

Pursuant to Article 82 item 2 and Article 91 paragraph 1 of the Constitution of Montenegro, the 26<sup>th</sup> Parliament of Montenegro, at its Sixth Sitting of the Second Ordinary (Autumn) Session in 2019, on 17 December 2019, passed the

## LAW

### ON PUBLIC-PRIVATE PARTNERSHIP

(Published in "Official Gazette of Montenegro", no. 73 of 27 December 2019)

#### **I. BASIC PROVISIONS**

##### **Subject matter**

##### **Article 1**

This Law regulates the conditions and procedure of preparing, proposing and approving public-private partnership projects, the method of selecting a private partner and other issues of importance for public-private partnership.

##### **Public-private partnership**

##### **Article 2**

For the purpose of this Law, a public-private partnership means a long-term contractual relationship between a public partner and a private partner, based on the division of rights, obligations and risks, for the purpose of executing works of public interest on public infrastructure and facilities (hereinafter: "public works") and/or providing services of public interest (hereinafter: "public services").

The public-private partnership contract referred to in paragraph 1 of this Article may:

1) transfer to the private partner one or more obligations within the competence of the public partner:

- financing, design, improvement, construction and/or reconstruction of public infrastructure and facilities, and/or maintenance, management, operation, use and provision of public services related to newly built or reconstructed public infrastructure or public facility; and/or

- maintenance, management, operation, use and/or provision of public services related to existing public infrastructure, or public facilities;

- a certain level and scope of risks that may arise in the fulfilment of obligations referred to in items 1 and 2 of this paragraph;

2) divide the responsibility for obligations and risks referred to in paragraph 1 of this Article between the public partner and the private partner;

3) determine the right of a private partner or company referred to in Article 43 of this Law to reimbursement of invested funds and reasonable return on invested capital:

- by granting the right to use the public works and/or public services and to charge a fee from the end user;

- by payments of the public partner that are usually related to the availability of the public facility and/or the provided public service; and/or

- by providing financial support, which may include monetary or non-monetary support and/or financing by the public partner, including in particular: subsidies, financial or other guarantees, participation in capital or granting rights to use public infrastructure and facilities, state-owned land or other public property.

## **Public partner**

### **Article 3**

For the purpose of this Law, a public partner may include:

- 1) the Government of Montenegro (hereinafter: “the Government”);
- 2) the competent local self-government body; and/or
- 3) a company and a legal entity performing an activity of public interest.

Companies and legal entities performing activities of public interest referred to in paragraph 1 item 3 of this Article shall be companies or legal entities:

- 1) in which the state or local self-government unit holds more than 50% of shares, i.e. stake;

- 2) in which more than half of the members of the governing body are representatives of the state capital representing the state body or the competent local self-government body; or

- 3) that are financed with more than 50% from the budget of Montenegro, local self-government and other public revenues or funds of a company or legal entity performing activities of public interest.

## **Contracting authority**

### **Article 4**

For the purpose of this Law, the contracting authority means a state authority, a state administration body, a local self-government body and a company, or a legal entity performing activities of public interest.

The contracting authority referred to in paragraph 1 of this Article may also be other authority, public service, legal entity and other user of the funds from the budget of Montenegro, or the budget of the local self-government unit and other public revenues, or another procuring entity in accordance with the law governing public procurement or special law.

A public-private partnership project may be implemented by one or more contracting authorities referred to in paragraph 1 of this Article.

For the purpose of this Law, a small-scale public-private partnership project means a project with estimated value equal to or less than EUR 5,000,000 without value added tax.

## **Participant in the procedure and bidder**

### **Article 5**

A participant in the procedure means a domestic or foreign legal or natural person or a consortium that has obtained the tender documentation in the public-private partnership contract award procedure, or that otherwise participates in the public-private partnership contract award procedure in accordance with law.

A bidder means a domestic or foreign legal or natural person or a consortium that has submitted a bid in the public-private partnership contract award procedure.

## **Private partner**

### **Article 6**

For the purpose of this Law, a private partner means a bidder whose bid was selected in the contract award procedure and with whom a public-private partnership contract has been concluded.

## **Principles of public-private partnership**

### **Article 7**

Public-private partnership shall be based on the principles of:

- 1) protection of the public interest, which is the basis of the public partner's obligation to ensure the exercise of the rights of private partners in accordance with the public interest established by law;
- 2) free management which ensures a high level of quality;
- 3) security and affordability, equality in access to and use of works or services under equal conditions;
- 4) transparency, which is ensured throughout the public-private partnership contract award procedure, and during the period of validity and execution of obligations under the public-private partnership contract;
- 5) non-discrimination, which includes equity and equality of participants in the procedure and bidders in the public-private partnership contract award procedure;

6) proportionality, which means that any measure undertaken by the contracting authority or the public partner shall be appropriate to the need to protect the public interest;

7) protection of competition, which includes the prohibition of restricting market competition between market participants;

8) environment protection, which is achieved through an integrated approach to the environment, through prevention and precaution, conservation of natural resources, the principle of sustainable development and the principle of responsibility of polluters in accordance with the law.

## **Types of public-private partnerships**

### **Article 8**

Public-private partnerships may be contractual or institutionalised.

In a contractual public-private partnership, the mutual relations between the public partner and the private partner shall be regulated by a public-private partnership contract.

Institutionalised public-private partnership shall be based on the establishment of a company held jointly by the private and the public partner, which provides public services, executes public works along with maintenance of public facilities that are the subject matter of works, or builds, reconstructs, manages or maintains public infrastructure, in order to implement the public-private partnership project.

The rights and obligations of the public partner and the private partner in the company referred to in paragraph 3 of this Article shall be regulated by the public-private partnership contract in accordance with the public invitation and the tender documentation.

The contractual or institutionalised public-private partnership shall be determined in the project proposal and the tender documentation in accordance with the intended division of risks and responsibilities, for the purpose of implementation of the public-private partnership project.

The provisions of the law governing contracts and torts shall apply to issues related to public-private partnership contracts that are not regulated by this Law.

## **Implementation of public-private partnership contract**

### **Article 9**

Depending on the predominant sources of income of the private partner referred to in Article 2 paragraph 2 item 3 of this Law and the division of risks, the public-private partnership contract may be implemented as:

1) a public works concession contract or a public service concession contract, or

2) a public-private partnership contract for public works or public-private partnership contract for public services.

## **Public works concession or public service concession**

### **Article 10**

The contract referred to in Article 9 paragraph 1 item 1 of this Law may be implemented as a public works concession or a public service concession.

A public works concession contract shall be concluded for the purpose of achieving public and financial interest, by which the public partner or several of them entrust the execution of works for a compensation consisting exclusively of the right to use the works that are the subject matter of the contract or of that right and a payment.

A public service concession contract shall be concluded for the purpose of achieving public and financial interest, by which the public partner or several of them entrust the provision and management of services other than the execution of works referred to in paragraph 2 of this Article to a private partner for a compensation consisting exclusively of the right to use the services which are the subject matter of the contract or of that right and a payment.

The granting of a public works concession or of a public service concession shall also involve the transfer to a private partner of the operational risk in the use of such works or services, which shall include demand risk and/or supply risk.

The transfer of part of the operational risk shall imply actual exposure to changes in the market, so that the estimated loss suffered by the private partner is not minor and negligible.

The operational risk referred to in paragraph 4 of this Article shall be considered to be the risk of the private partner's exposure to market conditions in such a way that the public partner does not guarantee the private partner, under normal operating conditions, directly or indirectly, any return on the invested funds or costs incurred in executing the works or providing the services that are the subject matter of the concession.

The demand risk referred to in paragraph 4 of this Article shall include the variability of market demand for works and services that are the subject matter of the public-private partnership contract (higher or lower than expected under the contract).

The supply risk referred to in paragraph 4 of this Article shall include the risk associated with the execution of the works or the provision of the services that are the subject matter of the contract, in particular when the execution of such works or the provision of services does not meet the demand.

## **Public-private partnership contract for public works and for public services**

### **Article 11**

The contract referred to in Article 9 paragraph 1 item 2 of this Law may be implemented as a public-private partnership contract for public works or a public-private partnership contract for public services, in accordance with Article 2 paragraphs 1 and 2 of this Law, if:

- 1) there are no conditions for the implementation of the public-private partnership contract as a concession referred to in Article 10 of this Law, and/or
- 2) the private partner assumes partially or fully the risk of availability.

The availability risk referred to in paragraph 1 item 2 of this Article means the risk of maintaining public infrastructure or public facility in operational condition in accordance with the agreed service quality standards.

## **Mixed contract**

### **Article 12**

A mixed contract shall include a concession which has as its subject matter both works and services.

The mixed contract referred to in paragraph 1 of this Article which includes several types of concessions that cannot be separated, shall be awarded in the manner and according to the procedure applicable to the main subject matter of the concession.

The main subject matter of the mixed contract referred to in paragraph 1 of this Article shall be determined according to the predominant subject matter of the works or service contract.

The law governing public procurement shall apply to a mixed contract containing elements of a works concession and a service concession and elements of public procurement.

## **Subject matter of public-private partnership**

### **Article 13**

In accordance with this Law, the subject matter of public-private partnership may in particular include:

- 1) roads, road and ancillary facilities;
- 2) railway infrastructure;
- 3) airports;
- 4) water transportation facilities and ports, in accordance with the law;
- 5) electronic communication networks and/or electronic communication infrastructure and related equipment;

- 6) information and communication technologies;
- 7) health care and social protection and welfare,
- 8) education and scientific activities;
- 9) utility infrastructure and/or utility equipment;
- 10) sports and recreational facilities and cultural facilities;
- 11) cable cars;
- 12) infrastructure related to the production, transmission or distribution of energy or energy products, in accordance with the law;
- 13) social housing and other forms of housing;
- 14) postal services;
- 15) utilities;
- 16) tourism and hospitality in accordance with the law governing tourism and catering activities;
- 17) bathing areas, marinas, moorings, ports and other coastal infrastructure facilities, in accordance with the law;
- 18) free economic zones and industrial parks;
- 19) energy efficiency;
- 20) other public infrastructure and facilities used for the purpose of providing public services and/or other public services in accordance with the law.

Public-private partnership for the construction and management of roads, railways, airports and ports shall be of strategic interest to Montenegro.

The Parliament of Montenegro may also declare a public-private partnership project covering a subject matter in other areas referred to in paragraph 1 of this Article to be of strategic interest to Montenegro.

### **Exemptions in application**

#### **Article 14**

This Law shall not apply to:

- 1) projects that:
  - a) are implemented under a special procedure of an international organization, on the basis of a concluded contract;
  - b) are implemented in accordance with the rules of an international organization or international financial institution, financing the project in full, unless agreed otherwise;
  - c) are implemented in accordance with the rules of an international organization or international financial institution, co-financing the project in the amount of more than 50%, and the contracting parties shall agree on the rules of procedure to be applied;
  - d) relate to the protection and rescue in case of natural disasters, catastrophes and in case of emergency;

e) relate to the procurement of weapons, ammunition and other items necessary for the defence and security of Montenegro;

f) relate to civil protection in accordance with the law governing protection and rescue;

2) goods, services and works covered by the law governing public procurement, and to:

a) contracts related to the acquisition, development, production or co-production of program material intended for radio and television broadcasting;

b) arbitration, amicable settlement of disputes and notarial services;

c) representation in proceedings before courts or institutions of another State or before international courts, tribunals or institutions;

d) legal services related to the exercise of public authority;

e) financial services related to the issuance, sale, purchase or transfer of securities or other financial instruments, in particular transactions of the procuring entity, for the purpose of raising money and capital and services of the Central Bank of Montenegro;

3) exploration and production of hydrocarbons in accordance with the law and to:

a) exploration or exploitation, or exploration and exploitation of mineral resources;

b) use of watercourses and other waters, or parts thereof or a certain amount of water, for the purposes determined by a special law;

c) construction of hydromelioration systems and extraction of materials from river basin districts;

d) use of forests;

e) use of natural resources in the coastal zone, for the purpose of performing activities of public interest;

f) exploration and/or exploitation of the marine area, seabed and subsoil, as well as living and non-living resources in inland sea, the territorial sea and the epicontinental shelf;

g) use of natural resources in state property for the construction, maintenance and use of energy facilities to generate electricity and/or heat;

h) use of river and lake shores;

i) use of natural resources in areas with natural healing properties and other natural values for the construction, maintenance, use and modernization of facilities;

j) organization of lottery games of chance and special games of chance;

k) exploitation of river deposits on public water resources;

4) projects that the contracting authority is required to implement in accordance with procedures established differently from this Law, on the basis of legal instruments establishing international legal obligations, such as ratified international agreements between Montenegro and one or more third countries for public-private partnership projects;

5) provision of public services, execution of public works and construction, reconstruction, management or maintenance of public infrastructure that the public partner awards to a related legal entity in accordance with a special law.

Legal instruments establishing international legal obligations, appropriate rules and procedures applicable to the award of contracts referred to in paragraph 1 item 4 of this Article shall be implemented in accordance with the principles of equal treatment, non-discrimination and transparency.

The Government shall notify the European Commission of the concluded agreements referred to in paragraph 1 item 4 of this Article.

A related legal entity referred to in paragraph 1 item 5 of this Article shall be a person in which:

- the public partner has more than half of the shares or stakes or more than half of the voting rights or has other management rights or supervisory rights;
- the public partner has the right to elect members of the governing body or persons authorized for representation in accordance with the law, or to have a decisive influence on the management and conduct of business of that person;
- there is no direct participation of private capital in accordance with the constitutive document, unless otherwise prescribed by law; or
- more than 80% of the revenue is generated by performing activities entrusted to the related party by the public partner controlling it or other legal entities controlled by the same public partner.

### **Use of gender sensitive language**

#### **Article 15**

Terms used in this Law for natural persons in the masculine gender shall include the same terms in the feminine gender.

### **Language in the procedure**

#### **Article 16**

The contracting authority shall prepare the public invitation and the tender documentation and conduct the procedure in the Montenegrin language.

The contracting authority may also prepare the public invitation and the tender documentation in English or another language common in international use.

The contracting authority may specify in the public invitation and the tender documentation that part of or the entire bid may be submitted in English or another language common in international use, in particular in the part relating to technical characteristics, quality and technical documentation.

In case of a dispute, the Montenegrin version of the tender documentation shall prevail.

## **II. MONTENEGRIN INVESTMENT AGENCY**

### **Legal status of the Agency**

#### **Article 17**

In order to implement public-private partnerships, investments and to promote investment potentials of Montenegro as an investment destination, the Montenegrin Investment Agency (hereinafter: the Agency) shall be established.

The Agency shall have the status of a legal entity.

Employees of the Agency shall exercise their rights and obligations from employment relationship in accordance with the law governing the rights, obligations and responsibilities of civil servants and state employees.

The Agency shall operate under the name Agencija za investicije Crne Gore.

The name of the Agency in English is: Montenegrin Investment Agency (abbreviated: MIA).

The head office of the Agency is in Podgorica.

### **Activities of the Agency**

#### **Article 18**

The Agency shall:

- 1) approve public-private partnership project proposals in accordance with this Law;
- 2) give opinions and proposals to contracting authorities regarding investments;
- 3) monitor the implementation of investments, cooperate with contracting authorities and other competent bodies in the field of promotion and support in the implementation of investments and public-private partnerships;
- 4) perform professional activities on the promotion of investment opportunities of Montenegro, in accordance with the law governing foreign investments and the annual program of the Agency, which shall include:
  - preparation, development and promotion of business opportunities in order to attract investments;
  - professional assistance to foreign investors for investments in certain areas and sectors of the economy;
  - organizing direct contacts of foreign and domestic companies and legal entities; and
  - cooperation with international institutions, in order to increase foreign investments and competitiveness;
- 5) monitor the status and dynamics of the implementation of public-private partnership projects and other investment projects in accordance with the law;

- 6) propose measures to increase foreign investments and improve the investment environment;
- 7) keep the register of approved public-private partnership projects (hereinafter: “the Register of Projects”);
- 8) keep the register of concluded public-private partnership contracts (hereinafter: “the Register of Contracts”);
- 9) keep records of foreign investors and foreign investments;
- 10) stimulate economic development by attracting investments;
- 11) assess the feasibility of development and investment programs that are of interest to Montenegro;
- 12) provide information on the institutional and legislative framework for public-private partnerships and other investments;
- 13) cooperate with international organizations responsible for public-private partnerships and investments and participate in initiatives of importance for public-private partnerships and investments;
- 14) perform administrative and technical tasks for the needs of working bodies of the Government in the field of investment policy, privatization and capital projects, in accordance with the law;
- 15) perform other tasks in accordance with the law and the statute of the Agency.

## **Agency bodies**

### **Article 19**

The bodies of the Agency shall be the Council and the Director of the Agency.

The Agency shall have Deputy Director and Assistant Directors, who are elected on the basis of a public competition in accordance with the law governing the rights, obligations and responsibilities of civil servants and state employees.

## **Agency Council**

### **Article 20**

The Council of the Agency (hereinafter: the Council) shall have a President and four members.

The President and members of the Council shall be appointed and dismissed by the Government, for a period of five years.

The President and members of the Council shall be accountable to the Government for their work.

The President and members of the Council shall be entitled to remuneration in accordance with the law governing the salaries of employees in the public sector.

## **Agency Director**

### **Article 21**

The work of the Agency shall be managed by the Director of the Agency.

The Director of the Agency shall be appointed by the Council, on the basis of a public competition, for a period of five years.

## **Council competences**

### **Article 22**

The Council shall:

- 1) adopt the statute of the Agency;
- 2) adopt the annual program and financial plan of the Agency;
- 3) determine the proposal for the strategy on encouraging investments;
- 4) adopt the report referred to in Article 26 of this Law;
- 5) decide on other issues in accordance with the law and the statute of the Agency.

The act referred to in paragraph 1 item 1 of this Article shall be approved by the Government.

## **Agency Director competences**

### **Article 23**

The Director of the Agency shall:

- 1) represent, manage and organize the work of the Agency;
- 2) be responsible for the legality of the work of the Agency;
- 3) propose the statute of the Agency;
- 4) propose the annual program and financial plan of the Agency;
- 5) propose the report referred to in Article 26 of this Law;
- 6) enforce the decisions of the Council;
- 7) adopt the act on the internal organization and systematization of the Agency, with the approval of the Council;
- 8) decide on other issues in accordance with the law and the Statute of the Agency.

## **Agency Statute**

### **Article 24**

Detailed competences of the Council and of the Director of the Agency, detailed scope of work of the Agency, method of adopting general acts, publicity of work and other issues of importance for the work of the Agency shall be regulated by the Statute of the Agency.

## **Agency financing**

### **Article 25**

Funds for the work of the Agency shall be provided from:

- 1) the budget of Montenegro;
- 2) donations, and
- 3) other sources in accordance with the law.

## **Annual reports**

### **Article 26**

The Agency shall submit to the Government the annual report and the financial report no later than by the end of the first quarter of the current year for the previous year.

## **III. PREPARATORY ACTIVITIES FOR THE AWARD OF PUBLIC-PRIVATE PARTNERSHIP CONTRACTS**

### **Content of preparatory activities**

### **Article 27**

For the purpose of approving a public-private partnership project and concluding a contract in accordance with this Law, the contracting authority shall carry out in particular the following preparatory activities, namely it shall:

- 1) identify potential public-private partnership projects;
- 2) prepare a public-private partnership project proposal which shall include:
  - public-private partnership feasibility analysis,
  - draft public-private partnership contract, and
- 3) submit a public-private partnership project proposal to the Agency, the state administration authority responsible for finance (hereinafter: “the Ministry”) and the Protector of Property Law Interests of Montenegro (hereinafter: “the Protector of Property Law Interests”) for an opinion.

The contracting authority may authorize another contracting authority to carry out the preparatory activities referred to in paragraph 1 of this Article.

## **Hiring of an advisor**

### **Article 28**

The contracting authority may hire an advisor to provide expert support in the preparatory activities referred to in Article 27 paragraph 1 of this Law, in contracting public-private partnerships and in the implementation of public-private partnership contracts.

The advisor referred to in paragraph 1 of this Article shall not be in conflict of interest and shall not be an advisor to the contracting authority and an advisor to the participants in the procedure or the bidder in the same public-private partnership project.

The advisor referred to in paragraph 1 of this Article shall be hired in accordance with the law governing public procurement and shall be responsible for providing expert support referred to in paragraph 1 of this Article in accordance with the law, rules of the profession and provisions of the service contract concluded with the contracting authority.

### **Initiative of an interested party**

#### **Article 29**

Preparatory activities referred to in Article 27 paragraph 1 of this Law may be carried out by the contracting authority at the initiative of an interested party, accompanied by a proposal for a public-private partnership project.

The contracting authority may accept the proposal of the public-private partnership project at the initiative of the interested party, which shall contain a proposal of cost-benefit analysis for the implementation of the public-private partnership project, with proof of the costs of drawing up the analysis, if the public-private partnership project proposal is not covered by the annual plan referred to in Article 35 of this Law.

The contracting authority shall examine the public-private partnership project proposal and the analysis submitted by the interested party from the aspect of protection of public interests.

The contracting authority shall carry out preparatory activities referred to in Article 27 paragraph 1 items 2 and 3 of this Law and after conducting the project approval procedure referred to in Article 33 of this Law, it shall prepare a proposal for amending the annual plan of approved public-private partnership projects.

The entity filing the initiative referred to in paragraph 1 of this Article shall participate in the public-private partnership contract award procedure on equal terms with other bidders and shall not be afforded preferential treatment.

Reimbursement of the actual costs of the analysis to the entity filing the initiative referred to in paragraph 2 of this Article shall be made by the selected private partner, after the completion of the contract award procedure in accordance with the public-private partnership contract.

## **Public-private partnership project value assessment**

### **Article 30**

The value of a public-private partnership project shall be the present value of the estimated total revenue of the private partner during the contract term, at the time of drafting the project, excluding value added tax, assessed on the basis of works and services that are the subject matter of the public-private partnership contract, and goods related to those works and services.

The assessment of the value of a public-private partnership project shall be determined on the basis of data from the feasibility analysis in accordance with Article 32 of this Law.

The assessment of the value referred to in paragraph 1 of this Article shall be valid from the moment of publishing the public invitation for awarding a public-private partnership contract or, if the obligation to publish a public invitation is not determined by this Law, from the moment of initiating the public-private partnership contract award procedure.

If the value of the public-private partnership project at the time of the contract award is higher by 20% compared to the originally estimated value in the public-private partnership project proposal, the project value shall be determined according to the value at the time of the contract award in accordance with the results of the new assessment.

The provisions of the law governing property valuation shall also apply to issues of determining the value assessment of a public-private partnership project that are not regulated by this Law.

## **Determining the assessed value of a public-private partnership project**

### **Article 31**

When assessing the value and determining the economic feasibility of a public-private partnership project, the contracting authority shall assess, in accordance with the subject matter of the public-private partnership contract, in particular:

- 1) the value of all types of public-private partnerships considered in the procedure of proposing public-private partnership project, including the term and possible extensions of the proposed term of the public-private partnership contract;
- 2) estimated revenue of the private partner based on the fees from end users of works or services, as well as other estimated revenues of the public partner based on the public-private partnership contract;
- 3) payments or financial support from the public partner to the private partner, including the compensation for the provision of public services and subsidies for investment costs;

4) the value of expected donations or other financial support from third parties for the execution of the contract;

5) income from the sale of property related to the subject matter of the public-private partnership contract, in accordance with the rights and obligations established by the public-private partnership contract and the law;

6) the value of goods and services made available by the contracting authority to the private partner, if they are necessary for the execution of works or provision of services;

7) rewards or other payments to the private partner;

8) fees, penalties, as well as other obligations of end users of works or services.

If the subject matter of the public-private partnership involves the award of several public-private partnership contracts, the total estimated value of all contracts shall be taken into account in the value assessment.

## **Feasibility analysis**

### **Article 32**

In the preparation of feasibility analysis particular account shall be taken of the realization of public interest under the public-private partnership project, environmental impact, risk assessment and technical, financial and economic effects of the proposed public-private partnership project.

The feasibility analysis referred to in paragraph 1 of this Article shall contain in particular:

1) the subject matter and the type of public-private partnership, assessment of the project value, location of activities and objectives achieved by the project implementation;

2) business plan, which shall include the expected estimate of capital costs, financing costs, operating costs and expected revenues;

3) identification and allocation of project risks;

4) analysis of potential project implementation through other alternative models (public procurement and direct financing);

5) analysis of the obtained value in relation to invested funds (value-for-money);

6) planned dynamics of public-private partnership project development;

7) types and amounts of security provided by the public partner and the private partner;

8) assessment of financial risks and impact on the budget of Montenegro, or on the budget of local self-government, with an analysis of the public partner's paying capacity;

9) the proposed term of the public-private partnership contract;

10) technical, financial, economic and legal analysis;

11) excerpt from the spatial planning documentation, ownership structure and method of resolving property law relations, as well as data on infrastructure and other

facilities located in the area envisaged for the implementation of the public-private partnership contract;

12) environmental impact;

13) the possibility that the contract may allow the private partner to perform other commercial activities or to construct other facilities within the implementation of the public-private partnership project in order to generate revenue;

14) economic viability and suitability of the project for financing by banks and other financial institutions;

15) compliance of the project with strategic goals at the state and local level;

16) assessment of market demand and market potentials for the implementation of the project proposal;

17) assessment of the capacity of the contracting authority and the public sector for the preparation and implementation of project proposals.

The feasibility analysis referred to in paragraph 2 of this Article shall be made on the form prescribed by the Agency.

The methodology for conducting a value-for-money assessment referred to in paragraph 2 item 5 of this Article shall be defined by the Agency.

In the feasibility analysis, the contracting authority shall determine the period for which the public-private partnership contract is concluded and the possibility of its extension, in a way that ensures amortization of the private partner's investment and reasonable return on invested capital, taking into account risks associated with commercial use of the contract subject matter.

The feasibility analysis for small-scale public-private partnership projects may be prepared in a way that does not include the elements referred to in paragraph 2 of this Article, with the explanation of the reasons for the impossibility of defining certain aspects of the analysis referred to in paragraph 2 of this Article.

The feasibility analysis referred to in paragraph 6 of this Article for small-scale public-private partnership projects shall contain the elements referred to in paragraph 2 items 1, 2, 3, 7, 8, 9, 11 and 14 of this Article.

## **Approving public-private partnership projects**

### **Article 33**

A public-private partnership project proposal shall be submitted by the contracting authority to the Agency and the Ministry, for the purpose of obtaining an opinion.

In the procedure of giving the opinion referred to in paragraph 1 of this Article, the Agency shall particularly assess whether:

1) the public-private partnership project has been proposed in accordance with national and local strategic objectives;

2) the contracting authority is authorized to propose the public-private partnership project;

3) the value-for-money of the project proposal was assessed in accordance with the methodology referred to in Article 32 paragraph 4 of this Law; and

4) the public-private partnership project proposal is prepared in accordance with Article 2 of this Law.

The Agency shall give the opinion referred to in paragraph 1 of this Article within 20 days from the date of submitting the public-private partnership project proposal.

In the procedure of giving the opinion referred to in paragraph 1 of this Article, the Agency may request additional information from the contracting authority and other competent state administration authorities.

In the procedure of giving the opinion referred to in paragraph 1 of this Article, the Ministry shall particularly assess the fiscal effects of the public-private partnership project proposal, fiscal availability, sustainability and feasibility, i.e. direct and indirect fiscal effects and risks, and shall deliver the opinion to the contracting authority and the Agency within 20 days after receiving the public-private partnership project proposal.

In accordance with the subject matter of public-private partnership, in the procedure of approving public-private partnership projects, the contracting authority shall obtain the opinion of the Protector of Property Law Interests in the part related to the protection of property interests of Montenegro in accordance with special law.

The Protector of Property Law Interests shall deliver the opinion referred to in paragraph 6 of this Article to the contracting authority within 20 days after receiving the public-private partnership project proposal.

If changes are made to the public-private partnership project based on the opinion of the Agency, the Ministry, or the Protector of Property Law Interests, the contracting authority shall submit the amended project to the Agency, or the Ministry.

The contracting authority shall obtain a positive opinion of the Agency and of the Ministry on the public-private partnership project proposal in the procedure of approving the public-private partnership project.

The public-private partnership project shall be approved by giving a positive opinion of the Agency, or the Ministry.

## **Register of Projects**

### **Article 34**

The Agency shall register the public-private partnership project proposal that was approved in accordance with Article 33 of this Law in the Register of Projects within seven days from the date of approval.

The Agency shall maintain and publish the Register of Projects on its website.

The content and method of keeping the Register of Projects shall be determined by the Agency.

## **Annual plan of approved public-private partnership projects**

### **Article 35**

Contracting authorities shall submit to the Agency the list of approved public-private partnership projects whose implementation is planned in the year for which the annual plan of approved projects is adopted, except for projects within the competence of local self-government, by the end of the second quarter of the current year for the following year.

The Agency shall submit the draft annual plan referred to in paragraph 1 of this Article for public debate for a period of at least 30 days.

The Agency shall submit the proposal of the annual plan of approved public-private partnership projects, after a public debate, to the Government by the end of the third quarter of the current year for the following year, for discussion and adoption.

The Government shall adopt the annual plan of approved public-private partnership projects for the following year by November 30 of the current year.

The Agency shall publish the annual plan referred to in paragraph 3 of this Article on its website by the end of the current year.

The annual plan of public-private partnership projects for the following year within the competence of the local self-government shall be adopted, after the public debate, by the competent body of the local self-government by November 30 of the current year for the following year.

The competent local self-government body shall submit the annual plan referred to in paragraph 6 of this Article to the Agency for publication on the website.

The public-private partnership project proposals referred to in paragraphs 3 and 6 of this Article shall be in accordance with the fiscal policy guidelines.

The contracting authority shall submit to the Agency a public-private partnership project that is not included in the annual plan in accordance with paragraph 1 of this Article, in order to supplement the plan in accordance with this Law.

The proposal for amendments to the annual plan of approved public-private partnership projects for the current year shall be adopted, after a public debate, by the Government, or the competent local self-government body.

If the approved public-private partnership projects whose implementation is planned by the annual plan of approved projects were not implemented in that year, they shall be included in the annual plan of approved projects for the following calendar year, unless the contracting authority and/or the Agency decide otherwise.

## **Decision to initiate procedure**

### **Article 36**

The decision to initiate a public-private partnership contract award procedure on the basis of the approved public-private partnership project proposal, in accordance with the annual plan of approved public-private partnership projects, shall be made by the contracting authority.

The contracting authority shall appoint a tender commission (hereinafter: "the Commission") simultaneously with the decision to initiate the procedure.

## **Commission**

### **Article 37**

The members of the Commission shall be appointed from the legal, economic, technical and other fields, depending on the subject matter and characteristics of the public-private partnership project.

The number of members of the Commission shall be an odd number and may not exceed nine members.

The Commission shall have a secretary.

The members of the Commission shall sign a statement indicating that they are not in conflict of interest, which guarantees that they have no personal interests in the public-private partnership contract award procedure.

The statement referred to in paragraph 4 of this Article shall be an integral part of the tender documentation.

In the event of conflict of interest or if a member of the Commission fails to submit the statement referred to in paragraph 4 of this Article, he shall be excluded from the public-private partnership contract award procedure.

The content of the statement referred to in paragraph 4 of this Article shall be prescribed by the Ministry.

## **Conflict of interest**

### **Article 38**

Conflict of interest referred to in Article 37 paragraph 4 of this Law shall exist if a member of the Commission is:

- 1) a bidder, subcontractor, legal representative or attorney of the bidder;
- 2) a blood relative in the direct line, and in the collateral line up to the fourth level of kinship with the bidder or the bidder is his marital or extramarital spouse or in-law relative up to the second degree, regardless of whether the marriage has ended or not;

- 3) guardian, adoptive parent or adoptee of the bidder, his legal representative or attorney;
- 4) shareholder or member of the governing body of the bidder, or the applicant;
- 5) a person who has a direct or indirect interest in the public-private partnership contract award procedure;
- 6) involved in other circumstances that cast doubt on his impartiality.

The provisions of Article 37 paragraphs 4 and 6 of this Law and paragraph 1 of this Article shall also apply to other persons who are involved with the contracting authority in the preparatory activities for the approval of the public-private partnership project, or in the public-private partnership contract award procedure.

### **Contract nullity**

#### **Article 39**

A public-private partnership contract shall be null and void if it is concluded with a proven existence of conflict of interest.

### **Commission activities**

#### **Article 40**

The Commission shall:

- 1) prepare the public invitation and the tender documentation in accordance with the public-private partnership project proposal approved in accordance with Article 33 of this Law;
- 2) conduct the bid opening procedure, evaluate and check the eligibility of bidders to participate in the public invitation, check the compliance of bids with the conditions specified in the public invitation and the tender documentation, evaluate bids and compile the ranking list of bidders;
- 3) compile the minutes of the public opening of bids and the minutes of the examination, assessment and evaluation of bids;
- 4) perform other activities necessary for the implementation of the public-private partnership contract award procedure.

The Commission may hire experts (from the financial, legal and technical professions) to perform expert tasks and provide assistance in performing the tasks referred to in paragraph 1 of this Article.

In the cases referred to in paragraph 1 of this Article, the Commission shall decide by a majority vote of the total number of members.

## **Contents of tender documentation**

### **Article 41**

Depending on the subject matter of a specific public-private partnership, the tender documentation shall contain in particular:

- 1) name of the contracting authority;
- 2) subject matter of the public-private partnership (technical characteristics, i.e. specifications for the execution of works or provision of services, conditions of subcontracting, deadline for commencement of execution of works or provision of services, indicative deadline for the completion of works or provision of services, i.e. envisaged term of the contract);
- 3) conditions to be met by the bidders in terms of economic and financial capacity and professional, technical and personnel qualifications, evidence and data proving the bidder's or consortium's fulfilment of these conditions;
- 4) value of the public-private partnership project;
- 5) conditions for the eligibility of bidders for participation in the public-private partnership contract award procedure, as well as conditions and requirements to be met in accordance with special regulations or rules of the profession;
- 6) place, time and manner of obtaining the tender documentation and the person in charge of providing additional information;
- 7) instructions to bidders (contents and method of bid preparation, method of submission, method of determining the price, i.e. concession fee or other fee, currency in which the bid value is expressed, language and letter of the bid, and other issues relevant to the subject matter of the public-private partnership);
- 8) amount, type and validity period of the bid bond, i.e. the performance guarantee or other security;
- 9) conditions regarding economic-financial capacity and professional-technical and personnel qualifications to be fulfilled by bidders;
- 10) criteria for the selection of the best bid and evaluation of bids;
- 11) place and time of examining the documentation necessary for the preparation of the bid and/or visit to the site where the activity which is the subject matter of the public-private partnership is to be performed;
- 12) conditions, deadline and method of returning the guarantee, or other security;
- 13) data to be submitted by the bidder on its competences and the competences of the members of the consortium, i.e. subcontractors;
- 14) conditions to be met individually and jointly by the members of the consortium, if necessary;
- 15) list of necessary technical documentation with conditions for its preparation and the list of permits, approvals and consents to be obtained before the start of implementation of the public-private partnership contract, in accordance with the law;

16) excerpt from the spatial planning documentation and data on infrastructure and other facilities located in the area for the implementation of the public-private partnership contract;

17) data on the date, time and place of submission of bids, i.e. the deadline for withdrawal of bids;

18) bid validity period;

19) date, time and place of public opening of bids;

20) list of competent authorities from whom the bidder may obtain information on obligations and the list of regulations governing issues of importance for the subject matter of the public-private partnership;

21) deadline, method and conditions of payment of the concession fee or other fees or payments by the public partner;

22) data on property law relations, ownership structure and manner of resolving property law relations;

23) deadline for issuing a decision on the public-private partnership contract award;

24) instruction on legal remedy in the public-private partnership contract award procedure; and

25) other information relevant to the public-private partnership contract award procedure.

The public invitation and the draft public-private partnership contract shall be integral parts of the tender documentation.

If the best bidder is required to establish a special purpose vehicle referred to in Article 43 of this Law, the tender documentation shall also specify the form of that company and the minimum founding capital, or in the case of establishing a joint company, the mutual rights and obligations of the public partner and of the private partner.

The contracting authority shall not restrict or endanger competition in the public-private partnership contract award procedure in the tender documentation.

Tender documentation shall be prepared in a way that allows for transparency and comparability of submitted bids.

Tender documentation may also contain templates, statements and other forms.

Tender documentation may also contain other elements contained in the tender documentation in accordance with the law governing public procurement.

Tender documentation for small-scale public-private partnership projects may be prepared without certain elements referred to in paragraph 1 of this Article, with an explanation of the reasons for the impossibility of defining certain elements of the tender documentation.

Approval of the tender documentation for public-private partnership projects, except for small-scale projects, shall be given by the Government, or the competent local self-

government body for public-private partnership contracts in which the public partner is the local self-government.

## **Technical and functional characteristics, or specifications**

### **Article 42**

The contracting authority may, through tender documentation, determine technical and functional characteristics, or specifications related to the works and services that are the subject matter of the public-private partnership, the specific process, or production or provision of works or services if they are related to the subject matter of the contract or the proportional value and the objectives of the subject matter of the contract.

The technical and functional characteristics, or specifications referred to in paragraph 1 of this Article may also refer to the quality level, environmental impact, special requirements (including access for persons with disabilities) and assessment of compliance with these requirements, performance, safety or measurement, symbols, testing, testing methods or instructions for users.

The contracting authority shall not use or refer to technical and functional characteristics, or specifications of the subject matter of public-private partnership in the tender documentation, if such reference would give preference to a certain participant in the procedure or bidder or might unjustifiably exclude other participants in the procedure or bidders.

When the contracting authority cannot describe, in the tender documentation, the technical and functional characteristics, or specifications of the subject matter of public-private partnership referred to in paragraph 1 of this Article, in a way that ensures that the characteristics or specifications are understandable to participants in the procedure, or bidders, the contracting authority may state the elements of trademark, patent, type or manufacturer, provided that the indication is accompanied by the words: "or equivalent".

## **Requirement to establish a company**

### **Article 43**

The contracting authority may, in the public invitation and the tender documentation, specify the requirement for the private partner to establish a special purpose vehicle, before concluding the public-private partnership contract, as well as the conditions to be met by the special purpose vehicle.

Notwithstanding paragraph 1 of this Article, the contracting authority may, in the public invitation and the tender documentation, specify the requirement for the bidder to be able to expand the activities of a company or other legal entity based in Montenegro

to perform the activity that is the subject matter of the public-private partnership, before entering into force of the public-private partnership contract.

The company referred to in paragraph 1 of this Article shall conclude the public-private partnership contract together with the private partner and may perform only the activities that are exclusively aimed at the implementation of the public-private partnership project for which it was established.

The head office, status or ownership structure of the company, part of a foreign company or other legal entity in the territory of Montenegro referred to in paragraphs 1 and 2 of this Article may be modified by the private partner with the prior consent of the public partner.

A contract concluded contrary to paragraph 4 of this Article shall be null and void.

The company referred to in paragraphs 1 and 2 of this Article shall be established in accordance with the law governing the establishment of companies.

The private partner referred to in paragraph 1 of this Article shall be jointly and severally liable for the obligations of the company or legal entity referred to in paragraphs 1 and 2 of this Article, unless otherwise specified in the public-private partnership contract.

## **Consortium**

### **Article 44**

A consortium may be formed for the purpose of participating in the procedure of awarding and implementing a public-private partnership contract, unless otherwise determined by the public invitation or the tender documentation.

A consortium shall consist of two or more legal or natural persons submitting one joint bid in the public-private partnership contract award procedure.

In the public invitation, or the tender documentation appropriate to the subject matter of the public-private partnership, the contracting authority may determine the detailed conditions to be met by the consortium.

## **Consortium members**

### **Article 45**

A member of a consortium may at the same time directly or indirectly participate in only one consortium established for the purpose of implementation of a public-private partnership project.

A member of the consortium referred to in paragraph 1 of this Article may not participate in the award procedure as an independent bidder.

In case of deviation from paragraphs 1 and 2 of this Article, the consortium's bid shall not be considered.

The contracting authority shall assess the capacity of the consortium in order to determine the fulfilment of the conditions specified in the public invitation and the tender documentation.

### **Liability of consortium members**

#### **Article 46**

The members of the consortium shall be jointly and severally liable for the implementation of the public-private partnership contract, unless otherwise specified in the public-private partnership contract.

Changes in the ownership structure of the company referred to in Article 43 of this Law after the signing of the public-private partnership contract may be made in the manner specified in the public-private partnership contract.

### **Bid bond**

#### **Article 47**

The type and value of the bid bond shall be determined depending on the type and the subject matter of the public-private partnership in accordance with the assessment of the contracting authority.

The contracting authority shall determine the amount of the bid bond in the absolute monetary amount, which may not exceed 5% of the value of the public-private partnership project.

The contracting authority shall not determine the type and amount of the bid bond that may discriminate against a participant in the procedure, or a bidder according to their financial position.

In case of extension of the validity period of the bid at the request of the contracting authority, the bidder is required to proportionally extend the validity period of the bid bond.

The deadline for extension of the bid bond referred to in paragraph 4 of this Article and its submission may not be longer than 30 days from the date of extension of the bid validity period.

The contracting authority shall return the bid bond to the bidders who were not selected in the contract award procedure immediately after the completion of the public-private partnership contract award procedure, in accordance with the tender documentation, and shall keep a copy of the bid bond.

## **IV. AWARD OF PUBLIC-PRIVATE PARTNERSHIP CONTRACT**

### **Procedure types**

#### **Article 48**

The provisions of the law governing public procurement and Articles 49 to 65 of this Law shall apply to the public-private partnership contract award.

Notwithstanding paragraph 1 of this Article, in the procedure of selecting a private partner, the provisions of the law governing public procurement shall not apply to the hiring of subcontractors, group of subcontractors, or joint bid in connection with the obligation to execute part of the contract to be implemented by individual members of the private partner's group, as well as obligations and payments between the private partner and the subcontractors.

The provisions of the law governing public procurement shall apply to issues of public-private partnership contract award that are not set forth by this Law.

#### **Public invitation for public-private partnership contract award**

#### **Article 49**

The public invitation for public-private partnership contract award (hereinafter: "public invitation") shall be published in "Official Gazette of Montenegro", at least one daily print media distributed in the territory of Montenegro, on the website of the contracting authority and on the Agency's website and, at the discretion of the contracting authority, in an international financial print or electronic medium.

The public invitation shall contain in particular:

- 1) information on the contracting authority;
- 2) date of publication of the public invitation;
- 3) subject matter and type of public-private partnership;
- 4) type of public-private partnership contract award procedure;
- 5) term and, if applicable, value of the public-private partnership contract;
- 6) conditions for participation in the public-private partnership contract award procedure;
- 7) criteria for selection of the best bid;
- 8) language in which the bid is submitted;
- 9) address and deadline for submission of bids;
- 10) date, time and place of the opening of bids;
- 11) information on the person in charge of providing relevant information during the public invitation validity period;
- 12) name and address of the authority competent for deciding on the appeal, as well as information on the deadlines for lodging an appeal;

13) time and place where the tender documentation may be obtained.

The costs of publishing the public invitation shall be borne by the contracting authority.

The public invitation may be amended no later than seven days before the deadline for submission of bids.

If the amendment to the public invitation changes the conditions for participation, criteria or sub-criteria, the contracting authority shall extend the deadline for submission of bids for the period that passed from the date of publication of the public invitation until the date of publication of the amendments to the public invitation.

Amendments to the public invitation shall be published in the manner in which the public invitation was published.

### **Confidentiality in the procedure**

#### **Article 50**

The contracting authority shall not publish the information marked by the bidder in the bid as secret, in accordance with the law governing the protection of business secrets.

The bidder shall, at the request of the contracting authority, ensure the protection of data confidentiality in the public-private partnership contract award procedure.

### **Anti-corruption**

#### **Article 51**

The contracting authority shall take measures in the public-private partnership contract award procedure to prevent fraud, corruption, favouring of bidders, and effectively prevent, identify and eliminate any conflicts of interest, in order to prevent distortions of competition in the market, ensure transparency of the award procedure and non-discrimination of bidders.

### **Access to tender documentation**

#### **Article 52**

The contracting authority shall provide electronic access to the tender documentation in accordance with the public invitation to the interested parties from the publishing date of the public invitation, or delivery of the invitation to bid.

The invitation referred to in paragraph 1 of this Article shall specify the internet address where the tender documentation may be accessed.

Notwithstanding paragraph 1 of this Article, the contracting authority may specify that for technical reasons or due to the particularly sensitive nature of commercial

information requiring protection, tender documents shall be obtained directly from the contracting authority, in accordance with the public invitation or invitation to bid.

The participant in the procedure may request additional clarifications of the tender documentation no later than ten days before the deadline for receipt of bids.

The contracting authority shall publish clarifications of the tender documentation, or additional information related to the tender documentation on the website where the tender documentation may be accessed no later than six days before the deadline for receipt of bids.

The contracting authority shall not be required to provide additional clarifications referred to in paragraph 4 of this Article, if the provision of such information would violate the provisions of the law or otherwise be contrary to the public interest, harm the legitimate interests of participants in the procedure, or jeopardize competition between participants.

## **Obtaining of the tender documentation**

### **Article 53**

In the public-private partnership contract award procedure, interested persons shall have the right to obtain the tender documentation under equal conditions.

The contracting authority shall keep the data on the participants in the procedure, or the bidders, secret until the bid opening.

The contracting authority may clarify, amend, supplement and/or correct the tender documentation, provided that these are available to participants in the procedure who obtained the tender documentation on the same day, and no later than seven days before the deadline for submission of bids.

In the case referred to in paragraph 3 of this Article, the contracting authority shall ensure the availability of clarifications, amendments, supplements and/or corrections to the tender documentation to all participants in the procedure, or bidders, at the same time and in the same manner in which the tender documentation was made available.

Amendments, supplements and/or corrections referred to in paragraph 3 of this Article may not make changes to the material elements of the public-private partnership project proposal.

## **Ineligible bidders**

### **Article 54**

The contracting authority shall exclude a bidder from the public-private partnership contract award procedure if the responsible person of the bidder has been convicted by a final judgment of the criminal offense of:

- 1) criminal association;

- 2) creation of a criminal organization;
- 3) giving bribe;
- 4) accepting bribe;
- 5) giving bribe in business;
- 6) accepting bribe in business;
- 7) fraud;
- 8) terrorism;
- 9) terrorist financing;
- 10) terrorist association;
- 11) participation in foreign armed formations;
- 12) money laundering;
- 13) trafficking in human beings;
- 14) trafficking in minors for adoption purposes;
- 15) establishment of slavery and transportation of persons in slavery.

The provision of paragraph 1 of this Article shall also apply to a member of the governing body or the supervisory body of the bidder.

The contracting authority shall exclude a bidder from the public-private partnership contract award procedure which has not settled all due obligations based on taxes or contributions in accordance with the law.

The contracting authority shall exclude any bidder from participation in the public-private partnership contract award procedure:

- 1) whose bid is not compliant with this Law;
- 2) which is in bankruptcy;
- 3) which has been convicted by a final judgment of a criminal offense committed in the course of professional activity;
- 4) for which it can prove that it has concluded agreements with other economic entities with the aim of distorting market competition;
- 5) which has violated the provisions of a previously concluded public-private partnership contract or other contracts with the contracting authority;
- 6) which has provided inaccurate data or concealed data relevant to its eligibility for participation or decision-making in the public-private partnership contract award procedure;
- 7) if data on business, ownership, financial records from the country in which it has its registered office or domicile are not available to the competent authorities of Montenegro;
- 8) which has tried to influence the decision-making process of the contracting authority or the Commission or to obtain confidential information that would provide an advantage in the public-private partnership contract award procedure, and
- 9) in order to protect the security and defence of Montenegro.

Eligibility for participation in the public-private partnership contract award procedure shall be proven by submitting evidence issued by the competent authorities in accordance with the public invitation and the tender documentation.

Notwithstanding paragraph 3 of this Article, the contracting authority shall not exclude any bidder from the public-private partnership contract award procedure due to outstanding obligations based on taxes and contributions which proves that, in accordance with regulations, it has no obligation to pay taxes and contributions or which has been allowed to defer payment of taxes and contributions, executed in a timely manner.

## **Submission of bids**

### **Article 55**

Bidders shall submit bids within the deadline specified in the public invitation, directly or by registered mail to the address of the contracting authority.

The bid shall be prepared in accordance with the conditions and requirements set out in the public invitation and the tender documentation.

The bid shall be submitted in writing, in a sealed package (envelope or wrapper) indicating the name and address of the contracting authority, the public-private partnership contract award procedure to which the bid refers, public invitation number and text indicating “do not open”.

The bid shall be binding on the bidder until the expiration of the bid validity period.

The contracting authority shall enclose instructions on the manner of submitting bids in the tender documentation.

In the public-private partnership contract award procedure, the bidder may submit only one bid independently, in a consortium or other form of business association.

The contracting authority may determine the procedure for submitting bids electronically in accordance with the regulations governing e-government, e-identification and e-signature, e-document, e-commerce and information security.

## **Deadline for bid submission**

### **Article 56**

The contracting authority shall specify in the public invitation and the tender documentation the deadline for submission of bids appropriate to the level of complexity of the subject matter and the time required for the preparation of bids.

The deadline for submission of bids, or applications for participation in the public-private partnership contract award procedure, may not be shorter than 30 days from the date of publishing the public invitation, or 22 days from the date of sending the invitation

for participation in the public-private partnership contract award procedure, if the procedure takes place in stages.

The deadline for submission of bids may be extended by the contracting authority no later than seven days before the expiration of the deadline referred to in paragraph 2 of this Article.

If the preparation of the bid or submission of an application for participation in the award of a public-private partnership contract requires a site visit or examination of documents supporting the documentation for the award of the public-private partnership contract, the contracting authority shall extend the deadline referred to in paragraph 2 of this Article, according to the time required for the site visit or examination of the documents supporting the public-private partnership documentation.

The bidder may amend or supplement the bid within the deadline for submission of bids or withdraw the bid in writing.

At the request of the contracting authority, the bidder may extend the validity of the bid.

### **Incorrect bid and application**

#### **Article 57**

A bid, or an application for qualification in the public-private partnership contract award procedure, shall be incorrect if it:

- 1) has not been prepared in accordance with this Law, the public invitation and the tender documentation;
- 2) contains provisions that harm the interests of the public partner, or the interests of Montenegro or which distort or restrict competition in the market;
- 3) does not contain proof of eligibility of bidders in accordance with the tender documentation;
- 4) is not accompanied by a bid bond in accordance with the tender documentation;
- 5) does not correspond to the description of the subject matter of public-private partnership, technical and functional characteristics and specifications, or offers services or works that are not in accordance with the subject matter of public-private partnership and/or conditions for performing the activity that is the subject matter of the public-private partnership.

### **Best bid selection criteria**

#### **Article 58**

Bids shall be ranked on the basis of objective criteria, determined in accordance with the subject matter of the public-private partnership contract, in accordance with the principles established by this Law.

The criteria referred to in paragraph 1 of this Article may include environmental, social or innovation criteria.

The contracting authority shall determine the order of importance of the criteria in the public invitation and the tender documentation.

## **Criterion**

### **Article 59**

In the public-private partnership contract award procedure, the criterion for selecting the most advantageous bid shall be the most economically advantageous bid.

## **Most economically advantageous bid**

### **Article 60**

The most economically advantageous bid shall be determined in particular on the basis of the following sub-criteria, in accordance with the subject matter and the nature of the public-private partnership:

- 1) quality, which includes technical achievement, aesthetic, innovative, functional and environmental characteristics;
- 2) operating costs and management costs;
- 3) economy;
- 4) type, value, or significance of the investment;
- 5) maintenance and technical support after delivery;
- 6) deadlines for fulfilment of obligations under the contract;
- 7) prices of services for end users;
- 8) amount of the concession fee or other fee;
- 9) realization of public interest;
- 10) effects on employment, infrastructure improvement and economic development.

The values of the sub-criteria in cash shall be expressed in Euros in net value on the deadline for submission of bids.

The value of the sub-criteria referred to in paragraph 1 of this Article shall be expressed by determining the maximum values in the appropriate range, with the sum of all points being 100.

The amount of the offered concession fee or other fee shall be expressed as a unit sum in Euros of the offered fixed or variable concession fee for the duration of the concession contract, discounted to the net value at the discount rate specified in the tender documentation.

If a special law specifies the amount of the lowest concession fee that the concessionaire is required to pay, the contracting authority shall specify in the tender documentation the amount above which the bidders are required to submit their bids.

## **Minutes of examination, assessment and evaluation of bids**

### **Article 61**

The Commission shall draw up minutes of the examination, assessment and evaluation of bids, which shall contain in particular:

- 1) assessment of the correctness of the submitted evidence in the bids;
- 2) opinion of the advisor referred to in Article 28 of this Law, if one is hired in the procedure;
- 3) reasons for rejecting bids;
- 4) evaluation of each individual bid on the basis of submitted documentation according to each criterion individually;
- 5) number of points awarded to each of the bidders for each of the established criteria and sub-criteria, with an explanation for the number of points awarded;
- 6) assessment of the correctness of bids;
- 7) names of the president and members of the Commission and the place and date of drawing up the minutes.

Each member of the Commission shall individually evaluate the correct bids, i.e. the criteria based on the data given in the bid.

Within 30 days from the date of the opening of bids, the Commission shall:

- 1) determine the average number of points awarded on the basis of each of the established criteria for each bidder;
- 2) draw up minutes and evaluation report with the determined ranking list of bidders, in descending order;
- 3) prepare and submit to the contracting authority a proposal for the decision on the selection of the most advantageous bid;
- 4) prepare a draft decision on the public-private partnership contract award.

The deadline referred to in paragraph 3 of this Article may be extended by the contracting authority at the justified request of the Commission, no later than three days before its expiration.

If two or more correct bids are ranked equally on the basis of the criteria and sub-criteria for the selection of the best bid, the contracting authority shall invite bidders whose bids have the same number of points and the selection will be made by lot by the President of the Commission.

At the proposal of the Commission, the contracting authority shall make a decision on the selection of the most advantageous bid, which shall be submitted with a copy of the evaluation report and the determined ranking list of bidders, referred to in paragraph 3 item 2 of this Article, within 30 days from the decision date, via registered mail with return receipt.

The decision on the selection of the most advantageous bid shall contain in particular:

- 1) name of the contracting authority and the public partner;
- 2) number and date of the decision;
- 3) name of the most advantageous bidder;
- 4) main rights and obligations of the public partner and the private partner;
- 5) type and subject matter of the public-private partnership;
- 6) term of the public-private partnership contract;
- 7) data on the evaluation of bids from the report;
- 8) explanation of the reasons for selecting the most advantageous bid;
- 9) data on protection of rights in the procedure;
- 10) signature of the responsible person of the contracting authority.

The contracting authority may decide to annul the public-private partnership contract award procedure:

- 1) if circumstances become known which, if they had been known before initiating the public-private partnership contract award procedure, would have caused the public invitation not to be published or a significantly different public invitation and tender documentation;
- 2) if no bids have been submitted by the expiration of the deadline specified in the public invitation;
- 3) if no valid bid remains after the rejection of bids in the public-private partnership contract award procedure; or
- 4) in other cases in accordance with the law.

A new procedure for the preparation of public-private partnership project proposals referred to in Article 27 of this Law may be initiated after the decision on annulment of the public-private partnership contract award procedure becomes final.

## **Protection of rights in the procedure**

### **Article 62**

In the public-private partnership contract award procedure, the protection of rights in the procedure shall be provided by the Commission for Protection of Rights in Public Procurement Procedures in accordance with this Law and the law governing public procurement.

The bidder who has filed an appeal, and who does not have a registered office in the territory of Montenegro, shall appoint an attorney to receive notifications and decisions in the territory of Montenegro or specify another method of delivery that would not delay the procedure.

## **Drawing up proposal for the decision and public-private partnership contract**

### **Article 63**

Upon completion of the procedure referred to in Articles 61 and 62 of this Law, the contracting authority shall draw up the proposal for the decision on the public-private partnership contract award and the public-private partnership contract.

The contracting authority shall submit the proposal for the decision on the public-private partnership contract award, the contract referred to in paragraph 1 of this Article and the minutes referred to in Article 61 paragraph 1 of this Law to the Agency, the Ministry and the Protector of Property Law Interests for opinion.

The Agency, the Ministry and the Protector of Property Law Interests shall give an opinion on the compliance of the proposal for the decision on the public-private partnership contract award and the public-private partnership contract with the public-private partnership project with the tender documentation and this Law.

The Agency, the Ministry and the Protector of Property Law Interests shall give an opinion on the proposal for the decision and the public-private partnership contract within 20 days from the date of receipt of the decision, or the contract.

The contracting authority shall submit the proposal for the decision and the contract referred to in paragraph 1 of this Article with the minutes and evaluation report with the determined ranking list of bidders referred to in Article 61 paragraph 3 item 2 of this Law and the opinion of the Agency, Protector of Property Law Interests and the Ministry to the public partner.

## **Decision on public-private partnership contract award**

### **Article 64**

The decision on the public-private partnership contract award shall be made by the public partner.

If the public partner is a company or a legal entity performing activities of public interest, the decision on the public-private partnership contract award shall be made by the competent body of the company or legal entity, with previously obtained approval of the Government or the competent local government body.

The public partner may decide to annul the public-private partnership contract award procedure, if it believes that the award of the contract is not in line with the interests of Montenegro.

The decision on the public-private partnership contract award shall be published in "Official Gazette of Montenegro".

## **Notification of public-private partnership contract award**

### **Article 65**

Along with the decision on the public-private partnership contract award referred to in Article 64 paragraph 1 of this Law, the contracting authority shall submit to the Agency a decision on the selection of the most advantageous bid, as well as the minutes and the evaluation report with the ranking list of bidders referred to in Article 61 paragraph 3 item 2 of this Law.

The decision on the public-private partnership contract award shall be published on the Agency's website no later than seven days from the date of publishing of the decision on the public-private partnership contract award in accordance with Article 64 paragraph 4 of this Law.

The Agency shall register the public-private partnership contract in the Register of Contracts within eight days from the date of concluding the contract.

The content of the notification referred to in paragraph 2 of this Article shall be specified by the Agency.

## **V. CONTRACT**

### **Conclusion of public-private partnership contract**

#### **Article 66**

The public-private partnership contract shall be concluded in writing.

If the first ranked bidder withdraws from conclusion of the contract or fails to submit a performance guarantee, or the insurance policy within the specified period, the public partner may decide to award the contract to the next best ranked bidder or order the contracting authority to annul the public-private partnership contract award procedure.

The rights and obligations under the public-private partnership contract shall not be the subject of bankruptcy or liquidation proceedings.

A decision or other act by which the rights and obligations under the public-private partnership contract become the subject of bankruptcy proceedings or liquidation shall be null and void.

### **Main elements of public-private partnership contract**

#### **Article 67**

The public-private partnership contract, in accordance with the subject matter of the public-private partnership, shall regulate in particular:

- 1) purpose and subject matter of the public-private partnership;
- 2) rights and obligations of the contracting parties;

3) conditions and manner of using the subject matter of the public-private partnership;

4) period of time for which the contract is concluded;

5) risk allocation between the contracting parties;

6) method and deadlines of financing or refinancing and investment dynamics;

7) ownership rights and the method of their exercise;

8) type and amount of the performance guarantee and insurance policy;

9) amount, deadlines, conditions and method of payment;

10) criteria and methods for determining prices, or tariffs of products and services for end users;

11) value of the public-private partnership project determined in accordance with Article 30 of this Law;

12) possibility and conditions for compensation and set-off of claims;

13) conditions for amending or terminating the contract, including changed circumstances or force majeure and the method of resolving the relationship in such case;

14) conditions for termination of the contract, penalties and fees for non-fulfilment of obligations of the contracting parties;

15) protection of intellectual property rights, business secrets and data confidentiality;

16) procedure and conditions for handing over immovable property, facilities, devices or plants, if it arises from the subject matter of the contract;

17) method of dispute settlement;

18) supervision over the implementation of the contract;

19) standards and quality of works and services, technology transfer;

20) founders' guarantees for a special purpose vehicle;

21) financial model;

22) handling by the private partner of objects found during the implementation of the public-private partnership that represent historical, cultural or natural values;

23) obligations to revitalize renewable natural resources, i.e. rehabilitate (recultivate) areas degraded by the implementation of the public-private partnership contract;

24) amount, deadlines and method of payment of the concession fee or other fee;

25) provision of risk insurance for the duration of the public-private partnership contract;

26) rights and obligations regarding the measures to be undertaken to ensure general safety, protection of health and environmental protection, improvement of energy efficiency, as well as liability for compensation of damages in accordance with the law.

The contract referred to in paragraph 1 of this Article shall also specify the method of mutual notification on the fulfilment of contractual obligations, the method of control over

the fulfilment of contractual obligations and the exercise of the rights and obligations of the contracting parties.

The contract shall be signed on behalf of the public partner by the person designated in the decision on the public-private partnership contract award.

The public partner may allow the private partner, in the contract, to perform other commercial activities or build other facilities within the implementation of the public-private partnership project in order to generate income.

## **Term of public-private partnership contract**

### **Article 68**

For a public-private partnership contract concluded for a period longer than three years, the duration of the contract shall be determined for the period that the private partner needs to recoup the funds invested in the execution of works and/or provision of services and to generate a return on invested capital, taking into account the costs and the risks assumed by the private partner for the duration of the contract and including the investments required to achieve the specific contractual objectives.

The investments referred to in paragraph 1 of this Article shall include both initial investments and investments during the term of the public-private partnership contract.

For public-private partnership contracts awarded for a period longer than 30 years, the contracting authority shall, before conclusion, submit the contract to the state administration authority responsible for state aid control, for an opinion.

The deadline referred to in paragraph 1 of this Article shall begin to run from the date of signing the contract, unless otherwise specified in the public-private partnership contract.

## **Performance guarantee**

### **Article 69**

The private partner shall submit to the contracting authority a performance guarantee or other security, in accordance with the tender documentation and the public-private partnership contract.

The private partner may not gain benefits and assume rights and obligations under the public-private partnership contract if it fails to submit a performance guarantee or other security in accordance with paragraph 1 of this Article.

The guarantee referred to in paragraph 1 of this Article shall be an integral part of the public-private partnership contract.

The contracting authority shall monitor the validity (validity period) and the amount of the security referred to in paragraph 1 of this Article.

The private partner shall provide a new performance guarantee no later than 30 days or within the period specified in the public-private partnership contract, provided that this period is not shorter than 30 days, before the expiry of the performance guarantee validity.

If the private partner fails to provide the new guarantee referred to in paragraph 5 of this Article, the contracting authority shall enforce the current bank guarantee.

If the private partner fails to provide the security instrument in accordance with paragraphs 1 and 5 of this Article, the contract shall be terminated in accordance with Article 77 of this Law.

## **Financing**

### **Article 70**

A public-private partnership contract may be financed by the private partner and/or the public partner, using available financial instruments that are available on the market.

With the prior consent of the public partner, the private partner may grant, pledge or encumber with mortgage, in the period and to the extent determined by the public-private partnership contract in accordance with the law, its right or obligation under the public-private partnership contract for the benefit of a financial institution, in order to secure the payment of incurred or future receivables related to the construction and financing, or refinancing of the public-private partnership project.

The decision or other act by which the rights and obligations under the public-private partnership contract become the subject of a pledge, mortgage or other security, contrary to the provisions of this Law, shall be null and void.

## **Amendments to public-private partnership contract**

### **Article 71**

A public-private partnership contract may be amended without implementing a new award procedure:

1) if the changes, regardless of their value in money, are envisaged under the public invitation and the tender documentation with provisions that may include price changes or through options, with a specified scope and nature of possible changes or options, as well as the conditions under which changes may be made, provided that the provisions do not provide for changes that alter the overall nature of the public-private partnership;

2) for additional works or services that proved necessary after the conclusion of the contract and which were not included in the public-private partnership contract, if the change of the private partner:

- is not possible for economic and/or technical reasons, such as requirements for interchangeability and compatibility with existing equipment, services or plants procured under the public-private partnership contract, and

- would cause significant difficulties or increased costs for the public partner;

3) if the need for the change arose due to circumstances that the public partner could not have foreseen and if the change does not alter the overall nature of the public-private partnership;

4) if the private partner is replaced after restructuring, including takeover, merger, acquisition or bankruptcy, in whole or in part by a new legal successor, i.e. economic entity, which meets the conditions met by the private partner with whom the contract was concluded, and the changes are envisaged in the public invitation and the tender documentation with provisions, provided that no other material changes are made to the public-private partnership contract referred to in Article 74 of this Law;

5) if the changes, regardless of their value in money, are not considered material changes to the public-private partnership contract referred to in Article 74 of this Law;

6) there is a threat to national security and defence, environment or human health, or this is required by the public interest of Montenegro in the event that the rights guaranteed by the Constitution of Montenegro and by law are threatened.

Notwithstanding paragraph 1 of this Article, a public-private partnership contract may be amended without a new public-private partnership contract award procedure if:

1) the value of the changes is less than 10% of the value of the originally concluded public-private partnership contract, and

2) the change does not alter the overall nature of the public-private partnership.

If the value of the public-private partnership contract may be expressed in money, the public-private partnership contract may be amended if the value of the contract after the changes does not exceed 50% of the net value of the original public-private partnership contract.

If several changes to the contract referred to in paragraph 3 of this Article are made, the value of the public-private partnership contract shall be estimated on the basis of the cumulative net value of all changes to the contract.

The value of the contract referred to in paragraph 3 of this Article shall include indexation, i.e. average inflation in Montenegro.

In the event that the public-private partnership contract does not contain a provision on indexation, the new value shall be determined taking into account the average inflation.

The contracting authority shall submit a proposal for amendments to the public-private partnership contract to the Agency and the Ministry.

The decision to amend the contract referred to in paragraph 1 of this Article shall be made by the public partner with the previously obtained opinion of the Agency and the Ministry, in accordance with the criteria referred to in Article 33 of this Law.

The contracting authority shall submit to the Agency a notice with the amendment to the contract referred to in paragraph 1 of this Article, within 15 days from the date of concluding the annex to the contract, in order to publish the decision on the Agency's website and to register it in the Register of Contracts.

In the procedure of amending the public-private partnership contract referred to in paragraph 1 of this Article, the contracting authority shall take particular account of:

- the level of implementation of the public-private partnership contract by the private partner;
- the level of return on private partner's investment;
- the method of performing the activities or the services that are the subject matter of the public-private partnership;
- compliance with contractual obligations by the private partner, and in particular the payment of concession fee and other fees, and
- other conditions relevant to the assessment of the request for extension of the term of the public-private partnership contract.

The decision to amend the public-private partnership contract shall be published in "Official Gazette of Montenegro".

## **Transfer of contract**

### **Article 72**

A public-private partnership contract may be transferred to a third party meeting the same conditions as the private partner with whom the contract was concluded, i.e. meeting the conditions provided by the public invitation and the tender documentation for the award of the public-private partnership contract.

The transfer of a public-private partnership contract shall not reduce the quality and disrupt the continuity of the contract implementation.

The transfer of a public-private partnership contract may be allowed in cases related to the acquisition of ownership over the private partner after the restructuring procedure, through procedures of merging an existing private partner with a future private partner, acquisition or other forms of acquiring ownership arising from the implemented restructuring procedure under the condition referred to in paragraph 2 of this Article.

The transfer of a public-private partnership contract may be done under the condition that the third party fulfils the conditions of capacity determined by the tender documentation for the private partner.

In case of non-fulfilment of obligations by the private partner under the public-private partnership contract and the financing documents that are an integral part of that contract, the financial institution (international financial institution, bank or third party) that provides financial resources to the private partner to implement the public-private

partnership contract, shall have the right to take over the public-private partnership contract.

In the case referred to in paragraph 5 of this Article, the financial institution shall settle its claim by transferring the contract to a new private partner.

The new private partner shall assume all the rights and obligations of the previous private partner.

The public partner shall inform the financial institution in case of non-fulfilment of the contractual obligations by the private partner and request to propose a new private partner within 86 calendar days.

## **Decision on contract transfer**

### **Article 73**

The decision on the transfer of the contract referred to in Article 72 of this Law shall be made by the public partner with the previously obtained opinion of the Agency and the Ministry, which shall take particular account of the fulfilment of the criteria referred to in Article 33 of this Law.

The Agency and the Ministry shall deliver the opinion referred to in paragraph 1 of this Article within 15 days from the date of submitting the proposal for the decision on transfer of the public-private partnership contract and the explanation of the reasons for transfer of the contract.

A contract by which a private partner transfers its rights and obligations under the public-private partnership contract to a third party without a decision of the public partner referred to in paragraph 1 of this Article shall be null and void.

The decision on the transfer of the contract referred to in paragraph 1 of this Article shall be published in "Official Gazette of Montenegro".

In the procedure of deciding on the transfer of the public-private partnership contract referred to in paragraph 1 of this Article, the contracting authority shall explain the reasons for the transfer of the contract referred to in paragraph 1 of this Article based on:

- 1) the level of implementation of the public-private partnership contract;
- 2) the method of settling any outstanding tax and other obligations by the private partner, the ability to further settle these obligations and the responsibility for settling these obligations in the event of transfer of the public-private partnership contract;
- 3) references of the persons to whom the public-private partnership contracts is transferred (technical and financial conditions, experience in performing activities that are the subject matter of the public-private partnership);
- 4) fulfilment of the requirements in the tender documentation on the basis of which the public-private partnership contract was awarded and the eligibility requirements in accordance with Article 55 of this Law;

5) the impact of the transfer of the public-private partnership contract on the settlement of obligations referred to in item 2 of this paragraph and whether the transfer of the contract is done between related parties.

### **Conditions under which contract shall not be changed**

#### **Article 74**

If it is necessary to make material changes to the public-private partnership contract, the contracting authority shall initiate a new contract award procedure.

A change to the public-private partnership contract referred to in paragraph 1 of this Article shall be material if one of the following conditions is met:

- 1) the change specifies the conditions that would allow the acceptance of another bid, or the selection of another bidder, in the public-private partnership contract award procedure;
- 2) the change alters the economic balance of the public-private partnership contract in favour of the private partner in a manner not provided for in the public-private partnership contract;
- 3) the private partner is changed, except in the cases referred to in Articles 72 and 73 of this Law;
- 4) the change significantly expands the subject matter of the public-private partnership in order to include goods, works or services that were not included in the public-private partnership contract.

### **Extension of public-private partnership contract for provision of public service**

#### **Article 75**

In order to ensure the continuous performance of activities of public interest that are the subject matter of the public-private partnership, the contracting authority shall initiate a public-private partnership contract award procedure for the same subject matter, at least six months before the expiration of the period for which the public-private partnership contract is concluded, in accordance with this Law.

If the public-private partnership contract award procedure is not completed within the period referred to in paragraph 1 of this Article, the public partner may extend the public-private partnership contract for up to six months, if the following conditions are met:

- 1) the service provided under the public-private partnership is an indispensable living and working condition of end users;
- 2) interruption in the provision of the public service provided under the public-private partnership would jeopardize the legally guaranteed rights of the users of such service;

3) the private partner accepts the rights and obligations arising from the extension of the public-private partnership contract.

### **End of public-private partnership contract**

#### **Article 76**

The public-private partnership contract shall end:

- 1) upon the expiration of the term for which it was concluded;
- 2) upon termination in order to protect the public interest;
- 3) by mutual termination;
- 4) by unilateral termination;
- 5) on the basis of a court decision;
- 6) in cases specified in the contract;
- 7) in cases specified by law.

### **Contract termination**

#### **Article 77**

A public-private partnership contract shall be terminated by sending a notice of termination if:

- 1) the private partner was ineligible at the time of the public-private partnership contract award in accordance with Article 54 paragraph 1 of this Law, for which reason it should have been excluded from the public-private partnership contract award procedure;
- 2) the private partner cannot fulfil its obligations due to insolvency, which threatens the continuity of the contract implementation;
- 3) bankruptcy or liquidation proceedings have been initiated against a legal entity with whom a public-private partnership contract has been concluded, except in the case of a consortium if other members of the consortium jointly and severally assume the obligations arising from the public-private partnership contract;
- 4) the private partner fails to provide project financing in accordance with the public-private partnership contract;
- 5) changes to the public-private partnership contract referred to in Article 75 of this Law have been made;
- 6) the financial institution fails to propose a new private partner referred to in Article 73 of this Law;
- 7) the private partner transfers its rights and obligations under the public-private partnership contract to a third party contrary to Articles 72 and 73 of this Law;

8) it changes the registered office, status or ownership structure of the company, part of a foreign company or other legal entity in the territory of Montenegro referred to in Article 43 of this Law without the prior consent of the public partner;

9) the public partner makes a decision to terminate the contract in order to protect the public interest;

10) in other cases determined by the public-private partnership contract.

### **Termination of public-private partnership contract after written notice**

#### **Article 78**

A public partner may terminate a public-private partnership contract if the private partner:

1) has not paid the fee specified by the contract and the law;

2) fails to perform the public works and/or fails to provide the public services in accordance with the deadlines and the quality standards specified by the public-private partnership contract and the law and the regulations governing the subject matter of the public-private partnership;

3) fails to implement measures for the protection of the environment and cultural property;

4) provides inaccurate data in the bid on the basis of which its eligibility for participation in the public-private partnership contract award procedure was determined;

5) fails to submit the security in accordance with Article 69 of this Law;

6) violates the provisions of this Law and the laws applicable in the enforcement procedure; or

7) in the event of force majeure or an emergency that prevents the continuous implementation of the public-private partnership contract in accordance with Article 87 paragraph 2 of this Law;

8) fails to fulfil the obligations specified under the public-private partnership contract.

Prior to the termination of the public-private partnership contract in accordance with paragraph 1 of this Article, the public partner shall notify the private partner and the financial institution providing financing of the public-private partnership contract in writing and set an appropriate deadline for the private partner to eliminate the reasons for unilateral termination of the contract.

If the private partner fails to eliminate the reasons for the termination of the public-private partnership contract within the period referred to in paragraph 2 of this Article, the public partner shall make a decision on the termination of the public-private partnership contract.

In case of expiration or termination of the contract in accordance with the provisions of this Law, the private partner shall fulfil its financial obligations, recultivation and

rehabilitation of areas and other obligations that arose before the expiration or termination of the public-private partnership contract.

## **Subcontracting**

### **Article 79**

In order to implement the public-private partnership contract, the private partner may entrust certain ancillary tasks serving for the performance of the activity that is the subject matter of the public-private partnership to third parties.

The private partner may conclude a contract with a subcontractor who meets the requirements of economic-financial and technical-functional capacities to execute the obligations set out in that contract, in accordance with the public-private partnership contract, if this possibility is provided in the approved public-private partnership project, the tender documentation, or the public-private partnership contract.

The private partner shall be jointly and severally liable for the performance of the contractual obligations by the subcontractor referred to in paragraph 2 of this Article, unless otherwise specified in the contract.

The possibility and the conditions of changing the subcontractor referred to in paragraph 2 of this Article shall be regulated by the public-private partnership contract.

Revenue from the fee gained by the subcontractor shall be included in the total income of the private partner as a fee for the use of the subject matter of the public-private partnership contract referred to in Article 86 of this Law.

The contract with the subcontractor may not be concluded for a longer period than the term for which the public-private partnership contract was concluded.

## **Dispute settlement**

### **Article 80**

Disputes arising from the public-private partnership contract shall be settled by the competent court in Montenegro, unless otherwise provided for in the public-private partnership contract.

Any disputes arising on the basis of or in connection with the public-private partnership contract may be settled before national or foreign arbitration, provided for in the public-private partnership contract. In the proceedings referred to in paragraphs 1 and 2 of this Article, the applicable law shall be the law of Montenegro.

## **VI. PROPERTY RELATIONS**

### **Ownership right and property management**

#### **Article 81**

Facilities, devices and plants constructed in accordance with the public-private partnership contract, including the increased value of the facility, shall be state-owned, unless otherwise specified in the public-private partnership contract in accordance with the law.

The private partner shall hand over the facility, devices and plants referred to in paragraph 1 of this Article, as well as all other objects of the public-private partnership that are state-owned after the end of the contract without encumbrances and restrictions in a condition that ensures their uninterrupted use and operation.

If the state owns an immovable property required for the execution of the public-private partnership contract, the public partner shall provide the use of that property, in accordance with the law and the public-private partnership contract.

If the realization of the subject matter of public-private partnership requires the right to use natural resources, properties in general use or other properties of general interest that are state-owned, in accordance with a special law, the mutual rights and obligations of the public partner and the private partner shall be regulated by the public-private partnership contract in accordance with this Law.

Unless otherwise determined by the public-private partnership contract, any investment of the private partner in public infrastructure and facilities, or devices and plants that are state-owned, which arose from the implementation of the public-private partnership contract, shall be state property.

### **Expropriation**

#### **Article 82**

If the implementation of the public-private partnership contract requires expropriation of immovable properties, or development of construction land, the costs, method and deadlines for payment of compensation for expropriation of the immovable properties, or development of construction land, shall be determined and implemented in accordance with law.

### **Registration of public-private partnership contract on immovable property**

#### **Article 83**

A record of the contract shall be registered on the immovable property that is the subject matter of the public-private partnership contract, in accordance with the law governing the registration of rights over immovable property.

## **Discoveries**

### **Article 84**

A discovery at the location where the activity is performed for the purpose of implementing a public-private partnership contract that has historical, cultural or natural value shall be considered state property and the private partner shall immediately notify the authority responsible for protection of historical, cultural and natural values of the discovery.

If the activities for the purpose of implementing the public-private partnership contract may endanger the discovered objects of historical, cultural or natural value, the private partner shall immediately suspend or limit these activities and notify the authority responsible for protection of historical, cultural and natural values.

The competent authority referred to in Articles 1 and 2 of this Article, shall, no later than eight days from the date of receipt of the notification, instruct the private partner on the handling of the discovery referred to in paragraph 1 of this Article, or the need to suspend or limit the activities on the implementation the public-private partnership contract at the site of the discovery.

In case of interruption of activities referred to in paragraphs 2 and 3 of this Article, the deadlines determined by the public-private partnership contract shall not run.

## **Insurance costs**

### **Article 85**

The private partner shall submit to the contracting authority proof of risk insurance (insurance policy) for the duration of the public-private partnership contract.

The insurance referred to in paragraph 1 of this Article shall be procured in particular for:

- 1) loss or damage to devices, equipment and other property under the public-private partnership contract;
- 2) possible pollution of the environment in connection with the rights and obligations under the public-private partnership contract;
- 3) loss of or damage to property or injury suffered by third parties in connection with the rights and obligations under the public-private partnership contract.

The insurance costs referred to in paragraph 1 of this Article shall be borne by the private partner.

Proof of insurance referred to in paragraph 1 of this Article shall be an integral part of the public-private partnership contract.

## **Fee**

### **Article 86**

The private partner shall pay the concession fee, or other fee in accordance with the law in the amount and using the method specified in the public-private partnership contract.

The amount and the method of payment of the fee referred to in paragraph 1 of this Article shall be determined depending on the subject matter of the public-private partnership contract, estimated value, term of the contract, risks and costs incurred by the private partner and expected profit.

The amount and the method of payment of the fee paid by the public partner to the private partner shall be determined in accordance with the tender documentation in the public-private partnership contract.

The public-private partnership contract may determine a variable amount of fee depending on the subject matter of the public-private partnership, the methodology of calculation and payment in a certain period of time during the term of the contract.

Concession fees and fees based on other types of public-private partnership shall be the revenue of the budget of Montenegro, or local self-government on the basis of public-private partnership contracts in which the public partner is the local self-government.

## **Suspension of rights and obligations under contract**

### **Article 87**

In case of force majeure or an emergency which prevents the execution of the public-private partnership contract for a limited period, which could not have been foreseen at the time of concluding the public-private partnership contract, the rights and obligations under the public-private partnership contract shall be temporarily suspended until the end of the effects of force majeure, or emergency.

In the event of force majeure or an emergency which permanently prevents the execution of the public-private partnership contract, the conditions shall be met to terminate the public-private partnership contract.

The public partner shall decide on the suspension of rights and obligations under the public-private partnership contract, after obtaining the opinion of the contracting authority, based on a written request of the private partner submitted no later than 15 days from the date when the circumstances referred to in paragraph 1 of this Article arose.

The decision on the suspension of rights and obligations under the public-private partnership contract shall not apply to the claims of the public partner due before the occurrence of force majeure or emergency.

## **Revitalization and recultivation**

### **Article 88**

The private partner shall carry out revitalization, or recultivation of the areas and facilities degraded by the implementation of the activities that are the subject matter of public-private partnership, within the deadlines, scope and in the manner prescribed by law and/or the public-private partnership contract.

If the private partner fails to carry out revitalization or recultivation referred to in paragraph 1 of this Article, the public partner or the contracting authority may hire an entity to carry out revitalization or recultivation of the areas and facilities degraded by the activity that was the subject matter of the public-private partnership on behalf of the public partner and for the account of the private partner.

In the case of hiring entities referred to in paragraph 2 of this Article, the private partner shall bear all actual and related costs of the hired entities and the public partner.

## **VII. RECORDS, REGISTER AND MONITORING OF PUBLIC-PRIVATE PARTNERSHIP CONTRACT IMPLEMENTATION**

### **Records of contracts concluded**

### **Article 89**

Records of concluded public-private partnership contracts within its competence shall be kept by the contracting authority.

A copy of the concluded public-private partnership contract with accompanying documentation shall be submitted by the contracting authority referred to in paragraph 1 of this Article to the Agency within 15 days from the date of conclusion.

The contracting authority shall permanently keep the documentation related to a specific public-private partnership project, in accordance with the regulations governing the retention of archives.

### **Contents and method of keeping the Register of Contracts**

### **Article 90**

Public-private partnership contracts and the documentation that forms an integral part of these contracts shall be entered in the register of contracts.

The register of contracts shall be kept in electronic form.

The register of contracts shall be published on the Agency's website.

The contents of the register of contracts shall be determined by the Agency.

## **Monitoring of contract implementation**

### **Article 91**

The status and dynamics of the implementation of public-private partnership contracts shall be monitored by the contracting authority for contracts within its competence and the Agency.

The contracting authority shall submit to the Agency by the 15th of the first month after the end of the six-month period a report on the implementation of the public-private partnership contract for the previous six-month period, which shall in particular include information:

- 1) on payment of fees referred to in Article 86 of this Law;
- 2) from the control of the work of the private partner;
- 3) on the business of the private partner, or the special purpose vehicle, if established;
- 4) on the execution of contracts with subcontractors concluded by a private partner, on the basis of the public-private partnership contract, and
- 5) other important data on the execution of a public-private partnership contract.

The report referred to in paragraph 2 of this Article shall be submitted on a form specified by the Agency.

Notwithstanding paragraph 2 of this Article, the contracting authority shall submit data on the implementation of a specific public-private partnership contract at the request of the Agency within 15 days from the date of receipt of the request.

In case of termination of a public-private partnership contract, the contracting authority shall immediately submit a notification on the termination of the contract to the Agency, and no later than within seven days from the date of termination.

The Agency shall submit to the Government a semi-annual report on the fulfilment of obligations under the public-private partnership contract with the data in accordance with paragraph 2 of this Article.

## **Control of fee collection**

### **Article 92**

The control of the collection of concession fee and other fees under the public-private partnership contract shall be carried out by the administration authority responsible for the collection of public revenues.

The report on the control of the fee collection referred to in paragraph 1 of this Article shall be submitted quarterly to the contracting authority by the administration authority responsible for the collection of public revenues within seven days from the end of the quarter for which the report is submitted.

## **Registration in immovable property records**

### **Article 93**

The contracting authority shall deliver the public-private partnership contract which includes the use of state-owned immovable property to the administration authority responsible for cadastre activities in order to register encumbrances in the cadastre of immovable property, or other appropriate records within 15 days of concluding the contract.

## **VII. SUPERVISION**

### **Supervisory authorities**

### **Article 94**

The Ministry shall supervise the implementation of this Law, other regulations and acts adopted on the basis of this Law.

Inspection control over the implementation of this Law shall be carried out by the administration authority responsible for inspection affairs.

## **IX. PENAL PROVISIONS**

### **Offences**

### **Article 95**

A fine in the amount of EUR 2,000 to EUR 20,000 shall be imposed on a legal entity for an offence if:

- 1) it performs activities that are not aimed at the implementation of the public-private partnership project for which it was established (Article 43 paragraph 3);
- 2) it makes the decision on the transfer of the public-private partnership contract referred to in Article 72 of this Law without the consent of the public partner and without previously obtaining the opinion of the Agency and the Ministry (Article 73 paragraph 1);

For the offenses referred to in paragraph 1 of this Article, the responsible person in the legal entity shall also be fined in the amount of EUR 250 to EUR 2,000.

For the offence referred to in paragraph 1 item 2 of this Article, a natural person shall also be fined in the amount of EUR 50 to EUR 2,000.

### **Article 96**

A fine in the amount of EUR 500 to EUR 10,000 shall be imposed on a legal entity for an offence if it:

- 1) fails to carry out preparatory activities for the approval of a public-private partnership project and conclusion of a contract in accordance with this Law (Article 27 paragraph 1);

2) fails to publish a public invitation for the award of a public-private partnership contract in the manner prescribed by Article 49 paragraph 1 of this Law;

3) publishes the information marked by the bidder in the bid as secret (Article 50 paragraph 1);

4) fails to exclude the bidder from the public-private partnership contract award procedure if the responsible person of the bidder has been convicted by a final judgment of one of the criminal offenses referred to in Article 54 paragraph 1 of this Law;

5) fails to exclude the bidder from the public-private partnership contract award procedure who has not settled all due obligations based on taxes or contributions in accordance with the law (Article 54 paragraph 3);

6) fails to exclude the bidder from participation in the public-private partnership contract award procedure in the cases referred to in Article 54 paragraph 4 of this Law;

7) submits to the public partner the proposal for the decision and the contract referred to in Article 63 paragraph 1 of this Law with the minutes and the evaluation report with the determined ranking list of bidders referred to in Article 61 paragraph 3 of this Law, without previously obtaining an opinion of the Agency, Protector of Property Law Interests and the Ministry (Article 63 paragraph 5);

8) fails to publish the decision on public-private partnership contract award on the Agency's website no later than seven days from the date of publishing the decision on the public-private partnership contract award in accordance with Article 64 paragraph 4 of this Law (Article 65 paragraph 2);

9) submits to the public partner a proposal for amendments to the public-private partnership contract without previously obtaining an opinion of the Agency and the Ministry (Article 71 paragraph 7);

10) fails to submit to the Agency a copy of the concluded public-private partnership contract with accompanying documentation within 15 days from the date of its conclusion (Article 89 paragraph 2);

11) by the 15th in the first month after the end of the six-month period, fails to submit to the Agency a report on the implementation of the public-private partnership contract for the previous six-month period (Article 91 paragraph 2);

12) fails to submit data on the implementation of a specific public-private partnership contract, at the request of the Agency, within 15 days from the date of receipt of the request (Article 91 paragraph 4);

13) fails to submit to the administration authority responsible for cadastre activities the public-private partnership contract which includes the use of state-owned immovable property, for the purpose of registering the encumbrance in the cadastre of immovable property, or other appropriate records within 15 days from the date of concluding the contract (Article 93).

For the offenses referred to in paragraph 1 of this Article, the responsible person in the state authority, state administration authority, local self-government body and legal entity shall also be fined in the amount of EUR 250 to EUR 2,000.

#### **Article 97**

A fine in the amount of EUR 250 to EUR 2,000 shall be imposed on the responsible person in the state administration authority if:

1) the administration authority responsible for collecting public revenues fails to control the collection of concession fee and other fees under public-private partnership contracts (Article 92 paragraph 1);

2) the administration authority responsible for collection of public revenues fails to submit quarterly to the contracting authority a report on control of collection of the concession fee and other fees under the public-private partnership contract, within seven days from the end of the quarter for which the report is submitted (Article 92).

#### **Article 98**

A fine in the amount of EUR 500 to EUR 5,000 shall be imposed on a legal entity if:

1) within seven days from the date of approval, it fails to register the public-private partnership project proposal approved in accordance with Article 33 of this Law 34 paragraph 1 in the Register of Projects (Article 34 paragraph 1);

2) if fails to register the public-private partnership contract in the Register of Contracts within eight days from the date of concluding the contract (Article 65 paragraph 3);

3) within 15 days from the date of concluding an annex to the contract, it fails to submit to the Agency a notice amending the public-private partnership contract for publication on the Agency's website and registration in the Register of Contracts (Article 71 paragraph 9).

For the offence referred to in paragraph 1 of this Article, the responsible person in the legal entity shall also be fined in the amount of EUR 250 to EUR 2,000.

### **X. TRANSITIONAL AND FINAL PROVISIONS**

#### **Initiated procedures and contracts concluded**

#### **Article 99**

Procedures of granting concessions for the provision of services of public interest, execution of public works, reconstruction, construction, or maintenance of public infrastructure in areas referred to in Article 13 of this Law which were initiated before the date of application of this Law shall be completed in accordance with the regulations based on which they were initiated.

Contracts for the provision of services of public interest, execution of public works, reconstruction, construction and maintenance of public infrastructure concluded until the date of application of this Law in the areas referred to in Article 13 of this Law shall remain in force until the expiration of the contract term.

The provisions of Articles 71 to 74 and Article 91 of this Law shall apply to the contracts referred to in paragraphs 1 and 2 of this Article.

### **Deadline for Council appointment**

#### **Article 100**

The Government shall appoint the Council within 20 days from the date of entry into force of this Law.

The Director of the Agency shall be appointed within 60 days from the date of appointment of the Council.

Until the appointment of the Director of the Agency in accordance with this Law, the Government shall appoint the Acting Director of the Agency.

### **Cessation of operations**

#### **Article 101**

The Secretariat for Development Projects and the Montenegrin Investment Promotion Agency shall cease to operate within 60 days from the date of appointment of the Council.

### **Deadline for assuming tasks and employees**

#### **Article 102**

Within 60 days from the date of the Council's appointment, the Agency shall take over the tasks, assets, obligations, documentation and employees of the Secretariat for Development Projects, the Montenegrin Investment Promotion Agency, and the administrative and technical departments of the Privatization and Capital Projects Council.

Employees referred to in paragraph 1 of this Article who are not deployed in accordance with the act on internal organization and systematization of the Agency, shall exercise the rights and obligations of the employee whose work is no longer needed, in accordance with the law governing the rights, obligations and responsibilities of civil servants and state employees.

## **Deadline for contract delivery**

### **Article 103**

Contracting authorities shall, within three months from the date of entry into force of this Law, submit to the Agency valid contracts referred to in Article 99 paragraph 2 of this Law, with accompanying documentation for the purpose of registration in the register of contracts in accordance with this Law.

The Agency shall register the contracts referred to in paragraph 1 of this Article in the Register of Contracts if they meet the conditions referred to in Article 2 of this Law within 60 days from the expiry of the deadline for their submission.

## **Deadline for establishing register**

### **Article 104**

The Agency shall establish the register of projects and the register of contracts within six months from the date of entry into force of this Law.

## **Deadline for establishing records**

### **Article 105**

The contracting authorities shall establish the records of contracts referred to in Article 89 of this Law within 60 days from the date of application of this Law.

## **Deadline for adoption of regulations**

### **Article 106**

Regulations for the implementation of this Law shall be adopted within six months from the date of entry into force of this Law.

Until the adoption of the regulations referred to in paragraph 1 of this Article, the regulations that were in force until the date of application of this Law shall apply.

## **Repeal**

### **Article 107**

The Law on Private Sector Participation in the Provision of Public Services (Official Gazette of the Republic of Montenegro, No. 30/02) shall be repealed as of the date of application of this Law.

The provisions of Articles 15 to 25 and Article 26 paragraph 1 of the Law on Foreign Investments (Official Gazette of Montenegro, No. 18/11 and 45/14), the provisions of Article 2 paragraph 1 indents 6, 16 and 17 in the part related to coordination and

directing of the process of cooperation with international financial institutions and potential partners and investors, and Article 8 of the Decision on the scope and composition of the Privatization and Capital Projects Council (Official Gazette of Montenegro", No. 83/09 and 4/11) shall be repealed within 60 days from the date of the appointment of the Director of the Agency.

### **Entry into force**

#### **Article 108**

This Law shall enter into force on the eighth day following that of its publication in "Official Gazette of Montenegro", and shall apply after the expiration of a period of six months from the date of its entry into force.

Number: 05/19-3/8

EPA 827 XXVI

Podgorica, 17 December 2019

26<sup>th</sup> Parliament of Montenegro

Speaker, Ivan Brajović, sgd.