

12/2008

PUBLIC-PRIVATE PARTNERSHIP

On 21 November 2008, the lower chamber of Polish Parliament (Seym) passed a new act on public-private partnership. At the moment, after amendments have been filed to the act by the upper chamber, i.e. Senate, the act is going to be re-considered by the Seym, and afterwards it will be forwarded for signature to the President of the Republic of Poland. The act will come to force on 21st day after its publication in the Journal of Laws.

The new public-private partnership act of 21 November 2008 ("The Act") is aimed to facilitate cooperation between public and private entities with the purpose of implementing projects of construction or modernization of buildings, provision of services, performance of work or other performances, combined with maintenance and management of assets used to implement a public-private venture.

Compared to the previous act, the new Act significantly broadens the list of public entities that may engage in public-private partnership. It is no longer limited to entities in the public finance sector within the meaning of public finance regulations, but it also includes legal entities established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, in which entities of public finance sector hold more than half shares or stocks, exercise supervision over the managing body, are entitled to appoint more than half members of the supervisory or management body. It may also be a legal person financed in more than 50% by entities of public finance sector. The private partner is always an entrepreneur.

Selection of the private partner is made in accordance with the procedures stipulated in the new act on concession for construction works or services, passed by the Polish Seym on 5 December 2008 (in case of remuneration stipulated as the usufruct right), by way of two-stage proceeding: negotiations and selection of the most advantageous bid from among those submitted by entities taking part in negotiations. Currently, the act is waiting to be signed by the President of the Republic of Poland and published in the Journal of Laws. The provisions of the Public Procurement Act apply to other cases, and thus it is possible to select the private partner by way of open or restricted tender procedure, or other procedures described in said act, provided that the conditions for application of such a procedure are met.

Under the public-private partnership agreement, the private and the public entity share risks and responsibilities. In particular, the private partner implements the venture in return for remuneration, and incurs expenses for such implementation in total or in part, while the public entity, in addition to remuneration, should make its own contribution, e.g. in the form of coverage of



a portion of costs or an asset. The partnership may also take the form of a capital company, a limited partnership or a limited joint-stock partnership.

Additionally, the act lays down the conditions for termination of cooperation between a public and a private entity. It involves transfer to the public entity of the assets contributed by it, which was used to realize the public-private partnership, in a condition that is not deteriorated in excess of wear and tear resulting from its proper use. However, the agreement may provide for a different way of termination of the cooperation, e.g. by transferring the contribution to a legal person or a commercial company in which local government units or the State Treasury hold majority of shares.

However, it should be stressed that in case the contribution takes the form of real property, the private partner will have the buying preference to such real property. Said right may be exercised by the private partner within 2 months from the date the partner was informed about provisions of the agreement concluded with a third party.

If the public-private partnership had the form of a capital company, the public entity has the preemptive right to shares or stocks of the capital company in case they are sold by the private partner. Also in this case the preemptive right may be exercised within 2 months from the date of notification of the public entity about the provisions of share or stock sale agreement.

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We hope the above information proves useful. It should not be construed as legal advice or opinion. If you wish to obtain further information or legal advice, please do not hesitate to contact us.

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