

**CHOOSING THE PRIVATE PARTNER  
FOR A PUBLIC PRIVATE PARTNERSHIP:  
A EUROPEAN UNION LAW PERSPECTIVE ON POLISH PRACTICE**

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**I. Introduction**

A never-abating demand for the improvement of existing infrastructure and the quality of public services continues throughout the European Union, despite the fact that EU governments have long been struggling at all levels to balance their budgets. Consequently, central and local governments are seeking new solutions to relieve such budget pressure, notably towards non-traditional sources of funding, in order to meet their capital and operating needs. One such method involves the formation of collaborations between public authorities and private companies, so-called Public-Private partnerships (PPPs). PPPs pursue financing and operational strategies based on cooperation between public and private bodies that enables the realisation of projects, including funding, political support, risk allocation, *'know how'* and more. PPPs are widely used around the world, but the legal regulation of this phenomenon remains in its infancy at both European and national levels.

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PPP collaboration is widely promoted and discussed by the European Commission in its communication with Member States. However, there are no binding legal provisions that regulate this instrument at the EU level. Therefore, there is no commonly accepted legal definition of PPPs:<sup>1</sup> 'Soft law' on PPPs is the only law established at the EU level. It is common knowledge that such provisions have no binding effect on the Member States. The most important soft law instruments regarding PPPs can be found in the Commission's Green Paper on public-private partnerships and Community law on public contracts and concessions<sup>2</sup> as well as in the European Commission's Guidelines for Successful Public Private Partnership from 2003.

## 2. Objectives of PPPs

One of the most important challenges associated with PPPs is the selection of a suitable private bidder capable of completing the project on time. Regulation of the procedure for choosing a PPP private partner depends on the objectives of the particular partnership: some will oblige a public authority to act within specific EU legal frameworks, while others will be regulated by national provisions or will leave the public authority full contractual freedom. Experience from countries where PPPs are widely established suggests that the main areas within which PPPs are utilised are as follows: municipal infrastructure, including roads, car parks, local transport, housing, road transport, especially motorways, water and sewage management and waste management. In summary those are realisations of works, delivery of supplies or service provision – all of which constitute different types of PPPs, such as concession or public contracts.

EU Directive 2004/18/EC<sup>3</sup> on public procurement lays down specific provisions for establishing work concessions – which are generally

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<sup>1</sup> Ch. Tvarnø, *A critique of the Commission's interpretative communication on Institutionalised Public-Private Partnership*, 'Public Procurement Law Review' 2009, Vol. 3, No. 1, at p. 12.

<sup>2</sup> COM (2004) 327 final.

<sup>3</sup> Directive 2004/18/EC of the European Parliament and the Council on the co-ordination of procedures for the award of public works contracts, public supply

analogous to provisions on public works contracts, included in the same Directive. However, service concessions, which have developed in practice in several Member States, are not governed by the Directive and are merely subject to the general rules and principles of the EU Treaties. Consequently, a public authority is left with a wider scope of freedom and flexibility when choosing a private partner for a PPP which will deliver a service concession.<sup>4</sup> Conversely, if a PPP's objective is the realisation of works, supply, or services exceeding specific threshold values and its aim has the characteristics of a public contract, as defined in the Public Procurement Directive, the choice of PPP private partner is regulated by EU public procurement law.<sup>5</sup>

The Public Procurement Directive includes different procedures for the award of public contracts, one of which is the Competitive Dialogue, which was initially presented with the explicit aim of promoting PPP contracts and facilitating their implementation.<sup>6</sup> The latter is a new procedure which was established to bring more flexibility to EU public procurement law, especially while dealing with complex contracts such as PPPs for which yet available, restricted procedures, or the negotiated procedures were not appropriate outline.<sup>7</sup> For these reasons, the main focus of this part of the article will be on the choice of private partner within the Competitive Dialogue procedure.

### **3. Choice of Private Party in the Competitive Dialogue Procedure**

Competitive Dialogue is a multistage procedure for the award of public contracts

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contracts and public service contracts O.J. 30.4.2004, L-134, p. 114 (Hereafter: Public Procurement Directive).

<sup>4</sup> This will certainly change, see Proposal for a Directive on public procurement COM(2011) 897 final.

<sup>5</sup> Public Procurement Directive, Art. 1 and 7.

<sup>6</sup> Green Paper on public-private partnership and Community law on public contracts and concessions, COM(2004) 327, at p. 10 para. 26.

<sup>7</sup> M. Burnett, *Developing a Complexity Test for the Use of Competitive Dialogue for PPP Contracts*, 'European PPP Law Review' 2010, No. 4, at p. 216.

[i]n which any economic operator may request to participate and whereby the Contracting Authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender.<sup>8</sup>

The tender has three stages: a pre-selection stage, a dialogue stage and an award stage. For the purpose of this article, the most important of these is the pre-selection stage, since it is during that stage that potential PPP private parties are chosen. During all stages, the public authorities must comply with the principles and rules derived from the EU Treaties, especially the principles of transparency, equality of treatment and proportionality.<sup>9</sup>

The need to guarantee fair competition during the public authority's selection procedures attracted the attention of the European Commission, which issued a communication on 12.4.2008, specifying that the aim of EU law was to facilitate applications for public procurements and licenses by all interested entrepreneurs, by way of just and transparent procedures – in accordance with the principles of the internal market – that will contribute to the emergence of a standard for these types of projects as well as to cost savings.<sup>10</sup>

The process begins with the publication of a contract notice wherein the public authority includes basic information concerning its needs and requirements, which bidding private companies must satisfy.<sup>11</sup> In the contract notice, the public authority specifies the minimum and, if possible, the maximum number of candidates and the objective criteria to be used to choose the appropriate number of candidates. In practice,

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<sup>8</sup> Public Procurement Directive, Art. 1(11)(c).

<sup>9</sup> D. Savvides, *The Effectiveness of the Competitive Dialogue Procedure under the EU Consolidated Public Procurement Directive (2004/18/EC) As an Award Procedure for Public Private Partnerships*, 'European PPP Law Review' 2011, No. 1, at p. 28; see also Ch. Bovis, *The Private Finance Initiative (PFI) as the Prelude of Public Partnerships (PPPs)*, 'European PPP Law Review' 2006, No. 1, at pp. 24–33.

<sup>10</sup> Commission interpretative communication on application of the Community law on Public Procurement and Concessions to institutionalised PPP (IPPP) O.J. 12.4.2008, C-91, p. 4.

<sup>11</sup> Public Procurement Directive, Art. 35–36.

that means that at least three candidates must be selected for the dialogue phase, since that number is accepted as the minimum required so as to ensure genuine competition.<sup>12</sup> The aim of this phase is to properly advertise the tender so that all potentially interested private parties may be deemed to have been informed of its existence. The contract notice provides all of the necessary information regarding the time, place and other requirements that potential tenders should fulfil. Interested private parties should submit their proposals in writing before the deadline.

Pursuant to the provisions of the Public Procurement Directive,<sup>13</sup> the public authority decides which interested bidders fulfil the necessary qualifications for the contract – this phase is often called ‘pre-qualification phase’, ‘short listing of the candidates’ or ‘pre-selection phase’. At this stage, the potential private parties are chosen. The public authority bases its choice of candidates on the applicants’ financial and technical qualifications.<sup>14</sup> In particular, candidates are selected on the basis of their ability to perform the objectives of the contract, taking into consideration such aspects as their bidding experience, financial capacity and ability to bear the risks connected with the contract.<sup>15</sup> These are the pre-selection criteria which must fulfill the criterion of having an economic value capable of being expressed as a monetary value.

In the Public Procurement Directive, a specific provision provides for the possibility to exclude a bidder from participating in a public contract tender (Article 45). The obligation to exclude a bidder from the tender occurs when the candidate was, or is, involved in a criminal organisation, corruption, fraud or money laundering. Besides such compulsory exclusion, there also exist situations wherein the public authority has the discretion to exclude a candidate who is bankrupt or is being wound up, has been guilty of grave professional misconduct, has not fulfilled obligations relating to the payment of social security contributions, has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which they are established or

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<sup>12</sup> Public Procurement Directive, Art. 44 (3).

<sup>13</sup> Public Procurement Directive, Art. 44–52.

<sup>14</sup> Ch. Bovis, *EC Public Procurement: case law and regulation*, Oxford University Press 2006, at pp. 224–233.

<sup>15</sup> *Ibidem*.

with those of the country of the contracting authority, is guilty of serious misrepresentation in supplying the information, or has not supplied adequate information. Usually, any such party will be excluded from the process and will not be taken into consideration in the pre-selection stage.

It is not possible for the public authority, at the pre-selection stage of the Competitive Dialogue, to choose one specific party with whom to collaborate and negotiate the conditions of the contract. Such a situation is only allowed in the case of awarding a public contract by using negotiation procedures, but the latter are exceptional procedures which should be used only in defined, exceptional circumstances.<sup>16</sup> During the pre-selection stage of a Competitive Dialogue, the public authority focuses on subjective elements and chooses private parties that fulfil their stated requirements. During the dialogue stage, it discusses with them the essential elements of the contract. Subsequently, the parties who are admitted to the dialogue phase submit their final offer based on the awarding criteria established in the contract notice, and the ultimate winner is eventually chosen. A different manner of choosing a partner for collaboration is established, as mentioned before, by negotiated procedures or partnering contracts, which are also a type of PPPs.

Partnering is primarily used for the award of contracts whose value does not exceed the legal threshold and therefore is not regulated by the Directive but, rather, by the national law of the specific Member State. The partnering procedure, which differs from the Competitive Dialogue process, involves, firstly, the selection by the public authority of a private partner with whom it wishes to collaborate, chosen on the basis of the private party's experience, good faith, and willingness to collaborate.<sup>17</sup> Secondly, having selected a partner and signed the contract, the parties discuss and negotiate the project.<sup>18</sup> This constitutes a rather risky approach towards the award of public contracts, since the contract's specification is only finalised following the actual award of the contract, which ultimately means that at the time the parties enter into collaboration they do not in

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<sup>16</sup> Public Procurement Directive, Art. 30–31.

<sup>17</sup> A. Moscho, J. Leiter, *Perfect partnering*, 'Nature Biotechnology' 2001, Vol. 19, No. 6, Suppl. 1, pp. 21–22.

<sup>18</sup> U. Olsson, U. Espling, *Part I. A framework of partnering for infrastructure maintenance*, 'Journal of Quality in Maintenance Engineering' 2004, No. 4, pp. 234–247.

fact know what they have 'signed up for'. From a broader perspective, the partnering procedure has a lot of flexibility, which is essential for complex contracts such as PPPs, especially since it takes into account the 'human' element and the importance of familiarity between the partners, involving a trusting and comfortable working relationship.<sup>19</sup> Conversely, this procedure may impede competition given the fact that the competition part is closed so early and negotiation occurs following the award of the contract. In this situation, the private party who won the PPP contract has considerably greater bargaining power, since it is no longer competing and may dictate the conditions of project implementation much easier. Furthermore, since project specification is established during that phase of negotiation and not earlier, competition may be impeded.

In order to counterbalance negotiated procedures, the Competitive Dialogue procedure was introduced to alter the balance of power held by the private bidder and to secure transparency, non-discrimination, equal treatment, proportionality and free competition in public procurement. Pursuant to the Competitive Dialogue legal provisions, the best offer of project implementation is granted primary focus; it is not a priority to choose one specific private party with whom the public authority wishes to work, but it is important to establish criteria to which private companies must adhere in order to be eligible to compete for the award of the PPP contract. It is not the private party that is chosen but, rather, the best proposal for project implementation which wins the award of the PPP contract.

The phases of pre-selection of potential partners for the PPP and the award of the contract are intertwined, since both need to be dealt with in a single procurement procedure. According to the Court of Justice's judgment in the *Acoset Case*,<sup>20</sup> the existence of two separate procedures is undesirable: the

[u]se of double procedure for, first, selection of the private participant in the semi-private company and, second, the award of the concession to that company, would be liable to deter private entities and public authorities

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<sup>19</sup> *Supra* note 19, BE 22.

<sup>20</sup> *Acoset Spa v Conferenza Sindaci e Presidenza Prov Reg. ATO Idrico Ragusa and Others*, Case C-196/08, Judgment of the Court of 15.10.2009, ECR 2009, p. I-09913.

from forming institutionalized public-private partnerships, on account of the length of time involved in implementing such procedures and the legal uncertainty attaching to the award of the concession to the previously selected private participant.

However, this situation is not devoid of difficulties: the division between the pre-selection phase and the award phase has already caused problems in practice, for example in the widely discussed *Lianakis* case.<sup>21</sup> In this case, the Court of Justice stressed that factors which may be considered when pre-selecting candidates as potential tenderers may not be used for the purposes of taking the contract award decision when the permitted award criteria of the lowest price, or most economically advantageous tender, must be applied. Furthermore, as previously indicated, it is necessary to have one procedure for selection of the private party for a PPP and award of the contract. Simultaneously, it is crucial to recognise that there is a distinction between those two stages, for example as regards the criteria which are used.

#### **4. Selection of a Private Partner for PPP in Polish Legislation**

Polish legal provisions concerning Public Private Partnerships are relatively new: they were introduced only three and a half years ago. Within this period, over 100 such ventures have been initiated, which confirms the great interest with which they have been viewed by both public authorities and private partners who cooperate to undertake public works.

The selection of a private partner for a PPP is regulated by three separate Polish statutes. The basic Act, namely the PPP Act<sup>22</sup> provides the legal definition of PPP: the subject of a PPP is the joint implementation of a project, based on the division of tasks and risks, between a public entity and a private partner.<sup>23</sup> Article 4 of the PPP Act includes a reference to

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<sup>21</sup> Emm. G. *Lianakis AE v Dimos Alexandroupolis, Planitiki AE.*, Case C-532/06, Judgment of the Court of 24.1.2008, ECR 2008, p. I-00251.

<sup>22</sup> PPP Act of 19.12.2008, Polish O.J. 2009, Issue 19, Item 100 (hereinafter: 'PPP Act').

<sup>23</sup> PPP Act, Art. 1 para. 2.



two other statutes: the license for construction works or services act (The Act on Concession for Works or Services of 9.1.2009)<sup>24</sup> and the Public Procurement Act.<sup>25</sup> It should be stressed that the criteria concerning the choice of legal basis among these statutes relates to the method of remunerating the private partner. Pursuant to Article 4 of the PPP Act, if the remuneration for a private partner is granted as the right to gain profit from the PPP or, crucially, if this right is complemented with the payment of a certain amount of money, the rules set out in the Concession for Works or Services Act should apply to the extent that it covers issues which are not regulated in the PPP Act. In other cases falling outside the scope of the PPP Act, the provisions of the Public Procurement Act are applicable.<sup>26</sup>

The multiplicity of applicable statutes gives rise to certain fundamental issues. As regards the choice of a private partner two distinct methods of selection exist, depending on the nature of remuneration payable to the private partner. Creating a single unified procedure for selection of a private partner might be a considerably better solution, ensuring both consistency and transparency within the procedure.

The main concerns raised by the procedure applicable to the choice of private partners pursuant to the Concession for Works or Services Act, as well as under the Public Procurement Act, are considered below.

#### **4.1. The Choice of Private Partners on the Basis of the Construction Works and Services Act**

This Act contains a separate provision – located in chapter II thereof – which determines the procedure to be followed for the conclusion of a license agreement, as defined in chapter III. The Act contains detailed rules for each stage of the procedure, which include the specificity and nature of the institutions issuing the licenses. These legal requirements are independent from the regulation contained in the Public Procurement Act. Furthermore, the procedure under the Concession for Works or Services Act contains important differences when compared to the Public

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<sup>24</sup> See fn. 1.

<sup>25</sup> See fn. 2.

<sup>26</sup> PPP Act, Art. 4 para. 2.

Procurement Act, in particular as regards the process of de-formalising procedures.

Article 6 of the Act is the most significant as regards defining the procedure as a whole, since it lays down the rules and principles that must be respected in the dealings of the public authority at each stage of the procedure. These include the following: the principle of equal and non-discriminatory treatment of competitors participating in the procedure, transparency of the public authority's actions and the principle of fair competition in the license awarding procedure.

The principle of the equal and non-discriminatory treatment of competitors taking part in the procedure establishes that all entities applying for licensing agreements should be treated according to the same rules. It can be inferred from the abundant literature on public procurement law that the principle of equal treatment requires in this context that the same criteria should apply to all potential licensors taking part in the competition, and that the evaluation of the applications according to such identical criteria should be transparent. Finally, it also requires that the same information should be communicated to all participants to the procedure.<sup>27</sup> An example of a breach of the principle of equal and non-discriminatory treatment might be the creation of conditions that would undermine or prevent the participation of potential competitors to the procedure.<sup>28</sup>

Transparency on the part of the public authority constitutes the principle of openness.<sup>29</sup> This rule is reflected in the language of, for example, Article 10 of the Act, according to which the public authority transmits a call for tender regarding a license for construction works to the Publications Office of the European Union via electronic mail in compliance with the form and procedures specified on the web page and described in the Public Procurement Directive<sup>30</sup> and in accordance with the

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<sup>27</sup> E. Norek *Prawo zamówień publicznych. Komentarz [Public Procurement Law. A Commentary]* LexisNexis Warszawa 2009, at p. 57.

<sup>28</sup> P. Granecki *Prawo zamówień publicznych. Komentarz [Public Procurement Law. A Commentary]*, C.H. Beck Warszawa 2009, at p. 61.

<sup>29</sup> The Concession for Works or Services Act 2009 of 9.1.2009, Art. 6.

<sup>30</sup> Appendix VIII to the Public Procurement Directive, Art. 3.

specified model described in the relevant regulation of the Commission.<sup>31</sup> This model institutes the standard format for the publication of tenders in accordance with contract awarding procedures and the Public Procurement Directive. Moreover, if the value of the item to be licensed is below the threshold specified in the provisions<sup>32</sup> of the Public Procurement Act and this fact was communicated to the Publications Office of the European Union, the deadline for submitting tenders for a licensing agreement should be no less than 21 days from the day of placing the notice for the license for services in the Public Procurement Bulletin, or from the moment of transmitting the notice to the Publications Office of the European Union.<sup>33</sup> This time limit might be reduced to 14 days in the event of an urgent need to conclude the licensing agreement without delay.

To guarantee compliance with the principle of fair competition when concluding the licensing agreement procedure, the public authority must restrain from any selective conduct that might distort competition.<sup>34</sup>

According to the provisions of the Concession for Works or Services Act, a two-stage procedural process precedes the conclusion of a licensing agreement. Firstly, the procedure is initiated via a license notice accompanied by application forms that are distributed by the entities in question, along with the legally required statements. The introductory stage requires the public entity to prepare details of the subject matter of the agreement. Such preparation is expressed in the contents of the notice. The significance of this first stage of cooperation should be stressed. This cooperation is to be established on the basis of the act concerning PPPs. The preparatory stage constitutes a key element in all procedures leading to cooperation between the public and private sectors.

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<sup>31</sup> Commission Regulation (EC) No. 1564/2005 of 7.9.2005 establishing standard forms for the publication of notices in the framework of public procurement procedures pursuant to Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council, O.J. 1.10.2005 L-257, p. 1.

<sup>32</sup> Polish Public Procurement Act, Art. 11, para. 8.

<sup>33</sup> The Concession for Works or Services Act 2009 of 9.1.2009, Art. 12 para. 1.

<sup>34</sup> See: Eradication of Unfair Competition Act adopted on 16.4.1993, Polish O.J. 2003, Issue 153, Item 1503, and Protection of Competition and Consumers Act, adopted on 16.2.2007, Polish O.J. 2007, Issue 50, Item 331.

Following submission of the application, negotiations with all invited candidates may commence. Only those candidates that have submitted the correct application forms may participate in this second stage.<sup>35</sup> The negotiations may refer to all aspects of the license, including technical, financial and legal aspects.<sup>36</sup> The provisions of the licensing act are concurrent with those which deal with selection of the most beneficial offer by means of Competitive Dialogue. During negotiations, public authorities may receive from competitors the confirmation of compliance with the principles of cooperation formulated by the public authority, which may even be persuaded to amend the scope of materials or technology requiring implementation so as to ensure the proper performance of the task(s) assigned to the private entity.

This can be considered as a good solution, considering that such a procedure allows for cooperation, the very essence of PPPs, to develop from the moment at which the terms were laid down. The call for tenders takes place after negotiation talks on the basis of which the choice of best offer is made. Moreover, the public authority must invite all candidates having participated in the negotiations. Furthermore it should be stressed that the Polish Concession for Works or Services Act does not permit the short-listing of private parties during the negotiations stage. The call for tenders occurs only if the terms of the license have been duly communicated to the competitors. The description of the terms must include all information necessary to choose the most attractive tender.

It is important to indicate that the criteria on which basis the public authority chooses the offer might include: the duration of the license, the amount of co-financing from the private party for the item to be licensed, the costs of usage, the costs of the services performed for third parties, the quality of the performance, technical value, aesthetic and functional features, environmental aspects, profitability and the delivery date of the item to be licensed.<sup>37</sup>

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<sup>35</sup> The Concession for Works or Services Act 2009 of 9.1.2009, Art. 13, para. 1.

<sup>36</sup> The Concession for Works or Services Act 2009 of 9.1.2009, Art. 14, para. 2.

<sup>37</sup> The Concession for Works or Services Act 2009 of 9.1.2009, Art. 17, para. 3.

## **4.2. The Choice of a Private Partner on the Basis of the Polish Public Procurement Act**

In the remaining situations, where the rules of the license for construction works and services act are inapplicable, the public authority must comply with the rules contained in the Public Procurement Act.<sup>38</sup> This act becomes the legal basis for the selection of a private partner in connection with EU law provisions. The Competitive Dialogue option (previously mentioned) was introduced into the Polish Public Procurement Act in order to enable complex orders to be made.<sup>39</sup>

Given the unusual nature of Competitive Dialogue, which is characterised by a considerable degree of discretion on the part of the public authority, EU law attaches significant importance to the transparency of the public authority's conduct regarding the mode of disclosure and the equal treatment of tenderers, especially through equal access to information. To ensure that the procedures concerning the selection of a private partner are transparent, as required in the PPPs Act, a threefold system has been defined.<sup>40</sup>

As in EU law, Competitive Dialogue in Polish procurement provisions consists of three stages, starting with public notice of the tender. The public authority is obliged to submit a notice to the Polish Public Procurement Bulletin, the Official Journal of the European Union (OJEU; series C), and the Polish Public Information Bulletin of public authorities. It should be noted that the reciprocal relation of the three duties is dependent on the type and scale of the planned PPP: public authority notices are announced in the Polish Public Procurement Bulletin or the OJEU, whereas the placement of information in the Polish Public Information Bulletin is mandatory, regardless of the scale and nature of the planned project.

At the second stage, the public authority engages in dialogue with the selected bidders in order to precisely define the terms of the procurement, specify the future aim of the project, especially the manner

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<sup>38</sup> See fn. 2.

<sup>39</sup> Polish Public Procurement Act, Art. 60(b); see also P. Granecki, *op. cit.*, at p. 229.

<sup>40</sup> PPP Act, Art. 5.

of realisation thereof in order to meet the demands and requirements of the procurer.<sup>41</sup> The public authority extends an invitation to bidders who meet the criteria defined in the procedure in terms of the minimal number of participants to the Competitive Dialogue – at least three. This ensures competition.<sup>42</sup> If the contract value is equal to or higher than a threshold specified in a regulation of the Prime Minister issued pursuant to Article 11 (8) Polish Public Procurement Act, the number of participants must be at least five.<sup>43</sup> The conclusion of this stage occurs when the public authority is able to specify its demands concerning the object of the procurement and its realisation.

At the third stage, the public authority sends invitations to bidders with whom it engaged in dialogue, in order to have them submit final tenders. The final tenders must be composed in accordance with the specifications of the conditions concerning the procurement attached to the invitation. The content of such specifications should include solutions that were proposed during the dialogue.<sup>44</sup> However, Polish law does not require any information as regards the conditions of participating in the procedure, the method of evaluation concerning the problem of meeting such conditions, nor any statements or documents to be submitted by the executors so as to confirm that the conditions of the proceedings have been fulfilled.

Poland's Procurement Act, just as the act on concession for works or services, provides no opportunity for the consecutive short-listing of bidders while holding a dialogue, whereas the Public Procurement Directive enables this option.<sup>45</sup> Naturally, a reduction in the number of successive stages is beneficial in order to reduce the time involved in the bidding process and to reduce the costs of the procedure.

In EU law, the winner of the procurement procedure must be the competitor which offered the most beneficial tender. The legal definition of the most beneficial tender should be understood as that which presents the best price structure and fulfils other criteria pertaining to the subject

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<sup>41</sup> E. Norek, *op. cit.*, at p. 143.

<sup>42</sup> Polish Public Procurement Act, Art. 60(d), para. 2.

<sup>43</sup> Polish Public Procurement Act, Art. 11 para. 3.

<sup>44</sup> E. Norek, *op. cit.*, at p. 143.

<sup>45</sup> Public Procurement Directive, Art. 29 para. 4.

of the procurement, or the one that offers the lowest price.<sup>46</sup> When it comes to public procurement concerning arts and science, where the subject is impossible to define in an unambiguous and exhaustive manner, one should choose the offer which presents the most beneficial price structure and other criteria pertaining to the object of the procurement. In accordance with public procurement law, the question of whether a tender is beneficial or not is determined through the most measurable and concrete criterion: the price. The second manner of evaluating a tender consists in the possibility to establish the fundamental conditions of the procurement and criteria other than the price, according to which the tender will be evaluated. Non-price criteria for evaluating tenders should include the object of the procurement. According to academic writings on procurement law, one should indicate specific criteria relating to quality, functionality, technical parameters, etc.<sup>47</sup> In the current legislation in force in Poland, the price constitutes merely one element for ascertaining the most beneficial tender.<sup>48</sup>

The aforementioned legal definition of the most beneficial tender in the Public Procurement Act does not define in detail the criteria to be fulfilled by an undertaking recognized as the best candidate with regard to a PPP agreement. Consequently, a separate legal definition for the most beneficial tender was added to the Polish PPP legislation. According to this definition, the most beneficial tender is that which presents the best balance of remuneration and other criteria pertaining to the enterprise.<sup>49</sup> The first and most basic criterion remains remuneration. In order to fully understand the notion of remuneration, one should perform an analysis of Article 6, paragraph 1 of the PPP Act. The remaining criteria were divided into obligatory criteria, which must be applied by all public authorities in all cases concerning the selection of a private partner, and optional criteria, to be applied as appropriate to the individual decisions of a public authority. The role of obligatory criteria as interpretive indicators during the process of private partner selection has been stressed on more

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<sup>46</sup> Public Procurement Act (fn. 2), Art. 2 point 5.

<sup>47</sup> P. Granecki, *op. cit.*, at p. 16.

<sup>48</sup> J. Pieróg, *Prawo zamówień publicznych. Komentarz [Public Procurement Law. A Commentary]*, C.H. Beck, Warszawa 2010, p. 19.

<sup>49</sup> PPP Act, Art. 6.

than one occasion in jurisprudence concerning public procurements.<sup>50</sup> In accordance with the PPP act, the utmost importance of protection of the public interest should be given to the obligatory criteria concerning the selection of a partner. The obligatory criteria include, firstly, the division of tasks and risks connected with the enterprise between the public entity and private partner and, secondly, the terms and amount of payments or other benefits provided for the public entity, if such are envisaged.

As regards the facultative criteria, the following aspects are to be taken into consideration during the evaluation process. Firstly, the division of income generated by the partnership between the public and private partner; secondly, the ratio of the contribution of the public entity to the contribution of the private partner; thirdly, the effectiveness of the realization of the enterprise, including effectiveness as regards the use of assets; and fourthly, criteria specifically concerning the subject of the enterprise, especially quality, functionality, technical parameters, level of technologies offered, upkeep costs, service, etc.

## 5. Conclusion

At the European level, the choice of PPP private partner is not regulated by any specific provision. However, given the objectives of PPPs, their establishment, and in particular the choice of private partner, will generally be subject to the provisions of the Public Procurement Directive, especially those rules regarding the Competitive Dialogue procedure. In the Polish legal system, the PPP Act adopted in 2008, provides a legal definition of this public-private collaboration and refers to concrete methods for choosing a private partner for PPPs. Depending on the form of remuneration to be received by the private partner, the choice will be regulated through either the Concession for Works or Services Act of 9.1.2009 or the Polish Procurement Act. Both acts present methods of procurement based on European Union law, especially the Competitive Dialogue procedure. The only noticeable difference is that the Polish legal system provides no option for successive stages of selection of PPP candidates. This should be interpreted as a useful and practical choice for the purposes of reducing the length and costs of the procedure.

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<sup>50</sup> UZP/ZO/O – 2404/06, Judgement of Group of Arbiters of 31.8.2006.