

ACT
of 19 December 2008
on public-private partnership¹

Chapter 1

General provisions

Article 1.

1. The Act defines the principles of cooperation between the public entity and the private partner within the framework of the public-private partnership and the appropriate authority in matters of public-private partnership regulated in the Act
2. The public-private partnership consists in joint implementation of the project based on a division of tasks and risks between the public entity and the private partner.

Article 2.

The terms used in the Act shall have the following meaning:

1) public entity:

(a) a public finance sector unit as defined by the provisions on public finance;

(b) a legal person other than that specified under (a) established for the special purpose of meeting needs in the general interest, not having industrial or commercial nature, not operating under standard market conditions, with its non-profit making activities and not incurring losses in relation to the conducted activity, if the entities specified in this provision and under (a), individually or jointly, directly or indirectly through another entity:

- finance it in over 50%, or

- hold more than half of the shares, or

- supervise its managing body, or

¹ This Act amends the Act of 17 November 1964 Code of Civil Procedure, Act of 21 March 1985 on public roads, Act of 12 January 1991 on local tax and charges, Act of 26 July 1991 on personal income tax, Act of 15 February 1992 on corporate income tax, Act of 27 October 1994 on toll roads and about the National Road Fund, Act of 20 December 1996 on municipal services management, Act of 21 August 1997 on real estate management, Act of 29 August 1997 - Tax Ordinance, Act of 4 September 1997 on government administration branches, Act of 29 January 2004 - Public Procurement Law, Act of 12 March 2004 on social assistance, Act of 17 December 2004 on responsibility for violation of public finance discipline, Act of 27 July 2005 - Law on Higher Education, Act of 9 June 2006 on the Central Anti-Corruption Bureau, Act of 12 January 2007 on road companies special purpose, Act of 27 August 2009 on public finance, Act of 15 April 2011 on medical activity, Act of 21 October 2016 on the concession contract for construction works or services.

- have the right to appoint more than half of the members of the supervisory or managing body;

(c) associations unions of entities specified under (a) and (b);

2) private partner – entrepreneur or a foreign entrepreneur;

3) asset – real property, a component of a real property, enterprise within the meaning of Article 551 of the Act of 23 April 1964 – Civil Code (JoL No 16, item 93, as amended), movable or proprietary interest;

4) project:

(a) construction or refurbishment of a building or structure, or

(b) provision of services, or

(c) performance of a work, in particular equipping an asset with devices increasing its value and use, or

(d) other consideration (service)

- combined with maintenance or management of the asset that is used for implementation of the public-private partnership project or related to it;

5) own contribution – an input of the public entity or a private partner that consists in particular in:

(a) bearing a part of expenditure for project implementation, including the financing of subsidies to the services provided by the private partner within the framework of the project,

(b) contribution of an asset.

Chapter 1a

Assessment of the effectiveness of project implementation

Article 3a.

1. Before initiating the selection procedure of the private partner, the public entity shall perform an assessment of the effectiveness of project implementation within the framework of public-private partnership in comparison with the effectiveness of its implementation in any other way, in particular with the exclusive use of public funds.

2. Performing the assessment referred to in paragraph 1, the public entity shall consider in particular: the planned division of tasks and risks between the public entity and the private partner, the estimated costs of the project life cycle and the time necessary to implement the project and the amount of fees collected from users, if planned, and the conditions for amending them.

Article 3b.

1. The public entity may request the minister competent for regional development to issue an opinion on the rationality of implementing the project within the framework of public-private partnership.
2. The request referred to in paragraph 1 shall be enclosed by the assessment referred to in Article 3a(1).
3. The minister competent for regional development shall issue an opinion on the submitted documentation in terms of the correctness and completeness of the performed analyses preceding the project implementation, the assumed legal and organizational model, mechanisms for remunerating the private partner, including the amount of fees collected from users, if planned, and the conditions for amending them, and the proposed division of risks in the project within 60 days from the receipt date of the complete request referred to in paragraph 1.
4. The minister competent for regional development may, by setting an appropriate deadline, request the public entity to correct, explain or supplement the request referred to in paragraph 1.
5. The opinion referred to in paragraph 1 must not be disclosed to any third parties until the conclusion of the agreement on public-private partnership, the concession contract for construction works or services or the contract on a public order, or until the procedure on the investment subject to the opinion has been completed in any other way. Has no selection procedure of the private partner been initiated despite the issuance of the opinion referred to in paragraph 1, the opinion may be disclosed not earlier than 2 years after its issuance.
6. The minister competent for regional development must not disclose any information gained in relation to issuing the opinion referred to in paragraph 1 in case that would jeopardize the disclosure of a business secret and other secrets protected by law.

Chapter 2

Selection of the private partner

Article 4.

1. The provisions of the Act of 29 January 2004 - Public Procurement Law (JoL of 2017, items 1579 and 2018, of 2018, items 1560, 1603, 1669 and 1693) shall apply to the selection procedure of the private partner and the agreement on public-private partnership in any matters not regulated herein.
2. Should the agreement on public-private partnership fulfil the conditions referred to in Article 3 of the Act of 21 October 2016 on the concession contract for construction works or services (JoL item 1920, and of 2018, items 1669 and 1693), the provisions of this act or of the act referred to in paragraph 1 shall apply to the selection procedure of the private partner and the agreement on public-private partnership in any matters not regulated herein . Shall the

act referred to in paragraph 1 apply to the selection procedure of the private partner, the provisions of Article 6 or Article 45 of the Act of 21 October 2016 on the concession contract for construction works or services shall apply accordingly.

3. In the situations in which neither the Act of 21 October 2016 on the concession contract for construction works or services nor the Act of 29 January 2004 - Public Procurement Law applies, the selection procedure of the private partner shall be conducted in a way which guarantees fair and free competition and the principles of equal treatment, transparency and proportionality, with appropriate references to the provisions of this Act and to the provisions of the Act of 21 August 1997 on real estate management (JoL of 2016, item 2147, as amended) in case the public entity makes a contribution in the form of a property.

Article 5.

1. The public entity, following publication of the announcement in the Public Procurement Bulletin or publishing the announcement in the Official Journal of the European Union referred to in the Acts listed in Article 4, shall additionally publish information about the planned public-private partnership in the Public Information Bulletin.

2. The announcement on the selection procedure of the private partner shall state that the procedure is aimed at concluding an agreement on public-private partnership.

Article 6.

1. The most advantageous offer shall be the offer that presents the most advantageous balance of remuneration for the private partner or for the company referred to in Article 14(1) or (1a), or of the project cost to be incurred by the public entity, and other criteria applicable to the subject of the project.

2. (repealed)

3. The criteria for evaluation of the offers may be, in particular:

1) the division of proceeds from the project between the public entity and the private partner, including the proceeds in the form of a share in the profit of the company referred to in Article 14(1) or (1a);

2) the ratio of public entity contribution to private partner contribution;

3) the effectiveness of project implementation, including the effectiveness of asset use;

4) criteria referring directly to the project subject, in particular its quality, functionality, technical parameters, level of technologies offered, operational costs, servicing;

5) the division of tasks and risks related to the project between the public entity and the private partner;

6) dates and amounts of projected payments or other considerations by the public entity, if planned.

Chapter 3

Public-private partnership agreement and implementation of public-private partnership

Article 7.

1. By the public-private partnership agreement, the private partner commits to implement the project at a remuneration and to cover in whole or in part the expenditure for project implementation or to have them covered by a third party, while the public entity commits to cooperate with the aim of achieving the project objective, in particular by making its own contribution.
2. The remuneration of the private partner shall primarily depend on the actual use or actual availability of the subject of project.
- 2a. The agreement on public-private partnership may defined that the remuneration of the private partner includes the amount of payments incurred by the public entity for financing the production, acquisition or improvement of fixed assets or for the acquisition of intangible assets within the framework of the project, which fulfil the conditions of capital expenditures in the meaning of Article 124(4) or of Article 236(4) of the Act of 27 August 2009 on public finance.
3. The agreement on public-private partnership shall define the consequences of undue performance or non-performance of the commitment, in particular contractual penalties or a decrease in the remuneration of the private partner or of the company referred to in Article 14(1) or (1a).
4. The provisions of Article 141, Article 150 and of Article 151 of the Act of 29 January 2004 - Public Procurement Law shall not apply to the liability for the performance of the agreement on public-private partnership or contributing a performance bond.
5. Shall the private partner plan to collect fees from users of the project, the agreement on public-private partnership shall define the maximum amount of such fees and the conditions for amending them.
6. Upon the conclusion of the agreement on public-private partnership, the maximum amount of the fees referred to in paragraph 5 may be amended exclusively in the form of an annex to the agreement, unless the amount of fees and the conditions for amending them are subject to other provisions.

Article 7a.

1. The public entity may express its consent to conclude and implement the agreement on public-private partnership with a one-person company established by the private partner to implement the project upon the selection of the advantageous offer or with a capital company which the private partners are the only shareholders of. Upon the conclusion of the agreement on public-private partnership, the provisions of this Act and separate provisions on the private partner, excluding paragraph 4 and Article 7b(2) of the Act and Article 778.2 of the Act of 17

November 1964 - the Code of Civil Procedure (JoL of 2018, item 1360, as amended), shall apply to the company referred to in the first sentence.

2. The public entity shall define conditions of its consent in the first document to be published in the conclusion procedure of the agreement on public-private partnership, in particular within the specification of needs and requirements of the procuring authority, terms of reference, concession documents, or other documents of the selection procedure of the private partner.

3. Shall the public entity not express its consent, as referred to in paragraph 1, it shall include an appropriate statement in the announcement on the selection procedure of the private partner.

4. In the situation referred to in paragraph 1, the private partner shall bear joint liability with the company referred to in this provision for any damage caused to the public entity as a result of the resources specified in the offer not being made available to the company, unless that has been caused by its fault.

5. Has the private partner relied on technical or professional capacities or on the financial or economic situation of other entities in the course of the selection procedure of the private partner, these entities shall be liable for any damage caused to the public entity as a result of these resources not being made available to the company referred to in paragraph 1, under the conditions specified in Article 22a(5) of the Act of 29 January 2004 - Public Procurement Law or in Article 36(3) of the Act of 21 October 2016 on the concession contract for construction works or services.

Article 7b.

1. The provisions of the Act of 23 April 1964 - Civil Code on the liability of the investor for the remuneration due to the subcontractor shall not apply to the public entity, if specified so by the agreement on public-private partnership. Shall the public entity be an investor and shall the provisions referred to in the first sentence not apply to the public entity, the private partner shall inform the subcontractor before concluding a contract accordingly.

2. Shall the agreement on public-private partnership exclude the liability of the public entity for the remuneration due to the subcontractor, in these situations the public entity would be liable under general principles, the remuneration due to the subcontractor falls under the liability of, acting as the investor:

1) the company referred to in Article 14(1) or (1a), or

2) the private partner in case the project is implemented by the private partner or the company referred to in Article 7a(1).

3. Shall the execution of the remuneration due to the subcontractor from the company referred to in Article 7a(1) turn out ineffective, the subcontractor has the right to execute it from the

property of the private partner. The subcontractor may bring an action against the private partner in case the execution from the property of the company turns out ineffective.

Article 8.

1. The public entity shall have the right to current control of project implementation by the private partner and to control the asset used by the private partner for implementing the project. The principles and detailed procedure of conducting the controls shall be specified in the agreement on public-private partnership.

2. Shall it be established based on the control that the asset used by the private partner for implementing the project is in a technical state which indicates that it is used incorrectly, the public entity shall call on the private partner to take appropriate measures, in particular to make expenditures to restore the correct technical state of the asset. The agreement on public-private partnership shall define the consequences of not taking appropriate measures to restore the correct technical state of the asset.

3. The private partner shall be obliged to report to the public entity on the advancement in the project implementation and on the technical state of the asset used by the private partner for implementing the project on an ongoing basis. The principles, detailed procedure and frequency of reporting shall be specified in the agreement on public-private partnership.

Article 9.

1. Making an own contribution in the form of an asset can take place, in particular, through sale, making available, transfer for use, lease or rental.

2. If an asset contributed by a public entity is used by the private partner in a way obviously contrary to its intended use specified in the public-private partnership agreement, the private partner shall transfer that asset to the public entity according to the principles specified in the public-private partnership agreement.

3. If the asset was the property of the private partner, the private partner shall be eligible to reimbursement of the value of the asset as at the moment of its transfer. In any other case, the private partner may demand reimbursement of outlays necessary as far as they are not covered by the proceeds from the asset. Reimbursement of other outlays can be demanded to the extent by which they increase the value of asset at the time of its transfer to the public entity. However, if the outlays were made after the time when the public entity demanded, in writing, the transfer of the asset or learned of filing against it a claim for such transfer, it can demand reimbursement of the necessary outlays only.

4. Has the asset of the public entity been a non-pecuniary contribution to the company referred to in Article 14(1) or (1a), it shall be transferred under the conditions specified in the company's articles of association or statute in case it is used contrary to its purpose.

Article 10.

1. Immediately after termination of the public-private partnership agreement, the public entity shall select a new private partner, unless the project is to be implemented in a different way.
2. If, prior to selection of a new private partner, the public entity commissioned performance of tasks that are within the scope of the public-private partnership under the procedure established by Article 67(1) of the Act of 29 January 2004 – Public Procurement Law, the agreement shall remain in force until commencement of performance of the public-private partnership agreement.

Article 10a.

1. The public entity may conclude a contract with a third party financing the project in whole or in part, based on which it will be able to transfer the whole or part of the obligations, including the related rights, of the private partner onto the third party in case there occurs a severe threat to the project implementation.
2. The third party referred to in paragraph 1 may entrust another entity or entities with the project implementation with the consent of the public entity only.
3. The announcement of the order, terms of reference, concession documents or other documentation of the selection procedure of the private partner shall involve the conditions to apply paragraphs 1 and 2. The agreement on public-private partnership may specify these conditions more in detail.
4. The provisions of the contracts concluded by the public entity, private partner or the company referred to in Article 14(1) or (1a) with the third party financing the project in whole or in part shall be invalid if contrary to the agreement on public-private partnership.

Article 11.

1. Upon the lapse of the validity period of the agreement on public-private partnership, the private partner or the company referred to in Article 14(1) or (1a) shall transfer to the public entity the asset which has been used for implementing the project, unless specified otherwise in the agreement on public-private partnership or the public entity decides to leave the asset within the property of the company.
 - 1a. The private partner or the company referred to in Article 14(1) or (1a) shall transfer to the public entity the asset without deterioration, including its normal wear and tear, unless specified otherwise in the agreement on public-private partnership. The provisions of Article 9(3) shall apply accordingly.
2. The public-private partnership agreement may provide that the asset shall be transferred to a state or local government legal person or commercial company with the at least a majority share of a local government unit or State Treasury.
3. A claim by the public entity against the private partner or company referred to in Article 14(1) or (1a) concerning the transfer of an asset shall be limited to 10 years as of the date of termination of the effective period of the public-private partnership agreement.

Article 12.

1. Shall the public entity or the company referred to in Article 14(1) or (1a) sell the property constituting the own contribution, the private partner shall have the right of pre-emption to be exercised within two months from the date it has been notified about the content of the contract concluded with a third party, unless a longer deadline is specified in the agreement on public-private partnership.

2. On the conditions specified in Paragraph 1, the pre-emptive right shall be due to the last private partner within one year after completing the performance of the public-private partnership agreement, unless:

1) the final decision of a court declared that partner responsible for inappropriate performance of commitments resulting from that contract, or

2) the public entity concluded a public-private partnership agreement with a new private partner.

3. The time frame specified in Paragraph 2 shall not commence, and if commenced, it shall be suspended, for the duration of court proceedings concerning the liability for inappropriate performance of commitments resulting from the public-private partnership agreement by the private partner or proceedings concerning the selection of a new private partner.

Article 13.

(repealed)

Chapter 4

Public-private partnership in the form of a company

Article 14.

1. The agreement on public-private partnership may state that the public entity and the private partner will establish a company with limited liability or a joint-stock company to implement it.

1a. The agreement on public-private partnership may state that the private partner will acquire shares or stock in the company with the participation of the public entity to implement it. The acquisition may take the form of subscribing for stock in the increased share capital or for shares.

2. The goal and business of the company may not exceed the scope specified in the public-private partnership agreement.

3. The body of government administration that established the company as the public entity shall exercise the rights of shares in the company belonging to the State Treasury.

4. The provision of Article 7a(5) shall apply to the liability of other entities referred to in the provision for any damages caused to the public entity as a result of the resources referred to in paragraph 1 or 1a not being made available to the company.

Article 14a.

1. The company referred to in Article 14(1) shall be established for a definite period, as necessary to implement the agreement on public-private partnership and to complete its affairs.

2. The period for which the company referred to in Article 14(1) is established may be prolonged for an indefinite period in case before the lapse of the deadline referred to in paragraph 1 the private partner has sold its stock in the company or shares of the company to the public entity or they have been redeemed.

Article 14b.

1. Not later than within one year from the end of the validity period of the agreement on public-private partnership, the private partner shall sell its stock in the company referred to in Article 14(1) or (1a) or shares in this company to the public entity or they shall be redeemed. The provision of Article 361 of the Act of 15 September 2000 - the Commercial Companies Code (JoL of 2017, item 1577, and of 2018, items 398 and 650) shall not apply.

2. The statute or the company agreement shall state that upon the ineffective lapse of the deadline referred to in paragraph 1 the stock or share of the private partner, excluding the stock or shares owned by entities of the public finance sector and by companies dependent on the public entity, shall be redeemed in the mode specified in Article 199 § 4 or in Article 359 § 6 of the Act of 15 September 2000 - Commercial Companies Code accordingly.

3. The sale or redemption of the stock or shares referred to in paragraphs 1 and 2 may be free of charge, if provided so by the statute or the company agreement .

Article 15.

All partners or shareholders of the company referred to in Article 14(1) or (1a) must express their consent for:

1) selling or encumbering:

(a) the property,

(b) the enterprise in the meaning of Article 551 of the Act of 23 April 1964 - Civil Code;

2) establishing another company;

3) subscribing for or acquiring stock or shares of another company.

Article 16.

1. The public entity shall have the right of pre-emption with regard to the shares or stock of the private partner in the company referred to in Article 14(1) or (1a).
2. The public entity may exercise the right of pre-emption within three months from the date it has been notified by the private partner about the content of the contract concluded with a third party, unless a longer deadline is specified in the agreement on public-private partnership.

Chapter 4a

Body competent for public-private partnerships

Article 16a.

1. The minister competent for regional development shall be competent for any matters of public - private partnerships within the scope regulated herein .
2. The minister competent for regional development shall have the following tasks, in particular:
 - 1) issuing opinions referred to in Article 3b(1);
 - 2) issuing opinions referred to in Article 133b(1) of the Act of 27 August 2009 on public finance;
 - 3) disseminating and promoting best practices in relation to public-private partnership, in particular those concerning hybrid projects referred to in Article 34(1) of the Act of 11 July 2014 on the principles for performing programmes within the framework of the cohesion policy to be financed under the financial perspective 2014-2020 (JoL of 2017, items 1460, 1475 and 2433);
 - 4) preparing and disseminating examples of template agreements on public-private partnership, guidelines and other documents to be used for planning and performing public-private partnerships;
 - 5) keeping a database of public-private partnerships;
 - 6) providing professional support to the public entities implementing projects;
 - 7) performing analyses and assessments of the functioning of public-private partnerships, including the status and perspectives for the financial engagement of the private sector.

Article 16b.

1. The public entity shall be obliged to provide the minister competent for regional development with information concerning the public-private partnership, in particular the information concerning:
 - 1) the initiation of the selection procedure of the private partner;

- 2) the conclusion of the agreement on public-private partnership, including:
 - (a) the name of the project,
 - (b) the mode for selecting the private partner,
 - (c) the date of signing the agreement and its validity period,
 - (d) the starting, suspension and completion date of the project,
 - (e) the value of the investment, including the tax on goods and services, to be understood as the investment expenditures to be incurred for project implementation,
 - (f) the value of services, including the tax on goods and services, to be incurred under the project,
 - (g) the value of the agreement, including the tax on goods and services, to be understood as the sum of planned expenditures which may be necessary for project implementation,
 - (h) the mechanisms for remunerating the private partner, including the amount of fees collected from users, if planned, and the conditions for amending them,
 - (i) the conclusion of the contracts referred to in Article 10a;
- 3) the amendment to the agreement on public-private partnership, including the amendment to the data referred to in point 2;
- 4) the establishment and registration of the company referred to in Article 7a(1) or Article 14(1) or (1a), its prolonging in the mode of Article 14a(2) and its dissolution.

2. The public entity shall submit the information referred to in paragraph 1 to the minister competent for regional development within 30 days from the date the incident the information refers to has occurred.

3. Shall the value of the agreement change without any amendment to the scope of services by the private partner or by the company referred to in Article 14(1) or (1a), the information referred to in paragraph 1 may be submitted jointly, however not later than within three months from the end of the financial year.

4. Based on the information referred to in paragraph 1, the minister competent for regional development shall prepare and publish information in the database of public-private partnerships which is made available on the Internet website kept by the office of the minister.

Article 16c.

To perform the tasks listed in this Chapter, the minister competent for regional development may request the public entity to provide information on the implementation of the agreement on public-private partnership at any time, while the public entity shall be obliged to provide such information immediately. Shall it be impossible to provide information within 30 days from the receipt date of the order, the public entity shall notify the minister competent for

regional development accordingly, by explaining why the information has not been provided and by specifying an additional date for providing it.

Chapter 5

Provisions in the domain of public finance

Article 17.

The total amount up to which government administration bodies can contract financial liabilities on the basis of public-private partnership agreements in a given year shall be specified in the Budget Act.

Article 18.

1. Financing of a project from the state budget in the amount exceeding PLN 100,000,000 shall require a consent from the minister competent for public finance, excluding the funds allocated for the financing of operational programmes that are specified in the Act of 6 December 2006 on the principles of conducting the development policy (JoL No 227, item 1658, of 2007, No 140, item 984 and of 2008, No 216, item 1370). In issuing the consent, the minister competent for public finance shall consider the influence of the planned budget expenditure on the safety of public finance.

2. The consent specified in Paragraph 1 shall be issued upon request of the public entity which contains:

1) name of the public entity;

2) description of the planned project;

3) the projected amount of state budget funds allocated for project implementation in individual budgeting periods.

3. The minister competent for public finance shall consent or refuse within six weeks as of the date of receiving the request. The consent or refusal is not an administrative decision.

4. The public entity may file another request for the consent referred to in Paragraph 1 for the implementation of the same project in the case of a change in the data specified in Paragraph 2(3). The provision of Paragraph 3 shall apply to the repeated request.

5. The consent referred to in paragraph 1 shall not constitute a guarantee that the project will be financed from the state budget.

6. The public entity may annul the selection procedure of the private partner in case the minister competent for public finance refuses the consent referred to in paragraph 1, while the possibility to annul the procedure based thereon has been specified in the announcement of the order, concession documentation or the documentation of the selection procedure of the private partner.

Article 18a.

1. The obligations resulting from public-private partnership agreements do not affect the level of state public debt or the public finance deficit in a situation where the private partner bears the most of the risk of building and most of the availability or demand risk, taking into account the influence of factors such as guarantees or financing by the public partner and allocation of assets when the agreement expires on the above risks.
2. In agreement with the minister competent for public finance and having solicited an opinion of the President of the Central Statistical Office, the minister competent for regional development may define, by way of a regulation, the extent of particular risk types and factors to be taken into account in their appraisal, with a view to ensuring the transparency of individual risk types.

Chapter 6

Amendments to the existing regulations

Article 19 to 35 – omitted

Chapter 7

Transitional provisions and the final provision

Article 36 to 38 - omitted