

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?

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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)

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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

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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

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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

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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)

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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

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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

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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

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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

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This is the end!

Thank you for your attention.

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