

PUBLIC-PRIVATE PARTNERSHIP AS A BASIS OF THE DEVELOPMENT OF PUBLIC PROCUREMENT

JUDr. Ing. Jiří Vlach, PhD.
Transparency International Slovakia
vlachj@bmail.sk

ABSTRACT

The process of public procurement is a typical case of a project that should be managed by means of project management. In the preparation phase there is the year's plan of procurement and its audit ex-ante, the necessity-statement of the object's procurement, the specification of the object and choice of the method. The competition phase serves to the election of the contractor. It begins with the public announcement of the tender and ends with the signing of the contract. The main activity is to elaborate the tender dossier and correct evaluate all the bids, finding the best value for money without any discrimination and with the best possible transparency. The last realisation phase after the contract signing ends with the complex evaluation of the project and with audit ex-post. The persons acting in public procurement in Slovakia must be qualified, but project-manager-certification is not obligatory asked and project management does not build an obligatory part of the education program of the buyers. The participation of certificated project managers in public procurement process and necessity of education of buyers in project management is discussed.

Key words: public procurement, certificated project managers

Partnerships between the public and private sectors, in both social and economic spheres, establish a fundamental basis of further development and improvement of society. This phenomenon is currently applied in all spheres of activity in societies worldwide as the essential element and crucial impetus for further growth of the societies. Numerous political, administrative and civic, both universal and specialized, agencies, organisations and corporations at the national and international levels work to encourage partnerships between public and private sector officials. Although the partnerships are helpful for all countries including developed countries, they may be particularly useful for the development of the countries in transition. As regards public-private partnerships, countries with developed economies are ahead of the countries in transition. However, that may be beneficial for the countries in transition because they can draw on experience of the developed countries to make quicker and correct decisions and implement the public-private partnerships.

Public-Private Partnership in Public Procurement

One of the areas where public-private partnerships are often utilized is public procurement. It is an acceptable public procurement practice because the very essence of public procurement is economic and ethical relationships between the public and private sectors.

Public sector officials purchase goods, services and works necessary for society, from private suppliers and use public funds (i.e. citizen's money administered by the public officials) to pay for it. Public officials, or in this case „contracting authorities“, are obliged to make sure they purchase only those things that are really needed with regard to their function and quality, and purchase it in the most economical way possible. This obligation is based on the „best value for money“ principle, i.e. to achieve the required (adequate) value for the money spent.

A private businessman as a supplier of these goods, services or works needed in society, i.e. the „bidder“, is interested to be awarded the public contract (which will improve its position

in the market) and also, to deliver the goods under the contract with the highest profit possible in the market. If the bidder can make even more than that, it is willing to share this „more“ with another entity that can help him to receive such a beneficial contract. It is not the purpose of this paper now to say whether it should be called an expression of gratitude, „tip“, bribe or any other sort of corruption, cronyism or mafia-kind of behaviour, or how to prevent or punish such behaviour.

As regards the application of public-private partnerships, any inappropriate conduct in public procurement that increases the public expenditures above the usual market level is socially undesired and dangerous, and as such is punishable as a criminal act. That is why such behaviour is not public; it is kept in secret and not disclosed in the documentation or accountable receipts of either the contracting authority or the supplier. Under such circumstances it is very difficult to prove such misconduct and only a very few cases can be brought before the court. However, such conduct is very dangerous for society. If it is not treated as a misdemeanour, an antisocial act, or even as a criminal offence, it will spontaneously encourage its repetition without punishment and corruption will become a habit. Again, this is not what this paper wants to focus on.

If a businessman applying for public contracts achieves its goal (i.e. gets the contract and makes an adequate profit), it has no reason – in a healthy market environment! – to give to the staff of the contracting authority who has any influence on the award of the contract a bribe in the form of a secret „returning“ of the difference between the higher price awarded in the contract and the usual market price of the goods procured. Quite the opposite, the entrepreneur fears such behaviour might be disclosed, and is concerned by the potential social and criminal consequences, pressure to repeat such behaviour in the future, or the possibility of future blackmail. The businessman does not have to worry about all that if it achieves its interests in the usual market conditions. But the businessman needs to know whether it can count on correct and non-corrupt conduct of the contracting authorities in the future procurement cases.

With regard to its interest in correct public procurement the private businessman applying for public contracts becomes an important element in the fight for socially beneficial and non-corrupt public procurement, an economical use of public funds, and efficient social life. A major role in this society-wide effort (apart from a number of other means, such as legislation, pressure on the economical use of public funds through public budgets and audits of their results, criminal and labour penalties, higher qualifications and ethical standards of the contracting authorities) is played exactly by public-private partnerships that are manifested through public declarations of anti-corruption agreements, enforcement of ethics codes or application of integrity pacts in major public procurement cases. It can be noted with satisfaction that public partnerships are acknowledged and supported not only in developed democracies, but their implementation can be now observed little by little also in Slovakia. Under the auspices of the EU Ambassador to Slovakia, Slovak Prime Minister and Transparency International Slovakia an anti-corruption agreement has been signed by a few dozens of major businesses in Slovakia. Moreover, contracting authorities and major bidders have begun drafting and enforcing codes of ethics, also anti-corruption and information basics on the public procurement process have been published and declared and samples of Integrity Pacts of contracting authorities and bidders made available. Despite all those efforts, however, it is still too early to evaluate the results delivered by public-private partnerships in Slovakia.

Project Management in Public Procurement

We must keep in mind that public procurement is a complex social, economic and

organisational process of management that fully meets the definition of a „project“ as used in the project management terminology. And as such, if this process should meet its goals, it is recommended that both the contracting authority and bidder manage the process with project management methods.

In the light of the above, as qualified specialists in the project management we must keep emphasizing the complexity of every public procurement project from its beginning to its end. This is necessary because under the influence of the Slovak legislation (Public Procurement Act) and a narrow scope of the competencies of the Public Procurement Office key attention is paid only to that part of the process that deals with the selection of the supplier, i.e. that part of the process that starts with the determination of the procurement method and ends with the signing of the contract. But as any other project, also a public procurement project has its preparation, pre-selection of bidders, and implementation and evaluation phases.

The project management principles are least observed in the preparation phase in which social needs and possibilities of satisfying of the needs are being determined.

In the pre-project part of the preparation phase the contracting authority formulates its needs and possibilities of public procurement as a whole. This part includes mainly drawing up a public procurement plan, review of the plan by an independent audit ex-ante, incorporating the plan in the budget of the authority, and publishing these documents. In respect of organisation, samples of documents in the sequence of the steps to be taken in the public procurement process must be prepared and published (and updated in the following years) and the information system for public procurement must be implemented (if possible, this information system should be part of the global information system of the authority). As far as ethics are concerned, the Code of Public Procurement should be drawn up and declared, as well as Integrity Pacts for important cases of public procurement.

The project phase of the preparation phase is concerned with individual cases of procurement and attention is concentrated on designing tender documents, mainly their key segments, i.e. the accurate specification of the purchased goods, conditions for participation of bidders in the selection process, criteria for the selection of the best offer. The design of the tender documents is the most difficult part of the procurement process because it is a laborious process requiring the most qualified work. The analyses of wrong, insufficient and incorrect procurement cases (that often get media coverage too) show that it is exactly inappropriately prepared tender documents that are the main cause of bad tenders, regardless of whether the insufficient preparation of the documents was caused by a lack of knowledge or qualifications, or negligence, lack of care or involvement of the staff designing the document, or even a bad intention of the staff. Inappropriately prepared tender documents almost always open the door to cronyism, bribery, corruption and mafia practices. The effort to design good and qualified tender documents is best helped if the documents are publicized.

The selection phase of procurement, i.e. the selection procedure and the sequence of the steps is thoroughly specified in the law and is subject to administrative control. It is therefore a phase that is the most monitored phase and gets most media coverage. The main steps in this phase are the advertising of the tender, preparation and submitting the bids, appointment of the members of the selection commission and the evaluation of the bids by the commission choosing the winning bidder, followed by potential compliant procedure, and –on the end of the process - the signing of the contract. Fears from potential penalty for breach of rules set forth for this phase cause that the contracting authorities overestimate the administrative part of the process at the expense of the effort to select the best bid. The sign of distortion in public procurement in Slovakia is an inadequately high number of complaints (as compared with the developed countries) that are filed by bidders against the procedure of the contracting authority after the bidders find out they have not won the tender. This protracts the length of the procurement process, which causes difficulties to the contracting authorities. According to

the Public Procurement Office the majority of the complaints filed in Slovakia is unsubstantiated.

Not enough attention is paid to the implementation phase. Lack of attention concerns mainly annexes to the contracts and checks of the quality of the supplied goods or services, which very often results in a failure to meet the societal goals of the public procurement. However, the failure of the procurement is discovered only at the final evaluation of the procurement when it is too late and nothing can be done against it. This happens because the changes executed in this phase are not subject to strict procurement laws and it is possible to use a simple non-public agreement to change the initial criteria for the selection of the best value bid (and thereby violate the original correctness of the tender), but also change the qualitative indicators of the supply or even the specification of the goods. That is why this phase is „discreetly“ abused by various corruption practices and cronyism.

Another phase remaining outside the realm of public interest is the evaluation phase, which causes insufficient review and checks on whether the initial objective, i.e. a proper satisfaction of the societal need, has been met, and whether it has been met in an economical and efficient manner. The sign of this lack of interest in the post-project phase is that no independent audit ex-post is required to review the results of the procurement process as well as the level of fulfilment of the procurement plan.

So far we have tackled public procurement cases from the point of view of the contracting authority as one party to the procurement and the contractual relationship. The other party in this process are bidders for public contracts, and later the contractor as the winning bidder. Also from the point of view of the other party procurement is a project that requires the application of project management. In the preparation phase the bidder takes the decision to participate in the tender. The main element of the selection phase is drawing up a qualified bid that offers the supply in accordance with the specification and procurement conditions and selection criteria, and if the bidder wins the contract, this phase is concluded with the signing of the contract. The key phase from the point of view of the supplier is the implementation phase in which the supplier provides for the performance under the contract. The fulfilment of the goals of the supplier will be reviewed in the evaluation phase. A responsible performance of the contract strengthens the contractor's image in the market and the achievement of an adequate market profit provides for its economic stability. There is no doubt that the common interest of both parties (the contracting authority as well as bidders) in a healthy market economy is to achieve a successful and smooth course of their projects and fulfilment of their project objectives. It is this common interest to achieve the project objectives in public procurement that is the basis for an efficient functioning of a public-private partnership.

Project Qualification of Contracting Authorities

The application of project management as a specific field of management is reflected in a successful preparation and implementation of procurement projects. Procurement cases, i.e. individual projects, can be managed well by those who are appropriately trained and qualified for such management. Under the Slovak public procurement law public procurement may be carried out only by persons with appropriate qualifications who have received a certificate of training and have been entered in the register of the Public Procurement Office of persons competent for procurement. However, these competent persons are currently trained and certified only in the knowledge of the public procurement law (i.e. only for the phase of the selection of the supplier) and no other certification of a project manager is required from them, nor is project management made part of their training. This must be considered a shortcoming in their qualification in case of more complex procurement projects. A qualified preparation and implementation of public procurement on the part of the contracting authority

as well as equally qualified approach of the contractor constitutes one of the foundation stones of a public-private partnership in procurement.

Public-Civic Partnerships in Public Procurement

So far we have discussed a partnership in public procurement from the position of contracting authorities and private bidders, i.e. business applying for public contracts, and we have come to the conclusion that in a healthy market both these parties are interested in a correct procurement process and are willing to support it in their own interest. The civic society – that is citizens as the carriers of the democratic political power, representatives of social ethics and morality, and a source of the public funds – is also interested in public matters and in how the public funds are used. If we succeed in involving the civic society in the efforts for correct public procurement, then we can speak of the partnership of the contracting authorities (whom we expect to ensure fulfilment of the societal needs and a good use of public money, i.e. the money belonging to all citizens that was delegated to their care) and the citizens, i.e. the civic society as the end users of the societal needs procured, directly participating in the ethics of society and last but not least, citizens as the source of public funds. The higher the level of democracy in society, the higher the citizen's interest not only in the fulfilment of the societal needs but also in a better use of the public funds and a higher level of the social ethics and morality, as well as the interest in a correct procurement process. Therefore, a certain level of an economic democracy significantly increases the possibilities, scope and the results of a public-private partnership (we can be more accurate: „a public-civic“ partnership), in particular in public procurement.

To initiate the citizen's interest in a good management of „their“ public money and citizen interest in an effective fulfilment of the needs of citizens and a life in an ethical and moral environment, we must encourage their decision to take interest in public procurement through providing them sufficient information about the whole process of public procurement. That is the issue of the information transparency of public procurement. The citizens should be able to get easy access to the information about the procurement plans of individual contracting authorities and the incorporation of the plan in their budget, information on the tenders and their conditions and criteria, tender documents in major procurement projects and the evaluation of the bids, signed contracts as well as the evaluation of the procurement plans and results of an independent audit of the plans. From the point of view of the ethical approach to the procurement process this can be ensured through a publication of information in the code of ethics of individual contracting authorities, provision of samples of their integrity pacts for major procurement projects, appointment of the members of the selection commission and prevention of any conflict of interest of the members, and the complaints against the procedure of the contracting authority. The most advantageous form of transparency of the information is its posting on websites of contracting authorities. The guidelines of transparent publication of procurement information can be found in brochures published by Transparency International Slovakia 10.

Transparency of information on public procurement is just one side of the interest in public-civic partnership. The other side is the use of the transparently publicized information to examine the correctness of the procurement process, requiring of correction of the found incorrectness in procedures of individual contracting authorities and the pressure to improve the organization of the system of procurement and its transparency. In USA the so-called „whistle-blowing“ is successfully used: citizens who inform on any wrong use of public funds get 10% of the public funds that was, or was going to be inappropriately used. Various civic associations and interest organisations as well as the media play an important role in this.

¹⁰ Such as D.Ursíny – J.Vlach : The Anti-corruption and Information Basics of Public Procurement, TIS, 2002

Conclusion

The Public-Private Partnership is very helpful in numerous areas of life. It can be initiated and its results used in public procurement between contracting authorities and bidders, and also between the contracting authorities and citizens also in the application of the project management on the part of both contracting authorities and bidders. As opposed to developed countries, Slovakia is only beginning to use these partnerships. The use of the experience of the developed countries, however, may accelerate the progress.