

Public-Private Partnerships 2020

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GENERAL PPP FRAMEWORK

Overview

- 1 How has the concept of public-private partnership (PPP) developed in your jurisdiction? What types of transactions are permitted and commonly used in your jurisdiction?

Article 1, paragraph 2 of Law No. 3389/2005 defines PPP as 'the written commercial co-operation agreements for the performance of construction work and/or services, between public and private entities'. Contractual PPP is the only category recognised under Greek law.

Covered categories

- 2 What categories of public infrastructure are subject to PPP transactions in your jurisdiction?

Partnerships may be subject to the provisions of article 2, paragraph 1a of Law No. 3389/2005 provided that their purpose is the construction of works or provision of services in the area of competence of the public entities on the basis of a provision of the law, or contract, or their articles of incorporation.

However, PPPs shall not be allowed to engage in projects or activities that are the direct and exclusive province of the state under the terms of the Greek Constitution, such as defence, police work, justice and the execution of judicially imposed penalties (article 2, paragraph 3 of Law No. 3389/2005).

In particular, PPP structures that have already been launched focus on the following:

- infrastructure (motorways, etc);
- education (schools, universities and sports centres);
- environment (waste management, waste water treatment, etc);
- health (hospitals);
- ports (infrastructure);
- public-sector buildings (courthouses, fire stations, municipal and regional buildings);
- broadband development; and
- public-sector real estate development.

Legislative framework

- 3 Is there a legislative framework for PPPs in your jurisdiction, or are PPPs undertaken pursuant to general government powers as one-off transactions?

The Greek PPP legal framework consists of Law No. 3389/2005 and the PPP task force (which implements PPP projects). Moreover, Law No. 4412/2016 on Public Procurement and Law No. 4413/2016 on Concessions Contracts remain applicable.

Relevant authority

- 4 Is there a centralised PPP authority or may each agency carry out its own programme?

Under Law No. 3389/2005, two new administrative bodies have been established.

The Inter-Ministerial Committee for Public-Private Partnerships (IMPPP Committee) is a collective government body (article 3 of Law No. 3389/2005) that:

- approves the inclusion of partnerships or revokes such decisions;
- approves the inclusion in the public investment programme of the contractual fee to be paid to the private entities;
- decides whether the public sector will participate in financing the construction of works or the provision of services; or
- decides any other relevant issue

Permanent PPP committee members include the ministers for:

- development and investment;
- finance;
- environment and energy; and
- infrastructure and transport.

Extraordinary members are the ministers whose powers include involvement of a public entity.

The Special Secretariat for Public-Private Partnerships (SSPPP) has also been set up within the Ministry of Development and Investment to provide support and assistance to the IMPPP Committee and the public entities (article 4).

The SSPPP identifies projects that can be delivered through a PPP scheme, evaluates the proposals submitted by public entities and their subsequent forwarding to the Inter-Ministerial PPP Committee for approval, promotes and monitors their implementation and provides support and assistance to the IMPPP Committee and public entities to finalise PPP projects. It also serves as a centre of knowledge and expertise on PPPs.

Procurement

- 5 Are PPPs procured only at the national level or may state, municipal or other subdivision government bodies enter into PPPs?

Under the provisions of article 1, paragraph 1 of Law No. 3389/2005, 'public entities' shall be understood to mean the following:

- the state;
- local government organisations;
- legal entities governed by public law; or
- *sociétés anonymes* whose entire share capital belongs to entities included in the above three points, or to one or more *sociétés anonymes* falling under this category.

Remuneration

6 How is the private party in a PPP remunerated in your jurisdiction?

The private party in a PPP may be remunerated by the contracting authority (availability payments: article 2, paragraph 2b and article 17, paragraph 2a of Law No. 3389/2005), or by the end users of the works or services through user charges (usage-based payments: article 2, paragraph 2b; article 17, paragraph 2e; and article 19, paragraph 1 of Law No. 3389/2005), or through a combination of both (mixed-usage and availability payments).

Sharing revenue and usage risk

7 May revenue risk or usage risk be shared between the private party and the government? How is risk shared?

The private entity shall bear the responsibility and risk of the financing that is required for the proper fulfilment of its obligations under the relevant PPP agreement (article 18 of Law No. 3389/2005). Therefore, the private entity shall assume the substantial part of the revenue risk or usage risk of the PPP project, as specified in the relevant PPP agreement. However, the law provides that in cases where the remuneration of the private entity is paid, wholly or partially, directly by the final users of the project, the public entity must provide any necessary assistance to allow the private entity to collect the said amounts, otherwise it bears the risk of compensating the private entity for any damage incurred (articles 19, 21, 23 and 24 of Law No. 3389/2005).

Government payment obligations

8 In situations where the private party is compensated in whole or in part through availability or other periodic payments from the government, are the payment obligations of the government subject to the relevant legislative body approving budgetary funding in the future?

The state procures services or works through the PPP without being obliged to finance them immediately because the initial financing is undertaken by the private sector. The invested private funds return to the private sector through periodic payments, and the state knows in advance the payment amounts to be made during the contractual period, leaving the contracting authority to secure funding in advance.

Rate of return caps

9 Is there any cap on the rate of return that may be earned by the private party in the PPP transaction?

No. The only provision in the PPP law referred to in article 2, paragraph 1d of Law No. 3389/2005 is that 'the total contractually budgeted cost for implementing the partnership object does not exceed €500 million, excluding payable VAT'.

Restriction of ownership transfer

10 Is the transfer of direct or indirect ownership interests in the project company or other participants restricted?

According to article 28 of Law No. 3389/2005, prior consent is required by the contracting authority for:

- any transfer outside the stock exchange of shares in the special purpose company (SPC), or any other transaction regarding the transfer of voting rights, if such transactions take place before the beginning of project operation or provision of services;

- any increase in share capital, or any modification of the articles of incorporation of the SPC, except those that are mandatory under the partnership contract, ancillary agreements or law;
- any bonds issue; or
- any form of merger, break-up, takeover or other corporate transformation of the SPC.

The special terms and conditions of this consent will be determined in detail in the PPP agreement.

PROCUREMENT PROCESS

Relevant procedure

11 What procedures normally apply to a PPP procurement? What evaluation criteria are used to award a PPP transaction?

Articles 7 to 16 of Law No. 3389/2005 determine the general principles (ie, equal treatment, transparency, proportionality, mutual recognition, protection of the public interest, protection of the rights of private individuals, free competition, protection of the environment and sustainable development, etc), the criteria (criterion of the most beneficial profitable offer from a financial aspect or criterion of the lowest price) and the assignment procedure for the selection of the private entity that will undertake the project. Article 15, paragraph 3 of the PPP law provides that in addition to the assessments described in paragraphs 1 and 2, the contracting authority shall also assess the economic and financial adequacy and the technical and professional abilities of the candidates or tenderers.

The evaluation procedure begins with the submission of a Greek public entity's project proposal to the SSPPP for evaluation and, in the case of approval, adding it to the list of proposed partnerships. The listed proposals are submitted for final approval to the IMPPP Committee. After committee approval, the SSPPP will tender the project determining the contract's scope, nature of the assignment procedure (eg, open tender, restricted tender, competitive dialogue or negotiation), its terms, criteria and minimum qualifications required from a potential bidder, and coordinate the procurement procedure.

Consideration of deviating proposals

12 May the government consider proposals to deviate from the scope or technical characteristics of the work included in the procurement documentation during the procurement process, without altering such terms with respect to other proponents? How are such deviations assessed?

Regardless of the nature of the assignment procedure, the contracting authority shall evaluate the tenders only on the basis of the contract award criteria laid down in the invitation to tender (article 13, paragraph 9 of Law No. 3389/2005). Furthermore, the parties customarily incorporate general and specific terms and conditions in to the PPP agreement regarding the changes in factual and legal conditions of the partnership, including deviations from the scope or technical characteristics of the work. See also question 26.

Unsolicited proposals

13 May government parties consider unsolicited proposals for PPP transactions? How are these evaluated?

No. A third party may submit a proposal for a project either directly to the SSPPP or to public entities for evaluation; however, the proposals are evaluated under the provisions of articles 7 to 16 of Law No. 3389/2005.

Government stipend

- 14 Does the government party provide a stipend for unsuccessful short-listed proponents or otherwise bear a portion of their costs?

No. There is no such provision in Greek law.

Financing commitments

- 15 Does the government party require that proposals include financing commitments for the PPP transaction? If it does not, are there any mechanisms during the procurement process to ensure that the applicable PPP transaction, once awarded, is financeable?

Yes. The private entity must demonstrate to the public entity that the financing, in whole or in part, of the construction of the works or the provision of services, shall be accomplished with capital and resources secured by the private entities. The contracting authority shall proceed to verify the economic and financial standing of the candidates or tenderers and also verify details of their ability to secure credit (article 2, paragraph 1c; article 17, paragraph 2; and article 18, paragraph 1 of Law No. 3389/2005).

Legal opinion

- 16 May the government ask its counsel to provide a legal opinion on the enforceability of the PPP agreement? May it provide representations as to the enforceability of the PPP agreement?

The SSPPP may enter into contracts with independent legal experts for support (article 6 of the PPP law).

Restrictions on foreign entities

- 17 Are there restrictions on participation in PPP projects by foreign entities? May foreign entities exercise control over the project company?

The private entities shall conclude the PPP agreements by means of SPCs established solely and exclusively for the purposes of the partnership. They shall have their registered headquarters in Greece and shall operate in accordance with the provisions of the law on companies limited by shares (*sociétés anonymes*). No restrictions exist for foreign entities holding shares in an SPC – even the majority or the total of shares (article 1, paragraph 4 of Law No. 3389/2005).

DESIGN AND CONSTRUCTION IN GREENFIELD PPP PROJECTS**Form of contract**

- 18 Does local law mandate that any particular form of contract govern design and construction activities? Does it mandate the choice of governing law?

There are no standardised PPP agreements in Greek law. Article 17, paragraph 1 of Law No. 3389/2005 states: 'The partnership contracts and ancillary agreements contain the terms and regulations defined by the public entity in the relevant invitation to tender during the contract award procedure, and represent the sole contract framework binding the public and private entities involved'. The partnerships included under this law shall be subject to the terms of the partnership contract, and supplementary to the Civil Code.

Furthermore, article 17, paragraph 2 of Law No. 3389/2005 provides: 'The Partnership Contracts and Ancillary Agreements shall contain clear and detailed descriptions of the rights and obligations of

the Parties under the Partnership concerning its object. Specifically, the above contracts shall make special provision for the applicable law'.

Therefore, the parties have the right to determine precisely the law governing the relations created within the partnership (on conclusion of the PPP agreement until the end of the PPP project), but the Civil Code's provisions will prevail over the PPP contract's regulatory provisions.

For dispute resolution involving interpretation, application or validity of the partnership contract, Greek substantive law shall be applicable (article 3 of Law No. 3389/2005).

However, in practice, the regulatory framework governing the contract's performance is determined by the contracting authority, which is accepted by the private operators.

Design defect liability

- 19 Does local law impose liability for design defects and, if so, on what terms?

Partnerships shall be subject to the terms of the PPP agreement, which must specify its terms and, only supplementary, the provisions of the Civil Code (article 17, paragraph 1 of Law No. 3389/2005).

Within this framework, each PPP agreement defines in detail the methods of monitoring the performance and operation of the work or provision of the service to determine whether the individual contractors meet their obligations regarding the functionality and quality of the infrastructures or services. In case of availability payments, if the degree of compliance with these criteria is lower than contractually acceptable, public-sector payments to private contractors will be correspondingly lower. In any case, the contracting authority has the right not to accept the project.

Warranties

- 20 Does local law require the inclusion of specific warranties? Are there implied warranties in cases where the relevant contract is silent? Does local law mandate or regulate the duration of warranties?

PPP law does not require the inclusion of specific warranties. Depending on the assignment procedure of selection the contracting authority may require a tender guarantee or good performance of the PPP project.

Damages for delay

- 21 Are liquidated damages for delay in construction enforceable? Are certain penalty clauses unenforceable?

Yes. It depends on the provisions of the PPP agreement and applicable law.

Indirect or consequential damages

- 22 What restrictions are imposed by local law on the contractor's ability to limit or disclaim liability for indirect or consequential damages?

PPP agreements serve the public interest. Therefore, in principle, contractors have restricted rights to limit or disclaim liability for indirect or consequential damages. In any case, contractors' rights are provided for in the PPP agreement and applicable law.

Non-payment

- 23 May a contractor suspend performance for non-payment?

Yes, but only according to the special terms of the PPP agreement and the relevant provisions of the Civil Code.

Applicable clauses

- 24 Does local law restrict 'pay if paid' or 'paid when paid' clauses?

Under Greek law, neither such restrictions, nor standardised PPP contract forms exist. Within this framework, the parties shall mutually agree the terms of the contract in accordance with contractual freedom and self-regulation.

- 25 Are 'equivalent project relief' clauses enforceable under local law?

Equivalent project relief provisions are not enforceable under Greek law.

Expansion of scope of work

- 26 May the government party decide unilaterally to expand the scope of work under the PPP agreement?

The government party is not entitled to unilaterally expand the scope of work under the PPP agreement. According to the provisions of article 17 of Law No. 3389/2005, PPPs are implemented through PPP agreements, whereby all of the project's requirements are clearly set out and expressly agreed upon. The government party may expand the scope of work or add incremental works to the contractor, but only under the terms and conditions of the relevant PPP agreement. Furthermore, article 132 paragraph 2 of Law No. 4412/2016 provides, in detail, that contract and framework agreements may be amended without a new contract procedure in the event of changes in the scope or object of the contract, of changes of financial or economic balance of the contract, of significant problems or of substantial overlap of costs for the contracting authority.

Rebalancing agreements

- 27 Does local law entitle either party to have a PPP agreement 'rebalanced' or set aside if it becomes unduly burdensome owing to unforeseen events? Can this be agreed to by the parties?

Agreements between the parties can only be made within the framework of the PPP agreement (in accordance with the principle of contractual freedom). However, see questions 8 and 26.

Liens laws

- 28 Are statutory lien laws applicable to construction work performed in connection with a PPP agreement?

The validity of the sureties in rem supplied by the SPC at any time, or any third party in relation to the financing or any other relevant or ancillary contract, or act for the performance of the works or the provision of services falling within the scope of Law No. 3389/2005, shall not be compromised by the imposition of any collective measure to satisfy any creditors (article 26 of Law No. 3389/2005).

Other relevant provisions

- 29 Are there any other material provisions related to design and construction work that PPP agreements must address?

No.

OPERATION AND MAINTENANCE**Performance obligations**

- 30 Are private parties' obligations during the operating period required to be defined in detail or may the PPP agreement set forth performance criteria?

The partnership contracts and ancillary agreements shall contain clear and detailed descriptions of the rights and obligations of the parties under the partnership concerning its object. Specifically, the above contracts shall make special provision for (inter alia) the sum to be paid to the private entity under the contract, and the provisions defining how any amounts paid by the final users for use of the work or provision of the service shall be shared by the parties to the contract (article 17, paragraph 2a of Law No. 3389/2005).

Within this framework, private parties' obligations during the operating period are defined in detail in the PPP agreement. Nevertheless, depending on the nature of the PPP project, a PPP agreement may set forth performance criteria, but in this case, there is no customary approach used by the government.

Failure to maintain

- 31 Are liquidated damages payable, or are deductions from availability payments possible, for the private party's failure to operate and maintain the facility as agreed?

Yes. Damages are payable after being determined case by case in the PPP agreement. The private parties shall assume a substantial part of the risks associated with the financing, construction, availability of or demand for the partnership object, and related risks such as (indicatively) management and technical risk. There is no other exact provision in the PPP law.

Refurbishment of vacated facilities

- 32 Are there any legal or customary requirements that facilities be refurbished before they are handed back to the government party at the end of the term? (To what degree must facilities be refurbished?)

The private entity must maintain certain quality standards in the PPP project until the last day of the contract, in accordance with the terms of the relevant PPP agreement.

RISK ALLOCATION**Delay**

- 33 How is the risk of delays in commercial or financial closing customarily allocated between the parties?

The private entities shall assume the risks related to the financing, construction and availability, and demand of the relevant work, and such related risks as management and technical issues (paragraph 1b, article 2 of Law No. 3389/2005). The risk of delays in commercial or financial closing is assumed by the private entity.

- 34 How is the risk of delay in obtaining the necessary permits customarily allocated between the parties?

The public entity shall assume the risk of delay in obtaining the necessary permits by state or other public authorities. Within this framework every PPP agreement contains terms relating to any delays attributed to the intervention by public authorities such as the archaeology service and public utilities, and for delays in land expropriation (articles 19, 21, 23 and 24 of Law No. 3389/2005).

Force majeure

- 35 | How are force majeure and geotechnical, environmental and weather risks customarily allocated between the parties? Is force majeure treated as a general concept relating to acts outside the parties' control or is it defined with reference to specific enumerated events?

According to article 17, paragraph 2(h) of the PPP law, the Partnership Contracts and Ancillary Agreements shall make special provision regarding the allocation of risk between the parties and the consequences of events representing force majeure. Thus, force majeure is normally defined by list of events in PPP agreements; there are no standardised rules for force-majeure risk allocation between the parties. Risk is allocated between the parties in accordance with the principle of contractual freedom and self-regulation of their relations.

Third-party risk

- 36 | How is risk for acts of third parties customarily allocated between parties to a PPP agreement?

As a general principle, the rule of the sphere of responsibility applies – if the third parties act on behalf of either the private entity or public entity, then the respective party shall bear the relevant risk.

Political, legal and macroeconomic risks

- 37 | How are political, legal and macroeconomic risks customarily allocated between the parties? What protection is afforded to the private party against discriminatory change of law or regulation?

The government shall grant the smooth and unhindered execution of works or provision of services (article 24 of Law No. 3389/2005). Within this framework, the political and legal risk (simply) is assumed by the public entity, and the macroeconomic risk is customarily assumed by the private entity. Specific provisions for taxation are made in favour of private entity (article 29 of Law No. 3389/2005).

Mitigating events

- 38 | What events entitle the private party to extensions of time to perform its obligations?

If the public agencies, enterprises and utility companies do not fulfil their obligations, the SPC may request – and the public entity shall be obliged – a deadline extension laid down in the contract that is equal to the delay caused by the failure to fulfil these obligations. In these cases, the SPC shall also be entitled to seek compensation for any loss it may have sustained as a result of this delay (article 24 of Law No. 3389/2005).

- 39 | What events entitle the private party to additional compensation?

There is no such specific provision in the PPP law.

Compensation

- 40 | How is compensation calculated and paid?

Compensation is calculated and paid according to provisions of the PPP agreement. The principle of restoration of financial balance is customarily set out in PPP agreements.

Insurance

- 41 | Are there any legal or customary requirements for project agreements to specify a programme of insurance? Which party mandatorily or customarily bears the risk of insurance becoming unavailable on commercially reasonable terms?

The private entity bears the insurance risk for a PPP project (article 17, paragraph 2 of Law No. 3389/2005).

DEFAULT AND TERMINATION**Remedies**

- 42 | What remedies are available to the government party for breach by the private party?

In the event of a breach of contract by the private party, the public entity may terminate the contract and claim damages, according to specific terms of the relevant PPP agreement and the applicable law.

Termination

- 43 | On what grounds may the PPP agreement be terminated?

PPP agreements must expire on the date agreed upon by the parties. However, in accordance with article 17 of Law No. 3389/2005, the PPP agreement must also provide a comprehensive account of the grounds for early termination by each contracting party (inter alia, breach of contract, force majeure, etc) and the consequences of such a termination. Additionally, article 133 of the PPP law provides that contracting authorities may, subject to the conditions laid down in the present provisions, terminate a public contract in the course of its performance provided that: (i) the contract has been substantially modified, requiring a new procurement procedure under article 132; (ii) the contractor, at the time of the award of the contract, was in one of the situations referred to in article 73 (1) and should therefore have been excluded from the award procedure; and (iii) the contract should not have been to be entrusted to concessionaire due to a serious breach of its obligations under the Treaties and the Directive 2014/24/EU.

- 44 | Is there a possibility of termination for convenience?

Yes. Upon termination, the SPC is entitled to payment for all work executed prior to the termination date and for any loss and expense suffered by it in connection with, or as a consequence of, the termination.

- 45 | If the PPP agreement is terminated, is compensation available?

It depends on the grounds of termination. The clauses of payable compensation in case of termination shall be specified in the PPP agreement.

FINANCING**Government financing**

- 46 | Does the government provide debt financing or guarantees for PPP projects? On what terms? Which agencies are responsible?

Typically, the government provides no debt financing or guarantees for PPP projects.

Privity of contract

- 47 | Are lenders afforded privity of contract with the government party through direct agreements or similar mechanisms? What rights will lenders typically have under these agreements?

Not applicable.

Step-in rights

- 48 | Is there a mechanism under which lenders may exercise step-in rights or take over the PPP project? Are lenders able to obtain a security interest in the PPP agreement itself?

No. However, SPCs participating in PPP agreements may assign, wholly or in part, their claims under the contract to banks or credit agencies or any other participating financial institution financing the partnership, or participation in contracts with such banks or credit agencies or any other financial institutions (articles 3, 25 and 26 of Law No. 3389/2005).

Cure rights

- 49 | Are lenders expressly afforded cure rights beyond those available to the project company or are they permitted to cure only during the same period and under the same conditions as the project company?

The rights of the lenders are distinct from those of the project companies. See also question 28.

Refinancing

- 50 | If the private party refinances the PPP project at a lower cost of funds, is there any requirement that the gains from such refinancing be shared with the government? Are there any restrictions on refinancing?

Prior consent from the contracting authority is a prerequisite for refinancing. There is no requirement that the gains from such a refinancing shall be shared with the government.

GOVERNING LAW AND DISPUTE RESOLUTION**Local law governance**

- 51 | What key project agreements must be governed by local law?

Not applicable (see question 18).

Government immunity

- 52 | Under local law, what immunities does the government party enjoy in PPP transactions? Which of these immunities can be waived by the government?

Not applicable.

Availability of arbitration

- 53 | Is arbitration available to settle disputes under the project agreement between the government and the private party? If not, what regime applies?

Any dispute in relation to the application, interpretation or validity of the partnership contracts or ancillary agreements shall be resolved by arbitration (article 31, paragraph 1 of Law No. 3389/2005).



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Alternative dispute resolution

- 54 | Is there a requirement to enter into mediation or other preliminary dispute resolution procedures as a condition to seeking arbitration or other binding resolution?

No. However, under article 17, paragraphs 2t and 2y of Law No. 3389/2005, the partnership agreement may also provide for ways of resolving the disputes between the parties that constitute pre-stages to arbitration (eg, the referral to a panel of experts nominated jointly by the parties involved).

Special mechanisms

- 55 | Is there a special mechanism to deal with technical disputes?

There is no such provision in Law No. 3389/2005. However, the parties, based on the principle of their contractual freedom, may determine in the PPP agreement a special mechanism to deal with technical disputes (article 17, paragraphs 2t and 2y of Law No. 3389/2005).

UPDATE AND TRENDS**Key developments of the past year**

- 56 | What are the current issues of note and trends relating to PPPs in your jurisdiction? Are there any identifiable trends in the financing of PPP projects in the jurisdiction?

Greece has experienced a rapid development of its PPP market since the adoption of the PPP law in 2005.

Today, Greece is a pioneer in the field of blending EU grant and private capital into PPP projects in Europe based on the European Parliament's Report: ([www.europarl.europa.eu/RegData/etudes/STUD/2017/602010/IPOL_STU\(2017\)602010_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/602010/IPOL_STU(2017)602010_EN.pdf)).

The opportunities arising though this legal framework are significant and both the public and the private parties, especially in today's complex times, will continue to take advantage of them.