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**HOW TO “PROCURE” THE BEST PRIVATE PARTNER:  
THE CASE OF COMPETITIVE DIALOGUE**

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***Abstract:** Although Public-private partnership (“PPP”) per se is relatively new method of infrastructure provisioning in the Republic of Serbia, its implementation is very well defined and stipulated in the legal framework. It particularly applies to the phase of private partner selection through standard public procurement procedures, including the competitive dialogue (“CD”). CD is a relevant method of selecting a private partner in cases where the public sector knows the goal wanted to be achieved by the project, but lacks the knowledge about the means and methods necessary to be applied for its achievement. The research is focused on the legal and institutional framework for PPPs, as well as the procedures for their realization, emphasizing the procedure of CD. The aim of the research is to contribute and to encourage public sector at the local and national level to use CD as complex but useful concept.*

***Keywords:** Public-Private Partnership, Competitive Dialogue, public sector, private partner.*

**1. Public Private Partnership in Serbian Legislation**

The success of the approach, known as “Public-Private Partnerships” (PPP), spread from a country to another with variations linked mostly to the national legislation framework. However, in the EU there is no common explicit legal framework that would regulate PPP and also, there is no single definition of PPP. According to the Green Paper on PPPs and Community Law on Public Contracts and Concessions, “... the term (PPP) refers to forms of cooperation between public authorities and the world of business which aim to

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*ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of a service* “ (Green Paper on PPP and Concessions, 2004, pp.3).

Serbian legislation related to PPP is based on two main pillars: Law on Public-Private Partnership and Concessions (2011) and Law on Public Procurement (2012). Law on Public-Private Partnership and Concessions is stipulating the definition of PPP as “...long-term cooperation between public and private partner with aim to provide financing, construction, reconstruction, management or operation of infrastructure and other objects of public interest as well as delivery of services of public interest which may be contractual and institutional” (Official Gazette of the Republic of Serbia, No. 88/2011). In both contractual and institutional form of PPP, before entering the process of private partner selection (public tender), public body is obliged to have a consent or positive opinion on whether the project proposal can be implemented through PPP concept or not issued by the Commission for PPP of the Republic of Serbia, the main PPP Task Force and base of the national institutional framework for PPP. There are two ways of procedures of PPP implementation, depending on the types of PPP:

a) If the project comprises elements of concessions, the procedure to be implemented for the award of the public contract is the one defined by the Law on Public Private Partnerships and Concessions.

b) If the project does not have elements of concessions, then the procedure to be applied for the contract award is the one stipulated by the Law on Public Procurement.

What are in common to both of these procedures are general terms and conditions that apply to contract award procedure. That starts with a general requirement that the following principles should be applied to all public procurements: equal treatment, non-discrimination, transparency. These principles are followed by the requirement for public procurement of an appropriate type and value to be advertised openly in domestic and international arena. Eventually, fairness and openness of bidding criteria and criteria for selecting and awarding projects, as well as dispute resolution systems, are very important standards that are defined and have to be met in both procedures described in Law on Public-Private Partnerships and Concessions and Law on Public Procurement. Both laws set the following procedures for contract award:

- Open procedure
- Restricted procedure
- Qualification procedure
- Negotiated procedure with public announcement for submission of proposals
- Negotiated procedure without public announcement for submission of proposals
- Competitive dialogue
- Concourse for design
- Procedure for public procurement of small value.

Republic of Serbia introduced the CD procedure through enacting the Law on Public-Private Partnership and Concessions (Official Gazette of Republic of Serbia, No. 88/2011) and elaborated in the Law on Public Procurement (Official Gazette of Republic of Serbia, No. 124/12).

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### **2. Competitive Dialogue as the Procedure for Private Partner Selection in Public-Private Partnership**

In March 2004 the European Commission published Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (Public Service Directive, hereinafter also: “Classic Directive”). The term “Classic Directive” is used extensively in order to differentiate Public service directive from the Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (“Special Directive”). Special Directive applies to public procurement contracts concluded by a contracting authority in the sectors in question for supplies, services, works, which are not exceptionally excluded by this Directive. However, in contrast to the Classic Directive, this Directive does not apply to works concessions.

Classic Directive beside other issues, introduced the new procurement procedure – Competitive Dialogue procedure (hereinafter: CD procedure). In that time, it was foreseen that it would largely replace the negotiated procedure except for “*the most exceptional projects*” (OGC/HMT Guidance on Competitive Dialogue, 2008, pp. 3). The legislation “...has therefore set itself the objective of providing for a flexible procedure which provides not only competition between economic operators but also the need for the contracting authorities to discuss all aspects of the contract with each candidate” (Classic Directive, 2004, Recital 31). Therefore, the main goal of CD procedure is to provide the procurement procedure suitable for the complex project for which established and common modalities of procurement are not eligible.

Regarding the circumstances under the CD can be used, commonly present are:

- When open or restricted procedure do not allow award of the contract, due to the extraordinary complexity of the project.
- Technical complexity of the project. CD is particularly useful for complex facilities or buildings where functional design or technology is critical to the success of a project but where many means to realize the goals are available. E.g. prisons, hospitals.
- Financial and legal complexity
- Additional requirements. In Serbian legislation, consent of the Public Procurement State Office is necessary.

CD procedure applies by particularly complex contracts, as defined in Classic Directive. Art. 29. § 1. Although CD procedure is by European Commission seen as the ideal method for the procurement of PPP project and therefore enjoys impetus of political nature, the Classic Directive provides only the general direction for the national legislators.

The first direction is contained in Art. 1. § 11. Point c) of Classic Directive prescribing that a public contract is considered to be ‘particularly complex’ where the contracting authorities: are not objectively able to define the technical means or capable of satisfying their needs or objectives, and/or are not objectively able to specify the legal and/or financial make-up of a project.

To define if contracting authority is lacking the capacity to realize PPP project without participation of private parties the crucial is what level of knowledge would be necessary for the third party in the similar situation. The incapacity is objective if, for example, the PPP for which procurement the CD procedure is initiated is (alternatively): the first of the kind; causing unreasonable costs for the contracting authority; depending on the specific knowledge which could not be acquired by contracting authority without time and cost beyond reasonable considerations.

Second direction is contained in recital 31 of Classical Directive Preamble. It is prescribed that "particularly complex contract" exists when it comes to important integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing. For those three types of projects there is rebuttable presumption that those projects are "particularly complex" in the sense of par. 2. Art. 29. of Classical Directive. Consequentially PPP projects intended to build schools, sport venues or similar objects are not presumably "particularly complex contracts" in the sense in which the projects which object is listed in the recital 31 of Classic Directive Preamble are. Therefore for the PPP projects placed outside definition of the abovementioned recital to be procured using CD procedure it is necessary to prove the "complexity" feature (on the basis of the circumstances of the concrete case at stake and comparison with the similar projects).

According to the Classic directive, the competitive dialogue begins with the publication of a notice in the EU Official Journal. Notice is the form for definition of ideas and requirements of contracting authority regarding the project which is the object of the procurement. In case that more elaborated data about project are available, it is possible for contracting authority to attach additional description of the projects features. The recommendation is to be cautious regarding the requirements directed toward potential bidders: namely, changing of once given procurement criteria is inadmissible. Consequently, it is also important to stress, the public body as a contracting authority is to the end bound to the (robust) award criteria set at the beginning of the CD in the notice, in terms of content and ponderation. But, at that point (zero point in terms of knowledge) contracting authority is not objectively in the position to know which technical, legal or financial solution for its PPP could be suitable.

There is also a pre-qualification phase of the competitive dialogue, during which contracting authority selects first favorite among the unlimited number of applicants. Here CD also has the function of aptitude/eligibility test. The particular significance of the competitive dialogue, in contrast to the negotiation process, however, is that the goal of the dialogue is not only to identify those companies that promise a flawless performance, but also the bidders able to present the contract content and technological variations already in the preliminary stages of dialogue. The filter is based on the criteria set out in the notice, criteria that have to be meticulously demonstrated by all applicants. The contracting authority is free to structure the dialogue. A dialogue leads further in order to help the contracting authority and dialogue participants to negotiate about content and conditions for task realization until is clear: how to achieve the wished performance; on what terms the dialogue partners should provide the mutual actions; allocation of duties and responsibilities. The dialogue is a dynamic process in which the contracting authority has to ensure the disclosure of project-specific information, but at the same time the information lie behind the particular approaches of the dialogue partners must be treated confidentially.

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Dialogue phase ends with one or more solutions eligible to achieve the object of the PPP. The dialogue phase can also end with the finding that no suitable solution was identified.

The companies that have completed successfully the dialogue phase are invited to make the offer. The approaches and solutions reached during the dialogue are the basis for the bid. The offer shall contain all the details necessary for implementation of the project. The contracting authority may require clarifications and additional information to be included in the bid. The risk of incompleteness is burdened by the bidder. The know-how already rudimentary disclosed during the dialogue phase must be fully disclosed in the bid, insofar as the content of the task requires.

Contracting authority has to assess the bids within a reasonable time. The bid(s) should be made in writing and in accordance with the provisions laid down in the contract notice. The “preferred-bidder” is in position that even after it is characterized as the “chosen one” to explain certain details of the offer or to confirm the taken commitments. The bid phase of the competitive dialogue ends with the decision of the contracting authority to determine the suitable offer. Before a contract is concluded the 14-day waiting (standstill, “Alcatel clause”) period must be complied with, in order for competitors to be informed shortly before the end of the tender which company is awarded the contract and what is the justification of such award.

### **3. Opportunities of CD Procedure in PPP Implementation in the Republic of Serbia**

All procurement procedures provided for in the legislation should be used to procure PPP projects in Serbia, as it is the practice in other countries. Which procedure will be used, depends mostly on the complexity of the project and other factors.

In comparison with other available procurement procedures, CD procedure offers to the contracting authority the highest level of flexibility in finding the best solution for the proposed PPP. More particularly, the benefits of CD procedure are:

- Improved communication between the contracting authority and the bidders. This leads to result in final solutions that better fit the needs of the contracting authority.
- Enhanced competitive tension
- Better priced discipline
- Fostering and bringing innovations
- CD implementation in general does not expose the contracting authority to greater risk of legal challenges than alternative procurement procedure.
- The contracting authority uses the knowledge gained from a dialogue in the ensuing dialogue, thus gaining the necessary detailed knowledge about the object of procurement. In this procedure takes place a know-how transfer, inevitably taking into consideration the structure and conditions on the application of competitive dialogue.

However, there are some concerns regarding the use of CD and the main are: a) CD should not be taken as a „one fits all“ option for PPP implementation, b) CD is perceived as a complex procedure, with a negative impact on procurement cost and time, and c) CD is perceived as lacking transparency and/or clarity.

For these reasons, public sector in the Republic of Serbia should be encouraged to take a case by case approach on whether CD is likely to deliver the best results and to be objective in decision-making process. Although the PPP implementation through the CD procedure has various challenges, it is crucial to keep strengthening the public sector awareness and knowledge of the CD procedure and its potential and advantages. In addition, it is very important to support capacity and ability of the public sector, particularly at the level of the local self-governments to deal with CD as a novelty in terms of qualifications, training and staff resources.

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### **KAKO IZABRATI NAJBOLJEG PRIVATNOG PARTNERA: PRIMER KONKURENTSKOG DIJALOGA**

**Rezime:** Iako je javno-privatno partnerstvo ("PPP") samo po sebi relativno nov metod obezbeđivanja infrastrukture u Republici Srbiji, njegova primena je veoma dobro objašnjena i propisana u zakonskom okviru. To se posebno odnosi na fazu odabira privatnog partnera kroz uobičajene postupke javnih nabavki, uključujući i proceduru konkurentskog dijaloga ("CD"). CD je značajan metod odabira privatnog partnera u slučajevima kada javni partner zna koje ciljeve želi da postigne projektom, ali mu nedostaje znanje o uslovima i metodima koji su potrebni za tu realizaciju. Istraživanje je usmereno na pravni i institucionalni okvir za PPP, kao i procedure za njihovu realizaciju sa fokusom na proceduru konkurentskog dijaloga. Cilj istraživanja je da doprinese javnom sektoru u Republici Srbiji i na lokalnom i na državnom nivou, i da ga ohrabri da koristi CD kao složen ali koristan koncept sa višestrukim prednostima.

**Gljučne reči:** Javno-privatno partnerstvo, konkurentski dijalog, javni sektor, privatni partner.