

# LAW

## ON PUBLIC-PRIVATE PARTNERSHIP IN THE REPUBLIC OF SRPSKA

### Article 1

This Law regulates the scope, principles, manner, and forms of public-private partnership, requirements for the establishment of a public-private partnership, elements of an agreement on public-private partnership, and other issues relevant to public-private partnerships.

### Article 2

(1) Public-private partnership is a form of cooperation between the public and the private sector, established by means of pooling of resources, capital and expert knowledge, for the purpose of fulfillment of public needs.

(2) Cooperation is established in order to provide financing for construction, rehabilitation, reconstruction, operation or maintenance of infrastructure, providing of services, or construction of facilities, for the purpose of fulfillment of public needs.

### Article 3

(1) The purpose of this Law is to create public and nondiscriminatory legal grounds, and to identify requirements for the establishment of public-private partnerships in the fields set forth in Article 2, paragraph 2 of this Law.

(2) Specific objectives to be achieved through a public-private partnership are as follows:

- a) contracting and implementation of a number of projects, which allow the public partner to better fulfill their obligations and to use public revenues in a more effective manner,
- b) creation of new sources of revenues, new infrastructure, and new services,
- v) natural market allocation of risks between the public and the private sector,
- g) creation of value added by allocation of resources, knowledge and skills of both private and public sector,
- d) upgrading of productivity, competition, and rational use of economic capacities of both private and public entities, and
- đ) transparency in selection and contracting.

### Article 4

(1) A public-private partnership must be established on the following principles:

- a) long-term contractual relations between the partners,
- b) priority reliance on private resources, which does not necessarily exclude public resources,
- v) identification of construction objectives by the public partner in view of the public interest, and achievement of standards of construction, maintenance and quality of service, including risk allocation in each individual case,
- g) payment of fee for construction and operation of built infrastructure to the private partner by the public partner, who undertakes to use the built infrastructure for the agreed purpose, or generation of fee by the private partner directly from end users, and
- d) transfer of built infrastructure to the ownership of public sector upon expiration of the agreed period of use.

(2) The public partner must also comply with the following principles:

- a) public interest protection, which implies the need for minimum financial earmarking by the public partner in the process of improvement of certain services,
- b) free competition, which implies incentives to largest possible participation of bidders,
- v) equal treatment, which implies avoiding discrimination on any grounds,
- g) mutual recognition, which implies acceptance of international technical specifications and certificates,
- d) commensurateness, which implies commensurate ratio between required capacities and agreement scope,
- đ) transparency, which implies public process of agreement award and establishment of legal protection measures, and

e) protection of natural environment and promotion of sustainable development, which imply the need for preservation of natural resources.

#### Article 5

The terms used in this Law shall have the following meanings:

a) public need represents provision of services in the field of public sector through facilities such as: airports, ports, railways and railway transport, education and health institutions, canals, water supply, irrigation, and other services provided in the field of public sector,

b) construction risk represents events related to the initial phase of property commissioning, such as delays in supply, failure to meet certain standards, additional costs, technical defects, negative external effects (including environmental risk), and compensation payments to third parties,

v) availability risk represents the cases in which a partner may be called to accountability during the period of property use due to inadequate management, which results in a volume of services lower than provided for by the agreement or in a service quality level below that specified by the agreement,

g) demand risk represents demand volatility, i.e. demand higher or lower than expected at the time of signing of the agreement, without assessment of features of the private partner, where change in demand may be caused by subjective or objective reasons,

d) financial leasing is a legal transaction where the lessor transfers the right of possession and use of the object of leasing to the lessee for a certain period, imposing on the latter the obligation to pay the agreed leasing fee, and the right to return the object of leasing to the lessor, to purchase it, or to extend the lease agreement and

đ) operational leasing is a type of rental or lease, or a model of financing, whereby the lessor offers only use and operation, not the ownership, of the object of leasing.

#### Article 6

(1) Eligible public partner is:

a) Republic of Srpska, or Government of the Republic of Srpska (hereinafter: the Government), through a line ministry,

b) public institution established by the Government,

v) state-owned company, majority-owned by the Republic of Srpska (hereinafter: the Republic),

g) local self-governance unit, i.e. municipality or city,

d) public institution established by a local self-governance unit, and

đ) state-owned company, majority-owned by a local self-governance unit.

(2) The share of the public partner may take the form of investment in kind, rights, or money paid as a regular fee to the private partner for services provided.

(3) The kind and rights representing investment by the public partner may take the following form: rental of land to the private partner, concession, right of construction, right of easement, or project documentation accepted by the private partner, including obligatory compliance with regulations governing the right of use and obligations.

(4) In establishment of a public-private partnership, the private partner shall be a legal person established in accordance with the laws of the Republic, owned by a local and/or foreign legal person, which is a party to the concluded agreement on public-private partnership, and which performs the agreement on public-private partnership in accordance with this Law.

(5) For the purpose of performance of a public-private partnership agreement, the private partner may establish a special purpose vehicle in accordance with the regulations of the Republic.

#### Article 7

The object of a public-private partnership may be construction, use, maintenance and operation, or reconstruction, use, maintenance and operation, of property, for the purpose of fulfillment of public needs in the following fields:

a) air, road, river and railway transport including supporting infrastructure facilities,

b) educational, cultural and sport infrastructure,

v) health infrastructure,

g) utility infrastructure,

d) information communication infrastructure,

đ) innovation and entrepreneurship infrastructure,

- e) management of ecological and solid waste, and
- ž) other fields of interest for the Republic and local self-governance units.

#### Article 8

Agreements in the field of cooperation between the public and the private sector may take two basic forms:

- a) contractual form of the public-private partnership, where partnership between the public and the private partner is based exclusively on contractual relations, or
- b) institutional form of the public-private partnership, where partnership between the public and the private sector includes cooperation by the vehicle established for that purpose.

#### Article 9

In the sense of Article 8 of this Law, the following contractual forms shall not be considered contractual forms of the public-private partnership:

- a) long-term agreements on services, whereby public sector purchases only services, without any capital investment by the private partner, and
- b) agreement on design, construction and execution for public sector.

#### Article 10

(1) Contractual forms of the public-private partnership, in the sense of Article 8 paragraph a) of this Law, shall be concessions and private financial initiative. The concession form of the public-private partnership shall be governed by the provisions of the Law on Concessions.

(2) Private financial initiative is a contractual form whereby the private partner finances, executes, maintains and operates a public building for the needs of the public sector, and charges fee for those services mostly from the public sector, in accordance with the previously established space and service standards and payment mechanism.

(3) Notwithstanding paragraph 1 of the present Article, the public partner may propose also another type of contractual form of the public-private partnership which must not prejudice public interest and must comply with the principles of Article 4 of this Law.

#### Article 11

(1) The institutional form of the public-private partnership in the sense of Article 8 paragraph b) of this Law shall imply establishment of a joint enterprise or other organizational form in compliance with the valid regulations.

(2) The joint enterprise may participate exclusively in the implementation of public-private partnership projects for the purpose of which it is established.

(3) Establishment of the institutional form of the public-private partnership shall imply the application of principles given in Article 4 of this Law.

(4) Rights and obligations of both public and private partners shall be regulated by agreement.

#### Article 12

(1) The public partner shall prepare an economic feasibility or pre-feasibility study for the specific public-private transaction, and make the decision on launching of procedure of the private partner selection based on the study and approvals by the Ministry of Finance and line ministry responsible for the field of public-private partnership, taking into account project proposal compliance with budget projections and plans, and fiscal risks and set limitations.

(2) The public partner shall issue a public invitation to express interest in the object of the public-private partnership, which should include a description of needs and requirements of the public sector, object of the public-private partnership, identification of economic, legal and other requirements relevant to the object.

(3) Prior to the issue of the public invitation, the public partner should prepare tender documentation which should include, inter alia: obligatory requirements that need to be fulfilled by the private partner, criteria for bid assessment, draft agreement, deadlines for submitting of bids, right of objection and appeal by interested private partners, etc.

(4) Proposal tender documentation shall be submitted for approval to the Ministry of Finance which must, when granting approval, consider whether the assessment criteria, procedure, and private

partner selection are satisfactorily based on clear, public and generally available principles of nondiscrimination.

(5) Private partner shall be selected through negotiation procedure in accordance with the norms of international law. The procedure shall include a phase of pre-qualification and a phase of negotiations and receiving of bids, where the public partner shall hold negotiations with selected bidders, consider all aspects of potential agreements, and provide equal treatment to all selected bidders during the negotiations.

(6) The procedure of selection of the private partner shall be regulated in further detail by a regulation adopted by the Government within three months from the date of entry into force of this Law.

#### Article 13

(1) Agreement on public-private partnership shall regulate working relation between the public and the private partner intended to fulfill a public need.

(2) Agreement on public-private partnership may include several main agreements based on relevant legal regulations.

(3) Agreement on public-private partnership must include:

a) rights and obligations of both public and private partner as contracting parties, including obligation to provide guaranteed service to users as per standards set forth by the public partner,

b) purpose and scope of agreement,

v) clear risk identification and risk allocation between the public and the private partner,

g) manner and conditions for providing of financial construction of the project, as well as conditions under which financial institutions may take part in the project,

d) minimum standards to be applied during design, space standards, service quality, and other requirements for project implementation,

đ) manner of payment, and conditions for setting and agreeing fees,

e) settlement of tax liabilities,

ž) full transparency and obligation of the public partner to publish information related to the management of the public-private partnership project,

z) right of supervision by the public partner during project implementation and agreement performance,

i) period of duration, and requirements for renewal of agreement,

j) identification of ownership after expiration of the agreement,

k) sanctions and fees in case of failure by a contracting party to fulfill its obligations,

l) agreement termination including right of partners to terminate the agreement, and procedure in case of agreement termination prior to the date of expiration set forth in the agreement,

lj) manner of dispute resolution,

m) measures to facilitate project financing,

n) description of events considered force majeure,

nj) other elements relevant to the object of the public-private partnership, and

o) obligation to contract a review of agreement after certain period.

#### Article 14

(1) The contracting parties may conclude an agreement with a third party whereby the private partner would transfer the whole of the agreement or some of the obligations to the said third party.

(2) Any change of the private partner shall become effective only upon approval by the public partner.

#### Article 15

Each party to the agreement on public-private partnership must act in accordance with the principle of conscientiousness and fairness; this obligation may not be excluded or limited.

#### Article 16

Protection of the public partner shall imply minimum insurance in the following fields:

a) physical damage to the facility,

b) claim by a third party,

v) reliability of employer,

- g) obstructions for business,
- d) hidden defects,
- đ) right of service beneficiary to request compensation from the private partner for suffered damage,
- e) allowing the Public Sector Audit Service of the Republic of Srpska to control the projects of public-private partnership.

#### Article 17

Protection of the private partner shall imply:

- a) equal treatment of all participants in public invitation,
- b) contractual arrangements for risk allocation and mitigation,
- v) providing of compensation to the private partner if, due to public interest, agreement is amended, modified or terminated upon request of the public partner,
- g) equal status in dispute resolution,
- d) right to introduce a creditor in case of failure by the private partner to fulfill an obligation, including right to replace the contractor, and
- đ) disallow expropriation, save for declaration of public interest in which case payment of full compensation would be provided for.

#### Article 18

(1) In cases where the public partner is the Republic, i.e. the Government by virtue of a line ministry, a public institution established by the Government, or a state-owned company majority-owned by the Republic, the conclusion of agreement shall be subject to the approval by the Government.

(2) Prior to obtaining of approval, the public partner described in paragraph 1 of this Article must prepare project analysis in terms of efficiency and risk distribution, which must include the following:

- a) economic and financial project indicators, including a comparative cost-benefit analysis of the application of public-private partnership and application of other forms of provision of public services,
- b) necessary financing by the budget of the Republic or local self-governance units,
- v) legal status of ownership, and
- g) risks associated with project implementation, with particular emphasis on investment impact on debt level of the budget of the concerned level of government.

(3) In cases where the public partner is a unit of local self-governance, a public institution established by a local self-governance unit or a state-owned company majority-owned by a local self-governance unit, the conclusion of the agreement on public-private partnership shall be subject to the approval by the Ministry of Finance and line ministry, based on the analysis described in paragraph 2 of this Article.

#### Article 19

(1) In a public-private partnership, it is obligatory to identify allocation of basic risks, i.e.:

- a) construction risk relevant to the activities linked to the initial state of the property object of agreement,
- b) availability risk relevant to the cases where the private partner is called to accountability during the management of property due to providing services below the set standard or services not in compliance with standards specified by the agreement, and
- v) demand risk relevant to demand instability compared to that expected at the time of signing of the agreement, independent of engagement of the private partner, i.e. the usual risk borne by the private party in a market economy.

(2) Allocation of other risks, such as initiation of bankruptcy proceedings or liquidation of the private partner, and others that arise from a public-private partnership, may be identified in the agreement between the public and the private partner.

#### Article 20

(1) Project value shall be registered as investment by the public sector, and property shall be entered in the accounting records of the public sector, if the public sector: is the contracting authority for the investment, bears the construction risk and availability risk or demand risk.

(2) Project value shall not be registered as investment by the public sector and shall not be entered in the accounting records of the public sector in case the private partner bears the construction risk and at least one more of the remaining two risks mentioned in paragraph 1 of this Article.

(3) In case described in paragraph 1 of this Article, the value of investment in the public-private partnership shall debit the budget of the Republic and be considered financial leasing.

(4) In case described in paragraph 2 of this Article, the agreement shall be considered operational leasing by the public sector and be recorded in the budget as purchase of services from the public partner.

(5) Instruction on entry of the property in the accounting records shall be adopted by the minister of finance within one year from the date of entry into force of this Law.

#### Article 21

(1) The public partner must monitor the implementation of the public-private partnership project during its implementation.

(2) Once a year, line ministry shall submit technical and financial statements to the Government on the implementation of each individual public-private partnership agreement, including assessment of project success.

(3) Once a year, the Government of the Republic of Srpska shall submit to the National Assembly of the Republic of Srpska a report about overall effects of the implementation of the Law on Public-Private Partnership.

#### Article 22

The public partner shall enable the public to become acquainted with the concluded agreements on public-private partnership, and inspect documents, forms and reports.

#### Article 23

(1) The agreements on public-private partnership shall be entered into the Registry of Public-Private Partnerships of the Republic (hereinafter: the Registry), kept by the Ministry of Finance.

(2) The Registry mentioned in paragraph 1 of this Article shall include public and private partners and all data identified by this Law and the Rulebook on Contents and Manner of Keeping of the Registry of Public-Private Partnerships, to be adopted by the minister of finance within 90 days from the date of entry into force of this Law.

#### Article 24

(1) The procedure of implementation and monitoring of public-private partnership projects shall be prepared by the line ministry, which shall also prepare the rules on monitoring criteria and mechanisms.

(2) Supervision of the application of this Law shall be performed by the Ministry of Finance, line inspection bodies, and Public Sector Audit General Service.

#### Article 25

This Law shall apply also to the public-private partnership projects approved prior to the entry into force of this Law, if the procedure of selection of the private partner has not been completed by the date of entry into force of this Law.

#### Article 26

This Law shall enter into force on the eighth day from the date of its publication in the Official Gazette of the Republic of Srpska.

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Banja Luka

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# LAW

## AMENDING THE LAW ON PUBLIC-PRIVATE PARTNERSHIP

### Article 1

In the Law on Public-Private Partnership in the Republic of Srpska (Official Gazette of the Republic of Srpska, no. 59/09), in Article 10, paragraph 2, after the word *maintains*, the word *and* is replaced with the word *or*.

### Article 2

In Article 12, paragraph 4 is deleted.

In paragraph 5, the words *negotiation procedure* are replaced with the words *competitive dialogue*.

The current paragraphs 5 and 6 become paragraphs 4 and 5.

### Article 3

In Article 18, paragraph 2 is deleted.

In paragraph 3, the comma and the words *based on the analysis described in paragraph 2 of this Article* are deleted.

The current paragraph 3 becomes paragraphs 2.

### Article 4

In Article 19, item v, the comma and the words *i.e. the usual risk borne by the private party in a market economy* are deleted.

### Article 5

This Law shall enter into force on the eighth day from the date of its publication in the Official Gazette of the Republic of Srpska.

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