

THE ROLE OF PUBLIC-PRIVATE COOPERATION CONTRACTS

The traditional “works” contract in the construction sector is based on the model that the owner, or his agent, define the requirements and specifications for a work in such minute detail that the prospective contractor can price the work without taking undue risk. This type of contract keep the parties at arm’s length.

Nowadays many alternative forms of contracting abound, where the contractor accepts more responsibility and risk in exchange for a higher reward. The ultimate form of this cooperation is the Public-Private Partnership or PPP contract. The classification of different contract types is given in Fig. 1. The definitions are given in Table 1.

Fig. 1. : Classification of construction contracts

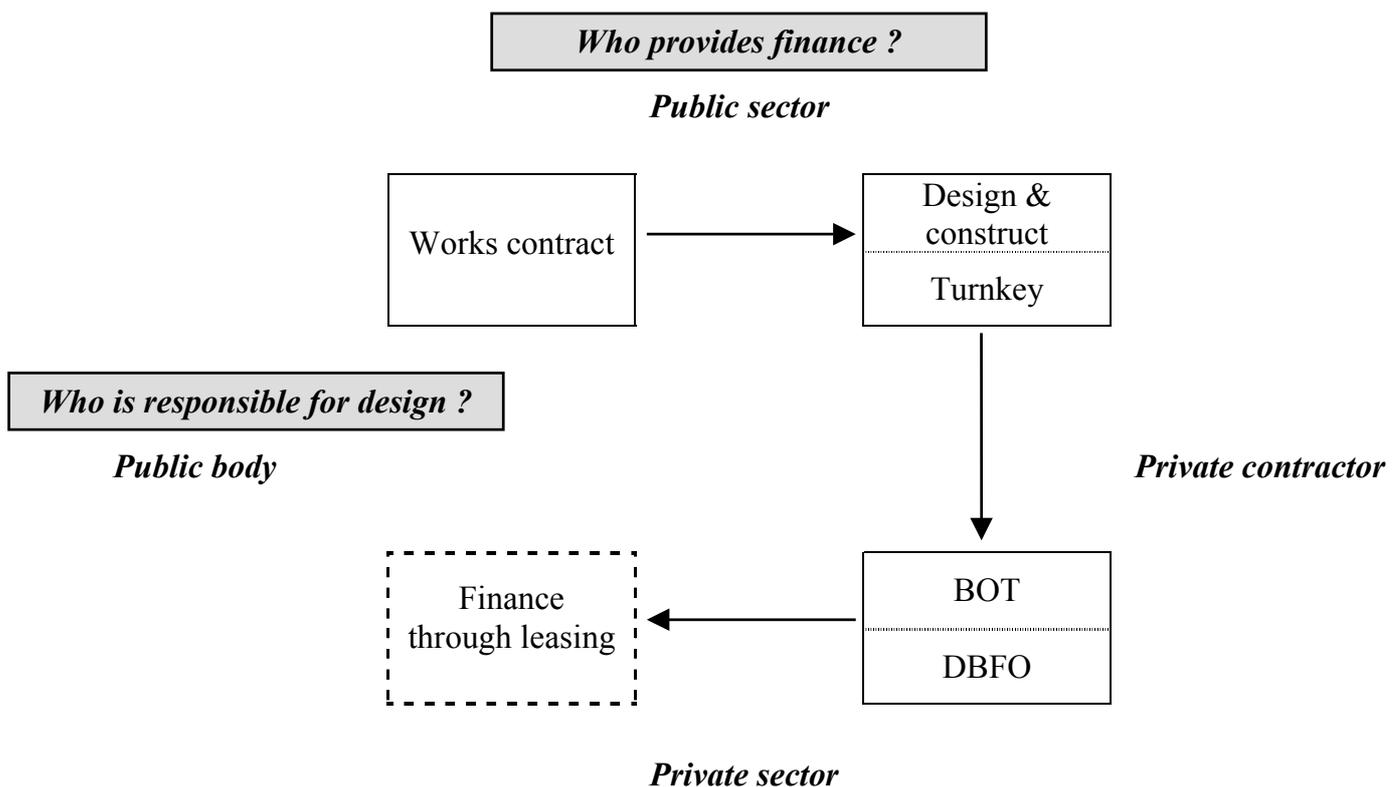


Table 1 : DefinitionsDesign & Construct contract

A contract between a public contracting party and one or more contractors which has as object the detailed design and execution of works in accordance with general requirements specified by the contracting party.

Turnkey contract

A contract between a public contracting party and one or more contractors which has as object the detailed design, execution of works and preparation for operation of works in accordance with specifications developed by the contracting party.

Concession contract

A contract between a public contracting party and a concession party which has as object the right to exploit a public work construction for a long period of time under specified conditions, or this right in connection with the responsibility to realise the works.

BOT (Build - Operate - Transfer) contract

A contract between a public contracting party and one or more contractors which has as its object the detailed design and execution of works as well as the obligation to operate those works for longer periods of time prior to transferring ownership of the assets to the public party.

DBFO (Design - Build - Finance - Operate) contract

A contract similar to BOT except for the stated obligation to finance the realisation of the works while the period of operation for which the contractors assume responsibility may be even longer.

The evolution in contract models reflects :

- The fast development in technology, which makes it difficult for the contracting entity to specify its requirements in detail.
- The growing size of many infrastructure projects, which is beyond the management capabilities of the public body.
- The need to attract private finance for public infrastructure.

Table 2 emphasises this shift towards more private sector involvement for certain contract models.

Table 2 : Main options for public contracting of works

Contract type	Ownership	Design	Construct	Operate	Maintain	Duration (years)
Works contract	Public	Public	Private	Public	Public or private	< 1 - > 2
Design & Construct	Public	Private	Private	Public	Public or private	< 1 - > 2
Turnkey	Public	Private	Private	Public	Public or private	< 1 - > 2
Concession	Public	Mixed	Private	Private	Private	25 - 50
BOT	Private	Private	Private	Private	Private	20 - 25
DBFO	Private	Private	Private	Private	Private	20 - 30

With the shifting balance between public and private sector it is necessary to consider the implications for the tendering process. The larger the project and the greater the ultimate responsibility for the contractor, the earlier public entity and private contractor should initiate detailed discussions on subject and form of contract. This development is somewhat at odds with the attempts of the EU Institutions to maintain an open and transparent market for public works in Europe. The current procurement directives are written on the basis of arm's length contractual relationships and do not accommodate partnership agreements.

As soon as one moves away from the traditional model, the directives do not satisfy practical needs very well. The ultimate development is to be found in public-private partnerships (PPPs), where responsibilities are shared between the public and private parties in function of their ability to manage these. Such a partnership may well imply equity shareholding in a joint venture by the public party.

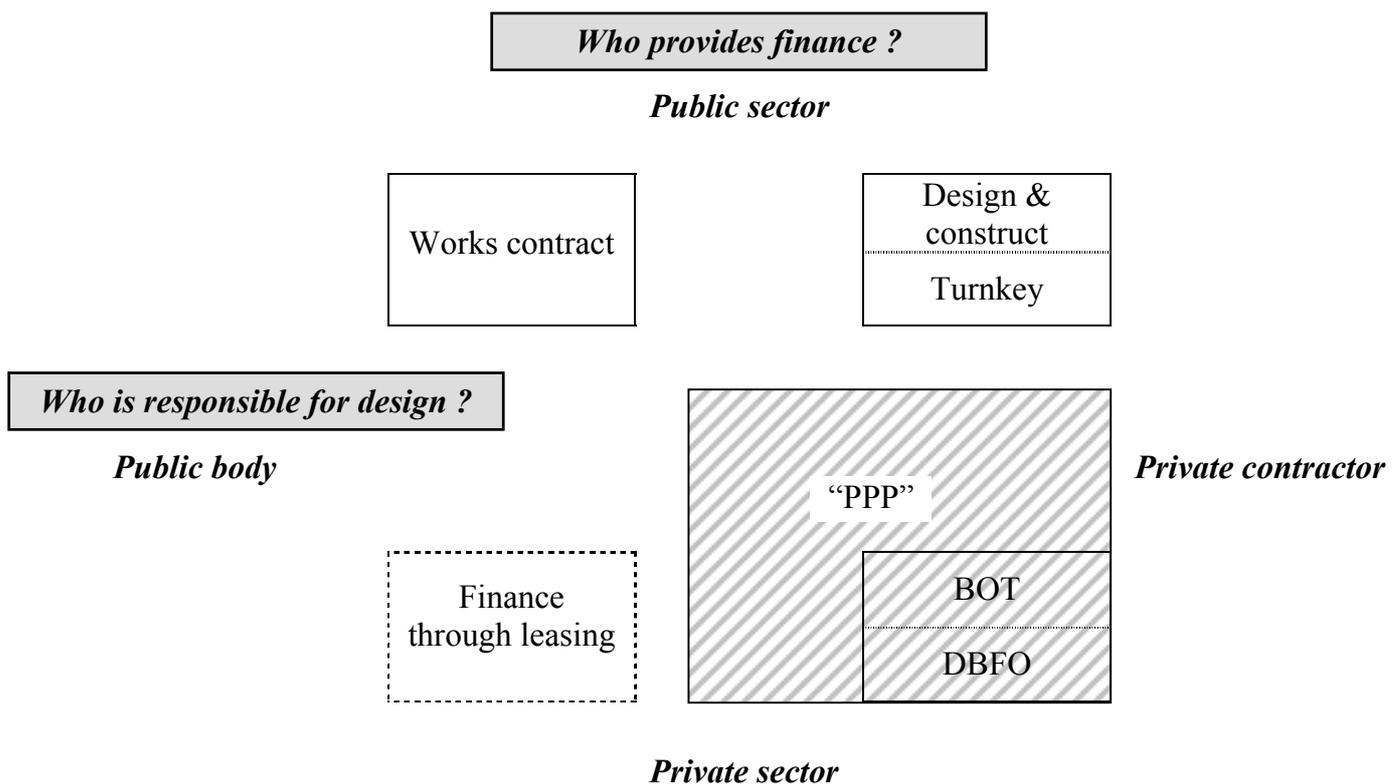
It is obvious that there is no question of arm's length contractual relationships any longer, since both sides have a financial interest to make the venture a success.

EuDA totally agrees with the conclusion of the European Commission that current public procurement directives cannot be directly applied to PPP contracts*.

The procedural uncertainty surrounding PPP is hardly surprising. First of all, there is no agreed, comprehensive definition of a public-private partnership. Secondly, there are many variants of PPPs in function of the particular scope and division of responsibilities foreseen in the contract.

Fig. 2 is an illustration of the somewhat fuzzy position that PPPs have when it come to clearly defining contractual demarcation lines.

Fig. 2. : Classification of construction contracts



* Ref. : Interpretative communication on concessions under Community law COM(2001)...