

# The German A Model Projects – Lessons Learned from the Evaluation Process

## Statement from the Market

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## BPPP and CMS

### – BPPP | Netzwerk Infrastrukturmanagement

- Association incorporated in 2003
- Platform for parties interested in PPP and other forms of innovative management of public infrastructures
- Representatives of public entities, contractors (large contractors as well as Mittelstand), banks, advisers, universities
- Working group for infrastructure: motorway PPPs and other infrastructure PPPs such as state and municipal roads, rail, ports

### – CMS | Law.Tax

- Law firm with international infrastructure and project finance practice
- Advised and advising on all A models (and other PPPs)



## Status

- Evaluation of pilot projects by BMVBS / VIFG
  
- Measures / statements regarding
  - Organisation
  - Model
  - Strategy
  
- Two more projects: A8 and A9 OJ in beginning of 2009
  
- Seven more projects in the pipeline (+ three F models)

## Content of Presentation

### – Organisation

### – Model

- Foundation risk
- Traffic risks
- Technology risks
- Termination
- Step-in

### – Strategy

## Organisation (1)

### – Continuity

- Necessary to avoid multiplication of efforts and costs
- Developing further instead of reinventing
- Market appreciates involvement of Federal Government in procurement process
- Market appreciates one-stop legal, technical and financial advice
- Continuity to be ensured with potential new advisers

### – Structured Negotiated Procedure preferred

- Not competitive dialog
- Not more bidders or preferred bidders, more projects

### – Prequalification criteria

- Burden for Mittelstand contractors?

## Organisation

### – Standardisation

- No need for specific standardisation program
- Continuity automatically leads to standard tender documentation and project agreements

### – Functional description of services

- As a matter of fact, detailed planning documents (Referenzplanung) has for consequence that it will be used (even if not binding)
- Results in less competition regarding technical issues
- Necessity to increase compensation for bidders (saved expenses for own planning)

## Model

- Second round after pilot projects
- A8 and A9 are totally different projects
- Considerable changes in particular in payment structure
- In negotiations further improvement and optimisation of risk allocation and bankability of projects
- But model may still be improved

## Model: Foundation Risk

- Foundation risk is one of the major reasons for increased costs in building contracts
- Particular concern by Mittelstand contractors because risks are passed down to EPC Contractor and its subcontractors
- § 7 (1) No. 6 VOB/A: relevant conditions of construction site, e.g. soil and water conditions, must be described in a way so that bidders may assess the effects of these conditions on the construction works
- This means
  - Additional investigation by Authority or
  - More money and time for assessment by bidders or
  - More risks taken by Authority



## Model: Traffic Risks (1)

- A 8 shadow toll model vs A 9 availability model
- Shadow Toll: separation of payment mechanism from toll system largely appreciated by the market
  - Shadow toll independent from political risks in connection with toll structure
  - Compensation mechanism were highly complicated and insufficient
- In general, parts of the market are ready to take traffic risk, but
  - Corrective measures, e.g. compensation in case of certain decline of traffic or traffic corridor, would be appreciated
  - Would increase competition of consortiums and banks because there are also many market players who do not like traffic risk at all

## Model: Traffic Risks (2)

- Compensation calculated in relation to reference period in previous year
  - Calculation too complicated and in part incorrect, in particular, in case of several overlapping compensation events
  - We would propose a clause under which compensation would be adapted if party can prove that calculation of compensation is incorrect
- Availability model (V model)
  - Very much appreciated by market, larger participation by Mittelstand and banks in line with proposals by Federal Audit Office (Bundesrechnungshof)
  - But structure of A9 with high upfront progress payments and service payment to be increased in two steps is not without problems
    - Project financing for small amount is expensive: value for money?
    - Maintenance and operational risks prevail

## Model: Technology Risk

### – Toll collect system still considered as black box

- Not much discussed in negotiations on current A models because it is considered useless, but:
- Need for control because cash-flow depends from traffic
- The pretended fact that there is no better way to prove traffic than TollCollect is irrelevant if Concessionaire has burden of proof
- In future there might be ways to prove

### – Inconsistencies in mechanism

- No obligation of Authority to apply toll collect system as described
- Compensation in relation to decline of control mechanism (not collection of toll) insufficient - this is relevant for violation quota (Beanstandungsquote)
- Company audits do not count for violation quota

## Model: Termination (1)

- Termination right in the event of non-performance regarding planning obligation even if Concessionaire is not responsible
- Easy to terminate if Concessionaire does not comply with obligations even if he is not responsible
  - Contractual penalty preferable
  - But contractual penalty should not lead to double penalisation (like availability deduction mechanism in A9 Project Agreement)

## Model: Termination (2)

- Compensation if Concessionaire is responsible
- A8: Any increase in debt capital to be compensated is appreciated, but still need for improvement:
  - Apart from some models in UK it is market standard to compensate outstanding debt (with deduction of costs for second procurement and some minor penalisation)
  - Even in case of increased compensation, Concessionaire should have right to prove that Authority has sufficient income from toll and no damage from early termination
  - No value for money
    - Financing more expensive: banks request for more equity and higher cover ratios
    - Benefit of reduced compensation only in case of early termination

## Model: Termination (3)

- Compensation if Concessionaire is responsible
- A9: only compensation of certain part of construction costs
  - No compensation if termination during operation period
  - In total much less compensation than A8 phase II
  - Does not reflect market standard (see above)
  - Not necessary
    - Reduction was justified to avoid that Concessionaire provokes termination by Authority if traffic / income is below estimates
    - Concessionaire does not take traffic risk!
  - No value for money
    - Financing more expensive: banks request for more equity and higher cover ratios
    - Benefit of reduced compensation only in case of early termination

## Model: Step-in

- Market appreciates improvements made in negotiations
- Direct Agreement should provide
  - Not only for step-in
  - But also for right to request new contract with same conditions in case the Concession Agreement is invalid e.g. for insolvency reasons
- Liability of lenders intending to step in is considerable burden for them to exercise these rights

## Strategy ... and Conclusions

- There should be steady deal flow
  - Market appreciates maintenance projects
- Mittelstand issues
  - There should be projects for large contractors and Mittelstand contractors
- Concession vs availability
  - Both types of contracts are appropriate
  - Concession with limited traffic risk would increase interest of consortiums and banks?
  - Availability model is the model for the future! (but different structure than A9)
- Project Agreements
  - Agreements may still be improved and optimised



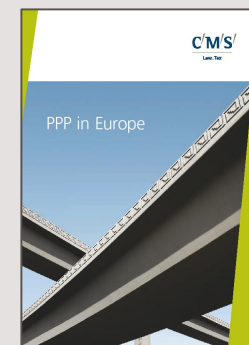
This is the end!

Thank you for your attention.

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