

PUBLIC-PRIVATE PARTNERSHIP



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PUBLIC-PRIVATE PARTNERSHIP

The Republic of Srpska on 11 of June 2009 adopted the Law on the Public-Private Partnership (hereinafter referred to as: the Law) and thus joined the states that have recognized this model as a method to realize investments of common interest through the cooperation of the private and public sector.

This Law regulates the subject, principles, manner, forms and conditions under which can be established a public-private partnership, then elements of a public-private partnership contract and other issues significant for the public-private partnership.

As defined by the Law, a public-private partnership is ***a form of cooperation between the public and private sector***, which shall be realized through pooling of:

1. resources,
 2. capital, and
 3. professional knowledge/expertise,
- and all with the purpose of satisfying public needs.

The contract on the public-private partnership arranges the business relationship between the public and private partners in order to achieve specific objectives such as:

- the ability of the public partner to better respond to its obligations and use public revenues more efficiently,
- creating new sources of generating income, new infrastructure and new services,
- distribution of risks between the public and private sectors,
- creating additional value through the allocation of resources, knowledge and skills of the private and public sectors,
- increasing productivity, competition and rational use of economic capacities of private and public entities,
- transparency in the course of the selection and negotiations.

The public sector may include:

- The Republic of Srpska, i.e. the Government of the Republic of Srpska with its competent ministries,
- A public institution established by the Government of the Republic of Srpska,
- A public company with majority ownership of the Republic of Srpska,
- Local governments or municipalities and cities,
- Public institutions founded by local self-governments and
- Public companies with majority ownership of the local governments.

The private partner may be a legal entity established in accordance with the laws of the Republic of Srpska, owned by the domestic and/or foreign legal entity, with whom the same concludes a contract on the public-private partnership and which implements the contract in accordance with the law.

The private partner may, for the purpose of the contract implementation of public-private partnership establish a company for special purposes in accordance with the regulations of the Republic of Srpska.

The subject of public-private partnership may be construction, use, maintenance or management of the same or reconstruction, use, maintenance and management of the property with the purpose of satisfying public needs in the following areas:

1. air, road, river and rail transport and associated infrastructure facilities,
2. educational, cultural and sports infrastructure,
3. health infrastructure,
4. utility infrastructure,
5. information and communication infrastructure,
6. innovative-entrepreneurial infrastructure,
7. environmental management and solid waste management and
8. other areas of interest for the Republic of Srpska and local governments.

It is required to apply certain principles in the public-private partnership:

- Contractual relations between partners are long-term
- The basis is primarily on private funds (which does not exclude public funds)
- The public partner, with the position of the public interest defines the objectives and standards of construction, maintenance and quality of services, while the distribution of risks shall be defined in each case separately
- The compensation to the private partner for the construction and management of the built infrastructure shall be paid by the public partner or directly by the user,
- Built infrastructure shall be transferred to the public sector ownership, after the agreed period of use.

The public partner, apart of the above stated, is also obliged to respect the following principles:

- a) Protection of public interest
- b) Free competition
- c) Equal treatment
- d) Mutual recognition
- e) Proportionality
- f) Transparency and
- g) Environmental protection and sustainable development promotion

Participation of the public partner may be in the form of investments, things, rights and money through payments of regular compensation to the private partner for provided services.

Things and rights that constitute the stake of the public partner can be: land lease to the private partner, concession, construction right, right of servitude, and project documentation which the private partner accepts, with due respect of regulations governing the disposal and obligations.

Contracts in the field of cooperation between the public and private sectors can be in two basic forms:

1) **Contracted form of the public-private partnership** - Partnership between public and private partners is based solely on contractual relationships and achieved through the execution of rights and obligations under the contract, such as concessions and private finance initiatives. Contracting form of public-private partnership will not be considered as a long-term service contract where the public sector only provides services, without the capital investments of the private partner and contract design, construction and performance of the public sector. Private finance initiative is a contractual form in which the private partner finance, run, maintain and manage the public construction for the public sector needs and its services, mostly charged from the public sector according to previously established standards of facilities and services, and payment mechanism. Exceptionally, the public partner may propose other types of contractual forms of public-private partnerships without prejudice to the public interest, which corresponds to the principles of the Law.

2) **Institutional form of the public-private partnership** - implies the establishment of a business entity and other organizational form in accordance with the applicable regulations, for this purpose, through which is achieved cooperation between the public and private sector. The joint company may participate solely in the implementation of public private partnership projects for which was primarily established, while the rights and obligations of public and private partners are determined by mutual agreement.

PROCEDURE

For the selection of the private partner shall be used competitive dialogue, in accordance with the Law on Public Procurement which includes the pre-qualification phase and phase of negotiation and collection of offers, in a way that the public partner after establishing the capacity of the candidate who submitted a request for participation, conducts negotiations with selected bidders and considers all aspects of potential contract and also in the course of dialogues enable an equal treatment of all selected bidders

Procedure for selection of a private partner shall be closer described with the Decree on the public-private partnership project implementation procedure in the Republic of Srpska, which was published in the Official Gazette no. 104/09 (hereinafter: Decree).

The said Decree prescribes that in the event that the public partner is self-government unit or public enterprise, the procedure of the project implementation of the public-private partnership may be conducted only if the established annual compensation to be paid to the private partner, under all private-public partnership contracts does not exceed the amount of 20% of public partner's income for the previous fiscal year. Also, the amount of costs for preparation of the necessary documentation and costs of the procedure of the project implementation of the public-private partnership should not exceed 2% of the total value of the investment unless there is assessment of the Ministry of Finance on its necessity.

Further, the Decree prescribes what should be contained in a project proposal as well as a study or pre-study of economic justification, and the course of the procedure and criteria for granting consent for the private-public partnership projects.

Initiation of proceedings

The public partner, therefore, first designs the study or pre-study of economic justification of specific public-legal work, which in order to obtain the consent for the same, then submits to the Ministry of Finance and the Ministry's department working on the issues of public-private partnerships. Along with that, it is important that the proposal must be in line with budget projections and plans, as well as with fiscal risks and prescribed limits.

The procedure for granting the consent should be completed within 90 days from receipt of the project proposal and supporting documents, after which the public partner, if the same received the necessary consent, makes a decision i.e. the resolution to initiate the procedure of selection of the private partner.

Prior to the issuance of the public call the public partner shall submit the proposal of the tender documentation to the Ministry of Finance which, in the course of granting the consent, takes into account whether the criteria for evaluation, procedure and selection of private partners are satisfactorily based on clear, transparent and accessible principles of non-discrimination.

Tender documentation should contain, among other things: mandatory requirements which are to be met by the private partner, criteria for evaluation of bids, draft contract, deadlines for submission of bids, right of interested private partners and others to object and appeal. The Ministry shall, within 15 days from the date of receipt of complete documentation (the deadline for the elimination of defects is 15 days) make a decision on the conformity of the tender documentation with the approved project proposal.

Public Call

The public partner then issues a public call for expression of interest in the subject of public-private partnership and the same have to be published in the Official Gazette of the Republic of Srpska, on the Government's website, and papers with international circulation and the text have also be summarized in English. The public call must contain information about the public partner, the subject of PPP, net value, duration of the contract, qualification requirements, criteria for the selection and evaluation of bids, the deadline for submitting requests to participate which may not be less than 37 days and cannot be shortened in cases of urgency or publication of prior information notice.

Course of procedure

In accordance with the above, the public partner shall appoint a committee for selection of the private partner, and the same should have the authority for the selection of the best bid in the negotiation procedure with publication of the notification on the procurement. Candidates who have demonstrated the ability to participate in the procedure should receive the invitation to participate as bidders, and their number cannot be less than three.

The specificity of the competitive (competition) dialogue is reflected in the fact that the public partner, as the contracting authority, is authorised to continue the dialogue procedure until the final solution or at least the most appropriate solution for the realization of PPP project.

If the dialogue takes place in several phases, the public partner is obliged that the decision which does not accept certain solution in the course of the dialogue shall then deliver to the candidate by registered mail or by other communication means which are possible to be proved, not later than 15 days after the end of that phase.

The dialogue shall end with a call for the submission of final bids, and by the same the public partner invites the remaining candidate or candidates on the basis of guidelines of the selected solution or solutions identified in the dialogue phase, to submit their final bid, which shall contain all necessary elements in accordance with the needs and requirements of the PPP.

Decision on the selection of the public partner

The decision on the selection of the private partner shall be submitted to all parties who have submitted final bids. The public partner is required that the final draft of the contract and complete documentation of the procedure of selection of the private partner submit to the competent authority and the Government or the ministry within 30 days to render a decision on the conformity of the final draft of the contract with the proposal of the PPP project, tender documentation and the relevant regulations. The Government has the right, regardless of the agreement of the Ministry, to suspend the process of approval of the contract with the possibility of fair compensation to the private partner for the costs incurred.

The public partner shall also, from the Public Attorney of the Republic of Srpska seek an opinion on the final draft of the contract.

CONTRACT ON THE PUBLIC-PRIVATE PARTNERSHIP

The PPP Contract may contain several basic contracts based on the relevant legislation. Mandatory elements of the contract are:

1. Rights and obligations of public and private partners, as the contracting parties, including the obligation to provide reliable services to customers at the standards set by the public partner,
2. Purpose and subject matter of the contract,
3. Clear identification of risks and risk distribution between public and private partners,
4. Method and conditions of providing the financial structure of the project, as well as conditions under which financial institutions may participate in the project,
5. Minimum standards to be applied during the project designing, standards, quality of service, and other requirements for the implementation of the project,
6. Method of payment, and the conditions for determining the alignment of compensations,
7. Regulation of tax liabilities,
8. Full transparency and obligation of the public partner to disclose information relating to the conduct of a public-private partnership project,

9. Right of the public partner to supervision during the project implementation and execution of the contract,
10. Duration, as well as conditions for renewal of the contract,
11. Definition of ownership upon termination of the contract,
12. Penalties and fees for non-fulfilment of contractual obligations,
13. Termination of the contract with the right of partners to terminate the contract and procedure in the event of termination of the contract before the expiry of the date set by the contract,
14. Method of dispute resolution,
15. Measures for facilitating project financing,
16. Description of the events that are considered *force majeure*,
17. Other elements relevant to the subject of public-private partnerships and
18. Obligation to agree on the audit of contracts after a certain period of time.

Each party to the contract of public-private partnership shall act in accordance with the principle of good faith and honesty, with no possibility of exclusion or limitation of liability.

The contracting parties may agree with a third party that the private partner can assign the contract to that third party or transfer some of its obligations, provided that that the change of the private partners have legal effect only with the consent of the public partner.

For the public-private partnership, an essential issue is the issue of protection of both public and private partners when it relates to a specific case.

Protection of the public partner implies a minimum security in the areas of:

- Physical damage to the building,
- Third party claims,
- The reliability of the employer,
- Business interference,
- Latent defects,
- The right of beneficiaries to seek compensation for damages caused by the private partner and
- Enabling an audit of the public-private partnership project by the Department for Public Sector Audit of the Republic of Srpska.

Protection of private partners includes:

- Treatment of all participants of the public call,
- Contractual arrangements to allocate and mitigate risks,
- Providing compensation to private partners if due to the public interest, the contract is, at the request of partners, amended, modified or terminated,
- Equal status in the course of dispute resolution
- The right to introduce the creditor (loan lender) in the event that the private partner does not fulfil the obligation, including the right to replace the contractor and
- Prevention of expropriation, unless there is declared public interest for the same and in this case to ensure payment of the entire compensation.

The Law regulates that in the public-private partnership it is mandatory to establish distribution of basic risks, such as:

1. **Construction risk**, which refers to activities, related to the initial state of the property that is the subject of the contract,
2. **Availability risk** that applies to cases where in the course of asset management the private partner is considered as accountable for the provision of services under the given standards or services specified by the contract and
3. **Demand risk** relating to the volatility of demand in relation to the expected at the time of signing the contract, regardless of the involvement of the private partner, i.e. it is a common risk borne by private parties in a market economy.

Determining the distribution of other risks (bankruptcy or liquidation of the private partner, etc.) can be regulated in the contract between the public and private partners.

The value of the project is managed as a public sector investment and shall not be recorded in the accounts of the public sector in the case the public sector is contracting authority for the investment, if bears the risk of construction, availability risk or demand risk.

The value of the project is not managed as a public sector investment and shall not be kept in the accounts of the public sector if the private partner bears the construction risk and at least one of the two remaining risks.

In cases where the public partner is the Republic or the Government through the relevant ministries, public institutions established by the Government or public companies in majority ownership of the Republic, the consent to the conclusion of a contract shall be made by the Government.

When the public partner is local government, public institutions established by local governments or public company in majority ownership of local governments, the consent to the conclusion of a public-private partnership shall be provided by the Ministry of Finance and the relevant competent ministry.

The public partner is obliged to carry out an analysis of the project from the standpoint of efficiency and risks, prior to obtaining the said approvals. Analysis of the project must contain:

- Economic and financial indicators of the project, including a comparative analysis of the costs and benefits of applying public-private partnerships and use of other forms of the provision of public services,
- The necessary financial resources from the state budget or budget of local governments,
- Legal status of property and
- Risks associated with the implementation of the project with special emphasis on the impact of investment on the budget indebtedness of the appropriate level of government.

The public partner is required to monitor the implementation of the public-private partnership in the course of its implementation, while the responsible ministry is obliged to annually submit technical and financial reports to the Government on the implementation of each individual public-private partnership contract, which must contain an assessment of the project effectiveness.

The Government of the Republic of Srpska submits an annual report to the National Assembly of the Republic of Srpska on overall effects of implementation of the Law on Public-Private Partnership.

The public partner shall allow the public access to the signing of the contract of the public-private partnership, access to documents, forms and reports.

The Ministry of Finance maintains the Register of Public-Private Partnership of the Republic of Srpska, in which are entered contracts of public-private partnerships, public and private partners and all the data defined by the Law on Public-Private Partnerships, and the Ordinance on the content and manner of keeping the register of public private partnership.

Relevant legislation:

- Law on the public-private partnership („Official Gazette of the Republic of Srpska“59/09, 63/11)
- Law on the public procurement („Official Gazette of BiH“39/2014)
- Law on concessions („Official Gazette of Republic of Srpska“59/13)
- Decree on the process of implementation of the projects of public-private partnership of the Republic of Srpska („Official Gazette of Republic of Srpska“104/09)
- Book of Rules on the content and manner of maintaining the register of public-private partnership („Official Gazette of Republic of Srpska“32/10).

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