) would improve the PPP system in Serbia.

The biggest concern is the fact that no **evidence was found that the monitoring of the implementation of all contracted obligation is carried out**, as in the case PPPs concluded before

²

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/205112/pf2_infrastructure_new_approach_to_public_private_partnerships_051212.pdf

³ The British guidelines also offer detailed proposals for the selection procedure, but it has not been analyzed here, given that the area under the PPP Law is defined by the Law on PP. These experiences can be exploited if it turns out that it is necessary to regulate this area in particular in relation to PPP.

U okviru projekata: „Povećana transparentnost i efikasnost javnog sektora u četiri oblasti“ koji sprovodi Transparentnost Srbija zahvaljujući podršci Delegacije Evropske Unije u Republici Srbiji i Kancelarije za saradnju sa civilnim društvom Vlade Republike Srbije.



2011, so in the case of those concluded under the new law, where it is an obligation. The register of public contracts, which should be publicly available and the reports on the implementation of the contract are not formed, and this is one of the biggest formal obstacles to the establishment of a much transparent PPP system. The biggest obstacle in practice is certainly the conclusion of PPP on the basis of intergovernmental agreements, without the implementation of the PPP Law, without competition and without the required supervision and reporting obligations. In this context, despite the often misunderstood functioning of the PPP system⁴, the politicians' announcements that some important future infrastructure projects, such as the Vinca landfill or the construction of underground garages in Belgrade, will be implemented as a PPP, with the full implementation of the PPP Law⁵ are encouraging.

And while the announces that the PPP Law will apply in practice encourage, **non-implementation of the PPP obligations arising from the Anti-Corruption Strategy is a cause for concern.** The Action Plan for the implementation of the National Anti-Corruption Strategy, among other things, envisages that the Ministry of Finance will, within six months from the adoption of the Action Plan (1 September 2013), develop a program and a plan for public information campaigns on PPP, to conduct a risk analysis on corruption in the Law on Public Private Partnership and concessions and degree of compliance with other laws within 12 months, and to permanently work on establishing mechanisms for the control and transparency of the work of the PPP Commission. According to the report of the Anti-Corruption Agency on the implementation of the Strategy and the Action Plan, the Ministry of Finance did not address any of these three obligations in its performance report.

7

Transparency – Serbia

Belgrade, 25. 5. 2015.

⁴<http://www.transparentnost.org.rs/index.php/sr/aktivnosti-2/pod-lupom/7152-gradski-menadzer-ne-zna-zakon-o-jpp>
<http://www.transparentnost.org.rs/index.php/sr/aktivnosti-2/pod-lupom/7134-bezakonje-ili-neznanje>

⁵ <http://www.blic.rs/Vesti/Beograd/545531/Gradonacelnik-Sanacija-deponije-u-Vinci-vec-na-prolece-2016-godine>
<http://www.blic.rs/Vesti/Beograd/513994/Sinisa-Mali-Beograd-poceo-sistemska-da-resava-problem-upravljanja-otpadom>
<http://www.blic.rs/Vesti/Beograd/504399/Partnerstvo-za-cetiri-nove-podzemne-garaze>

U okviru projekata: „Povećana transparentnost i efikasnost javnog sektora u četiri oblasti“ koji sprovodi Transparentnost Srbija zahvaljujući podršci Delegacije Evropske Unije u Republici Srbiji i Kancelarije za saradnju sa civilnim društvom Vlade Republike Srbije.

