

ADVICE FROM

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New Law on PPP: Hope for Local Government?

■ Local government authorities and private investors in the public sector had high hopes when the new law of Dec. 19, 2008 on public-private partnership (PPP) and the law of Jan. 9, 2009 on concession for construction works or services (Journal of Laws No. 19, 2009, items 100 and 101) were passed. Legal literature emphasized that those laws would facilitate the 'privatization' of public tasks, which would enable them to be carried out more effectively.

But only after the amendment to the law on PPP of May 7, 2010 was introduced did these legal changes start to look more optimistic. It is hoped that the amended law will to a large extent eliminate the shortcomings in the original version. Above all, a private partner is not treated as a threat to the public sector and is not seen as someone who will cause problems linked to corruption. It should be stressed that there is a long tradition of private companies helping carry out public projects, for instance in France.

French experience shows that the positive aspects of a relationship of a public partner with a private partner considerably outweigh the disadvantages. French media still occasionally report on corruption affairs involving links between these two sectors. Despite this, local communities in particular benefit enormously from a team-up between these two sectors.

It seems that the amended Polish law allows private companies to take part in public projects while providing a guarantee that such partners will be selected using the correct procedures.

In legal terms the joint completion of a PPP project is taken to mean cooperation by the participants in such a partnership with the aim of carrying out tasks specified for a given project. The division of tasks is closely linked to the distribution of risk between the public entity and the private partner. One has to agree with the opinion of most

commentators that the cooperation's legal structure in itself implies the "privatization of execution." In other words, the partnership is based on the principle that the task is completed by the private partner but the public partner bears responsibility for completing the public part of the task. It needs pointing out, however, that the public entity does not have absolute freedom when choosing a private partner, as the regulations of the law on public procurement must be applied here. In each case, the choice of a private partner must be made according to clear and transparent rules and also, the private partner should be an entity having the requisite know-how and experience for the task in hand.

Choosing a professional, meaning an entity expected to be successful upon taking over the planning, completion and running of a project, is the key issue for any project to succeed. To ensure the opportunities presented by the amended law on PPP are not to be wasted, public entities in such partnerships will have a particularly responsible task. After all, PPP projects will in a way testify to the enterprising spirit of local government. This means that the most important and fundamental task of a public partner will be to analyze any as yet unsatisfied needs related to public services and then to define the strategic and operational goals of a joint project.

It will be equally important to build and consolidate relationships with various local "actors," both immediate and more distant, which should foster the proper completion of PPP projects. To this aim, it will be necessary to conduct market research to identify private entities potentially interested in working on a specific joint project. The next step should be an analysis and evaluation of intangible resources and identifying any existing information deficits in order to build up the human resources involved in



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the project. Negotiations with businesses interested in the partnership must also be preceded by in-depth financial analyses. The information aspect of a project is just as important. It is essential to provide the local community with complete information on a planned project, which will serve to minimize any fears regarding new proposals that the local community might at first find irrational, ineffective or too innovative.

As lawyers, but also as members of local communities, we hope local governments will take on the challenge of working on much-needed local projects in public-private partnerships. At the same time, we want to alert everyone to the fact that the success of all such projects will depend on the organizational capabilities of individual local governments.

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