ALBANIA

NEW LAW ON PPPS AND CONcessions

1. Introduction

To date, Albania has seen a number of PPP projects, mainly in the area of the development and operation of hydro-power plants. While there is potential for PPP in all industry sectors including transport, public services, healthcare and waste, so far there has been little political support and little interest shown for the expansion of PPP projects into these sectors. It is yet to be seen in what direction and with what speed PPPs will evolve in Albania.

Recently the Albanian Parliament approved the Law no. 125/2013 “On concessions and public private partnerships” (the “Concession Law”), which in conjunction with the Council of Ministers' Decision no. 575 dated 10.07.2013 “On the approval of the rules for the evaluation and granting of concessions/public private partnerships”, and Council of Ministers' Decision no. 576 dated 10.07.2013 “On the approval of the rules for the identification, assessment, and granting of the concessions on hydropower plants” introduced a number of changes relevant to the implementation of public-private partnerships as compared to the provisions of the previous 2006 concession law. The intention behind the amendments was mainly to approximate the relevant legal framework with the directive 2004/18/EC of the European Parliament and the Council dated 31 march 2004 (CELEX no. 32004L0018).

Under the Concession Law concessions/PPP are granted for public works and public services, based on contracts with financial interests entered into between a contracting authority and one or more economical operators where the compensation for the works or services performed is derived from the right to exploit the works or services subject to the concession i.e. to generate revenues, in accordance with the concession agreement or to undertake the operational risks if the financial support afforded directly or indirectly to the concessionaire does not guarantee the return on investment or the costs.

Under the Concession Law the award of concessions/PPPs is driven based on the following basic principles:

- non-discrimination and equality of treatment of actual and potential tenderers;
- transparency of procurement procedures and reciprocity;
- proportionality of requirements and obligations imposed to actual and potential tenderers and legal security;
2. **Areas of public services and infrastructure that now may be offered as concession projects**

Under the Concession Law, the areas of public services and infrastructure that now may be offered as concession projects/PPP among other are:

- transport (railway system, rail transport, ports, airports, roads, tunnels, bridges, parking, public transport);
- generation and distribution of electricity and heating;
- production and distribution of water, treatment, collection and distribution;
- administration of waste water, irrigation, drainage, cleaning of canals and dams;
- collection, transfer, processing and administration of solid waste;
- telecommunication;
- science and education;
- health;
- tourism, leisure and hotels;
- culture and sports;
- social services;
- prison and judicial infrastructure;
- rehabilitation of land and forests,
- industrial parks, mining,
- housing, governmental buildings, service of maintenance of IT and data base infrastructure;
- recycling projects,
- natural gas distribution;

Of importance is to note that under the Concession Law the Council of Ministers may in specific cases offer concessions to economic operators under the symbolic price of one Euro. However, the Concession Law fails to determine what these specific cases are.

It is the role of the central government agencies or local government to identify potential concession projects. They may also be identified by third parties, through unsolicited proposals, provided that the project identified has not already been procured for. In the process of the project assessment, the competent ministries or local government authorities carry out a viability and profitability analysis based on the principles of value for money, alignment of potential concessions with the national and sector strategic
objectives, the technical and commercial feasibility of the potential concession and its ability to attract potential concessionaires and private financing.

3. What is excluded

Certain contracts are however excluded or reserved. The following contracts are excluded among other from the scope of the Concession Law:

- Contracts for works or services below the set threshold (however the relevant legislation fails to establish the said threshold);
- contracts which for their implementation require special security measures for the purpose of protection of the essential interests of a Member State;
- concessions which are subject and are awarded in accordance with the rules of international organizations;
- financial services in regard to the sale, purchase, emission or transfer of titles or other financial instruments; air transport services; or
- service contracts awarded on the basis of an exclusive right;
- acquisition or rental of existing buildings;
- the acquisition, development, (co)production of broadcasting programs;
- arbitration and conciliation services;
- the purchase, sale or transfer of financial instruments;

4. Criteria for the selection of the concessionaire

Concession contracts are generally awarded in a competitive procedure under the public procurement rules.

The Concession Law establishes that the concession contract may be awarded to the bidder with the most advantageous economical offer. However, in awarding the contract the contracting authority may consider criteria, such as: quality, price, technical merit, aesthetic and functional characteristics, environmental, characteristics, running costs, cost effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion.

In addition the concession contract may be awarded to the bidder which has offered the highest concessionary tariff.

Under the concession law the duration of concession contracts may not exceed 35 years, however it may be extended due to subsequent amendments of the concession contract.
5. Review procedures

The review of the award of concessions is made subject to the procedures set forth under the Public Procurement Law (i.e. the Law 9643 of 2006 “On public procurement law”, as amended (“PPL”)).

Each bidder may request an administrative review of the selection processes, when it deems that an action undertaken by the contracting authority is in violation of the provisions of the Concession Law or other legal or sub-legal acts on the concession procedures. The complaint shall be submitted to the Public Procurement Agency within 5 calendar days from the date of the publication of the announcement of the pre-qualified candidates or the announcement of the ranking of the bidders.

Upon receipt of the complaint, the Public Procurement Agency should notify the contracting authority within 5 days on the suspension of the further procedures and the commencement of the administrative review procedures. The further procedure will not be suspended when: (i) from the preliminary review it results that the complaint has no legal grounds; (ii) suspension would be in conflict with the public interest or would be to the detriment of the contracting authority or bidders. The Public Procurement Agency has to conclude the administrative review within 20 calendar days from the submission of a complaint and to notify the contracting authority and the petitioner about its decision. The decision of Public Procurement Agency is a final administrative act.

A party dissatisfied with the Public Procurement Agency decision may commence its judicial review procedure before the District Court of Tirana (Administrative Section) within 30 days from the notification of its negative decision of the Public Procurement Agency. Judicial review proceedings are frequent. They usually take up to 30 days. In case the challenge is successful, the eventual remedies may even impose the cancellation of the tender procedures.
Contacts

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If you would like to know more about the topics covered in this memorandum or our services in general, please get in touch with the contacts listed above, or with:

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