

## THE GALILEO PROCUREMENT FRAMEWORK

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### Abstract

Galileo is the name given to the European satellite navigation as a joint project of the European Union ESA and the European space industry.

It was initially decided to conduct this project within the PPP framework. This solution was given up. The project is being realised within a more classical framework.

The article will show that Galileo as being a European project cannot be handled without respecting the key EU procurement principles.

### 1. Introduction

Galileo is the name given to the European satellite navigation system. Composed of a constellation of thirty satellites turning around three different orbits at a mean altitude and in a ground infrastructure, Galileo should allow Europe to own a precise and reliable signal

Galileo's technical specifications will permit to equip the European Union of an autonomous positioning system with a worldwide range which is compatible with the existing systems.

This program is divided into 4 main phases\* which are the followings:

- definition phase;
- development and validation phase;
- deployment phase;
- operation phase.

This ambitious project was officially decided in 1999 by the European Union<sup>†</sup>; however this system is not yet operational. This delay can notably be explained by the contractual change that occurred. More precisely, the European Union had initially tried to realize the project within the framework of a public private partnership<sup>‡</sup>. However, this framework had been drop

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\* Commission européenne (2007), Galileo à la croisée des chemins : la mise en œuvre des programmes européens de GNSS, COM (2007) 261 final

† Communication de la Commission européenne affirmant la nécessité de mettre en œuvre le programme Galileo, février 1999

‡ In December 2000, the European council of Nice validated the choice to realise the Galileo programme

out in June 2007 following the communication of the European Commission of the 16th may of 2007. The Galileo project is being realized within a more common framework.

This article aims at demonstrating that it is the principle of equal access and fair competition which justifies the return to a more traditional contractual framework.

### 2. From the innovative PPP to a more classical framework

#### 2.1. Definition of the PPP

No accurate definition of the public private partnership (hereafter PPP) is provided with European law<sup>§</sup>. However, some key elements are given in the Green Paper on public-private partnerships and Community law on public contracts and concessions published by the European commission in April 30th 2004. According to this document, the following elements characterize the PPP's operations:

*« the term refers to forms of cooperation between public authorities and the world of business which aim to ensure funding, construction, renovation, management or maintenance of an infrastructure or the provision of a service \*\* ».*

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within the framework of PPP for the deployment and operation phases

§ En revanche, certains Etats membres ont défini le PPP. C'est le cas de France. En effet, selon l'article 1 de l'ordonnance n°2004-559 du 17 juin 2004 + BEA +

\*\* Green Paper on public-private partnerships and Community law on public contracts and concessions COM/2004/0327 final

The Galileo project undoubtedly involves a construction of an infrastructure which is being financed.

The others characteristics of the PPP are the following:

- a main contract lasting a relatively long time;
- public funds are generally less important than private funds;
- an operator very involved in the process notably relating to the design, completion, implementation;
- a repartition of the risk between the public partner and the private one, the possibility that the private partner bears all risks;

Regarding these characteristics, the realization of the Galileo project within the framework of the PPP appears right now to be doable and relevant.

## 2.2. Advantages of the PPP

For a public entity, the recourse to PPP represents three main advantages regarding to financing, the sharing of risk and the advantage of a *savoir faire* from the private sector.

The realization of the Galileo implies significant investments. The main advantage of the PPP is that the realization would be financed by private funds. In other words, the PPP would have, as a main consequence, to decrease the public funding for deployment and exploitation phases. Thus, in 2000, the European commission said that there was "no doubt a strong contribution from the private sector will constitute a large part of the financing right from the start of the developing phase<sup>††</sup>."

Secondly, according to the PPP framework, the private entities would bear the risk of the realization of Galileo.

Finally, the realization of this project within the framework of PPP represents the advantage of being beneficiary of the private sector's *savoir faire* and functioning methods.

Regarding these advantages, the European Union had decided to realize the project within the framework of PPP.

Although the PPP presents obvious advantages, this type of montage represents inadequate characteristics

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<sup>††</sup> COM 2000 750, p. 33

with the Galileo project. Still, this unsuitability needs to be put into perspective.

## 2.3. The relative inadequacy of the PPP to the Galileo Programme

Although the PPP is very attractive, it had shown weaknesses regarding, on one hand, the context, and on the other hand the specificities of the program.

Indeed, this PPP was a real challenge for the European cooperation. In addition to being very original, Galileo has been held by the European community. Being a pilot of this program, the PPP is very innovative. In other words, neither the European community nor the European space agency has so far gained significant experience as a procuring authority of such type of montage.

As noted, the PPP was about to concern a significant industrial programme at the European level.

Consequently, the decision of conceiving Galileo within the framework of PPP was very risky in regard to the small experience of the Commission and ESA on a project of this scale. In other words, the relevancy of such a decision could have been questionable.

Furthermore, the PPP involve some requirements that need to be concluded. The key requirements are transparent negotiations and fair competition.

However, it turned out that these prerequisites were not respected leading the European Parliament to redirect the programme in autumn 2007.

More specifically, despite the incompatibility of transparent negotiations, and with the principle of geographic fair return, the negotiations are characterized by a clear lack of putting them into competition

Furthermore, this very significant project could not go with fair and transparent negotiations.

Galileo is a project initiated under European cooperation. This latter cooperation is characterized by the principle of fair return.

This principle is not compatible with a fair competition.

#### 2.4. The relative inadequacy of PPP to the space sector

We could conclude the above developments by saying that the PPP appeared to be inadequate to the Galileo's program, and generally speaking, to the spatial sector.

Nevertheless, it is necessary to establish an outcome more mitigated. In its report n 7/2009, the European Court of ... outlines different reasons of a technical, political, and juridical order causing PPP's failure:

"the PPP was inadequately prepared and conceived. As a result, the GJU was required to negotiate a PPP which was unrealistic".

So far, these causes are mainly circumstantial. In other words, the failure of the PPP with the Galileo's programme does not imply that this model is totally incompatible with the spatial sector's programmes.

As part of the Galileo's programme, a consortium has been formed. In its report of 2008, the European Parliament said that it was essential "to avoid any PP that leads to some mixings establishing situations of exclusive control but also to avoid the rules of markets transfer that leads to exclusively controlled market structures". Dans son rapport de 2008<sup>\*\*</sup>, le Parlement européen indiquait qu'il convenait « *d'éviter tout PPP qui (conduise) à des fusions ou des consortia établissant des situations de monopole (et) aussi d'éviter les règles de passation de marchés qui conduisent à des structures de marchés monopolistiques* »

At all events, the recourse to public markets stays the safest contractual framework. However, this framework encounters, just like PPP, some risks to affect the fair competition principles.

### 3. The realization of Galileo within a more classical framework

In 2008, the regulation of the 9<sup>th</sup> of July states officially the drop out of the PPP. As well as outlining this information, this document indicates clearly the different steps leading to the operation of the project Galileo as well as the procurement framework.

#### 3.1. A realization under the EC principles

It appears clearly from the regulation n° 683/2008 of 9<sup>th</sup> of July 2008 that the Galileo is supposed to be realized according the procurement principles of the European Community.

<sup>\*\*</sup> Rapport Barsi-Pataky, 2008, p. 33

More precisely, the main key principles are the following:

- Open access;
- Fair competition;
- Clear communication of the applicable procurement rules.

The regulation has the merit to not only mentioning the principles but to be more specific about the application of these principles for the considered undertaking.

More precisely, the article 17 of the Regulation specifies the standards for awarding contract during the deployment phase of Galileo. These standards are the following:

- the procurement of the infrastructure is divided into six main packages as well as a number of additional work packages;
- all packages are submitted to competitive tendering. The bid for the role of prime contractor is limited to two work packages;
- "at least 40% of the aggregate value of the activities shall be subcontracted by competitive tendering at various levels to companies other than those belonging to group of entities that are prime contractors for any of the main work packages";
- "dual sourcing shall be pursued wherever appropriate in order to ensure better overall control of the programme, its costs and schedule".

By being specific on the standards, it appears clear that the intent s Commission is that the Galileo programme is being realized within a system of undistorted competition.

It appears that the standards have been so far respected. Furthermore, the Report from the Commission to the European parliament and the Council o the mid-term review of the European satellite radio navigation programmes underlines that savings have been done for contracts with competitive supply contrary to monopoly situations<sup>\*\*</sup>.

However as the mid-term report (provided for the article 22 of Regulation (EC) n° 683/2008 indicates that "since not all the packages have been awarded as yet,

<sup>\*\*</sup> Report from the Commission to the european parliament and the Council o the mid-term review of the European satellite radio navigation programmes

and not all the subcontractors are known, it is not possible to give precise figures at this stage<sup>\*\*\*</sup>.”

The outcome is yet positive. Indeed, it turns out that the choices regarding the type of procedure appeared to be relevant.

### 3.2. The relevancy of competitive dialogue to the Galileo programme

As a preliminary question, the framework for procurement law is mainly organized in the following documents: directive 2004/18 and 2004/17, regulations 1605/2002 and 2342/2002 as last amended by Regulation 478/2007.

Various procedures respecting key principles aforementioned are possible: the competitive dialogue procedure, the open procedure, the restricted procedure and the negotiated procedure.

Among all these procedure, the choice of procedure of competitive dialogue is an adequate procedure to obtain best value for money.

This procedure was introduced in the Directive 2004/18/EC. Under article 29 of this Directive:

“in the case of particularly complex contracts, Member States may provide that where contracting authorities consider the use of the open or restricted procedure will not allow the award of the contract, the latter may use of competitive dialogue”.

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<sup>\*\*\*</sup> Report from the Commission to the european parliament and the Council o the mid-term review of the European satellite radio navigation programmes, 18.1.2011, COM (2011) 5 final

Considering this article, it proves true that the competitive dialogue is a procedure which can only be used in the specific circumstances expressly provided in the article 29. The complexity covers technical, financial but legal aspects as well.

The procedure starts with a contract notice in which the contracting authority indicates its needs and requirements and describes them in a notice or document.

The competitive dialogue procedure has the advantage to allow discussion with the candidates.

In consequence, as noted in the midterm report dating from January 18, 2011, “competitive dialogue with the tendering firms is a key element in the procedures which have been launched.” It allows a competitive dialogue on technical, financial, legal and other issues. In this context, the procedure allows the contracting authorities to find out how to obtain best value money and take into due consideration into the bidding process.

### Conclusion

As a conclusion, Galileo is being realised under a more classical framework. Contracts have been awarded in accordance with the EU procurement principles.

Concerning the PPP, it can not be said that none projets related to space sector can be held within the framework of a PPP. However some keys requirements as to be respected such as a prior audit of the opportunity of such a PPP and transparent negotiations.

Major headings are capitalized, underlined and centred in the column.