



ARCHITECTS' COUNCIL OF EUROPE
CONSEIL DES ARCHITECTES D' EUROPE

RESPONSE OF THE ACE TO THE COMMISSION CONSULTATION
On the
Green Paper on Public-Private Partnerships
Published by the European Commission on the 30th April 2004 – COM(2004)327final

Background

The Architects' Council of Europe (ACE)¹ has taken note of the increasing importance that the European Commission has, in recent years, attached to the concept of Public-Private Partnerships (PPP's) for the acquisition of large-scale public infrastructure and buildings. It has monitored the steps that the Commission has undertaken in relation to this important model for acquisitions by public entities and has participated in public debates and consultations on the subject.

In parallel, the ACE has followed with intense interest and involvement the development and adoption of the new directives on Public Procurement². It is currently engaged in an exercise that will seek to ensure the proper and appropriately considered transposition of the requirements of the directives into national law for the provision of architectural services.

There are strong links between the procedures set down in the Public Procurement directives and the topic of PPP's which cannot be ignored. In this respect it is crucially important that all public authorities are made aware that the rules set down in the Public Procurement directives must be applied to PPP's as these are one form of public procurement.

The Green Paper – General Remarks

There seems to be a commonly held view that the use of PPP's by cash-strapped governments and public bodies is a panacea for the acquisition of important public infrastructure and buildings and that it is a method that provides quality and value for money. The ACE believes that, based on the experience of the architectural profession in Europe, this is far from proven at the present time. In particular, there is increasing evidence that the use of the Private Finance Initiative (PFI – an example of one type of PPP) in the UK for the procurement of public buildings such as schools and hospitals is leading to the creation of a poor quality built environment that it set to be a significant burden on future generations. These concerns about the situation in the UK have been expressed, not only by the architectural profession, but also by the independent Commission on Architecture and the Built Environment (CABE) and in the national press.

The Green Paper sets out a very abstract discussion on a few restricted forms of PPP's using terminology that deliberately obfuscates the subject matter. It is therefore difficult to welcome the Green Paper as a positive contribution to the current debate on the use of PPP's. Furthermore the technique of asking specific questions (22 in all) has the potential to ensure that interested parties are not permitted to express particular points of view that arise from their experience of PPP's, as the questions are not phrased in such a way as to allow for the expression of those points of view.

¹ The Architects Council of Europe (ACE) is an organisation, based in Brussels, whose Membership consists of the professional representative organisations of all twenty-five European Union (EU) Member States and all Accession States as well as Switzerland and Norway. As such it is an organisation that represents the interests of over 450,000 Architects from Europe. The ACE was founded in 1990 and its principal function is to monitor and influence developments at EU level highlighting those areas of EU Policy that have a direct impact on architectural practice, policy and the built environment.

²Reference number 2004/18/EC, published in the Official Journal of the EU on the 30th April 2004.

Given these limitations the ACE, in this response, starts by discussing its particular interest in the topic of PPP's, setting down its considerable concerns about the potential impact of these methods of procurement on the quality of the built environment, the impact on sustainability and the impact on the quality of life of the citizens of Europe. An Annexe to this position paper will provide answers, where possible, to the questions posed in the Green Paper, but it is the text of the following pages that should be considered as being the position of the ACE.

The Construction Sector in Europe

Architectural services form an essential part of the professional services required by the construction sector in Europe in the conception and realisation of the projects that lead to the materialisation of the built environment. It is in this environment that the citizens of Europe work, rest and play. It is therefore essential to ensure that the quality of the built environment provides the best possible stage on which we can all live productive and happy lives.

Furthermore the built environment is a principal carrier of the cultural identity of our society and it reflects, in a very permanent way, the aspirations, skills and identity of each succeeding generation. It is crucial that these cultural and social aspects of the world we construct about us is understood and respected as we contemplate how best to procure works that will reflect these values.

Beyond the cultural and social importance of the sector, the construction sector is the single most important industrial sector in Europe today and its economic significance in terms of GDP is very great. Some statistics from 2003 illustrate the point very well:

The Construction Sector in Europe (EU-15), in 2003, represented:

28.2% of industrial employment
7.2% of total employment
9.8% of Gross Domestic Product in the EU-15
51.2% of Gross Fixed Capital Formation
and
its turnover for the year was **€10 billion**³

There are various estimates of the proportion of the turnover that is accounted for by public buildings and works, but it can be said with reasonable certainty that it is above 50%. This underlines the importance that should be given to ensuring that any model for procurement in the sector is correctly and equitably devised and administered.

A final factor that forms a crucial aspect of the sector is the fact that 93% of all enterprises active in the industry are Small and Medium-sized Enterprises (SME's). In its position paper on the Green Paper, the European Builders Confederation, that represents the crafts and small contractors sector, estimates that 85% of contracts that their members sign are for publicly funded works. It is therefore essential that any procurement methods do not rob these enterprises of their livelihood.

The Role of the Architect in PPP

All construction projects have an impact on the existing built and natural environments and they each contribute to the quality of life of our citizens. Each construction project requires a team of various persons and companies to work co-operatively together to achieve the objectives of the project on behalf of the client, whilst taking account of its wider impacts. It is essential, for the proper functioning of such a team, that all aspects pertinent to the works in hand are expertly covered by the appropriate professional or craftsman. Each person in the team must clearly understand their role and their duty.

Within such a team the architect generally possesses the skills to be responsible for the conversion of the clients' requirements for space or the housing of a particular function into a design for the building or works that takes full account of all the constraints placed on the project. The architect also learns the skill of being able to see the way in which all parts of the project must be integrated and, thereby, to understand the required input of each of the other persons in the team.

³ Source: European Construction Industry Federation report "Construction in Europe – Key Figures" published May 2004

Furthermore the architect is, through training and experience, well placed to perceive the wider social, cultural and sustainability impacts of the project and is, finally, bound by deontological rules to act independently of vested interests in the achievement of the best outcome for the works.

For these reasons the ACE believes that the architect has a central and critical role to play in the design and execution of all construction projects including PPP projects, no matter which model of PPP is chosen by the contracting body. The ACE equally believes that it is crucial to the overall success of a construction project that the architect is permitted, by the terms of the contractual arrangement, to effectively take full account of all the economic, environmental, cultural and social aspects of the project in hand. In other words, it is not so important to ensure that the architect has a direct contractual relationship with the client as it is to ensure that the terms of any appointment, contract or sub-contract should impose an obligation on the contracting authority or operator to take full account of these wider, holistic issues.

It is important to be aware that a public body has a binding responsibility to ensure that the expenditure of public funds is carried out in the most economically advantageous way. In this respect the taking into account of the wider range of environmental, social and cultural issues at the outset of a project usually delivers significantly better value for money over the useful lifetime of the building or works. Therefore there is economic advantage to be gained by the use of a more holistic approach to procurement.⁴

The Nature of PPP's in Construction

The forms of PPP's that are generally used in construction projects are "Contractual PPP's" where a single private operator is charged with the design, construction, financing, operation and maintenance of the works. There are, of course, many variations where one or more of these functions is not contracted to the operator, but it is generally the case that all five functions are undertaken by the private operator.

The private operator is recompensed for taking on the contract by being able to levy a charge for the services it provides throughout a defined period of the service life of the project, or by way of monies paid by the public body for the use of the final facilities provided. In effect many of the PPP's in construction are little more than complex hire-purchase agreements between the public body and the private operator.

There are many difficulties with this approach to the procurement of buildings, of which the main ones are:

1. The private operators main interest is the profit margin it can achieve over the life of the contract.
2. As the period for which the private operator is to be responsible for the operation and maintenance of the completed building is defined at the outset, the specification of materials and equipment used in the construction often only have a design life equal to or just greater than this pre-defined period. Therefore the long-term serviceability of the buildings is not safeguarded and, all too often, poor quality materials are used.
3. Public bodies often choose to use a PPP so as to defer the capital costs of the project over a period of years in the belief that this makes good financial sense. In fact the result of engaging in PPP's is to increase the indebtedness of the public body and to increase the sums that must be expended monthly. The fact is that the cost of the contract over its full life will significantly exceed the costs that would have been incurred through traditional procurement as the private operator will ensure that a profit is made on the contract and it will not be able to borrow money at a better rate than the public body. In fact it is possible to envisage that cut-backs to essential services might ultimately result as public bodies struggle to pay the costs of these long-term commitments.
4. As the PPP approach to procurement of a building is usually only viewed in economic terms (by both parties) the social, cultural and sustainability impacts are frequently missing from the criteria that constitute the terms of the contract. This lacuna is compounded by the false belief, on the part of many public bodies, that it is sufficient for them to simply provide

⁴ This fact has been eloquently demonstrated in the contents of the Commission staff working paper entitled "Buying Green! A Handbook on Environmental Public Procurement" dated the 18th August 2004 and referenced SEC(2004) 1050

functional projects that adequately house the required activities desired by their policies or undertakings. This is not the case as it is our public bodies that are responsible to ensure the creation and maintenance of high quality environments for citizens and to ensure that true value for money is achieved when expending public funds.

5. Due to the complexity and scale of PPP projects, it is very costly to prepare a proposal to win a PPP contract. In the preparation of a proposal it is typically necessary to prepare full architectural, structural and services designs for the project, pricing each element fully in order that the proposer can be certain that the offer to be made is realistic. It is clear that it is not possible to succeed in winning every contract competed for and so there is a lot of wasted costs associated with the selection of a contractor for a PPP. These costs must be recuperated somehow and they are added, over time, to the general level of inflation in construction costs. Furthermore an operator can only afford to lose a few bids and so over time it is the large and very large operators that end up bidding with all the medium and smaller operators falling out of the market. This leads to a situation where there are so few operators in the market for PPP's that the principles of fair competition and the free market, so cherished by the European Commission, no longer operate.
6. In the circumstances described above, where the market can no longer provide a wide range of potential bidders for PPP contracts, there are two serious losses that accrue. The first is a loss of flexibility in the manner in which a PPP is executed as these large organisations that can afford to bid generally have heavy, inflexible management structures by which they abide. The second is the fact that there is no longer any viable route through which "new blood" can be brought into the process, thus depriving the public of innovative and creative approaches to these projects that would otherwise be available.
7. Once a PPP contract is awarded the successful bidder knows the bottom line for the contract and knows that any savings it can make along the way will be added directly to that bottom line. This frequently leads to the modification of the approved designs, particularly of the details of those designs, resulting in a significant lowering of the quality and appearance of the finished product. Furthermore the operator will often rely on "in-house" expertise and established approaches to construction at the expense of innovative and creative approaches, thus retarding the overall development of this crucial industry.
8. Some public bodies believe that the use of PPP's means that they do not have to apply the EU rules for Public Procurement as it is private money that is being used to construct a project. The Commission has been very clear on this point and has stated that the full requirements of the public procurement directives do apply to PPP's. The ACE believes that this message must be reinforced to ensure fair competition in the use of PPP's.

On the positive side it is the case that some PPP's can deliver much needed large-scale infrastructure and buildings more quickly than traditional procurement methods permit, particularly where several separate projects are "bundled" into one PPP. However this "bundling" further restricts competition and closes the market to potentially better contractors or operators for individual buildings.

The Position of the ACE

It is the view of the ACE that there is a limited role for the PPP procedure in the procurement of some large-scale infrastructures and buildings. In fact the ACE can see that the PPP model is suited to the procurement of large-scale infrastructure (such as roads, tunnels, tram systems etc) whereas it is not suited to the procurement of buildings. This is because of the specific cultural and social impact of buildings on their immediate surroundings and the need for their expression to be linked to the region in which they are located. Such factors cannot be readily incorporated into the criteria and clauses of legally binding contracts and yet they are essential to the long-term success of such works.

The manner in which a PPP is conceived and structured is crucial to the result that is delivered to the client. The ACE firmly believes that the architect must be involved in all stages of a building project regardless of the model used by the client to procure the project. In particular the architect must be:

- a. The principal interlocutor between the client and the project team as it is the architect who is best equipped to comprehend the overall factors and impacts of the project.
- b. Permitted to act independently to conceive of the best design solution to the problems posed by the project proposal whilst taking into account the extended impact of the project in economic, environmental, social and cultural terms.

- c. Closely involved in the detail design of the building.
- d. Permitted to monitor works on site and be able to influence the manner in which the works are executed, regardless of the PPP model chosen. This role is particularly crucial in the event of a design-build solution where the need to have regard for the life cycle costing is more acute.
- e. Adequately remunerated for the work and services provided.

In return the ACE believes that the architect must shoulder the responsibilities and consequences of the decisions he or she takes and that those decisions must be taken with the best interests of society at their heart.

Specifically, in relation to the involvement of the architect in the preparation of proposals for PPP's, the ACE believes that remuneration for the giving of ideas and designs must be guaranteed by the terms of the call for proposals and that the architect used in the preparation of a successful bid is retained for the later stages of work. In this way, it is possible to ensure that the ideas encapsulated in the project design are carried forward by their initiator.

Conclusions

Given that the annual value of the Public Procurement market in the EU is approximately €1,500 billion and that the annual value of the Public Procurement in construction is approximately €450 billion, it is imperative that the writing and structure of PPP contracts for this significant sector are properly conceived to ensure that the resulting works are fit for their function, contribute positively to the environment, encourage social cohesion and provide long-term value for money.

The achievement of this objective is a truly challenging, but the architectural profession is ready to do its part to succeed in this goal.

End of paper
20th September 2004

ANNEXE 1

Answers of the ACE to the specific questions in the Green Paper on PPP's:

1. What types of purely contractual PPP set-ups do you know of? Are these set-ups subject to specific supervision (legislative or other) in your country?

Most of the PPP's that architects are involved in are contractual in nature and the ACE is aware that there are a variety of set-ups for such PPP's. There are various typical set-ups for PPP's used in the procurement of buildings ranging from "design and build" to "design, build, finance, operate and maintain". The variations between the various forms usually relate to the number of functions committed to the operator.

Other variations arise with the method for financing the realisation of the project. Some PPP's rely on full financing by the private sector, some are fully financed by the public body and others are mixes of the two. On rare occasions the operator designs and builds for the public body in return for the acquisition of publicly owned land on which the contractor then builds a commercial scheme (such as housing) to recuperate all the costs it has incurred.

The ACE, as a European representative organisation, does not have any particular knowledge of specific legislation in the various Countries of the EU to which contractual PPP's are subject.

2. In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?

The ACE does not share this point of view. The new Directives on Public Procurement bring in the possibility that competitive dialogue may be used in the case of "particularly complex" projects. Such a procedure foresees that the public body would enter into discussions with a limited number of bidders and that all aspects of the projects would be open for discussion. These bidders are pre-selected on the basis of generic information such as track record, economic status and other technical factors. For construction projects it is the quality of the architectural concept that counts the most and it is frequently the case that the best solutions to complex projects come from micro or small architectural firms who would not pass the criteria of the selection phase. Therefore the competitive dialogue process is discriminatory and brings with it the risk that the best design solution will not be achieved for the project.

The ACE believes that the use of processes that permit the emergence of the best design solution are the only processes that should be used for construction works. One such process is the architectural design contest which, unlike the competitive dialogue procedure, permits the selection of the top performer based on substantial material grounds. This arises because of the requirement for anonymity of the participants, which results in the fact that only the "offer" is available for assessment. Furthermore, the selection process used to decide on the best contribution (prize-winner) is undertaken by a qualified, competent and independent jury, which is an essential precondition for a purely quality-based selection.

3. In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate.

It is clear that PPP's can be conducted on the basis of already existing Community law. However, it is questionable whether the common legal framework of the Community is rightly balanced in this respect since a PPP has to be conducted under the requirements of the public procurement directive, but they are often categorised as services concessions or franchises. It is hard to understand the reason why building concessions are regulated in the new Community law on public procurement in great detail, but services, service concessions and franchises are only subjected to primary Community law. The existing legal status could therefore be used by public authorities to "escape" into primary Community law.

4. Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union? What was your experience of this?

As the ACE is a European representative organisation, it is not in a position to organise, participate in any such procedure. Therefore the ACE offers no response to this question.

5. Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?

It appears to the ACE that the approach of the Commission and of the Community legal framework robustly strives to ensure that there is effective participation of non-national companies in the awarding of PPP's. However, the ACE is concerned that genuine competition is not guaranteed by the current framework as it allows for the use of many criteria that could permit the elimination of viable candidates from consideration. The factor that needs to be underwritten to improve this situation is the transparency of the assessment procedures used by awarding authorities in the decision on whom to award a contract. An extension of the use of the PPP model will further reduce the opportunities for genuine competition as it is a model that inherently favours the large scale organisation. It must be recalled that about 93% of all enterprises in the construction sector are either micro or small enterprises and that they do not have the resources required to prepare bids for PPP's.

6. In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?

Following on from the answer to question 5 above, a Community legislative initiative is desirable only if it can lay down procedures that take account of the structure of the construction sector and thereby allow for the participation of the majority of enterprises in such procedures. It is highly undesirable that procedures might emerge over time that would mean the majority of public works contracts would become PPP's.

7. More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPP's, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?

See answer to question 6.

8. In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?

This is a difficult question to answer due to lack of statistics. However, it is clear that the procedures foreseen by EU legislation in the field of public procurement (of which PPP must be seen as a sub-set) do open national markets to competition from other EU countries. Unfortunately it is not possible to assess whether the restrictions and requirements set down by national laws for the participation of such extra-national competitors do, in fact, provide for genuine competition.

9. In your view, what would be the best formula to ensure the development of private initiative PPP's in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment?

The selection of a contractual partner in a private initiative PPP has to be carried out under the basic rules of equal treatment and non-discrimination, as a private initiative PPP is also a form of public procurement. In cases where the participants develop project proposals without the request of the public administration, the application of the rules on public procurement is indeed rather difficult and problematic. Such propositions might be of high quality, and consist of high technical, innovative and economic solutions for existing problems. But the use by public authorities of such proposals as the basis of a PPP is usually impossible, if only for reasons of copyright. Acquisition of the rights of use on the other hand must, once again be seen, and treated, as a public procurement in itself. A call for tenders concerning such a project could lead to the use of parts of the developed proposal by competitors as if they were their own concepts, without being covered by copyright law. Naturally, in

this case it is not guaranteed that the initiator of the proposal will be awarded the contract. There is a need here for a remedy of compensation through the law on public procurement in favour of the initiators of such private PPP's.

10. In contractual PPP's, what is your experience of the phase which follows the selection of the private partner?

The ACE offers no response to this question.

11. Are you aware of cases in which the conditions of execution – including the clauses on adjustments over time – may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or freedom of establishment? If so, can you describe the type of problems encountered?

The ACE offers no response to this question.

12. Are you aware of any practices or mechanisms for evaluating tenders which have a discriminatory effect?

The ACE is not aware of any such practices that could not be dealt with through the remedies procedures foreseen by EU law..

13. Do you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment? Do you know of other "standard clauses" which are likely to present similar problems?

The ACE sees that there is a need, in certain limited cases, to have a "step-in" procedure. However, it believes that any such arrangement should be governed by the same level of transparency and non-discrimination as the parent procedures for the relevant PPP

14. Do you think there is a need to clarify certain aspects of the contractual framework of PPP's at Community level? If so, which aspects should be clarified?

The ACE, through its Members and in discussions among delegates from those Members, is aware of significant problems with the use of the PPP model for construction contracts. Principal among these has been the belief, on the part of many public bodies, that because the financing of a project was being sourced from private funds, no use of or recourse to the requirement of the Public Procurement procedures was necessary. This has led, in many cases, to the award of significant contracts of public works without the making of an open call for tenders or expressions of interest from suitable parties. This is clearly anti-competitive and discriminatory, closing many opportunities to both national and non-national operators and is therefore in breach of community law.

There is a need to clarify the fact that the use of the PPP model falls within the scope of the requirements of the Public Procurement directives, even when the money is coming from private sources.

15. In the context of PPP's, are you aware of specific problems encountered in relation to subcontracting? Please explain.

The ACE is aware of specific problems that arise in relation to the use of sub-contracting within PPP agreements. The PPP model for the procurement of buildings is the one model where the architect is often a sub-contractor to the building contractor. This is a problematic situation as it dis-empowers the architect from influencing, in an effective way, the manner in which the construction on site is carried out and on the specification of the materials to be used. It also means that the architect is not permitted to act in the best interests of the client as there is no direct contract (and sometimes not even direct contact) with the client.

This situation carries the risk that the building that results from a PPP will not adequately achieve the requirements of the client and will not be of sufficient quality to give long-term value for money.

16. In your opinion does the phenomenon of contractual PPP's, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?

Yes – this is particularly the case because of the fact that when a public body hands over the fulfilment of a public duty to a private body, that private body must then be treated, for the purposes of the particular transfer, as a public body. Rules and procedures will have to be devised to ensure that these duties are then adequately fulfilled by such a private body. See also the answer to question 15.

17. In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?

For the current procedures on Public Procurement there is probably no need for further initiatives to clarify or adjust the rules on sub-contracting. However if the Community decides to initiate legislation on PPP's then careful consideration of the rules on subcontracting will most certainly be needed.

18. What experience do you have of arranging institutionalised PPP's and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not ?

The ACE offers no response to this question.

19. Do you think that an initiative needs to be taken at Community level to clarify or define the obligations of the contracting bodies regarding the conditions requiring a call for competition between operators potentially interested in an institutionalised project? If so, on what particular points and in what form? If not, why not?

The ACE believes that an initiative does need to be taken, as the principles of public procurement should have an effect in this regard. Especially important is the need to clarify the extent to which the private bidder appears as a "public authority" within an institutionalised PPP.

20. In your view which measures or practices act as barriers to the introduction of PPP's within the European Union?

The ACE offers no response to this question.

21. Do you know of other forms of PPP's which have been developed in countries outside the Union? Do you have examples of "good practice" in this framework which could serve as a model for the Union? If so, please elaborate.

The ACE offers no response to this question.

22. More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful? Do you consider that the Commission should establish such a network?

The exchange of best practice and the regular review of the uptake of new approaches to procurement is always useful. It is therefore desirable that a properly balanced network of actors within the field be established so that these matters can be kept under review.

This question stands out from all the other questions in the use of the phrase "...social and sustainable economic development" and it is a surprise to the ACE that it is the only time that it has been mentioned in the set of questions. Clearly the principle objective of the EU at this time is to find the means through which such development can take place and so this matter of equitable social and sustainable development should be at the heart of the debate. Given the dis-empowerment of the architect in the usual approach to PPP's for construction projects, the ACE is very concerned that the widespread use of this model will lead to a noticeable and significant deterioration of the quality of the built environment and hence in the quality of life for the citizens of the EU.