



AGENCY FOR PUBLIC PRIVATE
PARTNERSHIP

A STEP-BY-STEP GUIDE TO PUBLIC PRIVATE PARTNERSHIPS

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AGENCY FOR PUBLIC PRIVATE PARTNERSHIP
REPUBLIC OF CROATIA

A STEP-BY-STEP GUIDE TO PUBLIC PRIVATE PARTNERSHIPS (PPPs)



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INTRODUCTION

A public private partnership (PPP) is a long-term contractual partner relationship between the public and the private sector. It may include financing, design, construction, operation and/or maintenance of infrastructure and/or provision of services by the private sector, which are usually procured and provided by the public sector. The PPP model yields benefits for both sides, provided that there is an effective combination of goals of the public and the private sector. It is important to recognise the circumstances where a PPP might be the best method for the delivery of a particular service or the construction of infrastructure in comparison to other traditional public procurement methods.

In many projects it is possible to use private sector funds and its management experience in the provision of services and the construction of infrastructure which would traditionally be funded and managed by the public sector. The basic concept of any public private partnership (PPP) is simple: instead of funding and building a distribution network, kindergarten, public garage or other facilities and infrastructure on its own, which is followed by operation, maintenance and the provision of end services, the public sector concludes a long-term contract with the private sector which then performs all or part of the activities in place of the public sector, which retains only its regulatory and supervisory function (such as the laying down of standards for the services rendered and the surveillance of conformity). On the other hand, the private sector may collect a fee for the services rendered directly from the end user (and bear the risk of market demand) or from the public sector in the form of rent and the like (and bear the risk of availability of the facility/infrastructure). The private sector usually also undertakes the tasks such as maintenance, operation and similar tasks, and assumes the risks which the private sector can manage better.

Public private partnership is complementary to the conclusion of a contract between the public and the private sector which does not have as its objective the provision of public services, but the objective of which is the privatisation of public goods or the encouragement of direct investments in market-oriented projects and therefore, they need to be distinguished.

Public private partnerships are different from privatisation in that the right to use public property is granted to a private partner for a definite period of time (such as the agreed term), and on expiration of the term the property usually goes back to the public sector in its original state or subject to a fee if investments were made to increase its value.

Public private partnerships open up opportunities for private investments which can result in the realisation of projects which would otherwise, based on the classic (budgetary) funding, not be possible or which would require much longer periods of time for implementation, which is often not acceptable where certain public services or their adequate level should be ensured promptly.

PPPs enable the private sector to use financial, business and other types of knowledge and skills and an innovative entrepreneurial approach in project implementation and management, which is sometimes the main reason to use the PPP model.

PPPs are definitely not appropriate in the case of projects which result in fast technological and other changes, and because of which it is difficult to determine in the long-term and with an ac-

ceptable level of certainty the standard of services rendered, that is, to provide for a sufficient level of contractual flexibility which is necessary to adapt to such rapid changes, and at the same time to foresee and agree in advance on the cost of such adjustments.

Preparation and implementation of PPPs is a lengthy and expensive process. Hence, the PPP model should be used only if the distribution of risk provides the public sector with lower aggregate costs over the entire agreed term of the project (greater value for money), or access to knowledge, skills and the like, which would otherwise not be available, and which contribute significantly to the level of the public services rendered. Fulfilment of the said criteria means the drawing up of a series of preliminary studies (such as market research, investigative work to select locations, feasibility studies, sustainability studies, etc.), and the criteria for the justifiability of using the PPP model. Use of the PPP model is approved by the Agency for Public Private Partnership (hereinafter the Agency) as the central institution in charge of the implementation of the Act on Public Private Partnerships, based on all procedures conducted previously and laid down by the Act and the subordinate acts.

This Guide includes step-by-step guidelines aimed primarily at potential contracting authorities, therefore the public sector, as to which actions should be taken and which procedures should be conducted to prepare and implement a PPP project successfully in accordance with the Act on Public Private Partnerships, as well as the Concessions Act and the Public Procurement Act as two other basic laws in terms of the use of the PPP model. The purpose of the Guide is to contribute to a more efficient and better proposing and implementation of PPP projects.

This Guide should be used along with the Act on Public Private Partnerships (hereinafter the PPP Act, OG I29/08) and the subordinate acts adopted pursuant to the said Act, as well as the Concessions Act (OG I25/08) and the Public Procurement Act (OG I25/08 and I10/07).

The Guide is primarily intended for:

- ministries and other state administration bodies which propose PPP projects,
- local and regional self-government units which propose projects,
- other stakeholders authorised to propose PPP projects under the PPP Act.

The key word in the implementation of any public private partnership is partnership. Therefore, everyone using this Guide is our partner in the making of its future editions, and all comments and suggestions pointing to potential improvements are welcome and will be reviewed with utmost attention. Any journey begins with the making of the first step. Therefore, we sincerely hope that the publication of this Guide is a step in the direction of building an extensive partnership, for the purpose of better understanding of the PPP concept, and its successful implementation to the benefit of all citizens of the Republic of Croatia.

GLOSSARY OF KEY TERMS

Concession contract is a contract signed by the concession grantor on one hand and the concessionaire on the other hand, and which includes provisions on the mutual rights and obligations connected with the use of the concession.

Concession fee is the fee which the concessionaire pays pursuant to the concession contract.

Concession grantor is a body or legal person which is competent to grant a concession under the Concessions Act.

Concessionaire is any natural or legal person with whom the concession grantor signs a concession contract.

Contractual public-private partnership is a PPP model where the mutual relationship between a public and a private partner is regulated by a contract on public private partnership as a concession model or as an operative lease model.

Cost-benefit analysis is an economic analysis method which is used to compare and evaluate all advantages and all disadvantages of an economic undertaking or project through an analysis of all costs and benefits. It is important for making the right decision and any project adjustments that might be necessary.

Decision on the selection of the most economically advantageous tenderer is an administrative act passed by the concession grantor on the proposal of an expert commission for concessions, following an evaluation of the tenders submitted for the award of concession and in accordance with the tender documents and the criteria for the selection of the most economically advantageous tender.

Depreciation is a method of calculation. Depreciation is a gradual decrease in the value of an undertaking's assets, and it is calculated annually according to the procedure laid down by law. As the amount of depreciation is deducted every year from the tax base, the method of depreciation affects the decision on the way of funding the procurement of equipment.

Discount factor or present value factor is a mathematical expression for calculating the discounted (present) value of an amount. It is also called the decumulation factor. It is the reciprocal value of the interest factor. It is most commonly found calculated in other financial tables, and for identical periodical amounts in the fourth financial tables.

Feasibility study is a document which helps the investor decide on an investment by answering the question whether a particular project is feasible in terms of the situation on the market and financially. If the study shows that the project is feasible and realisable, the study becomes the basis for drawing up an implementation study, that is, the operative project. The feasibility study consists of a market analysis, a technological-technical analysis, a location analysis, an organisational analysis, and the analysis of economic and financial indicators. The said information is then used to make an assessment of the feasibility and successfulness, i.e., the acceptability of implementation of a particular investment project.

Fiscal risk is a risk that the public sector will not be able to timely fulfil the obligations assumed (in the case of a PPP, it would be timely payment of the agreed obligations).

Institutionalised public private partnership is a PPP model based on the membership relationship between a public and a private partner in a jointly owned undertaking which is the competent authority responsible for the implementation of the PPP project.

Internal rate of return is the discount rate which reduces pure cash flows over the entire lifespan of effectuating an investment to the value of the initial cost of investment. It is also called the internal rate of profitability. The internal rate of profitability is the basic method of assessing the financial efficacy of investment opportunities (capital budgeting). It is the discount rate where the pure present value of an investment value equals zero. The internal rate of profitability is calculated by using the procedure of successive iterations, where it gradually comes closer and closer to the required discount rate where the pure present value equals zero. In calculating it, the procedure of linear interpolation is often used. Within the meaning of the method of internal rate of profitability, an investment opportunity is efficient if the internal rate of profitability is greater or at least the same as the fixed discount rate, i.e., the investor's opportunity cost (market capitalisation rate).

Net present value is the basic quantitative concept in finances. It represents the present value of all future receipts in money reduced to the present value of all future costs in money, i.e., the present value of all future pure cash flows resulting from the operation of the enterprise or a project of the enterprise or an intended transaction.

PPP contract is a basic contract concluded between a public and a private partner, or a public partner and a Special Purpose Vehicle (hereinafter: SPV) which, for the purpose of implementation of the PPP project, regulates the rights and obligations of the parties to the contract.

PPP project is a project carried out in accordance with one of the PPP models which, based on the procedure specified in the Act on Public Private Partnerships, is approved by the Agency.

Private partner is an economic operator selected based on the completed public procurement procedure or the procedure for the selection of a concessionaire which is awarded a PPP contract by the public partner, or which establishes an SPV for that purpose, or which establishes a membership relationship in a joint undertaking with the public partner.

Procedure for the selection of a private partner is the public procurement procedure laid down in the regulations governing the public procurement procedure or the concession award procedure laid down in the regulations governing concessions.

Project consists of a series of interconnected activities performed in a particular order with a view to achieving clear objectives within a given period of time and with resources assigned for the purpose.

Public body is any body which is the contracting authority within the meaning of the regulations governing public procurement.

Public partner is one or more public bodies concluding a PPP contract with an SPV or a private part-

ner, or one or more public bodies associated with a private partner through membership of a joint undertaking.

Public private partnership is a model of long-term contractual partner relationship between a public and a private partner which may involve financing, design, construction, operation and/or maintenance of infrastructure and/or provision of services by the private partner, which are traditionally procured and provided by the public partner.

Public Sector Comparator (PSC) is a comparison of the planned costs of the application of the public private partnership model versus the classic (budgetary) model of funding of all costs of the implementation of the project over the whole proposed term of the contract.

Public services concession means a contractually regulated legal relationship the subject-matter of which is the performance of one or more services which are in general interest and which are laid down by law regulating a specific concession or listed in Annex II of the legislation regulating public procurement, if the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.

Public works concession means a contractually regulated legal relationship the subject-matter of which is the performance of works or design, or both, and which relate to one or more of the activities laid down by law regulating a specific concession or listed in Annex I of the legislation regulating public procurement, if the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment.

Return on assets (ROA) is a return on invested capital, an indicator of the profitability of assets. It is calculated by using one of the values which shows the return in the numerator (such as net income, gross income, net or gross income increased by the amount of paid interest) and dividing it by its total assets (frequently, what is used is the average value of assets, and sometimes the value of assets as on 31 December of the year in question), and then multiplying it by 100. If in the numerator the return is shown as the size of cash flow, the indicator is marked as CFROA.

Special purpose vehicle (SPV) is an undertaking which may be founded by a private partner for the purpose of concluding a PPP contract and/or implementing a PPP project.

The most economically advantageous tenderer is a tenderer who was selected as the most economically advantageous in the selection process according to the selection criteria stated in the invitation to tender or in the tender documents.

Time value of money is a concept where money at present time is worth more and is preferred more than nominally the same amount of money at some future time. It is based on the possibility to invest money at present time to be increased in the future. It is also based on the fact that the propensity to spend money in present time is greater in comparison to the same volume of consumption in the future. Therefore, spending is delayed only if there is an opportunity to increase the volume of consumption in the future, that is, to satisfy the needs more completely.

There are several reasons for preferring the use of money in the present.

1. the risk of money inflow and its transformation (the future is uncertain in terms of the inflow of money and the possibility of its transformation into non-monetary forms of resources);

2. inflation (an additional reason for the time preference of money is the rise in prices, because of which the same amount of money in the future may really value less);
3. the possibility of using money (the possession of money enables its consumption, that is, the meeting of certain needs; furthermore, investing money in the present might result in an increase of the amount in the future).

Value for money (VfM) is an index of the relationship between the price of a particular product or service and its usability for the user (for example, the best product or service that the user can receive for a particular amount of money).

STEP I - STRATEGIC PLANNING

I.1. What is a strategy and why good project selection depends on the strategies adopted?

- I.1.1. Before any drawing-out and proposing of potential projects, it is necessary to set long-term strategic goals which should be realised through the projects concerned.
- I.1.2. The procedure used to set strategic goals is called strategic planning and the document which is the produce of such planning usually has got the word "strategy", "policy" or the derivatives of the said words in its title (hereinafter the Strategy).
- I.1.3. The strategy is a document which sets goals which should be achieved over periods in excess of 5 years, usually 10, 15 and 20, and which includes the projections of development and the relevant goals for period over 20 years.
- I.1.4. Periods of up to 5 years are covered by action plans, workflows and the like (hereinafter action plans) which focus on the implementation of the strategies adopted. Based on the said plans, annual implementation plans (such as business, financial and others) are drawn up.
- I.1.5. Specific project proposals must be included in the financial and time frameworks of action plans and implementing plans, while their objectives should contribute to the realisation of fixed strategic goals. The level of contribution of a particular project to the realisation of fixed strategic goals is used to determine the priority for its implementation (hereinafter the priority).
- I.1.6. Various strategies also form part of a certain structure of priorities, regardless whether they are interconnected or hierarchically connected. The relationship of one strategy to another is used to determine the priority for the implementation of its goals. Any project whose objectives are in line with the goals of a superior-priority strategy also has superior priority in terms of its implementation.
- I.1.7. Respect for the implementation of superior-priority projects ensures an optimum investment of time, money, and of natural and human resources (hereinafter the resources). Resources are always limited and therefore their optimum distribution is the basic precondition for a successful development of society as a whole. The more the resources are limited in terms of the list of wishes and needs, the more precious they are, and greater the significance of their distribution in line with the strategic goals concerned, that is, it is a key precondition for the fulfilment of the set goals.
- I.1.8. Strategies can be territorial - relating to a specific administrative or geographical area, and sector-related - relating to a specific field of human activity or relations.
- I.1.9. Strategies involving several areas are called umbrella strategies. Umbrella strategies include global strategies (for example, the strategy against global warming), regional strategies (for example, the European transport strategy), national strategies (for example, the national

framework for development), or county strategies, and each one of them usually involves one or more sector-related strategies (economic, transport, environment protection, social welfare, etc.).

- I.1.10. The implementation priority of a strategy is higher if the fulfilment of its goals is at the same time a precondition for the fulfilment of the goals of another strategy, therefore involving common goals of several strategies. It is, hence, important to determine common priorities in the implementation of various strategies. That would be the task of umbrella strategies. Therefore, implementation of the goals of umbrella strategies is of superior priority in relation to the goals of strategies relating to a narrower territorial/administrative area or to a narrower field of activity (sector). Harmonised (optimum) implementation of all strategies is thus ensured.
- I.1.11. An important part of any strategy is the setting of measurable goals, a timeframe for their implementation, and an assessment of the funds required (and possibly, of other necessary resources). If part of the planned funds is insufficient, the strategy may include guidelines for how to ensure sufficient resources (for example, it can foresee the use of the PPP model if the budgetary funds are insufficient to achieve the realisation of the fixed goals). The said three elements of any strategy (measurable goals, deadlines for their realisation and planned resources) are the basic precondition for an assessment of the sustainability of the goals at the moment of adopting the strategy, developing the corresponding operative and implementation plans, and for an objective monitoring of the implementation of the adopted strategies.
- I.1.12. In conclusion, it is clear that any strategy is a sort of guideline, without which it is not possible to correctly evaluate any of the paths selected. There is a well-known saying that one path is as good as another if it is not important where it leads. If it is not fitted into a strategy, project selection leads in an unknown direction, which actually constitutes wandering, and not selecting. Strategies, along with being a guideline, also provide benchmarks for making an assessment whether the goals are being achieved with the best value for money. In other words, whether the available resources are being used in the best possible way. Any other approach means lagging behind in terms of the actual possibilities for development. Therefore, drawing-up, monitoring the implementation and regular assessment of the adopted strategies is the first and vital essential step on the long path towards successful contracting and implementation of any PPP project.

I.2. Drawing up and implementation development of the strategy

- I.2.1. The first step in developing a strategy is the selection of strategic goals, determining their mutual priorities and ensuring a wider social agreement concerning the realisation of the goals selected.
- I.2.2. The selection of strategic goals is influenced by both outside and inside factors. Outside factors would be the conditions prevalent in the wider environment and in the umbrella strategy, with the goals of which an inferior-priority strategy must be aligned in order to ensure the social optimum. Outside limitations are usually difficult to change.

Inside factors would be one's social values, available resources, mutual relations, one's relationship towards the environment and the like. Inside limitations can be reduced by using the synergy of inclusion in the outside environment - such as acknowledging the goals of umbrella strategies, mutual co-operation, and the like. In that sense, co-operation and care for the environment are two very desirable presumptions in drawing up any strategy.

- 1.2.3. The drawing-up of a strategy is a creative process, which requires great knowledge and the involvement of a number of participants: political and state bodies, scientific institutions, NGOs and various other stakeholders. The approach must be professional, but it also must provide for the widest possible support (consensus) to the goals set in the strategy and its priorities, because in that way the success of the adopted strategy is ensured. However, the accord must be the result of arguments, and not compromises which eventually might result in poor goal selection. Therefore, it is important that leading authorities from the field in question take part in drawing up the strategy.
- 1.2.4. The adoption of a strategy is its political confirmation. Thus, through adoption it becomes part of the adopted policy. Long-term and stable political support and wide-ranging support provided by stakeholders are key preconditions for a successful implementation of any strategy..
- 1.2.5. The process of drawing up a strategy begins with the studying of the situation and directions of possible development in the environment and in the field in question. Depending on the results of such analyses, various scenarios are made for the period covered by the strategy, which is followed by an assessment of the probability of each of the scenarios and the consequences which every one of them might have on the field concerned. Depending on the assessments made, the desirable goals of action, which might have the greatest possible impact on the realisation of the more favourable scenarios, are determined. Based on an analysis of the resources needed to realise each and every one of the said desirable goals, the group of goals, which are realisable in terms of the resources available and which at the same time have the best possible impact on the development of the desirable scenario, is then set. The strategic goals selected are used to determine priorities and also criteria for the award of the resources needed. Resources must also be planned for the realisation of the main goals. Along with the group of main goals, reserve goals and their priorities are also determined. Reserve goals become main goals only if additional resources needed for their implementation are ensured (savings in the implementation of the main goals, EU funding, funding through PPPs and the like). During the implementation of a strategy, the priorities of a particular goal can change as the result of changed circumstances in the implementation of the strategy, so main goals can become reserve goals, and vice versa, if that should prove justified in view of the circumstances. However, the decision must always be based on the potential impact on the implementation of the strategically determined scenario.
- 1.2.6. Therefore, the strategy is a document which is aligned with other, particularly umbrella strategies and adopted policies, which clearly sets out a group of measurable goals (number of kindergartens, growth of GDP and the like), time limits for implementation, resources planned for implementation and mutual priorities, that is, which goal has got priority in relation to others in terms of the award of resources needed for its implemen-

tation.

- 1.2.7. Based on the strategies adopted, operative plans are drawn up as the main implementing documents.
Operative plans include a detailed elaboration of the strategy into steps no longer than 5 years, and preferably no longer than one year, which have got a measurable result and resources planned for implementation, thus enabling gradual implementation of the strategy and ongoing monitoring of the schedule of implementation of its goals
- 1.2.8. Annual implementation plans are drawn up on the basis of operative plans and they include a distribution of resources in line with the goals and time limits included in the operative plans.
- 1.2.9. The drawing up of strategies and operative plans must precede the procedure of appraisal and selection of PPP projects, which is laid down in the Act on Public Private Partnerships and the Regulation on the criteria for assessment and approval of public private partnership projects (hereinafter the Regulation on the criteria). That is why in the prescribed procedure the alignment of the objectives of a PPP project with the goals included in strategies referred to in the proposal and which must be stated in the project proposal is an important precondition for the selection of the PPP project.
Each and every phase of a PPP project must form part of operative plans, and its goals must be aligned with the relevant strategy.

STEP 2 - DETERMINING STRATEGY IMPLEMENTATION GOALS AND SELECTING THE MOST APPROPRIATE IMPLEMENTATION SOLUTION

2.1. Determining the implementation goal

- 2.1.1. Good goal setting depends on what one **actually** wants to achieve as part of the strategy concerned and the specific objectives of the proposed investment/project. Goals are usually connected with the improvement of a public service. Determining a goal can be regarded as the initial phase of initiating a particular project.
- 2.1.2. Good goal setting is based on the accurate definition of the problem, where it is particularly important not to determine potential solutions in advance.

FOR EXAMPLE:

Construction of a hospital - a poorly set goal!

A higher percentage of healthy population (that is, lower health insurance costs) for the purpose of ensuring better health protection in general - a well set and measurable goal, where potential solutions might be:

- a) more frequent periodical medical examinations,
- b) investments in the promotion of healthier lifestyles,
- c) professional development of health professionals,
- d) better equipment and reconstruction of the existing hospitals,
- e) construction of new/specialised hospitals,
- f) not taking any measures within the strategy for improving health protection (but, for example, the same goal might be achievable through measures within the strategy of environment protection), etc.

Therefore, building a new hospital is only one of several potential solutions.

2.2. Choosing the solution

- 2.2.1. After good goal setting, it is necessary to conduct an analysis of **all** potential solutions in terms of the strategy in question, but also within the framework of other adopted strategies. Solutions that must be reviewed include those that include capital investments and those that do not.

It is only as part of this step that the use of the PPP model can be taken into consideration, along with other possibilities.

The option "do something" includes the examination of all possible levels of providing end public services, from minimum acceptability to the highest standards, in terms of the

scope, content, time and the location of services to be rendered. It is necessary to review conventional approaches, but also new innovative methods of providing public services (for example, over the Internet).

The option "do the minimum" (status quo) means the absence of any investment, that is, minimal costs, only what is essential to maintain the services at the current level or as close as possible to the current level.

- 2.2.2. Preparing the proposals of potential solutions might include a number of activities, such as:
- studying the experience at hand with the application of similar solutions,
 - consultations with people who have hand-on experience and with experts with a view to gathering information essential for the realisation of the goals set,
 - analysing connections between the goals of the solutions proposed and the goals of the strategy with a view to determining the priorities in various possibilities,
 - analysing the financial, but also other costs and benefits,
 - checking the availability of the necessary resources, especially knowledge and skills,
 - analysing the best practice, including international examples.

- 2.2.3. All proposed solutions should be analysed to check the assertions on which they are based (correct/incorrect) and to possibly find yet unmentioned possible solutions. In the course of this step, it is particularly important to establish all advantages and disadvantages of every solution, and at the same time to review the objective needs of the user, without encouraging their unsustainable expectations.

- 2.2.4. In the preliminary appraisal of the solutions offered, various techniques are used, such as:
- a) a logical table including an assessment of the conformity of the goals set with the goals contained in the relevant strategies,
 - b) an assessment of (economic, social, etc.) benefits,
 - c) the drawing up of preliminary studies (market demand, sustainability, feasibility, and the like),
 - d) assessment of the risks entailed in applying the offered solution,
 - e) assessment of the adaptability of the offered solution in the case of potential future additional requirements, and the like.

The offered solutions are also classified according to the time necessary for their implementation in order to assess their conformity with short-term, mid-term and long-term priorities for the implementation of the goals set and an analysis is also conducted of the conditions which must be met to implement the project (rights connected with the use of a specific location, availability of certain information, etc.), and of the level of services which is achieved through each and every one of the proposed solutions.

- 2.2.5. After the preliminary analyses of all solutions, the solutions proposed, but not acceptable, for whatever reason, are dismissed (for example, solutions which are not acceptable, because the required manpower in terms of knowledge and skills or the location where the solution should be used is not available), and the remaining solutions are short-listed.
- 2.2.6. In making the final selection, it is necessary to prepare a thorough presentation of the business justifiability of the proposed solution (the so-called business case) for the short-

listed solutions, including:

- a brief description of the proposed solution,
- establishing the need for a public service of the corresponding level,
- a description of the goals and purpose of the proposed solution,
- implementation options,
- an analysis of the risks, costs, feasibility, sustainability of cash flows, etc. for each of the options,
- a selection of the option having priority (the referential option),
- a detailed analysis of the risks, costs, feasibility and sustainability of the cash flows in the implementation of the referential option,
- a summary project management plan.

2.3. Forming the project team

- 2.3.1. It is necessary to recognise and document all tasks, roles and responsibilities of the public sector which will be needed for the implementation of the selection solution.
- 2.3.2. Based on the list of tasks, knowledge, skills and the level of responsibility for their performance, it is necessary to evaluate whether there are human resources within the public sector suitable for the job.
- 2.3.3. In order to ensure knowledge and skills which cannot be secured within the public sector, it is necessary to plan the retaining of outside counsel. Outside counsel should be picked through the public tender procedure, and their duties and responsibilities should be defined in detail.
- 2.3.4. Project teams usually have got the following structure:
- the project committee (which supervises the work of other members and adopts key decisions),
 - the project director (in charge of finances, human resources, legal affairs, logistics and other activities essential for smooth progress of the project),
 - the project manager (in charge of co-ordinating all activities in the preparation and implementation of the project, monitoring the workflow of implementation of the project, management of cash flows and the like),
 - the head of contracting (in charge of activities related to the conclusion of contracts and monitoring of their implementation, within the meaning of performance of all contractually foreseen obligations and taking of all necessary legal actions),
 - the negotiating team,
 - technical advisors within the public sector,
 - outside counsel (if necessary).

STEP 3 - DECISION ON USING THE PPP MODEL

3.1. Approving the use of the PPP model

- 3.1.1. The presentation of a business case is the foundation stone for selecting one of the options of the selected solution, and the selection criteria would be the lowest cost for the public sector (the best value for money (VfM)) or the best ratio between the quality of the service and the costs (the most economically advantageous option). It is only by using one of the said criteria, based on the results of preliminary analyses and a detailed presentation of the business justifiability, that it is possible to make a decision on whether it is justifiable to use the PPP model.
- 3.1.2. The decision on whether it is justifiable to use the PPP model is taken by the Agency if, on the basis of the results of preliminary analyses and the presentation of business justifiability, that is, the Public Sector Comparator (PSC), it is evaluated that the value for money (VfM) is acceptable, that is, that the costs of the public sector over the lifetime of the project would be lower in the case of the PPP model than in the case of traditional procurement or that the use of the PPP model would ensure some other important advantage (such as easier access to the energy supply market, new knowledge, and the like). In making an appraisal of the expected value for money, it is necessary to make an objective appraisal of whether the private sector, i.e., potential tenderers, have sufficient experience, knowledge and opportunities (such as access to favourable sources of funding) to offer and deliver the appropriate solution. Criteria for the appraisal and selection of PPP projects are set out in detail in the Regulation on the criteria.
- 3.1.3. It is only public bodies, i.e., entities bound to adhere to the Public Procurement Act (hereinafter the contracting authorities), in charge of the provision of the public service, which is the result of the proposed project (Article 10 of the Act on PPPs), including the expert commission for concessions, that may submit project proposals to the Agency for appraisal. According to the Concessions Act (Articles 12 and 13 of the said Act), if during the implementation of the procedure which precedes the publication of a public tender procedure the expert commission for concessions concludes that the award of a concession has got the characteristics of a PPP project (which usually covers all concessions for public works and public services), it is obligated to provide for the implementation of the further course of the procedure in accordance with the provisions of the Act on PPPs, that is, submit the project proposal to the Agency for its approval.
- 3.1.4. Only projects with respect to which the Agency approves the use of the PPP model may have the status of a PPP project (Article 12 of the Act on PPPs) and may be referred to as such in public communications. The purpose of the provision is to correctly inform the public with a view to making a differentiation between PPP projects and projects not having such status, in line with the definition of the Act on PPPs and the criteria laid down in the Regulation on the criteria.

- 3.1.5. The contracting authority has the duty to draw up preliminary studies and to carry out preliminary analyses, and to draw up and carry out the analyses of detailed business plans before the commencement of the PPP appraisal and selection procedure. The procedure begins by submitting a project proposal to the Agency with all information and schedules that are needed (Article II of the Act on PPPs, and Article 3 of the Regulation on the criteria). On the basis of the documents received and opinions obtained, provided that the Ministry of Finance issues its approval and that the criteria laid down in Articles 6, 7 and 8 of the Regulation on the criteria are met, the Agency issues a decision approving the proposed PPP project. The Agency must issue its decision within 90 days of the date of receiving the project proposal and the corresponding documents in the form of an administrative decision, against which it is possible to initiate an administrative dispute.
- 3.1.6. Considering that the drawing-up of the necessary documents and the project proposal for the procedure of approving the use of the PPP model is time consuming and costly, it is justified only if the project is above certain limit value (that would be the minimum of HRK 60 million, so that the said preparation costs would be within the acceptable 1% or 2% of the cost of the investment). In other words, regardless of the criteria laid down by law, the use of the PPP model is not acceptable for certain small value projects, because it is not possible to prepare them well, that is, the costs of implementation of the project become unacceptably high. The solution would be either to connect several small projects into one (the so-called bound project (uvezani projekt)) with a sufficient aggregate value to ensure good quality preparation, or to use another implementation model.
- 3.1.7. If the Agency decides that the criteria laid down in detail in Articles 3, 6, 7 and 8 of the Regulation on the criteria are met, provided that before hand the Ministry of Finance provides its approval to the project proposal and that opinions obtained from other central state administration bodies and local and regional self-government units do not include grounds for a different decision, the Agency approves the use of the PPP model in the implementation of the proposed project.
In accordance with the provisions of the Act on PPPs, the Agency must request the Ministry of Finance to provide its approval in the procedure of approving the project proposal (Article II, paragraph 3 of the Act on PPPs), which includes an appraisal of the fulfilment of the obligations of the contracting authority in terms of the regulations which govern the planning and use of funds from the State Budget, and the appraisal and acceptability of fiscal risks entailed in the implementation of the proposed project.
In accordance with the provisions of the Act on PPPs, the Agency may decide to request other state administration bodies and local and regional self-government units to issue opinions on the conformity of the goals of the proposed project with the goals of the national strategy and of sector, that is, county, town and municipal development strategies. The said opinions are not individually binding, because the proposed project should not necessarily be connected with all strategies with respect to which an opinion was sought, but they are a foundation stone for the appraisal by the Agency as to whether the goals of the proposed project are in line with the strategically set goals at any level and in any of the sectors.
- 3.1.8. The list of selected PPP projects is published and updated in terms of its current status (approved, public tender procedure underway, invitation to tender published - selection

of private partner, selection of private partner underway) on the website of the Agency (www.ajpp.hr).

If after the project proposal is approved by the Agency the contracting authority fails to initiate the public procurement procedure within the prescribed term (Article 12, paragraph 4 of the Act on PPPs), that is, after concluding a contract with the selected private partner, the approved PPP project is removed from the list of approved projects on the Agency's website.

3.2. Research of the market - interests of potential investors

- 3.2.1. One of the reasons for the publication of approved PPP projects on the Agency's website is to check the interest of potential investors, and to check the structure of the proposed PPP. For that purpose, the Agency may organise presentations of the projects offered. In order to ensure successful implementation of the PPP model, it is important to ensure the interest of potential investors, and also the best possible competition by and between potential investors. Namely, only a PPP project agreed in the described way can be a successful PPP project. To the contrary, all efforts used and the related costs are useless. Therefore, research of the interest of the market in approved projects, before the publication and implementation of the (expensive) public tender procedure for the selection of a private partner, is also one of the important functions of the Agency.
- 3.2.2. If it turns out that on the market there is no interest in the offered project, that is, that the structure of the project should change to make it more attractive to potential investors and tenderers, the Agency must notify the public body having proposed the project. The decision on whether to proceed with the procedure regardless of the notification made by the Agency on the insufficient interest on the market or to change and resubmit a new proposal of the PPP project for approval, is a decision which must be made by the proponent of the project.

STEP 4 - DRAWING UP AND APPROVING TENDER DOCUMENTS

- 4.1. After the Agency approves a project, the contracting authority may begin to draw up tender documents for the selection of a private partner, i.e., the implementation of the project according to the PPP model.
- 4.2. The contracting authority must submit the tender documents to the Agency for its approval. The content of the tender documents should be in line with the project approved by the Agency, especially in terms of risk distribution and in accordance with the legislation governing the field of public procurement and the provisions of the Regulation on the criteria (Article I2). The contracting authority also makes the decision which of the two possible public procurement procedures (the negotiated procedure or the competitive dialogue) should be used in the case in question.
- 4.3. The Agency makes an assessment of the content of the submitted tender documents and their conformity with the approved project proposal, especially in the part relating to the duration of the contract period, risk distribution and the existence of a positive value for money (as stipulated in Article I3, paragraphs 1 and 3 of the Regulation on the criteria).
- 4.4. In the assessment procedure, the Agency may request an approval of the Ministry of Finance, that is, an opinion of the competent ministry on the conformity of the tender documents with the approved project proposal (Article I3, paragraph 2 of the Regulation on the criteria).
- 4.5. If it decides that the tender documents are in conformity with the approved project proposal, and especially in terms of the mentioned elements (the contract period, risk distribution, positive value for money), the Agency should issue a decision approving the tender documents within 30 days of the date of receiving a complete set of tender documents (Article I3, paragraph 4 of the Regulation on the criteria).
- 4.6. The Agency may approve tender documents even if there are deviations in relation to the said elements from the content of the approved project proposal if the changes are the result of justified reasons, for which there must be a credible explanation, and provided that the financial sustainability of the project was not undermined or the public interest jeopardised (Article I3, paragraph 7 of the Regulation on the criteria).
- 4.7. After the public body obtains the Agency's approval of the tender documents, the preconditions for the initiation of the public procurement procedure are satisfied. The contracting authority may initiate an administrative dispute against a decision not approving the tender documents.

STEP 5 - IMPLEMENTING THE PUBLIC TENDER PROCEDURE, SELECTING THE PRIVATE PARTNER AND CONTRACTING

5.1. General remarks

The procedure of selecting a private partner is a public procurement procedure regulated in the legislation governing public procurement or a concession award procedure regulated in the legislation governing concessions. Public private partnership contracts are therefore concluded as either public procurement contracts or concession contracts.

Namely, if a PPP project is based on the award of a concession, in the part relating to the procedure of selecting a private partner/concessionaire, the relevant concession award procedure stipulated in the Concessions Act is applied. If the concession being awarded has got mostly the characteristics of a public works concession, the relevant sector-regulating law, connected with the procedure of selecting a concessionaire/private partner, will refer to the relevant provisions of the Public Procurement Act. If the concession being awarded has got mostly the characteristics of a services concession, the procedure of selecting a concessionaire/private partner will be carried out according to the rules and the procedure laid down in the sector-regulating law.

- 5.1.1. The Public Procurement Act stipulates five different public procurement procedures, viz.: open procedures, restricted procedures, and negotiated procedures with or without prior publication of the contract notice, the competitive dialogue and design contests.
- 5.1.2. Public procurement procedures are procedures which the contracting authority bound to adhere to the Public Procurement Act must conduct before concluding a public procurement contract. According to the Act on Public Private Partnerships, a public body is any body which is the contracting authority within the meaning of the legislation governing public procurement. Therefore, contracting authorities within the meaning of the Public Procurement Act are defined in Article 3 (contracting authorities) and Article 4 (contracting entities operating in the water, energy, transport and postal services sectors) of the said Act, and the List of Entities Bound by the Public Procurement Act is included in the Regulation on the List of Entities Bound by the Public Procurement Act.
- 5.1.3. In view of the complexity of the subject-matter of procurement, that is, public private partnership as a long-term contractual and partner relationship between a public and a private partner, frequently because it is not possible to completely pre-determine the price and the risks arising from the performance of the contract, two public procurement procedures will usually be used in practice: **the negotiated procedure with prior publication of the contract notice and the competitive dialogue.**
- 5.1.4. The public procurement procedure is a strictly formal procedure in which the contracting authority should respect the provisions of the Public Procurement Act and the subordinate

legislation in the field, and the future private partner should follow all conditions and requirements of the contracting authority specified in the invitation to tender, the tender documents and the remaining documents submitted by the contracting authority in the public procurement procedure.

5.1.5. Article 13, paragraph 2 of the Public Procurement Act stipulates **a general condition for the commencement of each public procurement procedure**. The contracting authority may initiate the public procurement procedure only **when funds for procurement are planned**. Exceptionally, the contracting authority may initiate the public procurement procedure even **when funds for procurement are not planned**, either partly or fully, specifically:

- when the public procurement procedure is used to procure funds for the performance of the public procurement contract,
- when after the commencement of the public procurement procedure, and before the conclusion of the public procurement contract requiring payment over the following years, it is necessary to obtain a special approval of the competent body in accordance with the procedure stipulated in the legislation governing the budget,
- when the public procurement procedure is to end by conclusion of a framework agreement which does not create a contractual relationship,
- when the public procurement procedure is to end by establishment of a dynamic purchasing system.

5.1.6. Each public procurement procedure begins formally upon the adoption of **a decision on the commencement of the public procurement procedure**. The decision on the commencement of the public procurement procedure is an essential precondition (*conditio sine qua non*) for the commencement of any public procurement procedure.

The said decision includes the following information:

- the contracting authority,
- the subject-matter of procurement,
- the estimated value of procurement,
- the source of dedicated funds,
- the legal basis for conducting the public procurement procedure,
- the selected public procurement procedure,
- the contracting authority's authorised representatives in the public procurement procedure, and
- the contracting authority's responsible person (name and surname).

The decision on the commencement of the public procurement procedure must be signed by the contracting authority's responsible person.

5.1.7. After the adoption of the decision on the commencement of the public procurement procedure in which it is stated that one of the public procurement procedures is used, the contracting authority must publish an invitation to tender on the standards forms used for the purpose in the Electronic Public Procurement Classifieds in the Official Gazette (hereinafter the EPPC) (as the estimated value of procurement for PPP projects is greater than HRK 70 000.00), thus notifying economic operators that the contracting authority intends to award a public procurement contract. The main purpose of publishing the invitation to tender is to distribute relevant information needed by all economic operators who are interested in the information, so that they might evaluate whether they wish to take part in

the public procurement procedure. As of the accession of the Republic of Croatia to the European Union, contracting authorities will have the duty to publish procurement notices in the Official Journal of the European Union (OJEU) if the estimated value equals or is greater than the European thresholds laid down in the Regulation on public procurement notices and records.

- 5.1.8. The form and content of the standard forms for public procurement are laid down in the Regulation on public procurement notices and records. The Regulation includes 26 standard forms for procurement notices, 14 of them for procurement notices of greater value, 10 forms for procurement notices of small value, and 2 forms for concessions.

5.2. Negotiated procedure with prior publication of the contract notice

- 5.2.1. The Public Procurement Act defines the negotiated procedure as a procedure whereby the contracting authorities consult the economic operators of their choice and negotiate the terms of contract with one or more of these.

- 5.2.2. The contracting authority may use the negotiated procedure with prior publication of the contract notice if one of the conditions laid down by law is fulfilled (for example, if in the open or restricted procedure, all submitted tenders were unsuitable (the price exceeds the funds) or unacceptable (the offer meets the exclusion criteria), or if the subject-matter of procurement are intellectual services - design, etc.). However, for the purposes of concluding a public private partnership contract (for example, in the case of a larger and more complex subject-matter of procurement where it is impossible to foresee the scope of the job in advance, and where tenderers are not able to offer the aggregate price), the contracting authority may not use the negotiated procedure with prior publication of the contract notice **where in view of the nature of the works, supplies or services or in view of the risks entailed in the performance of the subject-matter of procurement it is not possible to determine the price in advance.**

It is precisely for the said reason that the Act permits negotiations between the contracting authority and the tenderer, so that the terms and conditions of the future contract might be clarified and so that the contracting authority might establish which initial offer is better for the contracting authority on the basis of the published selection criteria.

- 5.2.3. After the decision on the commencement of the public procurement procedure is published, stating that the negotiated procedure without prior publication of the contract notice is used, the contracting authority has the duty to have the invitation to tender published in the EPPC on the standard form for such publications, in which his needs and requirements regarding the procurement must be stated. Conditions concerning the suitability of economic operators to be invited to negotiate must be stated, and also information on the type of proof they must enclose to the **request to participate**, for the purpose of proving their suitability.
- 5.2.4. Economic operators interested in taking part in a public procurement procedure shall submit the **request to participate** to the contracting authority within the time limit set for submission. Along with their requests to participate, candidates should also submit documents proving their suitability, that is, the meeting of conditions set by the contracting authority.

The contracting authority may not open requests to participate before the expiration of the time limit for their submission.

The time limit for the submission of requests to participate, which is set by the contracting authority in the notice, is at least 37 days of the submission of the notice in the EPPC if the estimated value of procurement equals or is greater than the European thresholds laid down in the Regulation on public procurement notices and records, that is, 25 days for public procurement procedures the estimated value of which is less than the said thresholds. The time limit for the submission of requests to participate may be shortened by 7 days if the notices are drawn up and transmitted by electronic means. Exceptionally, in the case of urgency, the contracting authorities may use an even shorter term for the submission of requests to participate - at least 10 days, if the notice was drawn up and submitted by electronic means and by using the standard forms for notices.

- 5.2.5. The invitation to tender in a negotiated procedure includes information on the number of candidates to whom the invitation to negotiate will be submitted, where in the case of a sufficient number of suitable economic operators, the number of candidates to be invited by the contracting authority may not be less than **three**.

The procedure is conducted in two interconnected instances.

- 5.2.6. **In the first instance**, which is open to all interested economic operators, the contracting authority evaluates the suitability of the candidates who submitted requests to participate in response to the invitation to tender. After the requests to participate are received, the contracting authority should make an assessment of the requests received based on the conditions set out in the invitation to tender. The contracting authority, therefore, makes the assessment whether the candidates are able to perform the contract based on the following:

- a) legal and business capacity,
- b) non-existence of a criminal record,
- c) financial and economic standing, and
- d) technical and economic ability.

- 5.2.6.1. The contracting authority must draw up **minutes** concerning the assessment of the suitability of each candidate. The minutes must include all relevant circumstances, and the results of the assessment must be sent to both successful and unsuccessful candidates. The contracting authority must send a **decision on the inadmissibility of participation** to all candidates who are not to be invited to submit a tender, within 7 days, and if the shortened time limits are applied no later than 3 days of the date of its adoption. The decision on inadmissibility of participation must include reasons for such inadmissibility.

Any candidate must be allowed access upon his request to such part of the minutes which relates to his request to participate, which must be taken into consideration when drawing up the minutes.

Candidates who are dissatisfied with the decision made may file an appeal with the State Commission for Supervision of Public Procurement Procedure against the decision concerned, if they hold their rights were violated.

- 5.2.6.2. Only such candidates who meet the suitability criteria are entitled to be invited to negotiate.

However, the contracting authority may invite a limited number of suitable candi-

dates, meaning that some suitable candidates might not be invited to negotiate. The number of candidates to be invited to negotiate is set depending on the subject-matter of procurement, and the contracting authority must state it in the invitation to tender (contract notice). Where there are a sufficient number of suitable economic operators, the number of candidates to be invited by the contracting authority may not be less than three. Nonetheless, if the contracting authority establishes that the number of suitable candidates is greater than the published number of candidates to whom an invitation to tender is to be sent, the contracting authority may invite all or select candidates from amongst the ranks of suitable candidates in line with the published number and rules it intends to apply. Therefore, the selection must be based on objective and non-discriminatory criteria, so that the contracting authority may invite such candidates who fit the suitability criteria in the best possible way (for example, more experience, better financial standing, etc.).

5.2.6.3. Furthermore, if the contracting authority establishes that the number of suitable candidates is lower than the published number of candidates to be served with an invitation to negotiate, the contracting authority may proceed with the procedure by inviting one or more suitable candidates. The contracting authority may not include additional economic operators in the negotiating procedure or candidates who failed to prove their suitability. The number of candidates to be invited by the contracting authority must ensure tendering, while the rules which the contracting authority intends to apply must be objective and non-discriminatory and must be published in the invitation. If there are no suitable candidates, the contracting authority must cancel the procedure.

5.2.7. **In the second instance**, the contracting authority sends an **invitation to negotiate** to all selected suitable candidates at the same time. To the written invitation, the contracting authority must enclose tender documents and any other documents that might be necessary, or the contracting authority should state in the invitation that the tender documents are to be made available by electronic means.

The invitation to negotiate should include the following information:

- a) the deadline for the receipt of initial tenders, the postal or electronic address to which the initial tenders must be sent, and the language in which the initial tenders must be drawn up,
- b) a reference to the contract notice based on which the invitation to submit an initial tender is sent,
- c) all the information that the initial tender must contain,
- d) the Internet address at which the tender documents and any supporting documents are available, if available by electronic means,
- e) the award criterion or criteria, which the contracting authority determined in relation to or exceptionally based on the order of their significance, and
- f) all the information about the required supporting documents and all other relevant conditions.

5.2.7.1. According to the Act on Public Private Partnerships, **before the initiation of the procedure for the selection of a private partner** (public procurement), therefore before the adoption of the decision on the commencement of the public procurement procedure, the public body - contracting authority has the duty to submit to the Agency for Public Private Part-

nership a copy of the tender documents and all enclosures for assessment and approval, and the Agency has the duty to issue a decision on the conformity of the documents with the approved project proposal within the prescribed term.

- 5.2.7.2. At this point of the procedure, the selected candidates are notified in more detail about the subject-matter of procurement. The **tender documents** relating to the negotiating procedure will provide the basis for negotiations, that is, for the drawing-up of initial tenders, because the selected suitable candidates in this phase of the procedure will be invited to submit their initial tenders which will serve as the basis for negotiations on the technical, economic, legal and/or other aspects of the contract. The tender documents are drawn up in the Croatian language. However, whenever necessary in view of the subject-matter of procurement, the contracting authority may also draw up the tender documents or a part thereof in some other language(s), along with Croatian.
- 5.2.7.3. The documents made available by the contracting authority to selected candidates can include the following: the draft contract, specifications of the output, detailed information on the standards and the level of services which should be performed, the payment mechanism, measures for contractual supervision and operation, the risk distribution matrix, the parameters of tender acceptability, information on the accessibility/availability of the location, a description of the procedural processes to follow and the timetable following up to the signing of the contract, and the like.
- 5.2.7.4. For the selection of a private partner, the following criteria are used: the lowest price or the most economically advantageous tender. In the application of the criteria, the price means the net present value which relates to the aggregate of all costs over the contractual period. The public body - contracting authority initiating the procedure of public procurement for the selection of a private partner should set the discount rate which the tenderers should use in calculating the NPV in the procedure concerned in the tender documents.
- 5.2.7.5. Negotiations are based on the basic **principles of equal treatment and prohibition of any discrimination**. The contracting authority negotiates separately with each tenderer about **any of the parts of the initial tender** (technical, economic, legal and other aspects of the contract) in order to ascertain which initial tender is the best under the published selection criteria. The contracting authority may not provide information during the negotiations in a way that would discriminate against or favour any of the tenderers included in the process.
- 5.2.7.6. The contracting authority may conduct negotiations in several consecutive phases to gradually reduce the number of initial tenders being negotiated. In such a case, the number of initial tenders is reduced on the basis of the published criteria for adopting the award decision and the tenderers whose initial **tenders are not to be reviewed must be notified accordingly, without any delay**. If, as the result of such decrease in the number of initial tenders, only one suitable tenderer remains, in the final phase of the negotiating procedure it is permitted to negotiate with only such one tenderer, but in the notice or in the tender documents the contracting authority must foresee such a possibility.

- 5.2.7.7. During the negotiations between the contracting authority and the tenderer, the terms and conditions of the contract are established and explained. Based on the results, the contracting authority shall call on the tenderers to submit their final tenders, including their final prices.
- 5.2.8. The contracting authority has got the duty to notify the tenderer(s) participating in the negotiating procedure of the finalisation of the negotiations. He may do so by pronouncing a round of the negotiations to be the final phase or by asking the remaining tenderer(s) to submit final tender(s) within a reasonable term. After the expiration of the deadline for the submission of final tenders, the tenders may not be altered in any way.
- 5.2.9. Final tenders are then opened and assessed on the basis of the selection criteria set out in the tender documents. The published criteria for the adoption of a selection decision, unless provided otherwise in the tender documents, may not change during the negotiating procedure. Consequently, the contracting authority may expressly foresee in the tender documents that the selection criteria might be changed. This is relevant only in the case where the most economically advantageous tender is being selected and during the negotiations it becomes evident that a new selection criterion or changed selection criteria are essential.
- 5.2.10. In the negotiated procedure, the opening of tenders may be attended by the authorised representatives of those tenderers who submitted their **final tenders**. Most frequently, that is the case when in the final phase of the procedure there are several tenderers, and even then only when their final tenders are to be opened (and not their initial ones)..
- 5.2.11. After the opening of tenders, the contracting authority or his authorised representatives in the procedure of public procurement and the expert services of the contracting authority, and independent professionals, if retained, carry on a review and assessment of tenders received within the deadline for the submission of tenders, in accordance with the conditions and requirements set out in the tender documents. They must check the form, content and the completeness of the tender, fulfilment of the criteria connected with the characteristics of the subject-matter of procurement (technical specifications) and the accuracy of the calculations.
- 5.2.12. In the procedure of tender review and assessment, the contracting authority corrects any **calculation errors** detected in the tenders, and immediately notifies the tenderer whose tender was corrected. The tenderer has the duty to confirm that he accepts the correction within **3 days** of the receipt of the notification about the calculation error. If the tenderer does not accept the correction within the requested time limit, the contracting authority will exclude his tender from the procedure as unacceptable.
Based on the results of the tender review and assessment procedure, the contracting authority has the duty to exclude any offer which has any of the defects set out in Article 84 of the Public Procurement Act. Such offers are unacceptable.
- 5.2.13. Minutes must be drawn up about the review and assessment of tenders. An analytical presentation of the requested and submitted information on the tenderers' suitability, an assessment of the acceptability of tenders, and reasons for excluding them are a compulsory part of the minutes on the review and assessment of tenders.

An acceptable tender is any tender which does not include any of the grounds for exclusion under Article 84 of the Public Procurement Act.

- 5.2.14. The contracting authority must select the best tender from amongst the tenders remaining after exclusion according to the selection criteria.
- 5.2.15. Following the expiration of the deadline for the submission of tenders, the time limit for the adoption of the selection decision begins. The Act stipulates that in the tender documents the contracting authority may fix a reasonable term for adopting the selection decision. The contracting authority decides what is a reasonable term for adopting the decision in the public procurement procedure in question by taking into account the scope and complexity of the subject-matter of procurement, the estimated value of procurement, the urgency of performing the subject-matter of procurement, etc. However, if the contracting authority fails to set the time limit for adopting the selection decision in the tender documents, the statutory 30-day period of the expiration of the time limit for the submission of tenders applies (for contracting entities, the statutory term is 60 days).
- 5.2.16. Before the public body makes the decision on the selection of a private partner, in accordance with the Act on Public Private Partnerships (Article 14) it has the **duty** to submit the final draft of the contract, including any schedules thereto, to the Agency for its assessment and approval, and to obtain a consent of the Ministry of Finance to the final draft of the contract. The Agency assesses and approves the submitted final draft of the contract in accordance with the provisions of the Regulation on the criteria (Articles 14-17), and the Regulation on the content of public private partnership contracts. A public private partnership contract may be concluded with the selected tenderer/private partner only pursuant to the decision of the Agency, which includes the consent of the Ministry of Finance to the final draft of the contract.
- 5.2.17. The contracting authority makes a **decision on selection** or, provided that all conditions laid down in law are met, a **decision on cancellation**.
Only one tender is sufficient to make the selection.
It is an obligation of the contracting authority to send the selection decision and a copy of the minutes on the review and assessment of tenders by registered mail or another appropriate traceable means of communication to each and every tenderer without any delay. The selection decision must be forwarded to all tenderers, without any delay, otherwise it becomes null and void. Information that must be included in the selection decision are set out in Article 86, paragraph 1 of the Public Procurement Act.
- 5.2.18. Adoption of the selection decision does not automatically result in the award of the contract. The selection decision is a decision of the contracting authority concerning the tenderer with whom it intends to conclude a public procurement contract, i.e., public private partnership. The contracting authority may not sign a contract within the standstill period, which is 15 days of the date of delivery of the selection decision to each and every tenderer. The said time limit ensures that a dissatisfied party has got time to file for the protection of its rights before the State Commission for the Supervision of Public Procurement Procedure (hereinafter the State Commission) in the form of an appeal or otherwise as stipulated in the Act. Upon the expiration of the standstill period, if the legal protection procedure is not initiated, that is, upon the delivery of a decision of the State Commission dismissing or rejecting an

appeal, the selection decision becomes enforceable and the contractual relationship between the contracting authority and the selected tenderer is created.

- 5.2.19. Regarding public private partnerships, in this phase of the procedure an important difference in comparison to the procedure laid down in the Public Procurement Act is that the contracting authority must obtain the Agency's consent to the final draft of the contract before having it signed (Act on Public Private Partnerships, Article 14).
- 5.2.20. Another important difference might arise in a situation where the contract is not to be signed by the selected tenderer, but by the authorised representative of a special purpose vehicle (hereinafter the SPV) being formed by the tenderer for the purposes of implementing the PPP project concerned. Such a possibility and all obligations of the tenderer in that sense must be clearly set out in the tender documents. Where such a possibility is foreseen in the tender documents, the tender documents must also foresee the tenderer's obligation to enclose to the tender a draft deed of establishment for such an SPV, which is binding upon the tenderer. In such a way, it is already in the phase of tender review that the contracting authority is provided with a detailed view of the mutual relations of the founders of the SPV and their rights and responsibilities, including the right of representation and signing of the contract. It is also common practice that the founders of an SPV, along with the invested share capital, provide some other type of guarantee for the performance of the SPV's obligations (bank guarantees, corporate debentures, bills of exchange, etc.). Whenever such a possibility is foreseen in the tender documents, which is standard practice when it comes to SPVs, a situation is therefore possible where the contracting authority does not sign the contract with the selected tenderer, but with the SPV formed by the tenderer. That is another important difference in relation to the procedure for concluding a contract prescribed for the classical forms of public procurement contracts or concession contracts, which must be taken into account and which might arise whenever a public procurement contract or a concession contract has got the characteristics of a PPP.
- 5.2.21. The contracting authority must have a contract notice published on a standard form in the Electronic Public Procurement Classifieds in the Official Gazette within 48 hours of the adoption of the selection decision at the latest.
- 5.2.22. On completion of this last step, the contracting authority will have performed his obligations laid down in the Public Procurement Act. What follows is the performance of the contract (the delivery, controlling the subject-matter of procurement, payment, the guarantee, etc.) and is basically not regulated in the public procurement legislation, but belongs to the field of the Civil Obligations Act. One of the consequences of the set-up of the public procurement system as a whole is that a public procurement contract awarded pursuant to the public procurement procedure laid down in the Act may not be changed. From the standpoint of free and fair competition, an awarded contract is performed in accordance with the specifications and conditions included in the contract in question. Where there are objective and justified reasons because of which it is indispensable to change certain material conditions of the contract, the process must be carried out in accordance with the conditions laid down in law and it is necessary to launch a new public procurement procedure, so that an annex to the contract or a new satisfactory contract might be concluded.

5.2.23. Any and all amendments to an awarded PPP contract changing the rights and obligations of the parties must be submitted to the Agency for its approval, and consent of the Ministry of Finance must be also obtained (Article 14, paragraph 5 of the Act on PPPs, and Article 18 of the Regulation on the criteria).

After a PPP contract is concluded, it is necessary to submit the contract and all schedules and amendments thereto, i.e., the information from the contract, to the Agency for the purpose of entry in the Register of PPP Contracts, in accordance with the provisions of the Ordinance on the organisation and keeping of the Register of the PPP Contracts (Article 18 of the Act on PPPs).

5.3. The competitive dialogue

5.3.1. The Public Procurement Act defines competitive dialogue as a procedure wherein any economic operator may request to participate and whereby the contracting authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates selected are invited to submit their tender.

5.3.2. The competitive dialogue:

- introduces more flexibility in particularly complex subjects of procurement and major investment projects,
- is used in cases where open and restricted public procurement procedures are not suitable for projects,
- enables successive submission of tenders and/or solutions,
- enables dialogue after the submission of tenders.

5.3.3. The Public Procurement Act does not foresee the possibility of using this procedure for contracting entities as they may freely choose the negotiated procedure with prior publication of the contract notice.

5.3.4. In the case of complex investment projects, such as PPP models, economic operators often come together to use a concerted effort towards the contracting authority. A group of tenderers is a grouping of several economic operators whose aim is to submit a joint tender, regardless of the way in which their relationship is regulated, and who assume an obligation to perform procurement for the contracting authority within the same or different professional field in accordance with the contract, based on the principle of joint and several liability.

5.3.5. The contracting authority may not require any group of tenderers to assume a formal legal form before the submission of their joint tender (for example, a special purpose vehicle, SPV), but after the selection of their tender a legal form may be requested to the extent it is necessary to perform the contract in a satisfactory fashion, if that is stated in the tender documents. Tenderers who submit a joint tender are bound by joint and several liabilities. In that sense, the Act on PPPs stipulates that a special purpose vehicle is an undertaking that may be formed by a private partner for the purpose of concluding a PPP contract and/or implementing a PPP project. An SPV may take part solely in the performance of the

PPP project for the implementation of which it was set up, and it is established in accordance with the provisions of the Companies Act.

- 5.3.6. Article 13 of the Public Procurement Act lays down a general rule that contracting authorities may freely chose either an open or restricted procedure. The Public Procurement Act continues in the said article that **under special circumstances** expressly stated in Article 20 contracting authorities may use the competitive dialogue and that ***in special cases and under special circumstances*** expressly stated in the provisions of Articles 14, 15 and 16 of the Public Procurement Act contracting authorities may apply the negotiated procedure with or without prior publication of the contract notice
- 5.3.7. The contracting authority will opt for the procedure of competitive dialogue in the case of **a particularly complex subject-matter of procurement** and if the conclusion of a contract is **not possible in an open or restricted procedure**.
- 5.3.8. The subject-matter of procurement is regarded as particularly complex if the contracting authority is objectively not able to state the following:
 a) technical specifications (technical descriptions of the subject-matter of procurement), and/or
 b) legal and/or financial conditions of the project.
 The inability to determine precise legal and/or financial conditions of the subject-matter of procurement is typical for public private partnerships, because usually it occurs in the case of projects where the contracting authority wishes the private partner to finance, design, build and maintain a school, hospital or prison, i.e., to provide the whole public service (construction, maintenance, operation, security, nutrition, etc.) frequently over a long period of time. Legal and financial conditions are quite complicated in the said case, so one cannot say with certainty whether the result of the dialogue will be a concession contract or a public procurement contract.
- 5.3.9. In Article 13, the Public Procurement Act lays down general conditions for the commencement of the public procurement procedure. The conditions are the same for all procurement procedures. Therefore, the contracting authority may launch a public procurement procedure when funds for procurement are planned, and the public procurement procedure begins after the decision on the commencement of the public procurement procedure is adopted. However, the contracting authority may proceed with the public procurement procedure even when funds for procurement are not planned, either fully or partly, when the public procurement procedure is to be used to procure funds for the performance of the procurement contract.
- 5.3.10. **The first-instance** of the procedure is the same as in the negotiated procedure with prior publication of the contract notice. After the decision on the commencement of the public procurement procedure is adopted, in which it is stated that the competitive dialogue is to be used, the contracting authority publishes an invitation to tender on a standard form in the Electronic Public Procurement Classifieds in the Official Gazette, in which its needs and requirements regarding the subject-matter of procurement must be stated. Suitability criteria which economic operators must meet to be invited to the dialogue, and information on the proof they must enclose to the **request to participate** for the purpose of proving their suitability form a compulsory part of the notice.

In response to the invitation to tender, all economic operators having an interest in participating in the procedure may submit their **request to participate**. The first instance of the said procedure is open to any and all interested economic operators.

- 5.3.10.1. The contracting authority must state its needs and requirements regarding the subject-matter of procurement in the invitation to tender and/or in the competitive dialogue descriptive documents.

The selection criterion in the case of competitive dialogue would be solely the most economically advantageous tender.

Criteria on which the contracting authority bases its selection in the case of the most economically advantageous tender are criteria connected with the subject-matter of the public procurement contract in question, such as quality, price, technical achievements, aesthetic, functional and ecological features, operating costs, cost-efficiency, post-sales service and technical assistance, delivery dates and delivery terms or completion deadlines for works, and the like

- 5.3.10.2. In the application of the criteria, the price means net present value which relates to the aggregate cost over the contractual period. A discount rate is used for the calculation of the net present value of a PPP project. The public body - contracting authority initiating the public procurement procedure for the selection of a private partner must fix a discount rate in the documents which tenderers must use in calculating the net present value in the procedure concerned.

- 5.3.10.3. In the notice or in the descriptive document, the contracting authority must state the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender. Those weightings can be expressed by providing for a range with an appropriate maximum spread.

Where, in the opinion of the contracting authority, weighting of the criteria chosen to determine the most economically advantageous tender is not possible for demonstrable reasons, the contracting authority shall indicate in the contract notice or, in the case of a competitive dialogue, in the descriptive document, the criteria in descending order of importance.

- 5.3.10.4. The contracting authority must also draw up a report on the reasons for the application of the criteria chosen to determine the most economically advantageous tender and their relative weighing, and, where possible, determine the proportionate value thereof in the overall system of valuation and the method of calculation.

- 5.3.10.5. Economic operators who are interested in participating in a procurement procedure must send a request to participate to the contracting authority within the fixed term. Time limits for submitting **requests to participate** are set in the same way as in the case of the negotiated procedure without prior publication of the contract notice. Along with requests, candidates should submit documents proving their suitability, i.e., the meeting of conditions set by the contracting authority. The contracting authority may not open any of the requests to participate received before the expiration of the time limit for their submission.

- 5.3.10.6. Requests to participate received within term are assessed on the basis of the criteria specified in the invitation to tender. The contracting authority should make an assessment of

the requests received and evaluate whether the candidates are able to perform the contract, on the basis of an evaluation of their:

- a) legal and business capacity,
- b) non-existence of a criminal record,
- c) financial and economic standing, and
- d) technical and economic ability.

5.3.10.7. The contracting authority must draw up **minutes** concerning the assessment of the suitability of each candidate. The minutes must include all relevant circumstances, and the results of the assessment must be sent to both successful and unsuccessful candidates. The contracting authority must send **a decision on the inadmissibility of participation** to all candidates who are not to be invited to participate in the competitive dialogue within 7 days of the date of its adoption at the latest. The decision on inadmissibility of participation must include reasons for such inadmissibility.

Any candidate must be allowed access upon his request to such part of the minutes which relates to his request to participate, which must be taken into consideration when drawing up the minutes.

Candidates who are dissatisfied with the decision made may file an appeal with the State Commission against the decision concerned if they hold their rights were violated.

5.3.10.8. Only such candidates who meet the suitability criteria are entitled to be invited to the competitive dialogue.

However, the contracting authority may invite a limited number of suitable candidates, meaning that some suitable candidates might not be invited to participate in the competitive dialogue.

5.3.10.9. The contracting authority must state the number of candidates to whom an invitation to participate in competitive dialogue will be sent in the notice, and it is determined depending on the subject-matter of procurement and may not be under **three**. The rules must be objective and non-discriminatory and must be published. If the contracting authority determines that the number of suitable candidates is greater than the announced number of candidates to whom an invitation to participate in competitive dialogue will be sent, the contracting authority may invite all or select the best candidates from amongst those suitable in line with the number and rules stated in the notice. Therefore, the selection must be based on objective and non-discriminatory criteria, and the contracting authority may invite candidates who best satisfy the criteria of suitability (for example, more experience, better financial standing, etc.). Grounds for selection are stated in the minutes. However, the contracting authority may proceed with the procedure by inviting one or more suitable candidates if he establishes that the number of suitable candidates is lower than the announced number of candidates to whom an invitation to participate in competitive dialogue will be sent, and if there are no suitable candidates, the contracting authority must cancel the procedure.

5.3.11. **In the second instance**, the contracting authority must simultaneously and in writing **invite the selected candidates to participate in the competitive dialogue**. Attached to the written invitation must be the descriptive document and any supporting documents, or reference that the descriptive document is made directly available by electronic means.

- 5.3.II.1. The invitation to participate in the competitive dialogue must contain:
- a) a reference to the contract notice based on which the invitation to participate in the competitive dialogue is sent,
 - b) a reference to any possible adjoining documents to be submitted,
 - c) the relative weighting of criteria for the award of the contract or, where appropriate, the descending order of importance for such criteria, if they are not given in the contract notice,
 - d) the date and the address set for the start of consultation and the language or languages used.
- 5.3.II.2. Under the Act on Public Private Partnerships, even before the initiation of the procedure for the selection of a private partner (public procurement), i.e., before the issuing of a decision on the commencement of the public procurement procedure, the public body - contracting authority is obligated to submit a copy of the descriptive document and its schedules to the Agency for Public Private Partnership for assessment and approval, and the Agency must issue a decision on conformity of the documents with the approved project proposal.
- 5.3.II.3. The documents made available by the contracting authority to selected candidates can include the following: the draft contract, specifications of the output, detailed information on the standards and the level of services which should be performed, the payment mechanism, measures for contractual supervision and operation, the risk distribution matrix, the parameters of tender acceptability, information on the accessibility/availability of the location, a description of the procedural processes to follow and the timetable following up to the signing of the contract, and the like.
- 5.3.I2. The contracting authority opens a **dialogue** with the candidates, the aim of which is to identify one or more means best suited to satisfying the needs and requirements of the contracting authority. The contracting authority may discuss all aspects of the public contract with the candidates during this dialogue. The chosen candidates should be asked to provide their proposals connected with the project, which will include their approach to project design, company/consortium structure, financial proposals, comments on the general aspects of commercial terms and risk distribution, and all proposed variants.
- 5.3.I3. The contracting authority may not provide information in a discriminatory manner which may give some candidates an advantage over others in the competitive dialogue procedure. During the dialogue, the contracting authority may discuss with each candidate only the solution(s) proposed by such candidate. The solution(s) proposed by other candidates may be discussed only if they grant their consent.
- 5.3.I4. The contracting authority may provide for the procedure of competitive dialogue to take place in **several successive stages**. Should the contracting authority take advantage of such possibility, the number of solutions to be discussed during the dialogue stage by applying the award criteria stated in the contract notice or the descriptive document may be reduced. The contract notice or the descriptive document must indicate that recourse may be had to this option. The contracting authority has the duty to notify the candidate of its **decision not to consider a solution in the dialogue stage**, including the relevant reasons,

by sending the decision by registered mail or another appropriate traceable means of communication, not later than seven days of the date of completion of the said stage.

The contracting may continue such dialogue until it can identify the solution or solutions which are most capable of meeting its needs and requirements. At the end of the dialogue stage, there must be a sufficient number of solutions to ensure competition.

- 5.3.15. At the end of the procedure, the contracting authority must conduct the final phase of the competitive dialogue. The Public Procurement Act states that the contracting authority must send, without any delay, to **all participants in the dialogue, the decision on the conclusion of the dialogue stage, in which the basic characteristics of the chosen solution or solutions are specified**. The decision must be sent by registered mail or another appropriate traceable means of communication.
- 5.3.16. After the dialogue is concluded by **an invitation to submit final tenders**, the contracting authority must ask **the remaining candidate(s)** to submit their **final tenders** on the basis of the basic characteristics of the solution or solutions identified during the dialogue stage.
- 5.3.17. In the invitation, the contracting authority has the duty to state the final deadline for the receipt of tenders, the address to which such tenders must be sent and the language(s) in which the tenders must be drawn up. The tenders must contain all the elements required and necessary for the performance of the subject-matter of procurement of the contracting authority.
- 5.3.18. In reviewing the tenders, the first task is to check whether the tenders are complete and whether they meet the basic elements of the chosen solution(s). If the tenderer has obviously failed to respond to the required elements in line with the needs and requirements of the contracting authority or has materially changed output specifications, or refuses the risk distribution base or in any other way demonstrates that he is not ready to assume a project according to the foreseen conditions, the tender should be excluded.
- 5.3.19. The tenders should be categorised according to their economic feasibility. Such an evaluation should be based on the relationship between the price, risks and all other criteria stated in the invitation to tender or in the descriptive documents.
These tenders may be **clarified, specified and fine-tuned** at the request of the contracting authority, on condition that such clarification, specification, fine-tuning or additional information **does not involve changes to the basic features of the tender**, but not in a way which is likely to distort competition or have a discriminatory effect. The foregoing relates to the procedure which precedes the selection of the most economically advantageous tender. The competitive dialogue is the only public procurement procedure which permits the act of clarifying, specifying and fine-tuning final tenders.
Considering that the competitive dialogue procedure is conducted for particularly complex and expensive projects, and participation in the procedure is also quite expensive, and there is no guarantee of selection, the contracting authority may foresee compensation for those participating in the procedure.
- 5.3.20. The procedure which follows until the adoption of the decision on selection, the conclusion of the procurement contract, i.e., publication of the contract award notice, is identi-

cal to the one described in the negotiated procedure with prior publication of the contract notice, so everything that was said before applies to the competitive dialogue procedure. This also relates to the procedure of obtaining the approval of the Agency to the final draft of the contract, the establishment of an SPV and the signing of the contract with an authorised representative of the SPV (instead of the tenderer), and the submission of the contract, i.e., information from the awarded contract to the Agency for the purpose of entry in the Register of Public Private Partnership Contracts.

STEP 6 - IMPLEMENTATION OF THE CONTRACT

6.1. Obligations after the signing of the contract

- 6.1.1. After the signing of the contract, the contracting authority must send the contract and its schedules to the Agency for the purpose of entry in the Register of PPP Contracts (Article 18 of the Act on PPPs). Along with the contract, the contracting authority must submit filled out registration forms, laid down in the Ordinance on the organisation and keeping of the Register of PPP Contracts¹, which is set up and maintained by the Agency. The purpose of entering contracts in the Register is to record all awarded contracts and to monitor their implementation.
- 6.1.2. Usually, time limits within which one or both signatories must fulfil certain agreed pre-conditions for the entry into force of the contract begin to run as of the signing of the contract (such as the obtaining of any necessary permits and consents, the obtaining of any guarantees that are necessary, and the like).
- 6.1.3. The legal framework which governs contractual relations is the Civil Obligations Act.

6.2. Implementation of the contract

- 6.2.1. The most critical phase of contract implementation is usually the phase of construction or reconstruction of structures or infrastructure. Completion of the works (if agreed) is generally a precondition for the provision of the public service and the emergence of the payment obligation by either the final users, or the public partner. In other words, the period in question involves investments by the private partner, which is why it is extremely important that in the period concerned both partners make careful plans and implement all activities connected with the fulfilment of the assumed contractual obligations, and keep track of all related risks, so that there would be no unnecessary delays.
As soon as the works are finished, i.e., when the provision of the public service begins, receipts from the services rendered ensure a return on investment and the PPP project enters a safer phase of implementation.
- 6.2.2. In the phase where public services are already being provided, it is important for the public partner to ensure effective supervision of the standard of such services. A precondition for such effective supervision is ensured through the contractual provisions which define the relevant standards (usually in the form of an annex to the contract, which forms its component part) which the private partner is under the obligation to perform in the rendering of the services agreed (the so-called outgoing specifications), the organisation and procedures for ensuring effective internal and external supervision of the service standards, and a calculation of the rate at which the financial obligations should be reduced (possi-

¹ The Ordinance on the organisation and keeping of the Register of PPP Contracts has not entered in force before publishing of this Guide. Its adoption is scheduled till the end of 2009 and the Register will start work in 2010 as planned

bly also other measures, such as termination of the contract) in the case where the services provided are not at the agreed level. The said provisions must also include the obligations and rights of the partners, such as the obligation of the private partner to ensure that the public partner has got access to the location(s) where the services are rendered, verification of the procedures and access to the relevant documents, access to financial documents (especially where the distribution of profit is agreed), and the like.

- 6.2.3. Considering that PPP contracts are concluded on a long-term basis, it is important to ensure effective change management. The process involves a partner relationship, i.e., good co-operation on the part of both partners.
- 6.2.4. In order to ensure successful contract implementation management, the public partner must put in the required human resources, i.e., a monitoring team, which will include people with an appropriate level of knowledge, experience, capabilities and powers. It is important that they have good communication and problem-solving skills and that they are ready and capable of building good interpersonal relations,
- 6.2.5. The roles and responsibilities of all stakeholders in the implementation of a PPP contract should be clearly defined in order to ensure continuity of the management procedures, while taking into account the long-term character of the contract and the fact that the participants in the procedure will change during its term.
- 6.2.6. Risk management is a particularly important part of monitoring and supervising the implementation of any contract, so that during implementation there would not be any risk taking unawares, which might result in costs, which are a contractual obligation of both parties to the contract.
- 6.2.7. Where fee payments should be made from the budget, subject to appropriate decreases if the level of services provided is not satisfactory, a demanding part of monitoring the implementation of the contract is the calculation (monthly, quarterly, and annual - as foreseen in the contract) of the financial obligations of the public partner. The formulas, that is, the point-award system is quite complex. It takes into account the level of services provided as the basis for calculating any decreases if the services provided do not conform to the contractual specifications in all of their elements (such as deadlines, level, scope of delivery, etc.). Considering that the matter involves the process of proving quality of the services and the resulting financial consequences, the procedure as a whole is usually conditioned on the regular implementation of very strict procedures (including, but not limited to the procedures of inside and outside supervision, reports of any omissions, reporting, regular and unannounced controls, and the like), it involves complex calculations, and frequently the use of advanced IT systems and software made precisely for the purpose.
- 6.2.8. Good management of the implementation of contracts, i.e., PPP projects, is also extremely important with a view to ensuring good-quality control of fiscal risks. Regardless of who is to blame for the failure of a PPP project, the consequences are usually unplanned budgetary costs. Therefore, it is extremely important to take preventive action to avoid such situations and costs, which can be ensured only through quality organisation of management and supervision of PPP projects.

- 6.2.9. Contract implementation management may involve the drawing-up and implementation of the (agreed) plan for taking over employees by the private partner if the PPP project should result in reduced demands for public officials (for example, this frequently happens in PPP projects connected with the provision of health services).
- 6.2.10. Well-regulated mutual relations of the parties to the contract, subject to the delivery of the agreed service at the required level, open up opportunities for ongoing improvements and innovations which might additionally improve the manner or level of the public services rendered, regardless whether it concerns the price, term of delivery or the manner of providing services.

6.3. Resolving disputable situations

- 6.3.1. In view of the long-term nature of PPP contracts, the occurrence of disputable situations is very probable, and it is extremely important to foresee the manner of their resolution in the contract.
- 6.3.2. Disputes should be resolved as soon as possible and at the appropriate level in each organisation in order to avoid the unnecessary stalling of disputes.
- 6.3.3. Proposed solutions should be reviewed not only in the light of the content of the dispute, but also taking into consideration potential wider-ranging consequences of the proposed solution.
- 6.3.4. The public partner should review the possibility of drawing up a referential guide (manual) for all project-related contractual documents and a control list with key phases and issues which ought to be addressed during the life of the project.

6.4. Rights and obligations of the Agency

- 6.4.1. The Agency exercises its right to supervise the implementation of PPP projects pursuant to the Regulation on the supervision of implementation of public private partnership projects (hereinafter the Regulation on the supervision).
- 6.4.2. The Agency conducts the supervision with a view to monitoring the implementation of PPP projects and improving the performance of the contractual obligations of the public and private partner in the implementation of PPP projects.
- 6.4.3. All PPP projects are subject to supervision if their implementation began by the conclusion of a PPP contract or the establishment of a joint undertaking.
- 6.4.4. The Agency monitors the implementation of projects primarily by reviewing the project implementation report, which **the public partner must submit** to the Agency at 6-month intervals as a filled-out form, which is enclosed as an annex to and which forms part of the Regulation on the supervision..

- 6.4.5. For the purpose of conducting the supervision, the Agency may request the contractual parties to submit documents (stipulated in Article 7 of the Act on PPPs) relating to the implementation of PPP projects.
- 6.4.6. For the purpose of verifying the report and the documents received, the Agency may also carry out a hands-on inspection at the site of implementation of the PPP project in question, which is subject to the drawing-up of minutes.
- 6.4.7. If based on the supervision conducted the Agency observes any irregularities in the implementation of a PPP project, it has the duty to notify both the public and the private partner in writing. The notification should include recommendations as to the way of remedying the irregularities observed. The Agency must also notify other competent bodies of the irregularities observed.
- 6.4.8. The contracting parties have the obligation to report to the Agency any activities taken to remedy the irregularities observed at the latest within 15 days of the date of receiving the recommendation.

STEP 7 - THE END OF A CONTRACT (BY TERMINATION OR EXPIRY)

7.1. Introduction

- 7.1.1. Contracts are bilateral legal transactions, meaning that they are the result of the will of at least two sides. There are several types of contracts, but in civil obligations law the most important ones are the contracts of obligations. The said contracts are bilateral legal transactions which serve to establish a legal relationship with resultant obligations, and they include public private partnership contracts (hereinafter the PPP contract) as the main contract which is concluded by and between the public and the private partner, or the public partner and a special purpose vehicle, which regulates the rights and obligations of the parties for the purpose of implementation of the PPP project concerned.
- 7.1.2. Contracts create rights and duties for the parties to the contract, therefore for the legal entities who concluded the contract and whose will resulted in the contract. In the case of a PPP contract, on one side there is the public partner and on the other there is the private partner or a special purpose vehicle formed by the selected tenderer.
- 7.1.3. One of the main features of any relationship which involves obligations, including public private partnerships, is that the interest of those involved in the relationship is expressed through the fulfilment of the assumed obligations, meaning through termination of the relationship itself. If one were to examine the nature of subjective rights which involve obligations in greater detail, it is evident that by their very nature they are of **limited duration**, as opposed to, for example, subjective real rights (for example, the right of ownership), which are by their nature and function, usually, **permanent**.
- 7.1.4. A PPP contract is a contract which is concluded for a fixed term from 5 to 40 years, but just like all other obligations they are of limited duration, where the duration depends on the term stipulated in the contract. It is therefore understandable that the issue of termination of any obligation (contract) is much more important than, for example, the issue of termination of a relationship which involves real rights. Obligations are created at the moment when certain facts, which are called conditions precedent, take place. In the same way, obligations terminate upon the occurrence of certain facts which are in legal terms nothing more than conditions precedent for the end of the relationship.
- 7.1.5. The Civil Obligations Act (hereinafter the Civil Obligations Act, Official Gazette 35/05, 41/08) stipulates that any obligation terminates by agreement of the parties to the relationship, by performance, and in other cases laid down by law. Therefore, in accordance with the Civil Obligations Act, termination of an obligation may be either by a manifestation of human will (such as performance, compensation) or by some other legal facts independent of human will (such as an accidental inability to perform, expiration of time) which are laid down by law as reasons for termination of an obligation. In further text, we describe the most important and frequent reasons for termination of an obligation, with special focus on PPP contracts.

7.2. Expiration of time

- 7.2.1. Obligations concluded for a fixed period of time end on expiration of such period (for example, a PPP contract awarded for a 10-year period). In such a case, as opposed to termination, which is basically early extinction of a contract, extinction by expiration of time is a regular extinction of contract for the simple reason of expiration of the contractual term.
- 7.2.2. In the case of PPP contracts and their regular extinction, especially where a building or infrastructure was built pursuant to the contract which the private partner must transfer to the public partner on extinction of the contract, the contracts must include detailed provisions on the transfer of ownership in order to reduce the possibility of any disputes to the greatest possible extent.
- 7.2.3. The most important issue which must be regulated in a PPP contract is the issue of the standard of quality of the building or infrastructure at the time of handover or, in other words, the condition in which the building or infrastructure which is the subject-matter of the contract must be handed over to the public partner.
- 7.2.4. All rights for using the transferred building or infrastructure must also be transferred to the public partner, as well as technical documents necessary for use. The public partner may have the obligation to take over any employees working for the private partner at the moment of handover whose jobs are connected with the transferred buildings or infrastructure.
- 7.2.5. It is recommended that parties to a contract foresee the establishment, i.e., implementation of a programme, the implementation of which would begin one to two years before the expiration of the contract, and which would enable the private partner or a special purpose vehicle, if established, to take measures necessary to ensure the most successful handover possible.

7.3. Inability to perform

- 7.3.1. Whenever the performance of an obligation by one of the parties becomes impossible, the obligation of the other party also expires, and if the other party has already performed its obligations, it may request the defaulting party to ensure restitution according to the rules on the restitution of what was gained without grounds.
- 7.3.2. Inability should be the result of external extraordinary events occurring after the conclusion of the contract, which were not foreseeable at the time of concluding the contract, and which could not be prevented, avoided or remedied by any of the parties, and which are not attributable to any of the parties. Most of time they are external, extraordinary and unforeseeable circumstances occurring after the conclusion of the contract, which could not be prevented, remedied or avoided by either party. Usually, the events have the meaning of **force majeure**.
- 7.3.3. Provisions which regulate actions of the parties in the case of events which are attributable to force majeure, such as natural disasters (landslides, lightning, earthquakes, fires, and

floods), war, terrorist acts, civil unrest, strikes, blockades, embargo and similar events, must be part of any PPP contract.

7.4. Termination of contract

- 7.4.1. Termination is a way of extinction of a valid contract which is still **not performed** or is only **partly performed**.
- 7.4.2. Termination results in the extinction of a contract which is legally valid. Contracts which are not legally valid do not become extinct by termination, but by nullification. The grounds for nullification regularly already exist at the time of concluding the contract, while the cause of termination occurs after its conclusion.
- 7.4.3. Termination is different from cancellation. Cancellation is a unilateral statement by one of the parties finalising a long-term contractual relationship concluded for an indefinite period of time and it is always active *pro futuro*.

7.5. Termination by will of the parties

The parties to a contract may terminate a contract by mutual agreement, and they may also stipulate in the contract that each of the parties is entitled, under certain conditions, to unilateral termination of contract

7.5.1. Termination of contract by mutual agreement

- 7.5.1.1. Termination of contract by mutual agreement is an agreement by which the parties abandon the current valid contract before performance, where the legal foundation can be found in the principle which provides for the dispositive character of obligations which states that obligations arise, change and terminate by will of the parties.
- 7.5.1.2. Termination by agreement is possible only if the contract is **not performed** or is only **partly performed**.
- 7.5.1.3. Termination of contract which would occur after full performance of the contract is not termination of the current contract, but conclusion of a completely new contract on the same subject-matter and such contract is regarded as a new legal transaction. Considering that termination by agreement is by its very legal nature a contract, in order to be valid all conditions which are otherwise required for the validity of a contract are needed for termination to be valid (such as the capacity of the parties, the possibility, permissibility, determinedness or determinability of performance, the mutually agreed and valid expression of will, special form).
- 7.5.1.4. Regarding the form of contract termination, the Civil Obligations Act opts for the informal termination of formal contracts (contracts the form of which is prescribed), which in-

cludes PPP contracts, with two exceptions:

- whenever provided otherwise by law, and
- if the aim because of which the special form for concluding a contract is prescribed requires that termination be performed in the same form.

The parties are always left with the possibility of agreeing on a special form of termination of contract.

- 7.5.1.5. The main effect of termination by agreement involves the release from contractual obligations to a certain extent and as of a certain moment. It is common practice that the effects of mutually agreed termination of a contract which is partly performed take effect *ex nunc*, i.e., as of the moment of termination, and the effects of termination of a non-performed contract *ex tunc*, i.e., as of the moment of conclusion of the contract.

7.5.2. Unilateral termination pursuant to the contract

- 7.5.2.1. In contemporary law, the parties to a contract are permitted to incorporate special clauses which foresee the possibility of unilateral termination as the result of certain grounds and in certain situations. In a situation which arises in the case of bilaterally binding contracts by one of the parties, i.e., by its default, it is possible that the non-defaulting party is granted either the contractual or legal right of termination.

- 7.5.2.2. Croatian law of obligations also permits the parties to contractually provide for the right of unilateral termination of contract (mostly in the case where the other party defaults).

- 7.5.2.3. In order to avoid potential disputes concerning the right to unilateral termination, the parties must specify in any contract, including a PPP contract, the cases and grounds which entitle them to unilaterally terminate the contract (for example, on the grounds of frequent and repeated breaches of the contract or defaults).

- 7.5.2.4. Regarding grounds for termination of PPP contracts, there are more of them on the side of the private partner than the public partner. In other words, there are more grounds for termination of the contract which are attributable to the private partner. We shall mention only the most important ones, such as:

- the private partner is not in the position or is not able to fund the project,
- the private partner has failed to establish a special purpose vehicle if he is under the obligation to set it up,
- the quality of service is poorer than the one laid down in the contract,
- there are ongoing violations of the legislation by the private partner,
- the building or infrastructure cannot be used, and the like

7.6. Termination on the basis of law

The problem with contractual clauses which foresee the grounds and situations in which it is possible to unilaterally terminate the contract is that as an expression of the parties' will they only apply in cases where they are included in the contract. Therefore, there are

cases, if there are no special contractual provisions, where the legislation foresees the possibility of termination on the grounds of default.

We differentiate cases in which the law empowers a party to the contract to issue a **unilateral statement of will terminating the contract** and cases where the contract is terminated **by force of law** (*ex lege*).

7.6.1. Unilateral termination

The right to unilateral termination which the law grants to the contracting parties in cases where disturbances take place in the performance of their obligations, such as delays, uncertainties, partial inability to perform and aggravated performance, is divided into two groups:

- a) the cases of termination by reason of default, and
- b) the cases of termination by reason of changed circumstances.

7.6.1.1. Termination by reason of default

7.6.1.1.1. It is a general principle, which is also laid down in the Civil Obligations Act, that the performance of bilaterally binding contracts may be demanded only by the party who has already performed its obligation or is really ready to perform it. If there is no such situation, the other party may always refuse to perform by issuing the objection of "non-performance", but there are contracts in the case of which such an objection cannot be made in view of the nature of the transaction, because considering the nature of the job one of the parties is under the obligation to perform first (for example, lease, in certain cases PPP contracts).

7.6.1.1.2. There is another principle, which will often be used in PPP contracts, and which is also included in the Civil Obligations Act. It states that in the case of bilaterally binding contracts if there is a delay which is attributable to one of the parties, the other party may set a reasonable term, either on its own or through court, for subsequent performance. Such party must also issue a statement that if the obligation is not performed within the term it will terminate the contract.

The Civil Obligations Act elaborates on the principle by stating that in the event of non-performance of a bilaterally binding contract within term, **where the term of performance is not an essential element of the contract**, the creditor may terminate the contract, provided that he wishes to do so, but he must also set a reasonable subsequent term for performance to the debtor to perform its obligation. If the debtor fails to perform its obligation in the subsequent term, the contract is terminated pursuant to law.

7.6.1.1.3. The Civil Obligations Act permits the creditor to terminate the contract without setting a subsequent term, but only in the case where it follows from the debtor's conduct that he will not perform its obligation within the subsequent term.

7.6.1.1.4. In all of the above cases of non-performance, the contract is terminated in the form of a **simple statement by the creditor**. The Civil Obligations Act imposes an obligation on the

creditor to notify the debtor without any delay of its decision to terminate the contract. It is important to mention that the Civil Obligations Act does not permit termination of contract on the grounds of non-performance of only a negligible part of the obligation.

7.6.1.15. Unilateral termination can also take place where the performance of an obligation by one of the parties becomes uncertain, because of its deteriorating material circumstances or other serious reasons which occurred after the conclusion of the contract, i.e., before the conclusion of the contract if the other party was not aware of them and should not have been aware of them.

7.6.1.2. Termination by reason of changed circumstances

7.6.1.2.1. Once a contract is concluded, the situation can change so dramatically that performance of the obligations becomes extremely difficult and would result in great losses for one of the parties. In such a case, as a rule, the principle of equality of mutual performances is undermined. Almost all contemporary national legislations, including ours, permit termination or amendments to the contract in such a situation, subject to certain conditions

7.6.1.2.2. In accordance with the provisions of the Civil Obligations Act, a contractual party may request amendments or termination of contract if in view of the extraordinary circumstances having occurred after the conclusion of the contract the performance of an obligation would become excessively difficult or would result in excessive losses.

The clause which the parties used to incorporate into contracts, and which enabled recognition of any changes occurring during the contractual term, is known as *clausula rebus sic stantibus*. In contemporary law, the said clause is included implicitly. The underlying idea of learning about the clause is that the contract is binding under the tacit condition that circumstances remain the same as at the time of concluding the contract.

7.6.1.2.3. The right to terminate is recognised very restrictively, especially in the case of contracts concluded for a longer period of time, such as PPP contracts, because the parties simply must take into consideration certain business risks which might appear in the period concerned. That is why according to the Civil Obligations Act termination may not be demanded if the party invoking the changed circumstances had the duty to take into consideration such circumstances or could have avoided or overcome them at the time of concluding the contract..

7.6.1.2.4. Termination of contract by invoking the changed circumstances may not be demanded by the party who is already delayed, i.e., if the changed circumstances occurred after the expiration of the deadline for performing its obligation. Termination of contract is also not possible if the other contractual party offers or accepts fair amendments to the disputable provisions.

7.6.1.2.5. The contracting party demanding termination has got the duty, provided that the termination takes place, to provide compensation to the other party for a fair share of the damages suffered as the result of termination. Furthermore, the said party has got the duty to notify the other party about its intention to demand termination of contract as soon as it

learns about the occurrence of the relevant circumstances, because otherwise it is to be held liable for damages suffered by the other party as the result of the failure to be notified about the request..

7.6.1.2.6. The parties are permitted to waive the invoking of changed circumstances in advance by contract, unless that would violate the principle of conscientiousness and honesty.

7.6.2. Termination by force of law (*ex lege*)

7.6.2.1. Whenever termination occurs based on law, i.e., upon the fulfilment of the preconditions foreseen by law, we refer to termination *ex lege*. In the event of termination *ex lege*, a **statement of the party on termination is not necessary**.

7.6.2.2. The most well-known case of termination by force of law exists in the case of the so-called **fixed contracts**, i.e., contracts where performance within a certain period of time is an essential element of the contract. If the debtor fails to fulfil his obligation within such term, the contract is terminated based on law and a statement by the creditor on termination is not necessary. However, there is an exception. If the creditor wants the contract to remain in force, the creditor must notify the debtor without any delay that it demands performance. If the performance does not follow within a reasonable term, the creditor may declare that it is terminating the contract.

7.6.2.3. It is important to point out that termination *ex lege* may also take place in the case of contracts which are not fixed, which will happen if the debtor fails to perform its obligation within the subsequent reasonable term.

7.6.3. Effects of termination

In the case of contract termination, the main rule is that the parties are released from their contractual obligations, other than the liability for damages in certain cases of termination. Contract termination also results in the obligation of restitution of what was received as part of performance, and the return of any benefits, mostly in the form of pecuniary compensation, which the contracting party has accumulated from what it should return.

ANNEX

THE RELEVANT LEGISLATION:

Act on Public Private Partnerships, Official Gazette 129/08 of 7 November 2008
Public Procurement Act, Official Gazette 110/07 of 25 October 2007
Act on Amendments to the Public Procurement Act, Official Gazette 125/08 of 29 October 2008
Concessions Act, Official Gazette 125/08 of 29 October 2008
Civil Obligations Act, Official Gazette 35/05 of 17 March 2005, 41/08 of 9 April 2008

Regulation on the criteria for assessment and approval of public private partnership projects, Official Gazette 56/09 of 13 May 2009
Regulation on the supervision of implementation of public private partnership projects, Official Gazette 56/09 of 13 May 2009
Regulation on the content of public private partnership contracts, Official Gazette 56/09 of 13 May 2009
Regulation on the training of participants in procedures for the preparation and implementation of public private partnership projects, Official Gazette 56/09 of 13 May 2009
The Ordinance on the organisation and keeping of the Register of the PPP Contracts (in the phase of adoption)²

Regulation on the List of Entities Bound by the Public Procurement Act, Official Gazette 83/09 of 15 July 2009
Regulation on public procurement notices and records, Official Gazette 13/08, 77/08, 4/09

A GENERAL OVERVIEW OF SPECIAL (SECTOR-REGULATING) LAWS FOR CONCESSIONS:

Nature Protection Act
Health Care Act
Agricultural Land Act
Act on Cableways Designed to Carry Persons
Act on the Protection and Preservation of Cultural Objects
Waters Act
Electronic Media Act
Hunting Act
Act on Liner Shipping and Seasonal Coastal Maritime Transport

Waste Act
Gas Market Act
Act on the Production, Distribution and Supply of Thermal Energy
Utilities Act
Railways Act
Maritime Domain and Seaports Act
Mining Act
Public Roads Act
Act on Transport in Road Traffic

² The Ordinance on the organisation and keeping of the Register of PPP Contracts has not entered in force before publishing of this Guide. Its adoption is scheduled till the end of 2009 and the Register will start work in 2010 as planned

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