1 Abstract

The topic of this dissertation thesis is Public Private Partnership. Public Private Partnership is a new phenomenon for delivering services and works by public authorities and other public bodies and entities (as contracting authorities). It emerged in the English speaking countries, namely in the USA and UK, in the 70s and 80s of the last century. Later, because of budgetary restraints and problems with financing public contracts other countries across the European Union and the world showed interest in this phenomenon.

Public Private Partnership is an economic rather than a legal term. Legislation does not use this designation. Instead, common features of Public Private Partnership are used to describe and set down Public Private Partnership in law. It is a general designation for different forms of cooperation between public and private entities which have the following features: The cooperation is based on contractual relations, it is a long term relation and the private entity bears risks related to the performance which would bear the public entity otherwise. The objective of establishing the cooperation is to deliver services and works in the public interest and to satisfy public needs. Provided that the aforementioned features are given we can consider the relation as the Public Private Partnership. There are various forms of Public Private Partnership which are subject to different regulation. The forms differ quite significantly state to state and various authors also list different forms of Public Private Partnership. For example in the UK a phenomenon such as privatization is listed as a form of Public Private Partnership even though in the continental Europe and to be specific in the Czech Republic privatization is not generally considered to belong among forms of Public Private Partnership. The two main forms of Public Private Partnership are concessions and Private Finance Initiative. The substantial distinction between these forms is based on the fact that the consideration for the performance to be carried out consists either solely in the right to exploit the performance or in this right together with payment. This is a feature of concessions.

In the Czech Republic as it flows from section 1 of the Concession Act a generally accepted form of Public Private Partnership is concession, concession contract.

This dissertation thesis consists of three parts. In the first part we define the features of Public Private Partnership, set it down in the legal system and deal with its legal nature. The Public Private Partnership as a new phenomenon in life and in law as well deserves a proper legal analysis in order for us to be capable of setting it down in the legal system and to assess the legal relations between the public and private partners and also the users of services and works in the public interest. In assessing the nature of partnership we need to focus on legal regulation, the legal system as a whole and the entities which can be partners. Legal regulation is examined at three levels – international, supranational and national level. We also examine other forms of Public Private Partnership common in the United Kingdom with a view to the legal regulation and possibilities of using them in the Czech Republic.

In the second part of work we focus on the Concession Act which sets down the legal framework for bidding for concession contracts which are a form of partnership. Concession contracts were introduced into the legal system as it was demanded by the directive 2004/18/EC. Therefore, the interpretation of concession contracts must emanate from the interpretation of concessions provided by the European Court of Justice. As a European term it must be interpreted uniformly throughout the European Union. After an in-depth analysis of concessions related judgments of the court we are able to define features of concessions. The essence of concessions lies in the fact that the provider as a private partner bears the risks of operating the services or work and his consideration for the works or services to be carried out consists in a significant part in the right to exploit the work or services. The exploitation usually consists of the right to collect payment from the users of the services or work.

Then we move on to the analysis of the Czech act. A slight difference between concessions and concession agreements must be overcome by interpretation (especially as to section 18 of the Act). Bidding for concession contracts and bidding for public contracts by which a partnership

is established are distinguished from. A nature of risks and the consideration for the work and services to be carried out is a criterion to separate them.

In the Concession Act the lawmaker uses rather unadvisable method of referring to the Act on Public Procurement. As a result the procedure for bidding and choosing the concessionaire is divided between two acts. In the Concession Act there is a legal framework for bidding but the core of the procedure is contained in the Act on Public Procurement. However, the essence of concessions, the procedure as described in the Concessions Act and the whole concept of bidding for concession contracts sometimes make the interpretation of the Act on Public Procurement in relation to the Concession Act burdensome as it is apparent that originally the procedure was meant for a different procedure. For example the concept of price in public procurement is not applicable to concessions as the consideration instead of price is the right to exploit the work or services.

Another concern is that the Act on Public Procurement is based on bidding for three different contracts: public works contract, public service contract and public supply contract. Whereas the Act on Concessions and concession contracts themselves do not follow this distinction. Consequently, this discrepancy is reflected in the procedure as to setting down the qualification requirements, specification of the contract and assessment of the price.

The final part summarizes the findings of the thesis. The starting point and intent of the Concession Act is reasonable. The regulation is uniform for bidding for both the work and services; the contracting authority may negotiate with bidders on the terms of their offers. But there are two main drawbacks. First, the evaluation if it is advantageous to use concession contract is not always required, it is required only for contracts of a value which is over a set threshold. The concession project whose purpose is to assess whether it is advisable and economically preferable to conclude a concession contract should be carried out at the outset of any concession procedure. It should be mandatory for every concession procedure. Second, the act refers to the Act on Public Procurement in many aspect of regulation. Consequently the interpretation of regulation of public procurement in relation to the concession procedure is sometimes difficult or the procedure

does not fit properly for the needs of bidding for concession contracts. In our opinion it would be more useful in a view of legal certainty and transparency of the procedure if the Concession Act contained the regulation of the whole procedure without referring to the Act on Public Procurement. For example the price of the offer in the Act on Public Procurement is not applicable for concessions at all as the consideration for the performance consists in the right to exploit the performance. There is no money to be paid by the contracting authority or at least not a significant amount for the performance. However, the Concession Act does not state how these references to the price of the offer should be interpreted.