

05 Annex - Public Procurement

**25. LAW ON PRIVATE SECTOR PARTICIPATION IN
DELIVERY OF PUBLIC SERVICES**

Pursuant to Article 88 item 2 of the Constitution of the Republic of Montenegro I hereby issue the
DECREE PROMULGATING THE LAW ON PRIVATE SECTOR PARTICIPATION IN DELIVERY OF PUBLIC SERVICES

I hereby promulgate the Law on Private Sector Participation in Delivery of Public Services, adopted by the Parliament of the Republic of Montenegro at the fourth sitting of the first regular session in 2002 on 19 June 2002.

Number: 01-1894/2

Podgorica, 21 June 2002

President of the Republic of Montenegro

Milo Đukanović, signed

**LAW
ON PRIVATE SECTOR PARTICIPATION IN DELIVERY OF PUBLIC
SERVICES**

(Official Gazette of the Republic of Montenegro 30/02 of 26 June 2002 and Official Gazette of the Republic of Montenegro 08/09 of 4 February 2009)

NOTE OF THE PUBLISHER:

On the day when the Law on Concessions entered into force (Official Gazette of the Republic of Montenegro number 08/09 as of 4th February 2009) provisions of the chapters IV, VII, VIII, IX and articles 141, 142 and 143 of the Law on Participation of Private Sector in the Delivery of Public Services (Official Gazette of the Republic of Montenegro 30/02) as well as the provisions of other chapters that are related to the concessions and BOT arrangements shall be repealed and provisions of other laws governing the procedure of granting concessions shall not be applied if they are contrary to this Law.

**CHAPTER I
GENERAL PROVISIONS**

Purpose of the Law

Article 1

The purpose of this Law is to improve the participation of the private sector in the delivery of public services and, while taking into account the need for good governance and economic growth.

Application

Article 2

This Law shall apply to delivery of public services related to: - Leasing and management contracts
- Concessions
- Built-operate transfer arrangements (hereinafter:
-BOT) Regulatory bodies provided in this Law.

This Law shall apply to all public institutions as defined under this Law.

Interpretation and Definitions

Article 3

Where the context so permits words importing the singular shall be deemed to include the plural and vice versa and words importing the masculine shall be deemed to include the feminine and vice versa; words importing persons or parties shall include firms and companies and any person having legal capacity. The meanings which shall apply to this Law are:

"Build-Operate-Transfer, BOT": a contract arrangement, under a franchise, whereby a private investor and /or operator is obliged to build and operate a public utility and, after a determined period, transfer the ownership thereof to a public institution; BOT arrangements shall include build-lease and transfer, build-transfer-and- operate, develop-operate-and-transfer, rehabilitate-operate and transfer; tariffs payable by the clients shall be regulated by the contract entered into and shall be subject to the decision, after public hearings, of the regulatory body for the tariffs payable and the quality of the services delivered;

"concession": a repetitive contract arrangement offered under a license, to a private investor and / or operator for the proper extraction or exploitation of natural resources or raw materials for a fixed period of time; such arrangement may include investment or rehabilitation by the private sector; in contract in which a public institution of the Republic of Montenegro transfers some rights to a local or foreign firm or company which then operates subject to the terms of the contract and in return provide revenues to the Government of the Republic of Montenegro (hereinafter Government) or to a Local Self Government Unit per unit exploited or extracted;

"contingency liability": a liability that may occur only if a specific event happens; a liability that depends on the occurrence of a future and uncertain event;

"franchise": a revocable right, under BOT arrangements, conferred by the Government of the Republic of Montenegro or in a similar manner by a local self government to a provider of services to conduct specific business or to exercise corporate powers; the rights necessary for public utilities companies to carry on their operations shall be designated as a franchise, under wherewith substantial rights may be granted, contrary to a license wherewith less or limited rights are granted;

"Government-owned company or firm": refers to any company or firm, whether performing governmental or proprietary functions, owned at majority or otherwise controlled by the Government of the Republic of Montenegro;

"investor": natural or legal person that invests money with an expectation of earning profit;

"invitation for submission of investment bids": a public invitation for bids as a preliminary step to executing a contract;

"leasing": granting the possession of movable or immovable properties to another in return for rent;

"license"; a revocable permission granted by the regulatory body, established under this Law, to operate a concession;

"license fee": a monetary charge imposed by a public institution for the privilege of pursuing a particular occupation, business or activity; a charge of this type is accompanied by a requirement that the licensee takes some action or is subjected to regulation or restriction;

"management contract": a contract to employ persons in a company, or in a firm, responsible for conduct its business operation;

"natural resource": any material originating from nature and having potential economic value or providing for the sustenance of life, such as timber, minerals, oil, water, flora and fauna; environmental features that serve a community's well-being or recreational interests, such as parks;

"bid": an expression of willingness to enter into a contract on specified terms, made in the way that would lead a reasonable person to understand that acceptance, having been sought, will

result in a binding contract;

"operator": a company or a firm responsible to operate on behalf of an investor;

"privatization council": the council established under the article 2A of the Law on Privatization of Economy (Official Gazette of the Republic of Montenegro 23/96, 6/99, and 59/00).

"public institution": public institutions are courts, bodies of local government, all organizations designated as such by the Decree on organization and methods of works for public administration / Official Gazette of the Republic of Montenegro 8/93, 39/93, 19/95, 13/96, 24/96, 7/97, 13/98, 27/98, 38/98, 18/99, 31/99, 59/00, 31/01, and 33/01 and public institutions which perform social duties pursuant to the rules of Social Activity Law (Official Gazette of the Republic of Montenegro 19/90, 6/91, and 21/95) as well as any other institution which will be established and utilize public funds;

"public services": a project or any kind of services normally financed and operated by the public sector, such as power plants, highways, ports, airports, canals, dams, hydro-power plants, water supply, irrigation, telecommunications, railroads and railways, transport systems, housing, government buildings, tourism projects, markets, solid waste management, education and health care institutions and any others as may be determined by the Government;

"raw material": substances that are in their natural state before being processed or used in manufacturing;

"regulatory body": refers to an independent body established under this Law that is responsible for issuing licenses or authorizing franchises, regulating tariffs charged for public services and guaranties that the private operator and/or investor ensures the quality level of services;

"rules": refer to the rules and the necessary forms made under this Law by the Privatization Council or by the regulatory body; where rules introduce a standard form, such form shall be mandatory.

CHAPTER II

SELECTING THE TYPE OF PARTNERSHIP

Background document

Article 4

For selection of any of the contractual arrangements authorized under this Law, leasing, management contract, concessions or BOT arrangements, that may be proposed to the private sector in compliance with this Law, public institution shall prepare, as the first step, a background document, that would be submitted for the approval to the authorities established under the Law on Privatization of Economy, containing the following:

- 1). the public institution in charge of the project;
- 2). the subject matter and scope of the contract;
- 3). the duration of such contract, and circumstances that would give rise to early termination;
- 4). the obligations and rights of the parties;
- 5). where applicable, the key regulations that will be proposed;
- 6). who will manage identifiable key risks, such as design and development, construction, operating, revenue, financing, *force majeure*, insurance and environmental risks;
- 7). manner of measurement and monitoring of performance;
- 8). where applicable, manner of transfer of funds;

- 9). where applicable, who will be responsible for past or future environmental liabilities;
- 10). how disputes will be resolved; and,
- 11). for the purpose of transparency, what kind of public invitation methods will be used and the type of contract to be offered.

Approval

Article 5

Upon obtaining license in compliance with the Article 4 of this Law, contractual arrangements shall become the part of a privatization plan and it shall be subject to all the duties arising from this Law.

Selecting leasing

Article 6

Public institution, in addition to the requirements under the Article 4 of this Law may propose a leasing arrangement, as an alternative to public investment, where:

- 1) there is an evident situation of lack of funds for such public investment;
- 2) the beneficiaries are suffering from lack of public services; and,
- 3) the funds can be properly appropriated for the private investor or operator to meet its obligations under such contract arrangement.

Selecting management contract

Article 7

Public institution, in addition to the requirements under the Article 4 of this Law may propose a management contract as an initial measure aimed at greater participation of private sector in the Republic of Montenegro (hereinafter Republic) or in the cities where:

- 1) there is an evidence that initial conditions do not contribute to investments and risk-taking by private sector ;
- 2) where tariffs are below cost recovery levels;
- 3) where there is a need to administer or manage a complex arrangement, whether financial or technical.

Selecting Concessions

Article 8

Public institution, in addition to the requirements under the Article 4, may propose a concession agreement where:

- 1) natural resources such as minerals or any activity thereof as for tourist activities, and possibilities thereon, are not exploited properly therein;
- 2) revenues may be generated therefrom;
- 3) major private financial or technical inputs are necessary therefore;
- 4) economic growth results are determined by a valuation made thereof;
- 5) regulatory body may, under the license, control the level of quality of services and the applicable tariffs.

Selecting BOT arrangements

Article 9

Public institution, in addition to the requirements under the Article 4, may propose BOT arrangement, as defined under this Law, where:

- 1) major new capacity for public services is needed, based on expert estimate or elaboration;
- 2) no sale of existing publicly owned companies or firms may allow hereunder proper investment for the new capacity required therein; and,
- 3) after a determined period of operation, sufficient for the private investor to recover the investment and the costs of operating, the transfer of the properties, movable or immovable, is made

Combination

Article 10

Public institution may propose a combination of arrangements provided for in Article 4 of this Law, in which case such combination must include conditions for each separate arrangement that is being proposed.

The Government may decide to, due to liberalization of economy, permit the inclusion of private sector in provision of public services by applying different contractual arrangements not provided for by Article 4 of this Law, according to the conditions provided by a separate Law.

Objectives

Article 11

Pursuant to the Article 4, where proposing a private sector partnership, one or more public institutions together, such as group of local self-governments authorities, shall, for any proposed partnership, demonstrate the need to do the following:

- 1) to bring technical, financial, or managerial expertise and new technology in the sector;
- 2) to improve economic efficiency in the sector, operating performance and the use of capital investments;
- 3) to inject large scale investment capital into the sector or gain access to private capital markets;
- 4) where applicable or otherwise doable, to reduce public subsidies to the sector;
- 5) to make the sector more responsive to needs and preferences of consumers;
- 6) to assess the tariffs to be paid;
- 7) competitive pressures deriving from markets for returns on the capital to be invested; and,
- 8) competitive pressures deriving from the related sectors of services.

Preparation for submission of bids

Article 12

Upon obtaining approval, pursuant to the Article 4 of this Law public institution shall prepare the bidding documents in compliance with this Law, and before publication of the call for competition, obtain a prior consent from the authorized bodies on the contents of the bidding documents; after publication of the call for competition, public institution shall examine, evaluate and compare bids

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and obtain approval from the bodies before awarding the contract; copy of the contract shall be made available to the relevant regulatory body.

Duration

Article 13

Any contract offered under a call for competition or otherwise entered into under this Law shall be subject to maximum duration in the following manner:

- 1) lease agreement shall not exceed a period of two years, but might be subject to extension every year, in compliance with the terms and conditions of the contract, but the total period, including extension, shall not exceed maximum period of five years;
- 2) management contract shall not exceed a period of five years;
- 3) concessions or BOT. contracts shall not exceed a period of 30 years or, where the contract is based on recovery of investment, shall not exceed the period necessary for the recovery of investment only where the determined recovery is based thereunder on determined percentage of the tariffs paid by the beneficiaries; nevertheless, where the period may exceed 30 years under such contract, the period shall be, at time of contract signature, based on a probable recovery not to exceed 30 years; where an extension is necessary for recovery and part of the terms and conditions of a contract, such extensions shall be permitted strictly on the terms and conditions stipulated in the contract entered into;
- 4) the period for which a concession or a BOT has been granted may be extended in exceptional cases because of a substantial change in the conditions under which the concession or the BOT was granted;
- 5) the duration of preparatory work shall be specified in the concession as well as in the BOT agreement.

Commencement

Article 14

Pursuant to the Article 13 of this Law, the commencement of the period shall not include the period for construction or rehabilitation; therefore, the period shall start, in any case, on the day the operations start; for avoidance of doubt, the day the operations start shall prevail on the date -

- 1) the contract was signed and,
- 2) where applicable, the contract enters into force.

CHAPTER III

SUBMISSION OF BIDS FOR LEASING OR MANAGEMENT CONTRACT

Soliciting

Article 15

Subject to the Articles 4 and 12 of this Law, one or more public institutions may announce public invitation for submission of bids from private sector in compliance with the law.

Proposals for management contracts and bids for leasing

Article 16

The relevant articles of the Public Procurement Law shall apply to the management contract as

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well as to the contract based on which consulting services are provided, and to the leasing contract representing public procurement activity.

Rules and forms for management contract or leasing contract

Article 17

Subject to the Article 16 of this Law, for management contract, any request for proposals and, for leasing contract, any bids solicited, therefore any procurement undertaking There of, shall be in compliance with the public procurement rules and the standard forms approved by the Public Procurement Commission.

Pre-investment Committee

Article 18

Pursuant to the Articles 15, 16 and 17 of this Law where a construction or rehabilitation, resulting from such management or leasing contract, therefrom, therein, thereunder or thereafter, is planned for the state owned building and where its design is delivered by the private sector, the prior approvals have to be obtained from the Pre- Investment Committee established in compliance with the Public Procurement Law.

CHAPTER IV

Note of the publisher : Chapter IV, that is Articles from 19 to 54 ceased to be in effect on the basis of the Law on Concessions (Official gazette of the Republic of Montenegro 08/09 as of 4th February 2009).

CHAPTER V LEASING

Leasing of public facilities

Article 55

In compliance with the Articles 6, 11 and the Chapter Three of this Law, leasing shall be permitted for existing public facilities, to be rehabilitated or not, or for new public facilities, or for the use of the existing private facility to be used for public purposes.

Existing public facilities

Article 56

In compliance with the Article 55 of this Law, where the public institution prefers leasing to the owning of a public facility, the public institution shall -

- 1) determine the market value of the facility by using the service of an independent valuator who shall be selected in compliance with the law;
- 2) clarify property titles;
- 3) seek the authorization, in compliance with the law, to dispose the existing public facilities, by public offer, whereby the disposal is accompanied by an offer from the seller to lease for a given period the public facilities that are offered;
- 4) seek the authorization, in compliance with the law, to enter into such agreement and therefore obtain yearly appropriations to meet the obligations created thereunder; and,
- 5) where a rehabilitation is needed resulting in an investment needed prior to the leasing, detailed drawings and budget estimates shall be prepared and be part of the bidding documents.

New public facilities

Article 57

In compliance with the Article 55 of this Law, where the public institution prefers leasing to building a public facility, the public institution shall, prior to any public invitation, in compliance with the law:

- 1) obtain prior approval of the design by the Pre-Investment Committee of the Directorate of Public Works; where applicable, clarify land titles where the new facility is needed;
- 2) seek the authorization, in compliance with the law, to enter into such agreement and therefore obtain annual appropriations to meet the obligations created thereunder.

Use of existing private facility for public purposes

Article 58

In compliance with the Article 55 of this Law, where the public institution prefers leasing a private facility for public purposes, the public institution shall, prior to any public invitation, in compliance with the law:

- 1) stipulate in the bidding documents the standards for public facilities as approved by the Pre-Investment Committee of the Department of Public Works;
- 2) seek the authorization, in compliance with the law, to enter into such agreement and therefore obtain yearly appropriations to meet the obligations created thereunder.

Insurance costs

Article 59

Under any leasing agreement, all insurance costs shall be covered by the private investor or the private operator; copy of the insurance contract shall be part of the leasing contract, and evidence of payment for renewal shall be subject to the condition that the contract is always in force.

Maintenance costs

Article 60

Under any leasing agreement, the maintenance costs of the facilities, other than daily cleaning of interior shall be a responsibility of the private investor or of the operator.

Maximum payable leasing fees

Article 61

Under any leasing agreement, the increase of the fee payable for renewal, shall not be higher than the annual inflation as per indices on inflation published by the official statistics office; the name thereof shall be stipulated in the bidding documents and thereafter be part of the leasing contract.

Subsidy and contingency liability

Article 62

Under the provisions of this Chapter, the private sector investor or operator shall not be allowed to obtain any kind of benefits, directly or indirectly, from any kind of subsidy, or otherwise obtained by the use of any public funds for reconstruction or rehabilitation, or otherwise requires guarantees

other than usual guarantees under a normal leasing agreement in the private sector; except in the case of gross negligence, or under a court decision, any provisions of a leasing agreement entered into, whereby any contingent liability is created on any public institution, shall be deemed to be null and void.

Procurement by the private sector

Article 63

For avoidance of doubt, for investment made by a private sector investor or operator under this chapter, the procurement activities performed by him shall be undertaken as per the best recognized procurement practices in the private sector.

CHAPTER VI MANAGEMENT CONTRACT

Consultants or consulting firms

Article 64

In compliance with the Articles 7, 12, 13 and with the Chapter Three of this Law, management contract may be entered into, whereby the management, legal, financial, technical or supervisory services are provided by private consultants or private consulting firms.

Terms of references

Article 65

In compliance with the Article 64 of this Law, management contracts being utilized under this Law for preparatory actions or control of activities for the privatization of the economy, any public institution, in addition to all requirements of the Public Procurement Law, shall use the standard forms for terms of references as approved by the privatization Council for:

- 1) Economic consultants;
- 2) Experts for formulating policy in the adequate field of expertise;
- 3) attorneys,
- 4) Technical (Civil Engineering) Consultants;
- 5) Financial Advisors;
- 6) Procurement experts;
- 7) Management, supervision experts;
- 8) Experts for corporate governance;
- 9) Experts for environmental protection; and,
- 10) Advisers for privatization, as may be determined by the Privatization Council.

Monitoring of consultants under management contract

Article 66

Any public institution entering into management contract under this Law whereby the services are linked to the privatization procedure, shall appoint a monitoring committee of three members, subject to Articles 67 and 68 of this Law.

Consent

Article 67

Selection of the members of the monitoring committee shall be approved by:

- 1) the Government, in the case of Ministries, Departments or Secretariats;
- 2) their respective municipal assembly, in the case of a Local Self-Government or group of Local Self-Governments;
- 3) the parent ministry, for the state-owned companies or firms.

Membership and powers

Article 68

The members of a Monitoring Committee shall not be elected persons and shall be public servants having the relevant expertise to make decision on the basis of majority of votes, on behalf of the public institution to determine if services are delivered timely and satisfactorily or otherwise in compliance with the terms of references and the contract entered into.

Reports by consultants

Article 69

Under the provisions of this Chapter, any report made by consultants under management contracts shall be prepared in the format approved by the Monitoring Committee, and copies thereof shall be made available to the Privatization Council.

CHAPTER VII

Note of the publisher: Chapter VII, that is Articles from 70 to 103 ceased to be in effect on the basis of the Law on Concessions (Official Gazette of the Republic of Montenegro 08/09 of 4 February 2009)

CHAPTER VIII

Note of the publisher: Chapter VIII, that is Articles from 104 to 127 ceased to be in effect on the basis of the Law on Concessions (Official Gazette of the Republic of Montenegro 08/09 of 4 February 2009)

CHAPTER IX

Note of the publisher: Chapter IX, that is Articles from 128 to 140 ceased to be in effect on the basis of the Law on Concessions (Official Gazette of the Republic of Montenegro 08/09 as of February 4th 2009)

CHAPTER X FINAL PROVISIONS

Rules, regulations and forms

Article 141

Ceased to be in effect on the basis of the Law on Concessions (Official Gazette of the Republic of Montenegro 08/09 of 4 February 2009)

Transparency

Article 142

Ceased to be in effect on the basis of the Law on Concessions (Official gazette of the Republic of Montenegro 08/09 of 4 February 2009)

Code of ethics

Article 143

Ceased to be in effect on the basis of the Law on Concessions (Official Gazette of the Republic of Montenegro 08/09 of 4 February 2009)

Repeal

Article 144

The Law on Concession (Official Gazette of the Republic of Montenegro 13/91) shall be repealed as of the application date of this Law.

Transitional provisions

Article 145

Any right or obligation existing in a moment when this Law enters into force, in favor of, or against any of the public institutions shall, on commencement of this Law, be a right or obligation in favor of the same public institutions.

Any situation which occurred but had not been applied before this Law entered into force, shall remain in full force in conformity with the old legislation; but their exercise, duration and procedure to enforce them shall be regulated by this Law. If the exercise of the right or of the action was commenced under the old laws, but is pending on the date this Law takes effect, and the rules and regulations were different from that established in this Law, the rules and regulations made under this Law shall apply.

Rules and regulations laid down or made under this Law which may prejudice or impair vested or acquired rights in accordance with the repealed legislation shall have no retroactive effect.

Entry into Force

Article 146

This Law shall enter into force on the eight day of the day of its publication in the Official Gazette of the Republic of Montenegro, and shall be applied from 1 July 2002.