

PFI/PPP Projects in Portugal

This month, Lawyer Monthly speaks to José Moreira da Silva, partner in Portuguese law firm, SRS Advogados, about the details and complexities involved in PFI/PPP projects in Portugal. SRS is a well-established international law firm with offices in Lisbon, Funchal and Oporto, enjoying partnerships with several reputable international firms from countries such as the UK and Brazil, to name just two.

Q Can you give me any details of any Private Finance Initiative or Public-Private Partnership projects you have been involved with recently?

Just before the Government suspended all PPP projects, our firm was involved in several projects, mainly on roads and hospitals. Because of the financial crisis we advised the government on the renegotiation of five road contracts with the concessionaire and the banks, some €2 billion. We also advise the Government on the new major Lisbon Hospital, among others.

Q What seems to be the current trend in Portugal, are there more PPPs or PFIs at the moment?

The recession as well as the need to call the EU and the IMF for help, has impacted severely in PPP deals. In Portugal we saw the Government postponing all the major projects, like hospitals, roads, airports and high speed trains. All were projects which were announced by the Government that were prepared to go ahead by 2010. We are talking of projects worth more than €20 billion that now are going to wait for better days.

The Portuguese Government took specific measures regarding PPP, taking into consideration the recent financial difficulties and restraints. Apart from postponing several important projects, the Government also rescheduled investments and cut down on expenditures. Those measures implied the need to renegotiate some PPP contracts in order to cut costs and to diminish the public debt.

I think the most needed progress regarding PPP is a major revision of the Portuguese legal regimen of transfer of the project risks, in order to establish the right balance between public and private. Another public intervention is needed in the creation of a

unique public body to manage all the PPP, thus creating know-how and experience.

The Government should also try to revise the European criteria for public debt allowing the Government to accept some risk in order to promote more PPP projects in this specific financial crisis era.

Q What is the most common type of litigation to arise within PPP/PFI projects?

We can talk about two distinctive type of litigation arising from PFI/PPP projects: (i) the first one may appear at the tender stage - competitors challenging each other to win the tender; (ii) but the most complex litigation normally arises when a change in contract is needed due to a modification of the circumstances, may it be financial or technical. A litigious matter is resolved in arbitration and it can be of high complexity when involving financial matters, namely a reschedule of the debt.

Q What, in your opinion, are the advantages of PPPs? What about PFIs?

PPP/PFI Projects made a serious impact in almost all European countries and Portugal is no exception. The major public projects and investments of the last decade such as bridges, highways, high speed trains, airports, defence, schools and prisons were not possible without this kind of contract. Governments, investment banks and private investors soon learned the advantages of participating in a PPP project and of carrying on such kind of projects. Most of them would never be possible in a traditional mode, obviously the early European consideration as non-public debt helped. In Portugal all the PPP Projects are also PFI projects and so the benefits are linked.

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José Moreira da Silva

Q What challenges are faced when dealing with PPP or PFI projects? How do you assist your clients to overcome these challenges?

Anyone who wants to establish a profitable partnership with a public body has to be aware of the legal and financial constraints normally surrounding these bodies. Also they have to be aware of the complex decision making process and of the long time frame involved in getting a decision.

With the correct expert advisors it is possible to profit from a partnership with a public body. Our firm has an important track record with regard to PPP/PFI projects within the health and road sectors in Portugal, being advisors for public bodies, private investors and banks on most of the major PPP and PFI projects over the last decade. We are used to advising international investors and banks, and we work in several languages.

Our PPP team has experience and dimension and is ready to advise on all major projects. The team is comprised of specialists in PPP, public law, environmental law, public procurement, financial markets, project finance, tax and corporate finance. We can offer experienced advice regarding an investment which helps to create value for the client.

Q How can your clients avoid litigation when entering into PPP or PFI projects?

Our clients can avoid litigation by preparing the project with great care and being advised by lawyers at an early stage. We can never put aside the legal counsel when talking of entering into a PPP/PFI project. The lawyers have to be part of the team from the first contact with the banks and at the first stage of preparing the proposal to the tender.

The risks of the project have to be well defined and the allocation between all the parties. The relationship between the members of the project, the lenders, the builder, the operator have to be well-established so that all parties know exactly what is expected of one another. The negotiations of the contracts have to be dealt with by someone with great experience and know-how. That is part of the success of a PPP/PFI project. **LM**



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