

concessions  
**PPP**

User`s Guide

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Concession Unit (ATRAKO) is a government institution that has as mission to promote and assist contracting authorities in the review and evaluation of projects concession / public private partnerships, as solicited and unsolicited proposals; drafting bidding documents and following the procedure for granting the concession / public private partnerships through its phases. For more information about ATRAKO, please visit [www.atrako.gov.al](http://www.atrako.gov.al)

This publication has been prepared to help users to respect the procedures of concessions and public-private partnerships (PPPs) and as well as to foster the diffusion of best practices in Albania.

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## CHAPTER 1

## INTRODUCTION: PURPOSE OF THE GUIDELINE AND THE METHODOLOGY USED

**a) Purpose of the guideline**

The purpose of the hereto guideline on Concessions and Public Private Partnerships (PPPs) in the Republic of Albania is to serve as an informative document to facilitate the implementation and promotion of concessions and PPPs procedures on behalf of state entities and private entrepreneurs. In relation to the above purpose, this guideline attempts to provide a detailed analysis of composing processes and issues related to concessions and PPPs, as well as the necessary instructions regarding the assessment and decision-making with regard to the implementation of various PPP options. In addition, the guideline describes necessary procedural steps for the project evaluation, drafting of respective contracts and throughout the contract implementation stage, including their review and monitoring.

This guideline relies mainly on the existing Albanian legislation on concessions and PPPs as well as on the legislation on public procurements, which also has provisions that impact on the performance of competitive procedures and the granting of concessions and PPPs. The analysis offered by this guideline is based on and inevitably includes other generic provisions of the Albanian legislation connected to the PPP procedures, the activity of the public bodies and the commercial activity of private entrepreneurs.

In order to produce a qualitative guideline, we have utilized best practices, European Union *acquis communautaire* provisions, instruction documentation used by international organizations and examples of positive templates applied in some western countries, particularly developed for better and a more rapid implementation of PPPs.

Lastly, in order for this document not to remain a simple rigid analysis of the legislation in force, we have also incorporated the opinions and experiences of the law enforcement authorities functioning in the Republic of Albania. This applies particularly to the Agency for the Treatment of Concessions (ATRAKO), as well as opinions of a few private entrepreneurs with previous experiences and involvements in concessions, and PPP procedures.

Consequently, besides addressing procedures and the existing legal framework, the hereto guideline also contains auxiliary elements to facilitate the interpretation of certain situations throughout the performance of PPP procedures.

**b) Methodology**

The methodology used in this guideline is based on a thorough analysis of the legal and institutional framework related to concessions and PPPs, defining competent bodies as well as rights and responsibilities of the public and private party. This



guideline provides a comparative review of both concepts, “Concession” and “PPPs”, highlighting those cases when these are utilized by public entities, together with information on provisions related to the scope of concessions and PPPs, including the range of economic and social sectors, the types of contracts and the rationale for their application.

Furthermore, the guideline provides an overview and a description of the processes and procedures related to the launching and granting of concessions and PPPs, commencing with the project identification stage and moving on with the evaluation, the preparation and implementation of the necessary actions of the competitive procedure, the drafting and execution of contracts, as well as their management and monitoring until the successful finalization of projects.

A Concession and/or PPP contract template is annexed to this guideline, as well as a template of a feasibility study to be used by contracting authorities during procedures for granting Concessions and PPPs, together with the Guidelines for drafting the Summary Report and of the Feasibility Study.

Definitions, terminology and denominations used in this Guideline, are the same as defined in the legislation. For explanative purposes, a list of abbreviations used hereto is included in a specific annex.

## CHAPTER 2

## THE LEGAL AND INSTITUTIONAL FRAMEWORK OF PPPs

*a) The legal framework on concessions and public private partnerships*

The legal framework on concessions and PPPs in the Republic of Albania is mainly based on the following legislation:

- Law no. 125/2013 “On Concessions and Public Private Partnerships”, as amended;
- Decision of the Council of Ministers no. 575, date 10.07.2013 “On the approval of rules for the assessment and granting by Concession/Public Private Partnerships”;
- Decision of the Council of Ministers no. 130, date 12.03.2014 “On the electronic conduct of competitive procedures of Concessions/Public Private Partnerships”;
- Decision of the Council of Ministers no. 634, dated 01.10.2014 “On the approval of the rules for evaluation and granting of Concessions and Public Private Partnerships for the public Works and services for the construction, operation and maintenance of national roads”;
- Decision of the Council of Ministers no. 211, dated 16.03.2016 “On the establishment and management of the electronic registry for Concessions and Public Private Partnerships”;

To date there is still applicable the following legislation:

- Law no. 9663, dated 18.12.2006, “On concessions”, as amended<sup>1</sup>;
- Decision of the Council of Ministers no. 150, dated 22.03.2007 “On organization and functioning of ATRAKO – Concessions Treatment Agency, as amended;

Furthermore, during the PPPs tender stage, the procedures are based on the following public procurement legislation:

- Law no. 9643, date 20.11.2006, “On Public Procurement”, as amended;
- Decision of the Council of Ministers no. 914, date 29.12.2014, “On the approval of public procurement rules”;
- Decision of the Council of Ministers no. 918, date 29.12.2014, “On the electronic conduct of public procurement procedures”.

The above listed legal and sub-legal acts can be easily accessed on official web pages of the law enforcement institutions in particular on the web page of the Agency for the Treatment of Concessions [www.atrako.gov.al](http://www.atrako.gov.al) and that of the Public Procurement Agency <https://app.gov.al>.

Next to the above mentioned legal framework, the Albanian legislation governing the activities of public administration (in particular the Administrative Procedure Code) and the legislation which regulates the contractual relationship between the parties (in particular the Civil Code of the Republic of Albania) are applicable and used as a reference.

The legislation on Concessions and PPPs considers primarily the contracting authorities as “owners” who will be in charge of the implementation of Concessions and PPPs; they are granted by the legislation the right to undertake and execute procurement procedures for award of Concessions and PPPs.

The existing legal framework thus considers the central government ministries and local governmental units as contracting authorities.

Currently, the state cabinet of the Council of Ministers is composed of 19 line ministries. Based on the recently implemented administrative and territorial reform, in particular by Law no. 115/2014 “On the administrative territorial division of the local government units in the Republic of Albania”, and the Law no. 139/2015, “On the local self-governance”, local government units are municipalities (currently 61 in number), and districts (currently 12 in number).

Considering the above, ministries, municipalities and districts are bodies identified by the legislation as contracting authorities, which may undertake procedures for the execution of Concessions and PPPs.

In cases, and as pursuant to the legislative provisions, where the right to grant a given concession or PPP project pertains to more than one public body fulfilling the requirements to be a contracting authority, it is for the Council of Ministers to

assign by a special decision, who is the contracting authority or authorities, as the case may be.

Aside from contracting authorities, the legislation also includes other public bodies, which because of their field of activities have responsibilities related to concession and PPP processes. Bodies with specific involvement in this process are the Council of Ministers the Ministry responsible for Economy, the Ministry responsible for Finances, the Public Procurement Agency, the Public Procurement Commission and the Agency for Treatment of Concessions. Indirect roles and competences in this process have also other state bodies, such as the State Advocate, the Competition Authority and the administrative courts.

In addition, in accordance with applicable legislation, private partners may propose the procedures for entering into Concessions or PPPs, and may get involved in these procedures following the submission of unsolicited proposals.

In the following sections, there is a generic overview of the relevant state bodies and their duties in the processes of Concessions and PPPs. The subsequent chapters provide further details on their functions and activities; in particular more information is given in these chapters which describe the preliminary steps, tender procedures and contract enforcement.

#### ***b) PPP institutional framework: the role and responsibilities of state bodies***

##### *i. The Council of Ministers*

The Council of Ministers has a series of competences related to procedures for granting Concessions and PPPs, as set out by the law 125/2013.

Firstly, the Council of Ministers is the competent body for *the approval of necessary sub legal acts* for the implementation of the law 125/2013. In this context, the Council of Ministers has to date passed the decisions mentioned in the previous section on the PPPs legal framework.

Moreover, the Council of Ministers has the power to approve *the stabilizing provisions of the concessionary/PPP contracts*, by special decision, when requested by contracting authorities and pursuant to provisions of Article 41 of the law 125/2013.

Binding commitments undertaken by contracting authorities on behalf of the Albanian state, with the purpose of ensuring viable guarantees in favor of the private partner, shall be considered stabilizing provisions. These commitments aim at protecting the private partner from future legislative changes, which may have financial repercussions on the project at hand.

##### *ii. Ministry of Economy*

It is the Ministry responsible for the economic sector. It has been nominated as the body that *monitors, orients and coordinates* activities related to the

development of Concessions and PPPs. The Ministry of Economy is also the authority supervising the Agency for the Treatment of Concessions, whose powers are later detailed.

*iii. Ministry of Finance*

The Ministry of Finance has specific competences related to concessions and PPPs, in particular with regard to the financial aspects of contracts and their impact on the budget.

Hence, the Ministry of Finances is involved in the concession/PPP *project evaluation* process, and its approval is requested in those cases where such contracts require financial support. Ministerial approval is necessary in all cases when the effects of contracts influence or create risk and directly or indirectly impacts on the state budget or the budget of local bodies.

The Ministry of Finance determines the *rules for the payment of concessionary and PPP fees*. In case when such fees are not paid, the said ministry issues the fee payment order that constitutes executive title, in accordance with Albanian legislation provisions.

The Ministry of Finance duly receives regular *annual financial statements of concessionary companies* which, based on the legal requirements, are delivered to this Ministry from the contracting authorities within the first semester of each year. These documents are recorded in the electronic registry of Concessions and PPPs, which is managed by the Agency for the Treatment of Concessions.

Moreover, contracting authorities send to the Ministry of Finance *copies of contracts and of the extract of the registration* of the concessionary company with the commercial registry.

The Ministry of Finances shall be notified in advance in all cases when contracting authorities execute *contract extensions and/or conditional contracts* with private entities that execute Concessions and PPPs. Contract extensions and/or conditional contracts in particular are executed to ensure the necessary financing for the implementation of the initial contract.

In addition, contracting authorities require the preliminary approval of the Ministry of Finances with regards to *any amendments to the executed contracts* which impact on or carry the risk of a direct or indirect impact on the state budget or on the budget of local bodies, or which may alter in any way the financial support of projects.

The preliminary approval of the Ministry of Finance is also required in all cases of *concessions/PPP contract transfers*, in all cases of changes of ownership rights or of the legal entity Management for Special Purposes (MSP), as a result of a capital transfer, or of company shares' transfer, except for cases when the transfer is a consequence of the due trade of shares in a regulated capital market. This

approval is necessary when the scheduled transfer of the contract impacts or carries the risk of a direct or indirect impact on the state budget or on the budget of local bodies, or which may alter in any way the financial support of projects.

The Ministry of Finance is also notified by contracting authorities in cases when the private entity is granted *works and/or additional services* which are not part of the initial contract, but that due to unforeseen circumstances become necessary in accordance with conditions set out by the legislation.

Contracting authorities request the opinion of the Ministry of Finance in all cases of *resolution of executed contracts*, as set out by the legislation.

In case of a breach of legal provisions by representatives of the contracting authorities, the Minister of Finances is entitled to propose the issuing of disciplinary measures.

*iv. The Agency for the Treatment of Concessions*

The Agency for the Treatment of Concessions and PPPs (ATRAKO) is a special body established by DCM no. 150/ 2007 under the competency of the Ministry of Economy, which aims at assisting contracting authorities during procedures for the granting of Concessions and PPPs, mainly regarding the assessment of projects, the preparation of tender documents, the negotiation of contracts and monitoring their execution. ATRAKO assists contracting authorities in particular with regard to the completion of the following actions:

- Drafting of the feasibility study;
- Drafting of Pre-Bidding and Bidding documents and of the evaluation criteria;
- Assessment of proposals (both solicited and unsolicited projects) and the identification of the best bidder;
- Negotiations and signing of the concession contract;
- Monitoring of concession contracts.

ATRAKO also has the following competences:

- Proposes to the Minister responsible for the economy improvements to the legislation on concessions/PPPs, as well as the implementing guidelines of the law;
- Monitors, analyzes and studies the current European and global trends, knowhow and experiences in the area of concessions/public private partnerships, as well as instructions for the implementation of the provisions of this law;
- Cooperates with the Public Procurement Agency for the preparation and publication of the standard tender documents for concessions/PPPs.

#### v. *The Public Procurement Agency*

The Public Procurement Agency (PPA) is a central state body organized and functioning according to the Public Procurement legislation, under the Prime Minister's Office. The Public Procurement Agency has specific competences during the performance of competitive bid procedures, in compliance with competences granted to this agency by the public procurement legislation.

Concerning competences related to concessions and PPPs, the PPA exercises the following tasks:

- Monitors the tender procedures of the concessions and PPPs based on the public procurement rules, monitors the contract implementation and imposes administrative sanctions and proposes disciplinary measures in case of violations;
- Excludes an economic operator from participating in concession/PPP procedures, as per provisions of the Public Procurement Law;
- Publishes standard tender documents on concession/PPP procedures in its web page [www.app.gov.al](http://www.app.gov.al).

*vi. The Public Procurement Commission*

The Public Procurement Commission (PPC) is a central public body, under the Prime Minister, which reports every year to the Council of Ministers.

The Public Procurement Commission is the body tasked with reviewing claims filed against procedures and the results of the competitive bid procedures. Following the submission of a claim with the PPC, the contracting authority shall suspend the continuation of competitive bid procedures until the PPC issues a decision in this regard, pursuant to terms set out by the law.

After the conclusion of the administrative trial, the Public Procurement Commission is the body that issues final decisions in relation to claims submitted, including the suspension, revision or cancellation of procurement procedures.

The Public Procurement Commission is entitled to propose the issuing of disciplinary measures in case of a breach of legal provisions by representatives of contracting authorities.

*vii. Other institutions*

During the concession/PPP procedures, indirect and related competences are also given to other state bodies, based on the specific competences provided by the legislation according to their activity area.

Hence, contracting authorities are obliged to consult with the State Advocate Office during the process of drafting and signing the administrative contracts. This obligation lasts until the fulfillment of obligations by the parties of the agreements, referred to in Law no. 10018 dated 13.11.2008 "On State Advocacy".

Likewise, contracting authorities are obliged to require the evaluation of the Competition Authority, and, in the event of concession/PPP projects, adopt normative acts which set restrictions on the market access and trade, grants exclusive or specific rights to certain enterprises or products or impose uniform practices on prices and conditions of sales.

Finally, an important role in the process of concessions/PPPs can also be played by administrative courts or arbitration institutions.



Law 125/2013 recognizes that parties of a concession/PPP contract have the possibility to solve contractual disputes between contracting authorities and private partners, through the judicial system or even through alternative mechanisms for dispute resolution, as agreed by parties in the contract executed between them, including international arbitration procedures.

During the decision-making procedures related to granting a concession/PPP, claimants may address the competent court on administrative disputes, also in cases when they repeal decisions of contracting authorities or even against decisions of the Public Procurement Commission. Moreover, parties may also address the court for any dispute regarding concession/PPP contracts, except in cases when parties have agreed and provided alternative dispute resolution modalities in the contract.

## CHAPTER 3

## COMPARATIVE STUDY ON CONCESSIONS AND PPPS

This chapter is dedicated to a comparative analysis of public-private partnerships versus concessions, which focuses on clarification of the definition, and nature of these concepts. The purpose of this specific analysis is to assist contracting authorities in the identification of the most suitable form and type of contracts to be selected, in cases when they implement actual concessions or PPP projects. This serves the contracting authorities to respond to the query: “What type of contracts must be implemented by a project in a concession contract or in a public private partnership contract?”

In the Republic of Albania, the concession concept is to an extent more developed than public-private partnerships, given that it has been earlier regulated by the legislation, whilst the PPP concept has only recently been introduced in the Albanian legislation. For this reason, concession contracts have a more consolidated background and have been used more often by the public administration. The Albanian post-communist legislation initially regulated concessions by the law no. 7973 dated 26.07.1995 “On concessions and the participation of the private sector in the public services and infrastructure”, which was later replaced by the law no. 9663 dated 18.12.2006 “On concessions”. During recent years, a broader concept of public private partnership has been approved, based also on business practices and in compliance with the legislation, which is now also set out in the legal provisions of the current law regulating this area, respectively the law no. 125/2013 “On concessions and public private partnerships”.

There is no universally recognized definition of public-private partnerships and governments across the world describe them in varying ways. However, it is commonly understood that the term public-private partnership refers to the public and private sector jointly providing the investment and/or financing of public assets or services and/or the joint design, operation and management of public assets or services. A useful contribution to the discussion in Albania may be the World Bank definition, which reflects some commonly understood aspects, and describes PPPs as, “a mechanism for government to procure and implement public infrastructure and/or services using the resources and expertise of the private sector...PPPs combine the skills and resources of both the public and private sectors through sharing of risks and responsibilities”.

Common to all public-private partnership definitions and terms is their determination of rights, obligations and risks to be allocated between the two parties within a partnership. Both concessions and government-pay or availability-based contracts are principal forms of public-private partnerships fulfilling three important parameters; allocating rights, obligation and risks related to the scope, function and payment structure of the underpinning arrangement between private sector and public sector contracting authorities.

Various forms of public private partnerships including concessions are performed through the execution of contracts between the contracting authorities and private partners. In order to execute such contracts, contracting authorities must initially take into consideration the general provisions of contracts in accordance with the Civil Code. Pursuant to the Civil Code provisions, the contract is considered a legal act by which parties establish, change or extinguish a legal relationship. Parties to the contract may freely provide for the content of the contract within the limits set out by the legislation. The necessary requirements for the validity of a contract relate to the following elements: the consent of parties to undertake obligations, the lawful cause supporting the obligations, the object at the basis of the contact and its legally required form.

In accordance with definitions and provisions of the law 125/2013, “On concessions and public private partnerships”, the distinctive characteristics of concessions compared to public private partnerships can be assessed.

#### a) *Concessions*

##### i. *Concessions as a type of public private partnership*

Firstly, it is important to be aware that concessions are types of public private partnerships. In other words, public private partnership projects can be implemented through various contractual types, one of which is a concession contract.

Article 8, point 4 of the law 125/2013 specifically provides: “*Depending on the reward tools as well as on the normal main risk sharing, a private public partnership may be achieved in one of the following forms:*

- *A public works concession;*
- *A public services concession;*
- *A public works contract;*
- *A public services contract.*

Thus, it may be concluded that contracting authorities may perform a public private partnership project by way of four (4) contractual typologies.

The distinct elements of these 4 types of PPP contracts are outlined by the hereof provisions of law 125/2013. Article 8, point 4 of the law 125/2013 provides that the distinction among the above types of PPP contracts depends on the private public partnership remuneration tools as well as on the normal main risk sharing.

*ii. Distinctive elements of concession contract types*

Based on a combined reading of legal provisions, within the wide typology of private public partnerships, concession contracts have some distinctive features determined by the legislation related to the remuneration tools of the private partner and to the contract risk sharing modalities between parties.

For this purpose, a combined reading of the legal provisions on concessions is useful. Besides the hereof-mentioned provisions of Article 8, point 4 of the law 125/2013, there is a need to analyze the provisions of article 3, points 2, 3, 4 and 5 of the law 125/2013 which define concessions and evidences their distinctive elements.

- *Private partnership remuneration tools in concession contracts*

The involvement of a private partner in the realization of a concession aimed at the performance of a public act or the provision of a public service is naturally justified by the economic profit purpose of the private partner, aiming at the generation of revenues and proper remuneration for the work or services it has performed.

As regards the private partner remuneration tools in concession contracts, the legal provisions on concessions determine that concession contracts on public works can provide for the right of the private partner to use works that are subject of the contract as well as the possibility to add to this right the right of users/beneficiaries of this work to receive payments. Analogically, the public service concession contracts provide that the private partner is entitled to the right to use the services, to which can be added the right to receive payments.

Hence, the remuneration of the private partner in concession contracts can be performed through the following two mechanisms:

- The right to use public works and/or services which allows for the right to generate revenues;
- The right to use public works and/or services jointly with the right to receive payments.

- *Operational risk sharing between parties of a concession contract*

As per the definition provided by Article 3, point 5 of the law 125/2013, the private concessionaire partner in concession contracts must assume a considerable share of the operational risks related to the contract's objective.

The operational risk is related to the use of works or the provision of services or the risk related to the availability of the infrastructure facility built or used to provide services to final beneficiaries in accordance with the concession contract.

In conclusion, contracting authorities can identify ***distinctive elements of the concession contract*** based on the following:

- In concession contracts, the concessionaire is entitled to use public works and/or public services, it has performed during the duration of the concession contract, aimed at the generation of revenues;
- In specific cases, besides its right to use public works and/or services the concessionaire itself has developed, the concessionaire can also benefit payments; Payments of the private partner may be received by the contracting authority or by the end users and consumers.
- For the completion of public works and/or services as per the contract object, the concessionaire undertakes a considerable part of the contract operational risk.

### *iii. Object of concession contracts*

Based on the analysis of legal provisions, the object of concession contracts may be the performance of public works or public services. The object of the concession of *public works* is the performance of works toward the realization of a public work, whilst the object of the concession of *public services* is the provision of a public service.

However, concession contracts can be also mixed type concession contracts, having as part of their object of activities the performance by the private partner not only of public works, but also of public services. In such cases, contracting authorities must evaluate which is the most important element related to the purpose of the concession contract and whether the main object of the contract is the performance of works or the provision of services by the private partner, in order to determine if such a contract qualifies as a concession of works or a concession of services.

### **b) Other types of Public Private Partnerships**

Next to concession contracts, private public partnerships may also be performed through other forms and types of contracts. As emphasized above, article 8 of the law 25/2013 provides that besides concessions, PPPs can also be performed through the contracts of public works or services. The legislation in the field of PPP

contract types remains open, granting to contracting authorities some discretionary rights regarding the selection among various types of contracts and the determination of their content.

The contracting freedom of parties is a general principle derived from the Civil Code, pursuant to which contracting parties are free to determine their contractual relationships by respecting the principle that contractual provisions must not breach the legal provisions in force.

Thus, private public partnerships can be set forth through different types of contracts based on the needs of contracting authorities and private partners, in compliance with specificities of actual cooperation projects between them.

The general principle is the contracting authority must try to achieve their needs toward the performance of public projects in the most profitable and most feasible manner aiming to fulfill their purposes and naturally in line with the binding provisions of the legislation in force. On the other hand, the contractual freedom is an advantage also to private partners, which benefit from the necessary space to negotiate their rights and obligations in contracts they enter into with public partners.

Based on best practices, and examples of the most developed countries, private public partnerships may be performed through a variety of contracts, which may differ from one another and have different contents, according to contracting authorities' needs in accordance with the specificities of concrete cooperation cases between them.

Art. 8 of the law 125/2013 identifies some core characteristics of private public partnerships, and cases when projects have to fulfill the following requirements to qualify as private public partnerships:

- i.* Long-term cooperation forms: Public Private Partnerships usually target projects the execution of which requires long-term relationships between parties. As a consequence, PPPs are regulated by contracts of a considerable duration, for instance 20 years and above.
- ii.* Provision of a public service: The PPP object is the provision of public works or the provision of the necessary prerequisites for the provision of public services. In these cases, public services are no longer provided by a public body (the contracting authority), but by a private partner on behalf and as requested by the public partner. The PPPs as a rule are created in a public sector area. Hence, for this purpose it is useful or necessary that contracting authorities are ultimately responsible. This is an important difference of PPPs compared to privatization.
- iii.* Obligations of a private partner: For the provision of public services the private partner undertakes several obligations, depending on requirements of the public partner and the needs related to the performance of works

and public services. These obligations may include the financing, design, construction and/or reconstruction/renovation of public infrastructure facilities, the usage, operation and maintenance of a newly constructed and/or reconstruction/ renovation of public infrastructure facilities, or any combination of the above-mentioned obligations.

- iv. Risk transfer: In PPP contracts the private partner undertakes part of the risk related to the implementation of the contract. The risk sharing between parties of the contract is based on the principle that risks must be allocated to the party which can better bear them. As a rule, in these contracts each partner undertakes the risk for those risk events that are under its sphere of influence.
- v. The remuneration of the private partner: For the performance of works or services requested by the public partner, the private partner is remunerated financially, as provided by the contract. The private partner may be remunerated:

- By being granted the right to use public works and/or services, imposing fees or tariffs to be paid by end users of services, the consumers;
- By being granted the right to use public works and or services jointly with the benefit of receiving financial support from the contracting authority;
- By payments performed by the contracting authority or benefited on its behalf, as a rule against the availability of the facility and/or the provided service;
- Other forms of financial support including the transfer of material rights and of other real rights;
- A combination of the above mentioned remuneration modalities.

The following chart contains a summary of the public private partnership contract types used in the market and specifies their key features. Notwithstanding their form, the underlying characteristic is that public private partnership contracts must respect binding elements provided for by the Albanian legislation. Next, there is a detailed description of elements, criteria and characteristics identifiable by the Albanian legislation in force.

**Contract Types of Private Sector Involvement**

Design Bid - Build (DBB)	Design Build (DB)	Design - Build - Operate - Maintain (DBOM)	Design - Build - Finance (DBF)	Design-Build-Finance-Operate-Maintain (DBFOM)	Build Transfer Operate ((BDO)	Build-(Own)-Operate - Transfer (BOT or BOOT)	<b>Build-Own-Operate (BOO)</b>	
	Operations & Maintenance (O& M) Contract		Other Private Financing	Design-Build-Finance-Operate (DBFO)	Lease-Build-Operate (LBO)		<b>Private Sector Owns and Operates</b>	
				Long-Term Lease Concessions			<b>Asset Sale</b>	
							<b>Buy-Build-Operate (BBO)</b>	
Traditional Approach (non-PPP)		<b>Public - Private Partnerships (PPPs)</b>						<b>Full Privatization (non-PPP)</b>

Thus, public private partnerships provide for the performance of some public partner functions by the private partner, to benefit respective remunerations over the entire life-cycle of performed works and/or provided services. The PPP effectiveness depends on transfer and allocation of risks to the party that can best carry it.



For the sake of clarity, public private partnerships include contractual forms such as BOTs (construction, operation and transfer), DBFOs (design, construction, financing and operation), or similar long term contracts. These contracts can require different payment structures for private partners, which are as a rule user charges, fees paid by government or a combination of these. PPPs exclude a wide range of arrangements, such as short-term management, service contracts and all those arrangements where non-profit organizations or civil society perform public services.

*i. The duration of PPP contracts*

Private public partnership projects require a long-term cooperation between the public partner as the contracting authority, and the private partner according to the contract provisions. Based on provisions of the law 125/2013 Art. 30, private public partnership contracts can be entered into for a maximum term of 35 years. Contract terms may be extended only in exceptional cases, expressly provided by law 125/2013.

In order to determine the duration of these contracts contracting authorities must evaluate several elements, in particular the object of the contract, the type, the complexity, the time and the necessary monetary amount for the performance of works or the provision of their services, etc. The scheduled contract duration must be such that it guarantees the necessary term for the realization of required works and services, as well as on the other hand to guarantee a reasonable timeline for the private partner to cover the encountered financial costs and to allow the achievement of a reasonable profit on the performed investment.

*ii. The object of PPP contracts*

Firstly, it needs to be taken into consideration that PPP contracts can have as object of their activity the performance of public works, public services or a combination thereof.

In PPP contracts the private partner undertakes the obligation to provide itself public services that pertain to the public partner field of competences and/or the obligation to ensure to the public partner the necessary prerequisites to provide public services.

Therefore, public services can be provided to end users of services or to consumers by the contracting authority itself or by the private partner, based on and as determined by the object of the PPP contract.

*iii. Obligations of the private partner in PPP contracts*

Aimed at promoting innovation, economies of scale in provision of expected outputs, and fulfillment of contractual objectives, during the contract term the private partner may undertake the following obligations:

- Finance, design, construct, reconstruct or renew public infrastructure facilities;
- Use, operate and maintain the existing constructed or reconstructed public infrastructure facilities;
- Combinations of the hereof-mentioned obligations aimed at the completion of the contract objectives.

Public private partnerships rely on the performance of a series of functions or obligations mentioned here above, through the projects realization mechanisms, aimed at creating a number of benefits such as the technology innovation used and the efficiency of project costs.

*iv. Risk sharing in PPP contracts*

Transfer of Risk: In PPP contracts the private partner undertakes part of the risks related to the project implementation. The risk sharing between the contract partners is based on the principle that risks must be carried over by the party that is more capable to bear those risks. As a rule, in these contracts each partner shall be responsible for the risk events that fall under its sphere of influence.

The risk sharing between parties and the respective risk level undertaken by the private partner shall be set forth on case-by-case basis depending on the private public partnership and taking into consideration risks related to all contractual aspects, such as risks related to the financing, construction, request and/or availability, operation, management, maintenance and technical risks. As a rule, each partner shall be liable for risks that fall in its sphere of influence, and risks are allocated to the party that is objectively more capable to bear those risks.

Proper risk allocation to the party that can best carry it, is a key factor of private partnerships and Value for Money (VfM). This risk allocation can be best achieved if a competitive, transparent and non-discriminatory tender process takes place, which opens the way to the competition between the economic operators. Risk transfer is one of the key challenges for a well functioning system of projects that are based on private sector involvement, and a proper risk allocation is an important factor that contributes towards sustainable and successful public private partnership projects. However, the risk allocation is on a case-by-case, depending on the project's nature and the contractual undertakings regarding

works and services, maintenance, financial obligations and a number of other elements which must be taken into account with regards to the allocation of risks. Taking into account that whilst risk transfer is the key element for determining the efficiency and the Value for Money (VfM), ensuring the existence of competition and a lack of contestation of the tender projects' procedures are factors that add to the guarantees of ensuring effective risk transfer.

v. *The remuneration of the private partner in PPP contracts*

With regards to the remuneration of the private partner for performed works and services, the legislation determines that the private partner compensation may be through:

- The right to use public works and/or public service through the application of tariffs or payments from end users or consumers;
- The right to use public works and/or public service as above, jointly with the financial support of the public sector;
- Payments performed by the public partner in relation to the facility availability and/or the provided service;
- Other forms of financial support including the transfer of material rights and other real rights;
- A combination of the above mechanisms.

Based in the legal definition, it shall be considered as financial support any type of monetary or non-monetary support and/or the financing provided by the public sector including without limitation the subsidies, financial guarantees or other ones, contributions of capital and the transfer of property rights.

PPP contracts must contain a fair distribution of the rights and obligations of parties, toward the best public interest, but also taking into account the economic interest of the private partner. The success of a PPP contract often depends on the right balance between rights and obligations of both parties in the contract.

- *Special Purpose Vehicle (SPV)*

The law stipulates another alternative form for the realization of the private public partnership to include the possibility for the contracting authority to establish together with the private partner a special entity, defined by the law as a special-purpose vehicle (SPV) that accomplishes work or services on basis of the PPP contract. It must be kept in mind that the establishment of a SPV, which is usually understood as an off-balance sheet vehicle to be established for the financing of PPPs, is a regular vehicle to promote the mobilization of project financing. Thus, in

an off-balance sheet based SPV, lenders have no resort to the balance sheet of the holding.

Such type of SPV may be jointly owned by the public partner and the private and has a mixed capital, composed by respective contributions of partners according to provisions of the Article 8, paragraph 2 of Law 125/2013.

The private partner contribution is not limited only to the contribution in capital and in kind, but it involves also the active participation in the contract management. Simple capital injections by private investors at state companies do not be considered SPE.

On the other hand, the contribution of the public partner in SPV must not be in amounts that eradicate or risk eliminating the operational risk faced by the private partner; otherwise the law determines that such a contract or entrepreneurship shall not be considered as a private public partnership.

It must be taken into consideration that such SPV type must not be confused with the case of new concessionary companies (SPV concessionaire) to be established by economic operators of the winning bidders of tender procedures, in accordance with requirements of the contracting authority.

### *c) Common aspects of concessions and PPPs*

Aiming to assist contracting authorities to identify the distinctive aspects of the two concepts, concessions and PPPs, and aiming for the selection of the most suitable form and type of contracts to be implemented, we have analyzed and emphasized up to this point the differences existing among those. However, concession contracts and PPP contracts are part of the same category, are relatively similar and have many elements and characteristics in common. These common elements shall be the object of the following section.

#### *i. The duration of contracts*

Private public partnerships, including concessions, are long-term cooperation forms between public entities and private partners. The respective legislation provides that such contracts can be entered into for a period of up to 35 years, which can be extended in particular cases. As a consequence, the cooperation between parties is regulated through respective contracts, with a longer duration than ordinary contracts entered into by the public administration bodies. This duration is justified by the nature these contracts have, as well as by the high value of investments, which require time in order to produce profits.

#### *ii. The public partner in PPP contracts*

In concession/PPP contracts the public partner is identified as the contracting authority. As a rule, the public partner is a sole contracting authority requesting the private partner to perform activities that are part of its area of competences.

As described here above, in accordance with the existing legal framework ministries, municipalities and districts shall be considered as contracting authorities.

In special cases and in compliance with legal requirements signers of public partnership contracts can be multiple contracting authorities, in case when the object of the contract forms part of the field of activities of more than one contracting authority. In such cases the Council of Ministers, by special decision as the case may be, determines which body will be considered the contracting authority.

The presence of multiple contracting authorities in a public private partnership may also be achieved through agreements executed on a voluntary basis among several different contracting authorities. In some specific cases, in particular local municipality units may be interested in the joint exercise of some competences, given that in the case of their union they may manage to execute contracts to benefit services, which they could not afford if entered into separately, reducing expenses and obligations and also sharing the operational risk

### *iii. The private partner in PPP contracts*

The private partner entering into a concession/PPP contract with the contracting authority is the economic operator which following finalization of competitive procedures has been selected as the winner, given that it has submitted the contracting authorities with the best offer.

Winners of competitive procedures can also be some private partners, which have established a temporary union of companies, in accordance with requirements set out by the legislation on concessions and PPPs, and by the legislation on public procurements.

The legislation foresees that a commercial company may compete alone or as part of a group of companies that participate jointly in the tender, by submitting a joint sole offer. In the offer submitted by the group of companies there must be respectively determined relevant parts of works or services that shall be performed by each of the members of this group. The group of economic operators must select its representative during the competitive procedures and the contract implementation. The temporary union of companies must be formally established through a special agreement executed in writing and certified by the notary. The said agreement must determine the group representative, work/services participation percentages, as well as concrete elements to be performed by each of the group members. In cases when the group of economic operators is the winner of the competitive bid procedures the concession/PPP contract must be executed by all members of the group of companies, which shall be held jointly and individually liable for contractual obligations.

The legislation recognizes the right of the contracting authority to request, in special cases, that the winning economic operator/operators establishes a new

company which shall be tasked with the implementation of the concession contract. The new concessionary company shall be considered by the legislation as a special purpose vehicle (*SPV*) (*special purpose vehicle*).

A SPV shall be established by the private partner or private partners that shall be the winners of competitive procedures and shall be registered with the Albanian commercial registry. This new company shall have the object of the PPP contract as the exclusive object of its activity. Contracting authorities must determine in the tender documents and respective contracts the obligations of the mother companies which were the winners of tender procedures and which are the shareholders of the established new SPV Company. Moreover, contracting authorities may establish requirements or request the preliminary approval in case of changes in the SPV ownership or administration, in accordance with the legal specifications.

#### d) Sector application of concessions/PPP

Concessions/PPPs are implemented towards the performance of works and/or the provision of services across a variety of economic and social sectors, as set out by Art. 4 of Law 125/2013. The following are the economic and social sectors where concession and PPP projects can be implemented:

- Transport;
- Energy
- Water;
- Waste;
- Telecommunication;
- Science;
- Education;
- Tourism;
- Culture;
- Sports;
- Health;
- Social Services;
- Prisons and judicial infrastructure;
- Land and forest rehabilitation;
- Industrial parks and business support infrastructure;
- Mining;
- Accommodation;
- Public Administration facilities;
- Technology and information and the data base infrastructure;
- Natural gas;
- Urban and suburban rehabilitation and development;
- Public lighting;

Besides the above cases, the law entitles the Council of Ministers to resolve on the execution of concessions/PPPs on other sectors, based on proposals from ministries, municipalities, districts and central bodies involved in concession/PPP policies.

**e) Exemptions to concessions/PPPs**

The concession and PPP contracts are not applicable in certain sectors, which are expressly excluded by law 125/2013. Exemptions apply in the following cases:

- Contracts under the low monetary threshold. The low monetary threshold for concessions and PPPs is determined by Article 2 of the DCM no. 575. Currently, the low monetary threshold is set at 5 million Albanian Lek;
- When the execution of the contracts must be accompanied by special security measures;
- Acquisition or rental, by whatever financial means, of immovable property or related rights;
- Acquisition, development, production of material for media publicity and contracts for broadcasting;
- Concessions/PPPs, which are subject to different rules and are awarded pursuant to special procedural rules of international organizations;
- Arbitration and conciliation services;
- Financial services related to the issue, sale, purchase or transfer of securities or other financial instruments;
- Services included in utility contracts as per Public Procurement Law;
- Air transport services;
- Concessions/PPPs, which are subject to different rules and are awarded in accordance with international agreements, which include works, supplies or services intended for joint implementation or use of the projects by the signatory countries;
- Concessions/PPPs, which to the extent that this Law conflicts with an obligation of the State under, or arising out of, an international agreement or with an international organization, the provisions of that agreement shall prevail;
- Public service concessions/PPPs awarded by a contracting authority to another contracting authority, or to an association of Contracting Authorities, on the basis of an exclusive right which they enjoy pursuant to the legislation in force;
- Construction and exploitation of renewable energy sources according to the Law "On renewable energy sources", except hydropower plants with an installed capacity higher than 2 MW;
- Public works concessions/PPPs for the construction, operation, maintenance and rehabilitation of national roads where they present special importance for the country's road infrastructure.



## CHAPTER 4

## RATIONALE BEHIND APPLICATION OF CONCESSIONS AND/OR PPPs

The reasons which lead the contracting authorities to apply and award concession and public-private partnership contracts can be numerous. The common denominator in all cases is the fact that the realization of a project which involves the execution of works or public services can be performed with a higher level of effectiveness, efficiency and professionalism and with lower levels of cost by the public administration through the involvement of a private partner.

Analyzed below are some of the main reasons that justify the implementation of a partnership between public and private partners.

Public private partnerships as mutually beneficial relationships for the public and private sector and are an effective way to solve, on one hand, cases where there are lack of budget funds or available economic resources, and on the other hand, for the fulfillment of requests for public works or services and their timely provision. This causes an increase in the quality of the provided public works and raises the public access to them. The ability to transfer part of the risks, to use external financial resources and investment profits, and private sector intellectual capital, gives public-sector policymakers greater flexibility in allocating both human and financial resources.

Nonetheless, there exist also risks associated with public private partnerships carried over from the public sector, which may also include higher financial costs mainly due to the increase of the borrowing cost or the failure to fulfill expectations related to the equity return. The process for the preparation and the conduct of the competitive tender process is time consuming, requesting lots of human resources as well as good planning processes. For these reasons, transaction costs associated with the performance of a PPP are usually higher than costs encountered by the public sector for the performance of public projects through traditional public procurement projects.

In addition, the PPP may carry hidden fiscal costs caused by unforeseen events that may not have been anticipated during the contractual design phase. Also, public private partnership projects may be used by contracting authorities as mechanisms to avoid bypassing their borrowing limits, taking into account the off-balance sheet nature of PPPs.

PPPs do not involve the performance of an upfront payment by public bodies, but have instead a stream of such bodies' expenditures throughout the life cycle of the project. According to international accounting rules, for the majority of PPPs it is not required that these projects be included in the balance sheet of the public sector. Furthermore, VfM can only be achieved through good planning and careful project selection. The lack of a sound planning process or certain issues such as

politic interventions or instances of “personal gains” are referred to by the World Bank as factors that interfere with the careful planning of projects. Often, contracting authorities tend to accept too many fiscal risks when committing to these types of projects. Last but not least, PPPs represent VfM only in cases when the competition is effectively ensured in the competitive tender procedures. In this case, the efficient and transparent tender processes are a prerequisite toward achieving good outcomes in terms of risk allocation and VfM in the final contract.

In the following chart the main benefits and risks related to the performance of PPP projects are outlined and summarized.

Benefits of PPP-s	Risks of PPP-s
<p><b>Close the Funding Gap</b></p> <p><b>Ppps are used to indrtroduce private sector terchnology and innovation in providing better public services and improved operational efficiency.</b></p>	<p><b>Higher Financial Costs</b></p> <p>While private sector can make it easier to get finance, capital will only be available where operating cash flows of the project company are expected to provide a return on investment—cost of financing are higher.</p>
<p><b>Innovation &amp; Efficiency</b></p> <p><b>PPPs are used to introduce private sector technology and innovation in providing better public services and improved operational efficiency.</b></p>	<p><b>Higher Transactional Costs</b></p> <p>Development, bidding and ongoing costs in PPP projects are likely to be greater than for traditional government procurement processes – the government should therefore determine whether the greater costs involved are justified.</p>
<p><b>On- time Delivery &amp; Budget Incentive</b></p> <p><b>Incentivizing the private sector to deliver projects on time and within budgets</b></p>	<p><b>Potential Higher Fiscal Costs</b></p> <p>Due to PPPs long- term nature and their complexity, not all possible contingencies may be predictable at the outset and during the project. Unpredictable events may arise that were not known at the time of Financial Close.</p>
<p><b>VfM</b></p>	<p><b>Poor planning and Project Selection</b></p>

<p><b>Extracting long-term value-for-money through appropriate risk transfer to the private sector over the life of the project-from design/ construction to operations/maintenance.</b></p>	<p>PPPs do not substitute the planning and project selection process. Thus, poor planning and project selection is still a risk for public sector</p>
<p><b>Capacity Building</b></p> <p><b>Supplementing limited public sector capacities to meet the growing demand for infrastructure development</b></p>	<p>Failure to attain Competition for the PPP</p> <p>PPPs render VfM and the benefits laid out only if proper tender process has been the underlying path towards attaining an optimal structure and risk allocation.</p>
<p><b>Increased Competitiveness</b></p> <p><b>Creating diversification in the economy by making the country more competitive in terms of its infrastructure base as well as giving a boost to the industry.</b></p>	<p>PPPs are used to bypass borrowing limits</p> <p>Due to the off-budget nature of PPPs, if not carefully managed, government may use PPPs to bypass prudent borrowing limits.</p>

#### a) Insufficiency of funds by contracting authorities

The financial situation of contracting authorities, whose income is mainly based on contributions from the state budget, does not allow for the timely and efficient performance of public works or services in the best public interest. Budgetary funds allocated to central government ministries or to local governmental units often are not sufficient to cover costs for the implementation of all required projects that represent the public interest.

Insufficiency of funds is especially relevant in cases of large national, regional or local infrastructure projects, which need considerable long-term investment that exceeds the financial capacities and short-term forecast of contracting authorities' incomes. In reality this situation particularly affects local governmental bodies, which have as their main source of income unconditional annual grants, provided by the central government.

Moreover, big infrastructure projects need not only constant restructuring and maintenance, but are also in need of extension, renovation, modernization and adjustment in accordance with the economic development of the country.

Public private partnerships are efficient methods of procurement to bridge funding gaps. However, there are also risks associated with these types of projects including financial risks due to the higher borrowing costs, higher transaction costs or the inclusion of unforeseen fiscal costs.

Contracting authorities that usually cannot afford costs for the realization of projects through traditional public procurement, have at their disposal an additional option, by using PPPs. Public private partnerships can be performed by the contracting authority in a variety of contractual forms, completely or partially financed by the private partner, which can offer financing mechanisms that can be more suitable, compared to the traditional model of public procurement.

Financing by the private partner facilitates the prompt realization of those projects that, if based solely on scarce public funds, would be realized over a longer term, as a result of the dependence on annual funds provided from the central government. Since public private partnership projects do not foresee an upfront payment by government, and instead constitute a stream of expenditures for government during the life cycle of the project, there is a perceived easing of the financial burden at least during the early phases of the implementation of projects. Execution within a short period of public works or services produces an immediate advantage for end-users as well as for contracting authorities.

Furthermore, the possibility of contracting authorities to use private partners financing, reduces the risks associated with the increase of public debt, considering that state bodies, for the implementation of public projects, in cases of insufficient available funds, very often use the mechanisms of borrowing in financial markets. Most public private partnership projects, according to international accounting rules, do not require these kind of projects to be included on the balance sheet of the public sector.

#### **b) Poor planning**

Very often, the limited resources of the contracting authorities are used for some projects which are failing to achieve benefits compared to the encountered cost.

These situations may arise from a lack of planning and the poor coordination between state bodies' plans, strategies and projects. Coordination is needed in order to select the best projects that represent value for money and enable integrated development.

Public planning may also be influenced by the frequent amendments to their plans and strategies for development, as a result of frequent political changes.

Furthermore, the poor planning has caused misleading results in the assessment of some projects. As a result, benefits are often over-estimated, resulting in projects that are larger or more complex than is justified by a real demand for services, while costs are often under-estimated.

Another cause of poor planning is related to political interferences, personal interests and corruption. This may result in situations where, for political purposes or personal benefit, inefficient projects get selected, misrepresenting costs and benefits.

### **c) Weak management and inadequate maintenance**

In many cases, contracting authorities themselves manage public structures, works, assets and infrastructures or execute public works and services, as per their institutional competences.

It is a well-known fact that the direct management of public works or public services by state bodies in a free and competitive markets is not the best way to achieve satisfactory results. Public management has often demonstrated weaknesses, as a result of different causes, such as the incapacity to maximize revenues, a lack of professionalism in management, low efficiency, poor service quality, lack of an effective supervision, lack of competition or incentives for public managers, etc. Public management has traditionally been inferior in terms of results, compared with the management of private partners, who act as economic entrepreneurs with the aim of increasing quality, maximizing profits and ensuring careful economic management. Private entrepreneurs also offer advantages in terms of specific specialization in certain economic activities, which places them in a better position compared to contracting authorities.

In international markets, this conclusion is already accepted by many public authorities and the trend in the market is to direct the execution of public works or the provision of public services to the private sector, to be managed in collaboration with private partners to produce more satisfactory results, improve efficiency and lower costs for the public.

Another rationale for using PPPs is related to maintenance. Public facilities, assets, infrastructures and services need constant maintenance at satisfactory levels. In many cases, the level of maintenance from the public sector is inadequate, causing a reduction in the quality offered. A lack of planning and ineffective implementation of maintenance also increases economic costs, amortization and shortens the life expectancy of public assets, causing the need for the construction of new assets, which will incur substantial new expenses.

Insufficient funds, a lack of vision and poor planning in relation to the need for constant interventions, for the satisfactory maintenance of public assets and services is one of the issues encountered in the public sector.

In this case, the intervention of the private partners, who have the required economic and professional capacities, may significantly improve the maintenance situation, with lower costs and higher quality.

## CHAPTER 5

## PRINCIPLES AND ADMINISTRATIVE PROCEDURES OF THE PROCESS

The administrative process of evaluation and granting of a concession or a public private partnership is performed on the basis of the general principles and according to the detailed procedures set out by sector legislation on concessions and PPPs. Furthermore, to the extent provided, are applicable the provisions of the legislation on public procurement, in particular as regards the execution of tender procedures.

Moreover, Law 125/2013 provides that except for cases when it is expressly differently provided by the legislation on PPPs, in particular as regards the performance of the competitive tender procedures, the provisions of the public procurement legislation shall apply.

**a) General principles**

General principles, which should be implemented by the contracting authorities and the public administration during the exercise of their functions and competences throughout the identification process, and the assessment and granting of concessions/PPP, include the principles of transparency, non-discrimination, proportionality, efficiency, equal treatment, reciprocity and legal certainty.

*The transparency principle* is closely linked to the *principles of information, publication and public access*. This principle obliges all public bodies to exercise their administrative activity in a transparent manner, in close cooperation with natural persons and legal persons involved in these activities. The transparency principle refers to the performance of procedures in an open manner, guaranteeing the right to access information and the publication of information and data to the benefit of persons whose rights and interests are affected or may be affected by an action of the public administration. The public administrations' transparency during concession and PPP procedures produces some positive results, given that it draws into the competition and selection procedure more economic operators, thus influencing the increase of opportunities, fair competition, cost reduction and increases in the quality of works and public services. Moreover, transparency increases the commitment and the trust of the public as well as ensuring the implementation of control and monitoring mechanisms. Notwithstanding the above, the transparency principle is limited and combined with the implementation of other principles, such as the obligation to preserve state secrets, national security and defense interests, the protection of personal data and keeping trade or industrial property secrets.

*The principle of nondiscrimination* is closely related to *the equality principle*. It means that public bodies should treat all involved parties equally, fairly and

impartially. Under no circumstance can the public administration treat them in a differentiated way. This is especially valid in terms of gender, race, color, ethnicity, nationality, language, gender identity, sexual orientation, political, religious or philosophical convictions, economic, educational or social status, pregnancy, parental affiliation, parental responsibility, age, family or marital status, civil status, residence, health, genetic predispositions, disability, affiliation to a particular group or because of other differentiating cause.

*The proportionality principle* determines that every administrative action, which due to public interest needs or as a consequence of guaranteeing others' rights can limit an individual right or can harm legitimate interests, should be suitable to fulfill its purpose up to the necessary extent for the fulfillment of this purpose, avoiding to the maximum extent the legitimate rights or interests of the party, and in proportion with the need that dictates it.

*The efficiency principle* regards the achievement of successful results by the public administration. Pursuant to this principle, procedures must be properly carried out, in a timely manner with the least possible cost for the public body and the involved parties, in order to achieve what is necessary for a lawful result.

*The reciprocity principle* presupposes a relation between parties that is regulated by mutual legal relations. Reciprocity in public private relations is connected to the exchange at an equal measure, equal level, and proportionate of respective rights and obligations, engagements and benefits.

#### **b) Legal procedures**

*The legal safety principle* guarantees the due implementation of the law by the public administration. Pursuant to this principle, rules established by laws must be clear and accurate in order for individuals to identify clearly and unequivocally the rights and obligations established by the legislation, in order to act correctly and accordingly.

The process and the entire cycle of necessary actions in case of concession and PPP projects must be carried out in accordance with the steps and procedures well defined by law, which must be fully applied by the actors involved in this process. The entire administrative procedure implemented in concession and PPP cases is divided into several stages, to which concrete actions are applied, in accordance with the legal provisions.

Chronologically, the process starts with the *identification* stage of a project, which commences following a concrete proposal with the possibility for the realization of a project.

Further on there is the evaluation stage of the proposed project, during which *the project at hand is examined and the opportunity evaluation is performed* in relation to the feasibility of the submitted project. In cases where there is a positive evaluation of the project's feasibility, the process is followed by the

procedures of *awarding the concession/PPP*, including several procedural stages that commence with the performance of competitive procedures through the public tender and the evaluation of bids submitted by private entities. In cases of successful completion of competitive procedures, it is proceeded with *the stipulation* of the concession or PPP *contract*. The procedure does not end with the execution of the contract but includes a very important phase; *the management stage of the contract* whereby the effective implementation of the contract is monitored until the successful implementation of the project. After the finalization of a concession or PPP project, at the end of the respective contract the contracting authority can also perform an *ex post* assessment, focused in the analysis of positive and negative results produced by the contract implementation.

The identification phase					
<b>This phase commences with the receipt of a concrete PPP proposal</b>		Proposals may be submitted by the CA itself or other public bodies or investors as unsolicited proposals			
The evaluation phase					
<b>For the project evaluation CA and ATRAKO appoint a commission of experts</b>	The commission evaluates initially the project and drafts a summary report	If CA evaluates positively the project it is continued with the feasibility study	The commission drafts the feasibility study that provides details on the implementation of a project	When the outcome of the feasibility study is positive, CA resolves to continue the procedures	When the project requires financial support the project must be approved by the Ministry of Finances
The procurement phase					
<b>In this phase take place the tender competitive procedures, based on the public procurement rules</b>	CA announces the tender procedure and performs the evaluation of submitted bids		When the tender is successfully completed it is continues with the execution of the contract		



The contract management phase		
<b>The winner of the tender enters into a contract with CA</b>	Throughout the contract implementation CA performs necessary actions related to the contract management	CA monitors the due implementation of contract terms
The Ex Post Analysis		
<b>Following the contract termination CA performs an analysis of positive and negative outcomes of the contract</b>		

In the following chapters all procedural steps that must be followed are analyzed in chronological order and in a detailed manner, as well as the powers, rights and obligations which relate to the contracting authorities, other state bodies and private entities involved or participating in a concession or PPP project.

## CHAPTER 6

## THE IDENTIFICATION OF PROJECTS

The process of administrative proceedings in the implementation of a concession/PPP project commences with the identification stage, which starts with the submission of a concrete proposal to the contracting authority to assess the possibility of executing the proposal as a concession or PPP project.

**a) Proposing entities**

The initiative for the identification of potential Concession and PPP projects can be undertaken by certain categories of entities. In all such cases, the element that all of these entities have in common is the assessment of the proposal at all times by the competent contracting authority.

Firstly, proposals may be formulated by contracting authorities within their area of competences. Contracting authorities can identify those projects they deem necessary to be implemented through concession or PPP contracts. Moreover, a contracting authority may take into consideration the proposals delivered to it by central or local government bodies. In accordance with the provisions of the law 125/2013, proposals may be submitted to a contracting authority and by the Prime Ministry, by other contracting authorities and in general by central or local governmental bodies.

Similarly, concession or PPP projects may be proposed to the competent contracting authority by other categories of entities which are not part of the public administration. Hence, proposals may be submitted by local or foreign institutions or organizations having as the object of their activity the performance of financial, scientific and development activities. Such cases are identified by the legislation as solicited proposals, when contracting authorities request to interested private partners the implementation of a concession or PPP project.

Last but not least, are cases when the proposal of a concession or PPP project is submitted to the contracting authority by investors interested to implement such a project, as an unsolicited proposal. This case shall be addressed in one of the following sections.

In all above mentioned cases, it is the contracting authority, competent on the specific proposed projects, which is in charge of performing preliminary actions regarding the project identification and assessment.

Aiming at the coordination of works on concession or PPP projects, every contracting authority must notify the Public Procurement Agency every six months regarding concession/public private partnership projects that have been examined.

**b) Proposals identified from planning documents or studies of the public bodies**

Independent of the proposing entities, the draft idea of a concession or PPP may be a response to a need, lack, shortcoming or issue analysis identified through the planning process at the national, regional, local or sectoral level. These planning processes must comply with the policies, strategies and/or priorities approved at all governmental levels and that pertain to sectors and activity areas in which the implementation of concessions and PPPs are foreseen.

In addition, a potential project may be identified based on requirements to address certain issues detected in analyses performed by public entities, mainly in relation to the infrastructure situation, lack of services or the need for investments.

It is therefore imperative to ensure that unsolicited proposals align with the public interest, long term development goals and economic forecasting of the government, and are therefore subject to the same scrutiny from the contracting authority in the identification stage as solicited ones.

It is essential that persons and bodies that will be affected by the project should be consulted at an early stage and their views reflected in the PPP Assessment Report.

## CHAPTER 7

## THE EVALUATION OF PROJECTS

In this chapter, procedures implemented by contracting authorities during the evaluation phase of submitted projects shall be determined.

**a) The Establishment of the PPP Commission**

The body in charge for performing all actions related to the review, assessment and granting of a concession/PPP project is the contracting authority. That is, the body in charge as per the object of the concession/PPP project, in accordance with legal provisions determined by Law 125/2013 and DCM 575.

Based on these legal provisions and for the performance of the above-mentioned concrete actions, the contracting authority, in cooperation with ATRAKO, appoints a special PPP commission. The performance of actions by the contracting authority special commission aims at achieving two purposes.

First, procedural objectives are at the forefront given that the aim is for all concession/PPP procedures, including those related to the review, analysis, assessment, granting, signing and monitoring of the concession/PPP contract, to be performed by a special structure, hence through a single commission. Similarly, the latest amendments to the law are aimed at shortening the procedural terms of a commission, which has already set deadlines for the performance of its procedural actions.

This commission shall perform actions for the granting of concessions within 60 working days, and in case of complexity it may be postponed by 30 days, reducing significantly the terms compared to current procedures.

Second are objectives relating to the idea that the assessment of potential projects is to be performed by a specialized staff which possesses the required expertise to assess concessions and PPPs. For this reason, the legal provisions request that the said commission be composed of experts of the field, depending on the object and characteristics of the proposed concession/PPP, including members who are by profession lawyers, economists or specialized technicians.

In order to guarantee a high professional standard of the commission, during the procedures of the assessment and granting, the contracting authority must involve and cooperate closely with ATRAKO, which is the specialized body for the treatment of concessions and PPPs. It is for this reason that the legislation mandatorily requires the commission to have no less than two ATRAKO staff in its composition. In the event that a commission is established, the contracting authority addresses ATRAKO with a request for appointing ATRAKO members, a request that also needs to provide detailed information on the project.

In order to facilitate the decision-making and the internal organization of the commission, the commission must be composed of an odd number and have in total no less than 5 members. In the eventuality that projects are similar in their scope and nature, their assessment can be made by a sole commission.

The contracting authority should consider very carefully the appointment of PPP commission members and chairman since this process requires a high level of professionalism and representation in public administration hierarchy. Therefore it is recommended that the commission should have as its members, high level functionaries and also experts of the areas of the PPP project.

The documentation of the activities of the commission must be documented and recorded in minutes which needs to detail the performed activities and tasks, and should be signed by all commission members.

In order to avoid potential conflicts of interest, it is required for commission members to be appointed persons that do not hold any interest with regard to the exercise of the commission tasks or related to the project or related entities and activities. For this reason, in accordance with legal requirements regarding avoidance of conflict of interest, it is required that the commission members preliminarily sign under their full legal responsibility a statement guaranteeing that they have no conflict of interest.

In cases where the assessment of a project requires a high level of expertise in a certain field, as per the characteristics of specific projects, the legislation grants the contracting authority with the possibility to contract external consultants and experts.

#### **b) The Procedure for the evaluation of projects**

The commission must preliminarily verify that the submitted project fulfils the minimum legal requirements, thus:

- To pertain to one of the sectors determined by the legislation on concessions and PPPs;
- To present an investment value that exceeds the lower monetary threshold;
- To have a value which overcomes the low monetary threshold;
- To ascertain that the project is not included in any of the legal exceptions, as well as;
- To asses that the project does not overlap with other implemented projects or projects currently being executed.

In cases when projects fulfill these minimum criteria, the commission may proceed with the assessment.

To exercise the competences granted by law the commission performs the following tasks:

- i. Drafts a summary report on the project;*
- ii. Drafts a feasibility study;*
- iii. Determines the procedure type to be implemented during the bid;*
- iv. Drafts the tender documentation;*
- v. Evaluates submitted offers or requests for participation in the bid;*
- vi. Proposes to the contracting authority the selection of the bid considered as the successful one or the interruption of the procurement procedure, accompanied with a reasoned justification of such proposals*

Hereinafter are described in detailed the concrete actions to be performed by the commission during the evaluation phase of the concession or PPP projects, in order to exercise its rights.

#### *i. The Summary Report*

The commission is entitled to perform a preliminary evaluation of the submitted project. Based on the results of this preliminary evaluation, the commission drafts a summary report regarding the eventuality for the performance of the project. This report contains the necessary information related to the necessity of the project realization and the appropriateness of implementing the project, as well as taking into consideration the options and alternatives to its realization.

The report must contain at least the following crucial elements:

- A description of the current sector situation of the presented project, identifying and evaluating shortcomings and needs for development;
- Mid- and long-term forecasts for the specified sector;
- A general description of the submitted project;
- The identification of the legal basis that regulates the objective of the proposed investment;
- The nature of the institutional function requested to be performed by the private partner;
- A description of state properties proposed to be included in the project, and of their current user;
- Identification and evaluation of strategic and operational benefits foreseen to be achieved by the implementation of the submitted project;
- An evaluation of how the project will coordinate with general policies in the sector or with regional investments;
- A forecast of technical and economic scenarios for the implementation of the project;
- A preliminary evaluation of costs and of the projects' financial sustainability;
- A preliminary financial and/or economic analysis;
- Alternatives for the allocation of the financial, technical and operational risks, through the public and private partnership;
- Recommendations related to implementation methods and models;
- In case of unsolicited proposals, the evaluation must consider the possibility of granting the bonus in favor of the proposing entity as well as of the percentage of this bonus' points.

Detailed data that must be contained in the summary report are detailed in the specific annex attached to this Guideline.

After the drafting of this report on the draft project the concession/PPP commission sends this report for assessment to the competent contracting authority.

Based on the information of the summary report drafted by the concession/PPP commission, the contracting authority resolves in relation to the assessed project.

Following the review of the summary report the authority may select one of the below alternatives:

- To reject the project implementation

The decision of the contracting authority to reject the implementation of the project is usually related to the negative assessment of the project. This refusal may depend on several causes and reasons, such as the lack of the projects' legality, suitability, need, feasibility and/or profitability.

- To postpone the project implementation

The contracting authority may interrupt or postpone the implementation of a project due to various reasons. These reasons may relate to the impossibility or difficulty of the contracting authority to implement the project within the period which it has been assessed, or the need for the integration into the project of information, data or elements which are not available at the moment, or because the project is not considered as necessary for the time being, due to other priorities of the contracting authority.

- To return for completion the unsolicited proposal

The unsolicited proposal is returned for completion to the proposing entity in cases where it does not comply with the minimum requirements of article 10 of DCM 575. According to this provision, in order to be evaluated by the competent contracting authorities the unsolicited proposals must fulfill the following minimum requirements:

- The proposed project must concern sectors for which the legislation allows the possibility to implement concession/PPP projects;
- The unsolicited proposal must not relate to projects for which has already commenced or has been initiated a concession/PPP procedure;
- The unsolicited proposal must be submitted to the competent contracting authority as per the legal provisions;
- The unsolicited proposal must be presented as per the format required by the law thus; either in the developed format<sup>1</sup> or as a feasibility study.



The entity that has submitted the unsolicited proposal is guaranteed a 30-day term to complete the unsolicited proposal, a term that commences from the date such a proposal is returned by the contracting authority.

- Continuation of procedures for the project implementation

In cases where the contracting authority issues a positive evaluation of the submitted project, the continuation of legal procedures regarding the project implementation may proceed.

Further procedures related to the implementation of the project are effectuated by the same commission, established for the assessment of the submitted project. Following the finalization of the summary report by the concession/PPP commission, in cases where the contracting authority has resolved positively on the implementation of the submitted project, the commission continues its work on performing further actions foreseen by the legislation, as detailed below.

#### *ii. The Feasibility Study*

The following chronologic action in the assessment procedure of concession/PPP projects is the drafting of a feasibility study on the presented project.

The drafting of a feasibility study by the commission aims at putting at the disposal of the contracting authority a document that contains an analysis of all composing aspects of a proposed project, based on which the contracting authority will issue its decision (positive or negative one) on its engagement on the respective project.

With regards to the structure and composing elements of the feasibility study, it is advised that it be drafted based on the standard template published by ATRAKO on its web page.

At the practical level, with regards to its content, the feasibility study is a document that contains a complete analysis of the project and an ulterior assessment that analyses in detail the information and data contained in the summary report of the commission.

Firstly, the feasibility study must assess general conditions and assess whether the realization of a concrete project is in the public interest or not.

Secondly, the feasibility study must assess if the project is compliant with national and/or sectoral strategic objectives set out by the planning documents, such as policies, strategies, or plans approved by the central or local government.

Thirdly, the feasibility study must identify the main characteristics of the project under assessment and should be accompanied by a deep analysis of integral elements, including technical, economic and financial aspects, a risk analysis and the project's social and environmental impact.

Finally, the study must produce a reasoned Value for Money assessment, based on the analysis of whether the project under evaluation will be more economically advantageous if it is implemented in the form of a concession/PPP, compared to the traditional public procurement model or other alternative mechanisms.

- *Timelines for drafting the feasibility study*

The latest amendments to the concession/PPP legislation aimed to determine clear timelines and to shorten the procedure for the assessment of projects. As a consequence of these provisions the feasibility study must be drafted by the concession/PPP commission within 60 working days, a term that commences from the date of the establishment of the commission. In cases when the project under assessment proves to be very complex, the above 60-day term can be extended by a maximum of 30 additional working days.

Exceptionally, if the object of the concession/PPP is related to a hydro power plant, the above deadlines start from the date of receipt of technical opposition prepared by the responsible state structures.

- *Content of the feasibility study*

With regard to the content, the feasibility study should contain the following elements:

A general description of the assessed project;

- A summary of operational stages required for its performance;
- A detailed technical analysis;
- A detailed economic and financial analysis;
- A detailed legal analysis;
- A structure analysis of Concession/ PPP
- Environmental and social impact assessments;
- The Commission's conclusions and recommendations with regard to the assessed project.

Detailed data that must be contained in the feasibility study, the methodology used and other necessary clarifications are provided in detail in the specific annex attached to this guideline. Also in the annex attached to this guideline is a template of the feasibility study drafted by ATRAKO, which can serve as an example to contracting authorities for drafting their feasibility studies for the evaluation of concession and PPP projects.

The legislation pays special attention to and details by specific provisions some integral elements of the feasibility study, namely: the technical analysis, the economic and financial analysis and the social and environmental impact.

- *Technical analysis*

With regards to the technical analysis which should be part of the feasibility study, special provisions<sup>1</sup> determine that the aim of such document is to evaluate and prove by way of a detailed analysis that the assessed project can be implemented by using the proposed technologies and free of any unreasonable technical risks.

- *Economic and financial analysis*

The aim of the economic and financial analysis is to determine the “value for money” of the project, thus to determine if the contracting authority will receive the maximal possible profits by opting for a public private partnership project.

The value for money of the project shall not only consider the value of works or of public services of a project, but shall also assess other financial and economic elements of the project, which includes the quality, costs, the use of resources, the fitness of the contract purpose and objective of the contract, as well as the necessary time for its performance.

The final assessment of the economic and financial analysis serves to determine if all these elements combined, throughout the duration of the project, constitute the best economic value.

The financial and economic analysis is composed of these main elements:

- Direct investment costs
- Direct maintenance costs
- Direct operational costs
- Indirect project costs
- Project income
- The project economic viability
- The affordability
- The financial fitness
- Risk analysis
- Sensitivity analysis
- The evaluation of the model for the project implementation; PP or PPP.
- *Environmental and social impact assessments*

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<sup>1</sup> Article 5 of the DCM 575.

One of the most important elements of the feasibility study is related to the identification and assessment of the social and environmental impact of the project. For this purpose, the analysis of the social and environmental impact should identify the impact, consequences and potential effects with negative, harming or altering consequences for the environment, as well as respective measures for the diminishing and avoiding such consequences. The analysis of consequences should be focused in particular on the most important environmental components such as the population, air, land, landscape, fauna and flora, biodiversity, endangered species, and sensitive and legally protected ecosystems. Preventive measures need to be identified to protect the environment in accordance with the standards and specific provisions of the Albanian legislation and those of the European Union.

The analysis must also include the identification and assessment of the social impact of the project on the territory and its inhabitants. This analysis is focused at the study of the social aspects that include, among others, the protection of human rights, the health of the population and community, safety, employment, consequences for vulnerable groups or categories in need, changes in the status of the land, involuntary resettlement, and the protection of the cultural property and heritage.

- *Expected outcomes of the feasibility study*

The outcome of the feasibility study is of utmost importance for the contracting authority as this document shall serve as the basic document to evaluate if a certain project should be implemented or not. Moreover, as we shall note here below, the analysis, results and assessments of the feasibility study shall be useful in order to draft a fair PPP contract that shall regulate the project implementation. As a result, the drafting of a complete and accurate feasibility study, shall have impact also during the project implementation phase and the management of the contract monitoring.

In conclusion, based on the information, analysis and above actions, the feasibility study should be a document that can show and argue if:

- The project is suitable and necessary for the contracting authority;
- The project is feasible from a technical, economic, financial and commercial point of view;
- The project does not have a negative social and environmental impact;
- The concession/PPP alternative is more beneficial compared to other mechanism.

Moreover, the feasibility study shall contain the following main elements:

- To determine the type and object of the concession/PPP to be implemented;
- To assess the direct financial risk of the project and the implications for the central and local state budgets;
- To determine the forecasted value of the contract;
- To determine the proposed duration of the contract;
- To summarize the information that should be included in the tender documents.

Only in cases when as the conclusions of the feasibility study attest that the project does fulfill all these requirements can it be succeeded by the procedure for granting the concession/PPP, by the contracting authority.

## CHAPTER 8

## UNSOLICITED PROPOSALS

**a) The submission of unsolicited proposals**

Proposals of concessions or PPPs can be submitted to contracting authorities by private entities interested to be part of the concession or PPP implementation in the quality of the private partner, in the format of unsolicited proposals.

Proposals should be submitted to the contracting authorities competent to resolve on the specific unsolicited proposal. Prior to assessing the unsolicited proposals, contracting authorities should check the fulfillment of minimum legal requirements, in accordance with provisions of article 10 of DCM 575.

Firstly, the authorities should verify if the submitted unsolicited proposal is part of those sectors for which the legislation recognizes the opportunity to perform the concession and PPP procedures, in particular in accordance with provisions of articles 4 and 5 of the law 125/2013.

Nonetheless, the legislation recognizes in special cases the possibility for contracting authorities to propose to the Council of Ministers through the line ministry regarding a project's area of activity, if considered reasonable and necessary, to approve the implementation of concessionary projects or PPPs, also in other sectors besides those expressly approved by the law. In such cases, the Council of Ministers' approval regarding the performance of concession or PPP procedures, for a project that is not part of the sectors approved by the law, must be granted by a special decision.

Further on, contracting authorities should verify if the unsolicited proposal is related to a concession or PPP for which respective legal procedures have commenced or have been published. Besides this preliminary verification, contracting authorities should verify the fulfillment of requirements regarding the format of unsolicited proposals. Such proposals may be submitted by private entities in one of the following forms:

*i. Unsolicited proposal with a feasibility study*

In this case, the unsolicited proposal should contain a fully developed feasibility study, which must include the reasoning of the decision for granting of the concession/PPP. This feasibility study should be drafted and must contain all elements required by the law, as described in the above section.

*ii. Unsolicited proposal in a developed format*

The unsolicited proposal in a developed format contains a range of technical, economic and financial analyses, as determined in article 11 of DCM 575. The unsolicited proposal submitted in this form contains in detail the following:

- A description of the current situation, including also the identification of needs, shortcomings, and loopholes, to analyze the development context and when convenient to provide a market overview;
- Mid- and long-term forecasts of specific needs;
- A general description of the proposed project;
- The expected strategic and operational benefits of the project;
- Coordination of the general, sector or regional investment policies;
- Technical analysis;
- Environmental and social impact assessments;
- Economic and financial analysis.

The technical analysis, the social and environmental impact assessment and the economic-assessments should be drafted in accordance with provisions of articles 5, 6 and 7 of the DCM 575.

#### **b) The procedure for the assessment of unsolicited proposals**

By analogy to the procedure for the assessment of the concession and PPP projects, described at the above Chapter 7, the contracting authority and ATRAKO shall establish a special commission, which implements tasks and follows legal procedures.

Similarly, during the assessment of the unsolicited proposals the commission must draft a summary report regarding the specific project. The summary report shall validate the satisfaction of the conditions laid down in Article 10 of the DCM 575 and must determine the verification of the following elements:

- The project objectives to be clearly defined and feasible for implementation;
- The project objectives serve the public interest and fit within the strategic priorities of the contracting authority;
- There are no restrictions or legal obstacles regarding the project implementation and/or to enter into a concession/PPP project;
- The project can be implemented as scheduled using the proposed technologies and not facing any unreasonable technical risks;

- The project presents economic sustainability;
- The project is able to attract the guarantors/financial supporters by providing the reasonable financial return;
- The proposed level for the risk allocation between the public and private partner is logical and reasonable;
- The adequate financial support can be arranged within the limited budget and other fiscal obligations.

During the time of the preparation of the summary report, the contracting authority may request additional information to the proposing party, for the completion of the report.

Based on the assessment summary report drafted by the commission, the contracting authority may decide to refuse the unsolicited proposal, to return for completion of the unsolicited proposal or to accept the proposal as provided in the hereof Chapter 7.

In all these cases, the decisions of the contracting authority are communicated in writing to entities that have submitted unsolicited proposals.

In cases when the contracting authority decides to accept the unsolicited proposal, it continues with the procedure through the drafting of a feasibility study. For the drafting of such a study, the concession/PPP commission may use the information contained in the unsolicited proposal, under the condition to carefully verify the information, the data, hypothesis, assumptions, solutions, indicators, analysis and results of the unsolicited proposal to be accurate, implementable and suitable for the project execution. Independent from the data submitted by the private entity in the unsolicited proposal, the feasibility study must be considered as a product of the contracting authority.

The feasibility study must be drafted in accordance with legal requirements as set out in the above Chapter 7 and should result in a complete document, which shall indicate that:

The project is suitable, necessary and fulfills the requirements and policies of the contracting authority;

The project is feasible in terms of technical, economic and commercial point of view;

The project does not have a negative social and environmental impact;

Granting of the contract by concession/PPP is economically more favorable than granting it by public procurement or by other mechanisms;



Terms regarding the completion of the feasibility studies of unsolicited proposals are similar to the ones mentioned here above, of 60 working days from the date of the establishment of the concession/PPP commission, a term that can be postponed by up to 30 working days in the case of complex projects.

Based on the feasibility studies, is calculated the estimated value of the PPP project, including all possible changes and contract options, excluding VAT. The estimated value of public-private partnership is calculated according to the provisions of public procurement legislation.

Based on the feasibility study outcomes, if proven that the project complies with all such requirements and it receives a positive assessment, then contracting authorities can continue with the procedure for granting the concession/PPP.

Even in the case of unsolicited proposals, the contracting authorities shall send the project for approval to the Ministry of Finance, should financial support be requested for the realization of the project.

In cases where an unsolicited proposal is accepted, and procedures for granting the concession or the PPP are continued, the proposing private entity will become subject to competitive tender proceedings, to be undertaken through a transparent and non-discriminative process, in which other private entities interested in implementing the respective project shall also be invited to participate and to submit offers.

## CHAPTER 9

## PROJECTS REQUIRING FINANCIAL SUPPORT

**a) The preliminary approval of the Ministry of Finance**

Concession/PPP projects assessed by contracting authorities and which have received a positive rating should receive the preliminary approval of the Ministry of Finance before passing into the next stage, that of awarding the concession/PPP when there is need for financial support, regardless whether these proposals are solicited or unsolicited ones.

According to the legal definition, financial support shall be considered the monetary or non-monetary amount and/or the financing provided by the public sector, including but not limited to subventions, financial guaranties or other ones, capital contributions and the transfer of the property rights.

The preliminary approval of the Ministry of Finance regards only the evaluation of fiscal aspects of the project, such as: affordability, sustainability, and fiscal feasibility concerning immediate and urgent implications and fiscal risks of the project.

The request for financial support is submitted to the Ministry of Finance in writing, based on conclusions of the feasibility study drafted by the contracting authority. For this purpose, the contracting authority hands over to the Ministry the feasibility study prepared and its annexes, and the draft of the contract for the implementation of the concession/PPP. The feasibility study must be fully developed and should contain the reasoning of the decision for granting by concession/PPP, a risk analysis, information on existing concession/PPP projects and their respective budget commitments. In conformity with the provisions of DCM 575, prior to submitting a PPP project requiring financial support to the MoF for approval, the contracting authority shall ensure that the project costs have been planned to be covered within the approved annual budget, as well as within the medium-term expenditure ceilings approved by the Council of Ministers.

In cases where it is considered necessary and when this information is with the contracting authority, the Ministry of Finance may request additional information. The additional information that may be required is mainly related to:

- Projects, the documentation or the contract descriptions;
- Special purpose requests of the entity;
- The purchase and the transfer of property rights, properties, ownership rights or other real rights;
- Service and maintenance standards;
- Mechanisms for the calculation of the availability fee;
- Requirements regarding insurance;

The request and the accompanying documentation should be submitted in written form and in electronic format (CD or other similar forms).

The Ministry of Finance verifies the submitted documentation and if shortcomings are identified it may request their completion.

Moreover, in cases where the project has been drafted with the assistance of ATRAKO or of external experts, the Ministry of Finance may request through the contracting authority their opinion regarding determined project issues, which are important regarding the analysis to be performed by this ministry.

#### **b) The requests assessment procedure**

The Ministry of Finance evaluates requests for financial support by performing its analysis and assessments in accordance with the provision of the sector legislation on concessions/ PPPs.

The project evaluation by the Ministry of Finance is based on the feasibility study data and is focused on the following aspects:

- The evaluation regarding the immediate and potential impact on the purposes of the assessment of their affordability and sustainability, as well as for budgeting purposes such obligations and undertakings, when possible;
- To define the fiscal sustainability in relation to the compatibility of the envisaged financial support (budget allocations) including its risks, budget/debt ceilings determined by the budget rules;

- To determine the fiscal sustainability and feasibility regarding long-term projections (cash flow) and budget capacity forecasts (macroeconomic) and the ability to support the financial support service and other contractual commitments provided by the project;
- The risk analysis, mainly those undertaken entirely or partially over by the contracting authority toward the assessment of the probability of their occurrence and of costs, as well as in relation to the fulfillment of requirements for the off-balance sheet treatment.

The results of these evaluations serve the Ministry of Finance also during the drafting process of the mid-term budget program and of the annual budget, given that the Ministry should take into consideration the maximum limit of total direct obligations, including but not limited to the payment of availability fees of the public private partnership, which can be issued at the central and local level.

#### **c) Terms for the assessment of requests**

The term for granting the preliminary approval of financial support by the Ministry of Finances is no later than 40 days from the date of the receipt of all required documentation. This term can be extended by 15 days in cases when the Ministry addressed the contracting authority with a request for the completion and for provisions of clarifications regarding the documentation.

#### **d) Decisions of the Ministry of Finance**

At the completion of the assessment process, the Ministry issues a decision which can be the approval or refusal of the submitted project. The decision of the Ministry should be reasoned.

The Ministry of Finance approves the submitted projects in cases when the estimated amount and the modality for the provision of the financial support are affordable and sustainable. The approved projects are published at the web page of the Ministry, within 20 days from the date of approval. The projects are considered to be tacitly approved in case that the Ministry of Finances does not issue a decision within the above legal terms.

The Ministry of Finance rejects requests and opposes projects if the estimated amount and the payment modality of the projects' proposed amount are unaffordable and/or unsustainable or if the probability of risks undertaken by the public partner in the project is such that it considerably endangers the affordability and/or sustainability of projects. The rejected projects can be subject to necessary amendments and be resubmitted for approval with the Ministry of Finance.



## CHAPTER 10

## TENDER PROCEDURES REGARDING PUBLIC PRIVATE PARTNERSHIPS

As described in the foregoing chapter, when following the procedure for the positive assessment of the PPP project by the contracting authority, the procedure is continued to the stage of granting a PPP.

The procedure for granting the PPP foresees the performance of a public tender in which commercial companies interested in the implementation of that PPP project are invited to participate in the competition.

Throughout the development of tender procedures, specific procedures are based on provisions of the legislation on public procurement, except when they are differently provided by the legislation on concessions and PPPs. Therefore, either when a contracting authority aims to realize a PPP contract or when it aims to realize a public procurement (PP) contract, in both cases the tender procedures take place according to the same procedure that is regulated by the public procurement legislation.

Preliminarily, it needs to be stressed that as regards tender procedures, provisions of the law 125/2013 expressly determine the following:

- The procedure for granting a PPP commences with the publication of the contract notice and in the case of a positive closing it is concluded with the publication of the winner notice, or in negative case it is interrupted by a decision of the Contracting Authority;
- With regards to awarding the PPP, during the tender procedure the contracting authority may use the open procedure, the restricted procedure, or the negotiated procedure with preliminary announcement of the contract notification;
- In case of PPP contracts having as object public works the minimum term for the submission of offers is not less than 30 days from the date of the publication of the contract notification;

- Evaluation criteria for awarding the most economically advantageous PPP bid can be based on several criteria. In the tender documents the evaluation coefficients and respective scores for each of the applied criteria should be preliminarily specified;
- In case of unsolicited proposals, the proponent shall compete and participate in the tender jointly with other interested bidders. However, in cases when the unsolicited proponent has been granted a bonus by the Council of Ministers, it participates in the tender taking into account the points of this bonus, up to 10% of the total tender points.
- Even during the performance of the tender procedure, it is the PPP Commission established within the contracting authority that follows the legal procedures on behalf of this body.

The public procurement legislation is based mainly on the following normative acts:

- Law no. 9643, dated 20.11.2006 “On the Public Procurement”, as amended;
- Decision of the Council of Ministers no. 914, dated 29.12.2014 “On the approval of public procurement rules”;
- Decision of the Council of Ministers no. 918 dated 29.12.2014 “On the electronic performance of public procurement procedures”;
- Standard tender documents on concessions/PPPs approved by the PPA.

#### **a) Tender Procedures**

With regard to the type of procedure to be executed during the tender procedure, Law 125/2013 in Article 22 provides that for PPPs contracting authorities may use these three procedures:

- Open Procedure;*
- Restricted Procedure;*
- Negotiated Procedure, with preliminary announcement of the contract notification.*

Therefore, these three types of procedures, open, restricted or negotiated with preliminary announcement of the contract notification are the only procedures that may be executed in cases of concessions and PPP awarding.

In compliance with the legislation in force, the determination of the procedure to be executed for a given project during the tender procedure is performed by the PPP commission established at the Contracting Authority.

The open procedure is a procedure which can be used for all types of contracts and the legislation recommends to be used as the standard procedure to be used by contracting authorities, while other procedures may be used only in determined cases for the selection of which contracting authorities should provide a reasoned justification.

The restricted procedure may be used when it is necessary to make a distinction between the selection phase, during which the qualification of candidates is evaluated, and the bid evaluation phase when the winning contract will be decided. On the other hand, the negotiated procedure may be used only in particular circumstances, pursuant to the legislation on public procurement. The latter procedure is most often applied and resorted to across the EU when tendering for PPPs and concessions.

However, the open procedure internationally and within the EU is rarely used for application to procurement of PPP and concession projects, which are very complex and requires further specifications, which can be managed better during more than one procedural stage.

The above procedures are detailed by the public procurement legislation as follows:

*i. The Open Procedure*

For the open procedure, interested private partners are notified and may participate in the process after fulfilling the requirements of the tender documentation. This procedure takes place in one single phase.

In an open procedure, the contracting authority publishes a contract notice and all interested bidders may submit their bid. After the expiration of the maximum term for the submission of bids, the contracting authority verifies the fulfillment of the required criteria, and following evaluation of submitted bids, selects the winner of the tender.

Open procedures are not conducive to the application of, PPPs and concessions since these are complex types of procurement that require bid optimization which is required in terms of the processes that cannot be taken account in open procedures.



## *ii. The Restricted Procedure*

The restricted procedure is a procurement procedure that takes place in stages. The use of this procedure is justified only when forecasted circumstances are verified in the public procurement legislation. These circumstances are verified in cases when:

- Due to their particular and complicated characteristics, the requested works or services can be provided or executed only by some private partners which possess the required technical, professional or financial capacity;
- It is economically more profitable for the contracting authority to initially evaluate the capacity and qualifications of interested entities and then to invite to submit bids only those which fulfill the required specific qualifications.

For the above reasons, the restricted procedure must not be used in cases when requested works or services are easily found in the market and in cases when there are technical specifications or general and well known standards in the market.

In the restricted procedure, the contracting authority publishes a contract notification in which is described the objective of the contract, selection criteria, evaluation criteria for determining the winning bid, as well as the invitation to express the interest to participate. In this phase, every interested entity may express its interest to perform the contract, submitting a request for participation in the first qualification phase.

At the conclusion of the submission of participation requests, the contracting authority selects the candidates which fulfill the requested requirements. Following the pre-qualification phase and in conclusion of the appeal terms, the contracting authority sends an invitation to submit bids only to these selected entities.

At the end of these terms, the contracting authority evaluates the submitted bids and selects the tender winner.

## *iii. The Negotiated Procedure, with preliminary announcement of the contract notification*

The negotiated procedure with the preliminary announcement of the contract is a procurement procedure that is executed in stages. Also in this case, such a procedure may be implemented only upon the verification of the requirements set out by the legislation on public procurement.

The cases provided by the legislation regarding the implementation of this procedure are the following:

- When after the performance of two consecutive procedures, opened or restricted ones, only invalid bid offers have been submitted;
- The contract nature does not preliminary permit the accurate determination of the total value;
- The contract nature does not preliminarily permit the accurate determination of specifications;
- When the contract nature serves only toward research, testing or development and does not relate to the achievement of benefits or the recuperation of research and development costs;

In this procedure, the contracting authority negotiates with the bidder to adjust their bids with its requirements aiming to select the best offer, in accordance with article 55 of this law. Negotiated procedures, as applied in many EU countries for the procurement of PPPs, recognizes that PPP and concession contracts involve legal setups promoting long-term relational commitments among two or more parties. The parties must shift from being parties to being partners, a significant tool for maximizing the output from a long-term strategic relationship. Sharing information via negotiations is a relevant tool that is used to create final partnering in a PPP. Even in Europe, the public procurement directive 2014/24/EU shows that the EU Commission has recognized that there is a great need for contracting authorities to have additional flexibility in choosing a procurement procedure, which allows for negotiations. *"Member States should be able to provide for the use of the negotiated procedure with negotiation or the competitive dialogue, for PPPs and in situations where open or restricted procedures without negotiations are not likely to lead to satisfactory procurement outcomes."*

An efficient PPP or concession project is dependent on negotiation and a well-functioning interrelationship between the parties. The interrelationship depends on both the task, and the contract regarding the project. The negotiations of the PPP contract must result in a joint goal benefitting, or removing the opposing interests among, the parties. When optimizing the project or the transaction, the parties can focus on a common interest instead of their own interest. For example, in a traditional building contract the building owner will demand the lowest price and the contractor will set the highest possible price.

The PPP negotiations seek to create an improvement in the final contract and share the risks and benefits among both parties. In a traditional contract the supplier is obliged to deliver the asset at the right time, place and condition, otherwise he/she will be in breach of contract. The asset owner will deliver the right payment at the right time and place. Neither of the parties have an incentive to deliver a better solution than agreed upon. The communication with each of the participants in this procedure must guarantee equal treatment, non-discrimination and the confidentiality of the information for all bidders.

The procedure commences with the publication of the contract and the contracting authority may execute it in various phases, reducing the number of bid offers subject to the negotiation, but these procedural phases must be set out in advance in the tender notification and the announced specifications.

After the closure of the qualification phase, the contracting authority invites the selected candidates to submit their bids. The contracting authority may negotiate on an individual basis with each of the shortlisted bidders until it determines the winning bid.

Also in this case, the participation terms for such procedure are related to the contract value and are as follows:

- For contracts of a higher value than the high monetary threshold the minimum term for the submission of the request for participation is of 20 (twenty) days from the date of the publication of the contract notification;
- For contracts whose value is situated between the higher and lower monetary threshold, the minimum term for the submission of the request for participation is 15 (fifteen) days from the date of the publication of the contract notification;

In cases when notifications have been drafted and published by electronic means in accordance with the format and the electronic transmission procedures, these terms may be shortened by 5 (five) days.

In all these cases, independently of the type of the procedure that has been executed by the Contracting Authority to continue the process for the selection of a PPP bidder, at least one valid bid needs to be accepted. It needs to be highlighted that in any case, even when PPPs are awarded whose object of activity is the performance of public works, independent from the type of the procedure that has been implemented, the term for the submission of bids cannot be less than 30 days from the date of the publication of the contract notification.

#### **a) Tender Documents**

For the performance of tender procedures, besides the competence to determine the tender procedure that shall be executed, the PPP commission established under the Contracting Authority must also draft the tender documents based on the standard concession/PPP documents published by the Public Procurement Agency.

Throughout this phase, the commission continues to be assisted by the Agency for the Treatment of Concessions that cooperates with the PPA in the drafting and approval of the standard tender documents on concessions and PPPs.

Tender documents are published electronically in the electronic procurement system of the contracting authority as well as in the Public Procurement Bulletin, the publication where all public notifications on public procurements performed by the contracting authorities in the Republic of Albania are published.

The Public Procurement Bulletin is published every Monday on a weekly basis, as well as in any other case whenever needed. In the Bulletin, are published: the tender documents, contract notification, the announcement of the winner, the announcement on the contract that has been executed, the annulment announcements as well as the list of the economic operators that have been sanctioned and banned from the public procurement.

Based on provisions of DCM no. 130 dated 12.03.2014, the publication of documents on the concession/PPP competitive procedures as well as the submission of bids for these procedures is performed by electronic means.

Tender documents must contain *general information* and *specific information* on the PPP.

*i.* The General Information:

The general information of the tender documents includes:

- The contract notice;
- The invitation to submit a bid (in the case of procedures that take place in phases);
- Instructions for the candidates/bidders;
- General qualifying/participation criteria;
- The form for stating the conflict of interest;
- The form of the economic bid;
- The form for the bid insurance;
- The form for the notification of bidders/candidates' disqualification;
- The complaint form;
- The winner notice form;
- The description of the general and specific terms of the contract;
- The form regarding the contact insurance, and;
- The form for the announcement of the executed contract.

The content and the element of these documents are specified in detail by the public procurement legislation. However, below are described in a summarized form the main elements of these documents

- *The Contract Notice*

The tender procedure commences with the announcement of the contract notice by the Contracting Authority. The publication of such a notification aims to make public the intention of the contracting authority to grant a certain PPP project.

The contracting authority performs the notification of the contract using the standard form approved by the contracting authority, form that is published electronically in the Public Procurement Bulletin together with the tender documents.

The notification of the contract and of tender documents is uploaded by the contracting authority in the electronic public procurement system published by PPA.

The contract notification must contain all necessary information granting the economic operators with the opportunity to decide whether or not to take part in the public procurement proceedings. In this notification at least the information set out in Article 24 of the Law 125/2013 must be included. The notification must contain general data of the PPP contract, such as: the contracting authority, responsible persons of Contracting Authority, the type, the object, the location and term of the PPP, the contract value and the selection criteria. Moreover, as regards to bids that should be submitted, it needs to specify the following information: the delivery term, the address and the delivery modality, information and data that must be included, the time and place for the public announcement of bids, the criteria regarding the disqualification of bidders, the type and the value of the bidders guarantees, the procedure and terms for the evaluation of bids.

In cases when the value of PPP contracts is situated above the high monetary threshold of public procurements, a summary of the contract notification should also be published in also at least one newspaper with Europe-wide distribution. The high monetary threshold is currently set at the amount of 1.200.000.000 (one billion and two hundred million) Lek for public works contracts, and of 200.000.000 (two hundred million) Lek for public service contracts.

- *The Invitation to Bid*

The invitation to bid is a document that is used in case of execution of tender procedures that take place in phases. This invitation is sent only to those candidates who have been shortlisted in the pre-qualification phase during the procurement procedure. The bid invitation should contain the necessary information in order to enable the selected candidates to submit their bids.

- *Instructions for Bidders*

The instructions for bidders, or for candidates in the case of the tender procedures in phases should contain all information, data and descriptions regarding the drafting of the bid, indicating the composing elements of the bid, the modalities and required forms as well as the actions prohibited by law. In addition, the instructions must also provide information on the review and repeal procedure.

- *General qualifying/participation criteria*

The general qualifying/participation criteria contain the list of legal and administrative documentation requested to the bidders in order to participate in the procurement process.

- *The Conflict of Interest Stating Format*

The statement of the conflict of interest by bidders aims to avoid any conflict of interest incidents, as per the respective legislation in force.

- *The economic bid*

The economic bid contains the value of the submitted bid that should be detailed in the detailed list of specific prices offered.

- *Bid Bond*

The contracting authority may request to bidders to submit the bid bond as a deposit or bank guarantee, when the contract value is higher than the high monetary threshold. The bid security value is 2 (two) % of the contract value. The tender documents should specify the validity period, the nature, form, value and other essential terms of the bid bond.

The contracting authority shall call on the bid bond in case of the withdrawal or changes to the submitted bids after the expiration of the final term, the refusal to execute the contract, failure to submit a bid security when the respective bid has been announced to be the winning one, or in cases of non compliance with any other compulsory term prior to the execution of the contract, expressly set forth in the tender documents.

The contracting authority reimburses the bid bond to those bidders that are not the winners of the tender, as well as to the winning bidder who must replace it with the performance bond.

- *The disqualification notification for bidders/candidates*

This notification contains a description of cases and reasons that justify the disqualification of a bidder or candidate during the public procurement procedure, based on the criteria set forth by the legislation.

- *The complaint form*

Bidders or candidates are entitled to submit with the contracting authority complaints against actions or non actions of the latter, by way of a standard form containing the necessary instructions for its completion.

- *The notification of the bid winner*

At the conclusion of the tender procedures and the selection of a winning bid the contracting authority notifies the winning bidder in relation to the admission of its bid and regarding the contract execution, as per the standard form that is published in the Bulletin of Public Notifications.

After the publication of the winner the contracting authority invites the winning bidder to sign the contract, but not later than 30 (sixty) days from the date of the publication of this notification.

- *General terms and special terms of the contract*

General and special terms of the contract determine the required works or services, the rights and obligations of parties, as well as specifications regarding the obligations to be fulfilled, the supervision and the contract management.

- *The Performance Bond*

The contract Performance Bond aims to provide a guarantee in favor of the contracting authority in case of the contract breach by the private partner. Prior to signing the contract, the winning bidder must provide to the contracting authority a Performance Bond of 10% of the contract value in the requested form.

- *The notification of the executed contract*

Within 5 (five) days from the date of the contract execution with the private partner, the contracting authority publishes the notification regarding the execution of the contract, which contains information on the contract type and the description of works and services that form the object of this contract.

- i. Specific Information*

The specific tender information contains information regarding works and services that form the objective of the contract.

Usually, the specific information includes the Terms of Reference indicating at least:

- The design and specifications;
- The estimation of costs;
- The implementation schedule;
- Special qualification requirements and winner's announcement criteria;
- The requirements on the key personnel.

This information is detailed by the public procurement rules and depends by the type of contracts to be implemented. To summarize, we could emphasize that in the case of public works contracts the tender documents must also provide detailed information in relation to public works required to be performed, including such elements as: price per unit, volume, measurements, the quality and the type of works. Likewise, in a schedule of works the phases and terms for the execution of works must be detailed.

In contracts which have as their object of activity the provision of services, the contracting authority should determine the Terms of Reference, which should include the objective, the purpose, technical specifications and the respective terms.

The contracting authority should also specify the special qualification requirements for bidders, in relation to their execution capacity and experience, taking into consideration the nature and the contract value. Special qualification requirements can be linked to the verification of technical, economic and financial capacities.

*ii. The amendment of the tender documents*

Interested parties are entitled to request that the contracting authority amend or correct tender documents. In cases when the contracting authority accepts the performance of requested amendments to the tender documents, the bidders are guaranteed a postponement of the deadline for the submission of bids by 5 (five) days for procurements whose value is lower than the high monetary threshold, and by 10 (ten) days for procurements whose value is above the high monetary threshold.



*ii. The temporary/provisional union of companies*

Interested parties may submit their bids as a sole bidder or as members of a group of economic operators that have established a provisional union of companies with the purpose of executing a concession/PPP contract. In this case, all entities that form the economic operator's union must jointly submit a single bid.

In case of an economic operator's union, the particular legal form for the temporary/ provisional union of companies must be performed according to the form, manner and specifications which must be included in the tender documents by the contracting authority. One of them should be appointed as a representative of all union members throughout the tender procedure, in case of the selection and during the execution of the contract.

Moreover, in the submitted bid the services and works that will be provided by each of the members of this union must be specified.

The temporary/provisional union of companies must be formally established by way of a notary agreement that sets out the representatives of this union, the participation rate of works, and the services or essential elements to be performed by each of the members of this union. This union must be formally established prior to the submission of the bid.

In cases where the bid submitted by the temporary union of companies is accepted and is the winning bidder, the concession/PPP contract must be signed by each of the union's members.

Legal criteria set out by the legislation and required in the tender documents should be fulfilled by each of this union's members, whilst the economic, financial, professional and technical criteria should be fulfilled by the entire union altogether, in accordance with the contract participation rate

An entity that submits a bid as a member of a union of companies cannot submit at the same time an individual bid.

The change in the temporary/provisional union of economic operators after the submission of the bid will cause the rejection of the bid.

If as a result of the submission of an individually submitted unsolicited proposal, one of the union members has received the respective bonus related to the unsolicited proposal, in cases when it bids as a group member this bonus shall be assigned to the temporary/provisional union of the operators of which this entity is a part of. Whilst, in cases when two or more operators have been granted with a bonus for the unsolicited proposal submitted jointly by them, the bonus points shall not be calculated to each of them, in case they participate individually in the tender.

## **b) The valuation of bids**

### *i. The submission of bids*

Based on the tender requirements, bids must be submitted in the format and as per modalities set out by the contracting authority, within the set deadline for submission. Bids submitted after the expiration of the deadline shall not be evaluated and are returned to the bidders that had presented them.

It should be noted, that based on provisions of DCM 130 dated 12.03.2014, the submission of concession/PPP competitive bid procedures take place by electronic means based on the specific instructions of the PPA regarding the upload of the bids into the public procurement electronic system.

### *ii. Opening of bids*

The contracting authority opens all submitted bids on the date, place and the time set out by the tender documents, after the termination of the deadline for the submission of bids.

### *iii. The verification and evaluation of bids*

Following the opening of bids, the commission verifies and evaluates the submitted bids, qualifying only those bids that fulfill the qualifying criteria set out by the tender documents.

If the commission deems that additional time is needed for the evaluation of bids, it informs the bidder regarding the time and date when the outcome of the bid evaluation and the final classification shall be communicated. The duration of the

evaluation should not exceed 15 (fifteen) days, except when otherwise provided by the Albanian legislation.

In case of procurement procedures in phases the commission, within a 10 (ten) day term from the date of submission of the required documentation, determines the final list of qualified candidates whose bids will be subjected to evaluation, and informs all candidates that have submitted a request for participation. At the end of the appeal term, an invitation to bid is sent to the qualified candidates. After the submission of bids, the commission performs the final evaluation procedures of the submitted bids.

In the case of negotiated procedures with a preliminary announcement of the contract notification, depending on the complexity of the contract, the commission may organize negotiations in various phases with each of the shortlisted candidates.

*iv. The evaluation criteria*

The criteria for the determination of the winning bid must be only those which have been preliminarily and expressly determined as such in the tender documents. The PPP commission determines the best bid, following the comparison and evaluation of all submitted bids. The evaluation is made by the commission and proposed for final approval to the Contracting Authority, which have the final decision

The criteria of the bid with the lowest price are used as the determining element in evaluating and selecting a winning bidder, particularly during procurement stage for simple contracts or contracts with well-known technical standards. On the other hand, during procurement stage for complex PPP contracts, besides price as an economic value, other criteria of important elements such as technical advantages, technical support, level of environment pollution etc., also determine the decision of choosing the best bid.

Usually, the most used tool internationally, is to award a contract based on the principle “the most economically advantageous tender” (MEAT). The most economically advantageous tender criteria enables the contracting authority to take account of criteria that reflect qualitative, technical and sustainable aspects of the tender submission as well as price when reaching an award decision.

All criteria established in relation to the evaluation of bids shall be as realistic as possible and must be expressed in figures. In all cases when there is more than one evaluation criterion, the price criteria should not be awarded with less than 50 points. The maximum points given to a bid are 100. For each evaluation criterion the specific points must be determined according to the importance of each one, as well as the calculation modality for the subsequent bidders. The evaluation formula must be clearly and preliminarily provided in the standard tender documents.

v. *The selection of the winner*

Following the evaluation of bids, the commission prepares the final classification of bids and selects the winning bidder. The commission notifies the winning bidder, bidders that have respectively submitted bids but which are not the winners, as well as the disqualified bidders, together with the respective reasoning. After the receipt of such notifications, bidders are entitled to submit their appeal regarding the executed procedure within the legal terms.

i. *The administrative and judicial appeal*

Based on legal provisions, any entity interested in a competitive procedure which considers that it has suffered damages or the risk of damages due to the decision making of the contracting authority, which it considers to have been approved in violation of this law, is entitled to submit an administrative appeal to the Public Procurement Commission.

In all cases, a written copy of such a claim must be sent for information to the contracting authority.

If the object of the claim regards the competitive procedure documents, the entities have a 10 (ten) day term from the day following the publication of the contract notification, whilst if the claim regards the decision on the review performed and the final classification, the 10 (ten) day term commences from the day following the receipt of the notification or the date in which it should have been notified.

The submission of the claim causes the immediate suspension of the competitive procedure by the contracting authority. The suspension remains in force until the moment when the Public Procurement Commission reviews the claim and approves a final decision regarding such a claim.

The claim to the Public Procurement Commission is performed according to a standard form that is also part of the tender documents, as clarified here above. The claimant must outline the reasons, the legal basis regarding the violations and the alleged irregularities together with documents and respective evidence that justify its claim.

The Public Procurement Commission responds in writing to the claimant within 10 days from the date of the submission of the claim, or within 20 days in cases when information is required to be provided by the contracting authority.

The procedure for the administrative review and the decision-making of the Public Procurement Commission is based on the provisions set forth by the public procurement legislation.

Following the finalization of the administrative review, the Public Procurement Commission can issue the following decisions:

- Suspend the judgment in cases where no legal breaches are found. In such case the Public Procurement Commission provides a written explanation to the claimant regarding the reasons for the suspension of the judgment;
- Issue a decision that obliges the contracting authority to stop the illegal acts within a certain time limit.

Contracting authorities should execute the issued decision or requires the review of such decision of the Public Procurement Commission within 10 (ten) days from the notification of the decision.

The claimant is entitled, in the case of a negative decision of the Public Procurement Commission, to address the competent administrative court with an appeal. In such cases, the court appeal does not suspend the continuation of competitive procedures, the execution of the contract, or the implementation of obligations between parties.

*vi. The summary report on the evaluation of bids*

Following the termination of legal terms regarding the submission of eventual claim by bidders, the commission drafts a summary report with information regarding the procedure, the description of works and services, the bid values, disqualified bidders, together with the reasons for their disqualification, the winning bidder, as well as information regarding submitted claims and decisions issued in this regard. This summary report is sent for approval to the head of the contracting authority.

*vii. The notification of the winner*

After the approval of the summary report, the contracting authority sends for publication at the website of the PPA and at the Public Notification Bulletin the notification of the winner as per the standard form. Following such a publication of the notification of the winner, the contracting authority invites the winning bidder to sign the contract no later than 60 (sixty) days from the publication date of this notification.

## CHAPTER 11

## ACTIONS REQUIRED TO BE PERFORMED PRIOR TO THE CONTRACT IMPLEMENTATION

**a) The Performance Bond**

Prior to the signing or entry into force of the concession/PPP contract, the contracting authority should receive the Performance Bond from the private partner. Elements of the bond regarding the contract execution, such as the value, the form and the modality, must be in compliance with the requirements provided by the contracting authority in the tender documents.

The performance bond serves to the contracting authority as a compensation tool with regard to the damage that may be caused as a result of the failure of the private partner to fulfill the contract obligations. The security titles requested by the contracting authority may be a promise to perform payment, a bank guarantee, corporate guarantee, bills of exchange, or other security titles, but in any case as previously specified in the tender documents.

The Performance Bond is submitted to the contracting authority, which must keep it for the entire duration of the contract. The contracting authority should periodically verify the validity of the security titles provided by the private partner.

Following the receipt of the Performance Bond, the contract security submitted during the competitive tender procedure is returned to the private partner.

**a) The Special Purpose Vehicle (SPV)**

In cases when, pursuant to the specifications of tender documents, the selected bidder is required to establish a Special Purpose Vehicle (SPV), the winning bidder must establish a commercial company in accordance with the Albanian legislation that shall execute the contract with the contracting authority.

Tender documents must specify the required legal form of the legal person, the minimum capital, obligations of the most successful bidder regarding the establishment of the company, as well as other relations between the most successful bidder, the SPV and the contracting authority.

The SPV must have its legal seat in the republic of Albania, with the specification "Concession Company" in its legal name; the object of its activity must be that of the concession/PPP contract. In this case the contracting authority executes the

contract with the legal representative of this company. After the SPV registration, the contracting authority submits to the Ministry of Finance a copy of the contract and of the extract for the registration of the company.

In cases when the winning bidder withdraws from the contract execution, or does not provide the contract guarantees, the contracting authority may resolve to award the contract and to offer the contract to the bidder that is next in the classification of successful bidders. The winner's withdrawal for these reasons, leads the contracting authority to cash in the Performance Bond.

In the following chapter aspects related to the specific provisions of contracts shall be detailed. A draft contract that may serve as a template to contracting authorities can be found in the specific annex attached to this guideline.

#### **b) The negotiation and the execution of the concession/PPP contract**

After the successful performance of competitive procedures and the selection of the offer, the contracting authority invites the winning bidder to enter into a concession/PPP contract.

Contracting authorities cannot execute a concession/PPP contract without finalizing the legal procedures regarding the submission of administrative claims. The execution of the contract prior to the expiration of the classification notification term or before the administrative review is finalized causes its absolute nullity.

The contracting authority shall notify the private partner within 10 (ten) days from the expiration of the term for submitting claims, except for cases when such a term is extended for justified reasons, which must be specified in the tender documents.

During this phase, parties shall negotiate the final concession/PPP contract. Contracting authorities and private partners shall base their work for the drafting of the contract on the general and specific terms of the contract which have been part of the tender documents, as well as upon all other elements including the tender documents which specify the elements for the contract implementation. Likewise, terms provided by the private partner must be in accordance with the submitted bid which was proclaimed as the winner.

The purpose of legal provisions is related to the fact that contract terms must not differ from those required by the contracting authority in the tender documents and terms provided by the private partner in its bid, proclaimed as the winning one.

Moreover, it is notable that during the process for drafting and executing the administrative contracts, contracting authorities must consult with the State Advocacy. Also, contracting authorities have an obligation to request the opinion of the Competition Authority in cases when, as a result of the concession/PPP

projects, they approve normative acts that set limits to the market access or trade, grant exclusive or special rights to certain enterprises or products or impose similar practices on prices and sale conditions.



## CHAPTER 12

## CONTENT OF CONCESSION/PPP CONTRACTS

**a) Drafting the PPP contract**

Public private partnership projects are performed through contracts entered between the contracting authorities and private partners selected as winners following performance of competitive procedures. The legislation has determined only four general types of PPP contracts, in accordance with article 8, point 4 of the law 125/2013, which may be concession for public works or services, or contracts of public works or services. The general term “contract” grants to contracting authorities the discretionary right to select the particular type of contracts to be implemented as per the principle of contractual freedom. The contractual freedom principle is determined by the Civil Code providing that parties are free to regulate their relationships by contracts, within the limits set out by the law. Hence, the limit of the contractual freedom lies with the fact that the contract cannot contain provisions which are in breach to the legislation in force in the Republic of Albania.

As a result, PPPs may be regulated by contracts having different structures, according to the needs of contracting authorities and private partners in compliance with specificities of actual cooperation projects among them.

The PPP contract must be drafted based on the information contained in the tender documents and in the specifications of the offer selected as the winning one, at the conclusion of the competitive procedures. This conclusion is based on the fact that contract terms cannot be different from those required by the contracting authority in the tender documentation and the offer submitted by the private partner in its bid.

As described at previous chapters the tender documentation shall include some specific information which shouldn't identify solely the contracting authority, the object the type and duration of the contract, but should also determine the general and specific terms of the contract.

Based on best international practices the advice for contracting authorities is to include to the extent possible at tender documents a comprehensive draft of the contract. This serves to avoid potential confusions or misunderstandings between parties in relation to the implementation of the project and issues that may come up during the negotiation process. Moreover, drafting of a comprehensive contract is unavoidable in cases when during the tender process, the respective procedures shall be implemented in phases/stages; hence, the restricted procedure or the negotiated procedure, in which has no more space for negotiations between parties, follow the submission of the final offer.

With the purpose to draft well-defined contracts, contracting authorities must consult with the ATRAKO specialized staff. The same needs to be done when it is

required a high expertise level, a case in which external legal consultants or technical experts can be involved. Throughout the process of drafting and signing of contracts, contracting authorities must consult with the State Advocacy. Moreover, contracting authorities are required to request the opinion of the Competition Authority in those cases when they resolve to restrict the access or marketing, to guarantee exclusive or special rights for certain enterprises or products or to impose similar practices regarding prices and sale terms.

When drafting contracts, contracting authorities must pay attention in order for the text of the contract to be as clear and understandable as possible and to create certainty for parties that will implement it, by avoiding the eventuality of misunderstandings, misinterpretations or the identification of its loopholes. The contract shall be the basic document upon which shall be regulated the long term relationships between parties involved in the project implementation, as a result is should guarantee the necessary clarity toward an efficient implementation of a PPP project.

In addition, the contract is the document on which contracting authorities and the private partner shall base their activities during the management and monitoring stage of the contract, which lasts until the completion of the PPP project.

#### **b) The content of the contract**

As regards the content and provisions of the contract, hereinafter are identified some of the main elements that must be part of the contract. These elements are identified based on instructions and best international practices, including those of the World Bank and the European PPP Expertise Centre on PPPs.

Moreover, as an annex of this guideline can be found a draft of concessions and PPP contract that may serve to the contracting authorities as templates to base their work for drafting future contracts.

Part of the contract's content must be provisions that determine at least the following elements:

- i. The general provisions of the contract – object, implementation method, definitions;*
- ii. The scheduled commencement and duration of the contract;*
- iii. Rights and obligations of each party;*
- iv. Allocation of Risk;*
- v. General Terms relating to Works/ Services – including such as objectives and performance standards, required for the performance of works or services by the private partner;*

- vi. *Remuneration mechanisms of the private partner including the terms and payment modalities;*
- vii. *Sanctions and penalties that may be imposed in case of breaches by parties;*
- viii. *The Contract Guarantee (Performance Bond);*
- ix. *Changes – Reasons and procedures for which amendments related to the contract are permitted in the future,;;*
- x. *Early termination, causes that- justify the early termination of the contract and related procedures to be applied in such cases;*
- xi. *Step in rights of creditors and the contracting authority;*
- xii. *Movable and immovable property related issues;*
- xiii. *Dispute resolution mechanisms;*
- xiv. *The procedure to be performed at the contract termination, including the hand-over of assets, final verifications and eventual payments (Hand –over and Disengagement)*
- xv. *Contract management mechanisms;*
- xvi. *Monitoring mechanisms, including terms and monitoring modalities;*

Here below are provided detailed instructions in relation to the determination of above elements of PPP contracts.

*i. General Provisions of the contract;*

The general provisions of the contract shall be well defined, describing the concrete PPP project to be regulated by this contract. The object of the PPP contract shall observe the provisions of the legislation, thus having as its object the granting of concession/PPP for the performance of works or the provisions of public services or the performance of both elements. The contract shall also elaborate on the PPP method to be implemented (BOT, BTO, BOOT, etc.)

To clarify the scope of the contract and intention of the parties to implement it, it often happens that to the contract are attached as annexes the tender documents, contract notice, the technical specifications and the bid submitted by the private partner, which detail the conditions requested by the contracting authority and accepted by the private partner.

These documents are becoming part of the contract as attachments, helping the parties to identify more clearly the mutual obligations and objectives to be reached by the contract and are a good reference tool in case of conflict.

*i. Contract Term;*

The contract should determine the duration of its term that must not exceed the maximum term of 35 years set out by the law 125/2013.

The contract duration is preliminarily determined in the feasibility study and shall be assessed in a reasonable manner, taking into consideration certain elements.

First of all contracting authorities should determine a reasonable deadline for the performance of works or services requested by the private partner.

Secondly, the deadline term should be such as to provide the private partner sufficient time to achieve the return of its investment and a reasonable profit rate.

Thirdly, the deadline term must be determined in appropriate timeframes that do not limit the competition more than it is necessary.

The contract must determine which shall be the effective date for the commencement of its term. It may be the date of the contract signing, or a later date, in case that for its commencement it is necessary the completion of some prerequisites or the performance of some preparatory actions. Depending on the commencement date and in accordance with the determined duration, the contract must also specify the exact date of its completion.

The contract duration can be conditioned also by cases when occur events that may suspend its implementation (i.e.: force majeure cases, public interest requirements, or delays of the competent authorities to issue the necessary licenses and authorizations), which as a result cause the postponement of the completion date.

Based on provisions of point 5 of the law 125/2013 the contract term can be extended only for cases provided for in articles 31, 32 and 33 of such law, which relate to the cases of the amendment of the contract, assignment of the contract or granting of additional works and services.

*ii. Rights and obligations of parties;*

The determination of specific rights and obligations of parties is among the most important elements of the contract. Respective provisions should clearly and

specifically determine specific rights and obligations of the public partner and of the private one, in order to avoid any eventuality for misunderstandings or disputes during the contract implementation.

Parties' rights and obligations can be of various natures. Those are set out in accordance with a variety of factors that include the contract typology, characteristics and the kind of the implemented project, terms set out by parties, risk sharing levels among partners or other elements.

The general principle is the contract to ensure a balance between rights and obligations of both parties. In any case, the contract must include a division between those that reflects on one hand the important fact that the contract is related to the performance of works or the provision of services, which present a public interest, and on the other hand, the fact that the private partner should be provided the opportunity to recover investment costs, as well as to achieve a reasonable profit as a result of the performance of works and services in accordance with the contract requirements. The rights and obligations must be in line with the provisions laid out in the tender documents from the procurement stage.

Rights of the contracting authority could include mainly the right for monitoring the due implementation of the contract, the verification that required standards have been achieved, the receipt of information and reports by the private partner regarding the performance of controls and the handover of assets and services upon the completion of the contract, if applicable by the contract.

Obligations of the contracting authority could include the performance of payments in favor of the private partner as per the agreed modalities, the provision of assistance with the purpose the being granted with necessary permits and licenses, putting at disposal of public assets or the logistic support in cases when those are offered, the exchange of the information and the proper communication with the private partner. Obligations of the contracting authority are specifically related to the facing of respective risks that are borne by the public partner.

Rights of the private partner usually include mainly the right to benefit income from the works performed works and the services provided the receipt of necessary information by the contracting authority or receiving the assistance of the public partner as regards the necessary permits and licenses.

The private partner can undertake a variety of obligations depending on the public partner requirements and of needs related to the performance of public works or services.

Obligations of the private partner include mainly the obligation to finance, design, construct, reconstruct, maintain and perform works or services, to respect standards, terms and required modalities, to provide information and to report to

the contracting authority. Obligations of the private partner are specifically related to facing respective risks that are under its responsibility.

The contract must determine the obligations of the private partner by defining which shall be the works, operations or services to be performed; determining also the specific terms, the methodology, the modality, technical specifications, standards, maintenance levels, and handover modalities, the usage warranties following the handover or other related issues. Apart from the separated rights and obligations, mutual obligations for both parties should be accounted, highlighting the commitment each party has agreed to, such as not breaching any applicable Laws, consulting with the other party as soon as practicable as to any event that may affect the performance of the contract, etc.

Even in this case, to clearly define the rights and obligations of the parties, it is useful that to the contract are attached as annexes, the tender documents, contract notice, the technical specifications and the bid submitted by the private partner, in which are determined the contract conditions.

*iii. Allocation of Risks;*

Risks must be charged to the party that is objectively more capable to face those. As a rule each party assumes the responsibility for risks events that fall under its sphere of influence.

The contract should specifically identify the risks envisaged in relation to the contract implementation, the distribution of such risks among parties as well as applicable procedures when those are identified. This risk sharing can be based on a risk matrix agreed by parties, in which are specifically enlisted potential risks, as well as it is determined for each of them, if those are assigned to the public partner or the private partner, or if those are shared and faced by both parties.

This risk matrix or the risks chart can be detailed in one of the contract annexes. Moreover, risk sharing can be also integrated in the risk management plan, plan which besides risk identification and allocation of the responsibilities, describes also the specific actions and procedures that should be implemented by parties to prevent, avoid or mitigate consequences, when such risks are identified.

**Example: Model of risk matrix**

Risk	Subject who the risk is allocated to			Mitigating instrument	Article of the Concession Agreement where the risk and its allocation are established
	Public	Private	Shared		
<b>Project Financing</b>		x		Protective measures by preventing possible negative consequences, in the business plan and related financial agreements with lenders	Article _____ of "Responsibilities of the private partner"
<b>Changes in Law</b>	x			Pre determination of a model of financial equilibrium between the parties	Article _____ of "Responsibilities of the Contracting Authority"
<b>Force Majeure Events</b>			x	Immediate communication of the event, execution of actions and procedures according to the contract and insurance coverage for force majeure events	Article _____ ' Force Majeure"
_____ etc					

*iv. General Terms relating to Works/ Services;*

Under this section, the purpose is to lay out the necessary provisions relating to the performance of Works and/or Services to be provided by the private partner. The contract must include the list of core and non-core works/services as well as other provisions on delivery of such works/services. An example can be commonly seen is the provision on sub-contractors, whether the private partner is allowed or not to sub-contract with an independent (supply) company.

The contract should also clearly determine which are the performance objectives, levels, and standards, required to the private partner, specifying quantities and the quality of works and services to be performed by it. For example, the contract can preliminary determine international standards which serve as indicators and reference for the required quality levels. If these standards are detailed and big in numbers can be listed and laid out in special annexes, in order to preserve the easy reading of the contract text and its legibility.

An important element for determining the input performance is related to the fact that to the extent possible the contract must above all determine inputs regarding expected outputs, more than the manner as how to achieve inputs. For example, for road management contracts it is best to determine the required surface quality of the road, than just to determine materials and specific methods to be used. In this manner the private partner is free to renew or update the materials or the technology utilized in the PPP projects.

The performance inputs must be specifically determined, quantifiable, attainable, real, and set out as timelines.

The verification of performance standards observation is closely related with aspects of the contract monitoring phase. The contract shall also provide mechanisms for the independent verification of the fact if standards have been respected or not, in cases when there is an agreement between parties, if only through experts of third independent parties.

Moreover, the contract must also determine consequences for the cases of failure to achieve each of the performance inputs, determining also applicable consequences, including applicable penalties, damages to be covered, payment cuts or cash in of the performance bond.

Other Terms should be discussed could be: Quality Assurance, Information Records (technical and financial records), Personnel, Obligations on Environment/ Health/ Safety, etc.

*v. Payment mechanism;*

Payment mechanisms must determine the remuneration modality regarding the performance of works and services by the private partner as per the contract.



These mechanisms need to lay out clearly the payment modalities their resources as well as payment terms.

Payment modalities of the concession/PPP, terms, tariff amounts and manners, are determined in advance in the feasibility study proportionately with the object, the value and the contract duration, as well as with the value of properties and assets made available by the contracting authority.

Similarly, payment mechanisms must foresee for eventual changes and adjustment in payments, which can depend on the achievement of performance inputs, risk factors, inflation, etc.

As described in the previous chapters, the private partner shall be remunerated by the public partner for the performance of requested works or services:

- Being granted with the right to use public facilities and/or public services, setting fees or payments that are borne by the end users of services, or by consumers;
- Being granted with the right to use public facilities and/or public services, jointly with the benefit of financial support by the contracting authority;
- With payments performed by the contracting authority or benefited on its behalf, as a rule conditioned by the availability of facilities and/or of the provided service;
- With other financial support modalities, including the transfer of material rights and of other real rights;
- A combination of the here above mentioned remuneration modalities.

Based on the legal definition, it shall be considered financial support any type of monetary or non monetary support and / or the financing provided by the public sector including but not limited to subventions, financial guarantees, or other ones, capital contributions and transfers of property rights.

The main remuneration forms toward a private partner may be:

- Payments of end users, which may be fees paid by users of public services provided by the private partner. In this case, in accordance with the provisions of Albanian legislation regarding the establishment and determination of fees, should be the contracting authority to sets the tariffs

afforded by end users of public works or public services, performed by the private partner;

- Payments of the contracting authority or state bodies, which shall be paid to the private partner for the offered facilities or services. These remuneration mechanisms envisage payments that may be:
  - Based on the use, such as when the contracting authority pays a fee based on the number of vehicles that use a certain road that according to the contract is under the administration of the private partner;
  - Based on the availability, therefore for cases when payments are conditioned by placement at the disposal of the private partner of a facility of a service as per the required standards;
  - Financial support, based on the achievement of certain predefined objectives.
- Remuneration and penalty mechanisms that may plan for the granting of bonuses in case when there are registered satisfactory results or to the contrary, the application of penalties when expected results have not been achieved.

*vi. Sanctions and penalties in case of violations;*

A crucial element of the contract is related to the accurate provision of sanctions and penalties that may be executed. Firstly, must be identified in advance the specific cases that shall be considered as violations of the contract. These may be related with the non-fulfillment of contractual obligations, non-compliance with required standards or failure to perform payments. For each of these cases it needs to be determined the procedure to be implemented for the verification of the violation, the modality for applying sanctions as well as the level of applicable sanctions.

The contract must also determine the mechanisms for the application of sanctions that may be the imposing of fines, reductions in remunerations, compensation for damages, or the retention of amounts from the performance bond.

*vii. Contract Guarantee (Performance Bond);*

As described in the above chapters, the private partner should provide a performance bond that serves the contracting authority as insurance for the successful achievement of contract obligations by the private partner and prevent the private partner from abandoning the project.

Requirements regarding the performance bond are set out in the tender document. The performance bond can be requested to be provided in various

forms, such as: promise to pay, bank guarantee, corporate guarantee, bill of exchange, etc.

As a rule, the performance bond is requested to be provided prior to the signing of the contract, or before its effective date.

In any case, it is in the private partner's interest for the performance bond to remain unaltered throughout the contract term, but to be gradually reduced, throughout its implementation, in accordance with the fulfillment of its obligations, this requirement is related to financial costs associated with the maintenance of contract guarantees of a considerable value.

In such cases contracts must determine not only the format and the guarantee level, but also the procedure and modalities for its gradual reduction. The reduction may be based on deadlines or on the completion of particular contract milestones by the private partner. Also, the contract can provide the rights of the contracting authority as regards the periodic assessment of the guarantee instruments, the maintenance of levels, the format and its terms as set out in the contract.

*viii. Contract amendments and applicable procedures;*

PPP contracts are long term ones, complex, and carry a variety of risks which can be assessed in the future throughout its implementation. For this reasons there can be cases when changes and amendments may be necessary to be made in the contract, as per the new terms. For this purpose the contract should contain provisions that identify cases and reasons that may cause changes to the contract terms, for which changes need to be performed, as well as the respective procedure to be implemented in relation to the contract amendment. The flexibility of the contract through adjustment mechanisms bypasses the need for the renegotiation of the contract or the early termination of the contract. The readjustment mechanisms may be based on the principle of financial balance providing that in cases when occur changes that produce negative effects for a party to the contract, the contract must be amended in order to maintain the financial balance among parties, as it was at the beginning at the contract execution.

These type of changes are typically related to three occurrences: force majeure (Natural causes or civil unrests), changes as a result of interventions from the government (changes in the tax system, capital transfer or of the exchange rate), or essential and unpredictable changes of economic conditions (such as the considerable increase in the prices of raw materials that are used).

Based on legal provisions, contracting authorities may undertake binding obligations in the name of the Albanian state, with the purpose to grant suitable guarantees to the private partner, to protect from negative financial consequence, which many result as a consequence of subsequent changes in the legislation. These commitments may be undertaken only in case when financial consequences

and the nature of the legislation have been clearly and accurately pre-determined, and cannot last beyond the contract term. Such binding commitments are considered as stabilizing provisions and can be undertaken only by way of special decisions of the Council of Ministers, following the proposal of the contracting authority.

The contract must include the procedures, starting from the initiation of change/ amendment (for example, a Change Notice within a limited duration), type of changes, agreement/rejection of the amendment by the private partner, implementation of changes in terms of rights, obligations, additional costs, etc.

*ix. Cases of the early termination of the contract and respective procedures;*

The contract can identify those cases which are of particular importance and which produce serious consequences to an extent that justifies the decisions for the early termination of the contract. The contract termination by the contracting authority can be performed on cases when the private partner cannot execute its obligations, due to insolvency, failure to secure the project financing or in case of serious breaches of its contract obligations. Nonetheless, the contract termination is a possibility that is provided also to the private partner in case of the serious breach of obligations by the contracting authority. The contract can be also terminated before its term, at the mutual consent of parties, as well as for objective reasons that do not permit the contract implementation.

Besides the identification of concrete cases that cause the termination events, the contract should also determine the respective procedures to be implemented if such cases do happen. These procedures should determine the communication between parties, issuance of Termination Notice, the assessment of breaches, preliminary notifications and the procedure for the contract termination.

The early termination of the contract is executed in those cases when it has not been possible to prevent the negative consequences and when the verified breaches could not be avoided even following sanctioning mechanisms. Before the early unilateral termination of the contract by the contracting authority, it should conduct a careful assessment if it has duly performed its rights and obligations in accordance with the contractual provisions. This assessment intends to avoid eventual penalties that may be charged to the contracting authorities by arbitrage panels or courts, in case of abusive termination of contracts.

In cases when the contracting authority is the one that undertakes the initiative for the contract termination, prior to the termination of the contract this authority must inform the Ministry of Finances regarding causes and circumstances concerning the contract termination, and request its opinion.

*ii. Step in rights;*

Step in rights are applied in very special cases, envisaging the possibility for the private partner to be replaced in the exercise of its contractual rights and obligations by a third party or by the contracting authority, in order to avoid the interruption of the public service provided in accordance with the contract.

The first case, that of *the lender's step in right* is verified in cases when as a result of the failure by the private partner to successfully fulfill the PPP project, third party financial interests are at risk, parties which in their quality of lenders financed or have supported financially the private partner. These third party creditors that as a rule are bank institutions or financial institutions, can replace the private partner to achieve the contract objective, intervening itself or through a third private partner.

The contract shall outline cases and procedures for the implementation of this step in mechanism, taking into account the protection of the public interest but also the legitimate interests of the project financiers. Step in rights can be also regulated by separate contracts which can be attached to the PPP contract or to which the PPP contract refers to.

The second case, *that of the public partner step in rights* is applied in special cases in which the contracting authority temporarily takes over the control of a PPP project, when are identified issues that endanger the provision of public services, as a rule in case of environmental and health emergencies, or those related to the safety. This mechanism is a temporary one and is related to the fact that the public partner can better withstand the extraordinary emergency situations.

In both cases, the contract must determine the procedure as well as the rights and obligations of the lender or the public partner, including issuance of the Step-In Notice, payments on Step-In, provisions for Step-Out, liabilities of the public and private partner, etc.

*x. Movable and immovable property ownership issues;*

The contract should clearly determine the legal status, the ownership rights and rights related to the ownership and usage rights of immovable properties and other ones that form the object of the contract. Moreover, it must be determined the ownership and usage rights on properties and assets created by the contract implementation, during its implementation and at the moment of its termination.

*xi. Dispute resolution mechanisms;*

The contract should provide which shall be mechanisms to be applied for the resolution of potential disputes between the public and private partner. This is a very important aspect of the contract, given that its intention is to prevent to the extent possible, or mitigate the negative consequences of disputes, in order to avoid the failure of the project and the final termination of the contract. Main dispute resolution mechanisms are:

- The mediation, hence cases when a third independent party is included in the dispute resolution process, advising on the modality for the conflict resolution. The mediation is mainly used to avoid the termination by way of court proceedings or arbitration.
- Referring the case to a regulatory body, used as a rule in PPPs implemented in economic regulated sectors and provides for the possibility of parties to address the competent regulatory body for the solutions of their disputes.
- The judicial modality of termination, envisages for parties to address courts with the resolution of their disputes. Often private partners request to avoid this possibility, in countries where the judicial system lacks high expertise levels or is not free of political influences.
- The arbitration, that provides for the dispute resolution through addressing these disputes at a panel of arbiters or experts. The arbitration can be a consultative one (non binding opinion provided to parties), or a decision-making one (in cases when it is issued a final decision, which parties must observe). Also, the arbitration can be national or international. In this case the contract should determine the arbiters and the applicable procedure pursuant to the arbitration rules.

In all cases it must be taken into account the binding provisions set out by article 46 of the law 125/2013, that a PPP contract is ruled by the Albanian legislation applicable also during procedures for the resolution of disputes between the public and private partner.

*xii. The applicable procedure at the termination of the contract;*

The contract needs to well define the applicable procedure at the termination of the contract which may include the performance of some actions such as the handover of works, services or assets of the contract, performance of final verifications of their status as well as the eventual payments for the private partner. These provisions are applicable both for cases when the contract terminates at the end of the foreseen contract term, as well as in the eventuality of the early termination of the contract.

In accordance with provisions of the law 125/2013 facilities constructed based on a PPP contract are under the property of the contracting authority, except when otherwise provided in the PPP contract. As a result following the termination of the contract the private partner shall hand over the constructed facilities pursuant to the contract in accordance with the contract terms and modalities.

Hence, for example the contract must set out terms and modalities for the handover of contract assets. The contract can provide that prior to the termination of the contract parties shall communicate as per the scheduled terms, in order to draft and determine modalities for the handover of assets.

In addition, the contracting authority may be entitled to verify itself or through independent experts the handover of assets at a satisfactory usage status, even though it shall continue to use such assets for public interest, in the future. In this regard, the contract may provide for the private partner to respect some quality standards at the moment of their handover or to issue warranties regarding their future usage. Similarly, the contracting authority may prefer for the private partner to also handover a certain quantity of materials or raw materials which enable the use of assets or services for a determined period of time after the contract termination, in order not to cause the interruption in the provision of services.

The contract shall also determine mechanisms for the verification of standards and for avoidance of conflicts as regards the asset handover phase. On the other hand the contract can arrange for payments to be made by the contracting authority for the private partner, at the moment of the handover and termination of the contract, related to the value of assets or payment condition according to the contract.

In addition, the successful contract termination causes also the return of the performance bond in favor of the private partner.

All aspects must be determined and set forth in detail by the PPP contract.

*xiii. Mechanisms for the contract management;*

The contract management stage lasts throughout the duration of the contract until its completion. The management of the PPP contracts includes;

- execution of all the necessary actions and procedures for the implementation of the contract;
- management of communications and relations between the parties;
- monitoring of the correct implementation of the PPP contract.

The contract must be clearly determined in detail the management procedures and those regarding the monitoring of the PPP contract. For the management of

the PPP contracts by contracting authorities some mechanisms can be used among which the ones detailed here below:

- *The determination of responsible structures for the management of the contract*
- *Monitoring the implementation of the PPP contract*
- *Monitoring the contract risks*
- *Management of needed amendments to the contract*
- *Contract re-negotiation*
- *Dispute resolution mechanisms*
- *Termination of contract and handing over*
- *Early termination of the contract*

For this purpose, the provisions of the contract should consider disciplining procedures and modalities of action, to regulate the above aspects. More detailed definitions on the contract management stage are given in the following chapter.

*iii. Mechanisms for the contract monitoring;*

One of the most important elements toward the successful completion of a project and a PPP contract is related to contract monitoring by the side of the contracting authority. Contract monitoring intends to verify the accurate implementation of contracts' rights and obligations, standards, terms and procedures.

The contract must contain provisions that detail mechanisms for the functioning and monitoring of the contract, which firstly include provisions related to the information exchange and communication between parties. For this purpose it needs to be identified the type and nature of the information to be exchanged, the methods of gathering such information, modalities, reporting forms and terms as well as persons or sending and receiving entities. In cases when during the monitoring phase are identified discrepancies of positions between the two partners as regards the contract implementation, the contract shall determine mechanisms and structures for the verification of their application, which may be also performed by independent experts or third parties.

The contract should contain a plan and a well defined monitoring system. The main purpose of the monitoring is the identification on the spot of encountered



issues and the prompt reaction of parties. Parties must try to prevent risks or issues and in case those do happen to attempt to avoid or mitigate their negative consequences.

The contract monitoring is closely related to the verification by the contracting authority of the due observation of performance standards by the side of the private partner. For this reason the contract should lay out which shall be the verification mechanisms. In addition, for situations in which can be verified differences of stands between parties, concerning the observation or not of standards, the contract should set out mechanisms for their termination, like the appointment of independent experts or third partied.

It is advisable that contracts contain well defined monitoring mechanisms regarding the fulfillment of the performance objectives that is able to identify in a timely manner the encountered issues, determining the escalation of reaction mechanisms of the contracting authority. Initially these mechanisms must be of preventive nature, further on mitigating identified negative consequences and only if the default persists and intensifies should be applied sanctioning mechanisms, or in extreme cases mechanisms that lead to the contract resolution.

The monitoring stage of the contract shall be further more detailed in the following chapter.

#### **c) Other contracts, related to the PPP contract**

There exists the possibility that during the implementation of PPP projects parties decide to enter into other agreements with third parties besides the main PPP contract, agreements which are linked to this contract.

Therefore, besides the PPP contract the contracting authority can execute additional or conditional contracts with the private partner or third parties. These additional and/or conditional contracts as a rule are contracts executed with the purpose to secure the necessary financing for the contract implementation. For securing the contract financing private partners usually address to banks or financing entities with requests for loans or other suitable financing mechanisms. In order to protect respective interests related to the loans granted to the private partner the lenders may request the provision of different guaranties to protect the PPP contract financing.

These guarantees may be in a variety of forms and can be determined in different special contracts. Among the most frequent cases is that when contract funding entities request from the private partner that has been granted a bank loan to secure in favor of the creditors its rights related to payments received in the framework of the PPP contract. The above request can be effectuated only following the approval of the contracting authority and can be performed only in favor of financial institutions to secure their claims based on the loan agreement.

In order to protect the above mentioned interests, lenders may request to be granted with step in rights for cases when the implementation of a PPP project is endangered following the default of the private partner. In such cases creditors may step in the role of the private partner through their intervention or the selection of another private partner for the contract implementation, thus succeeding to protect their financial interests. This *step in right of the lender* can be provided in a special contract executed between the lender, the private partner and the public partner.

In all cases when are executed special contracts, related to and which impact on the main PPP contract, these contracts can be annexed to the main one, or it is possible for the provisions of this contract to contain special references regarding the obligations and applicable procedures resulting on the basis of these contracts.

## CHAPTER 13

## IMPLEMENTATION AND MANAGEMENT OF THE PPP CONTRACT

After the negotiation and execution of the contract, and after the commencement of its implementation, the monitoring stage of the contract starts. The management of the PPP contracts includes monitoring and implementation of the PPP contract terms, as well as the management of relations between the public and private partners. The contract management stage lasts throughout the duration of the contract until its completion.

The legislation on concessions and PPPs does not contain detailed provisions regarding contract monitoring and management, but from an overall analysis it results that issues related to the contract management must be set out and included within the PPP contract entered between parties. However, the legislation provides that the contracting authority is the main body to monitor the contract implementation, and should cooperate in this regard with the Agency for the Treatment of Concessions.

For this reason, the present chapter is based not only on the analysis of the Albanian legislation in force, but also upon an evaluation of best practices and manuals of international bodies regarding the implementation of PPP projects and in particular those related to the monitoring of contracts.

The PPP contract management stage aims to ensure the fulfillment of contract terms, in particular if:

- Works or services subject to the contract are duly performed and realized, in accordance with the contract standards and criteria;
- Liabilities according to the contract and the risk sharing is implemented in practice and in particular if liabilities and risks of the contracting authority are efficiently managed;
- The project impact has been positive or negative on the territory and the people.

Firstly, with regards to the contract management, it should be taken into consideration the general principle according to which the best support point to effectively manage the implementation is the PPP contract itself. For this reason, when drafting the contract, the management procedures and procedures regarding the monitoring of the PPP contract must be clearly determined in detail.

For the management of PPP contracts by contracting authorities, some mechanisms can be used, including those detailed below:

- *The determination of responsible structures for the management of the contract*

The contracting authority must identify the body, the structure or the responsible unit regarding the management of the contract, as well as determining respective competences and responsibilities. Contracting authorities can appoint one Project Manager or a Project Management Team.

After the signing of the PPP contract, as a rule, the responsibility for the contract management is assigned by the contracting authority to a certain team, which shall perform the daily control for the contract implementation. In cases when there are other similar PPP contracts (for example: PPP contracts for the construction or maintenance of some roads) it is advisable for their management to be performed by the same team.

The responsible structure for managing the contract must have resources and sufficient professional capacities as well as a hierarchic level that can facilitate communication, not only with the private partner but also with other public bodies that are involved in the project implementation. These may be bodies with sector competences related to the implementation of a specific project or bodies whose powers concern the concession area, such as the Agency for the Treatment of Concessions or the Ministry of Finance.

The responsible body for the contract management shall perform, on behalf of the contracting authority, all actions and procedures set forth by the contract, pursuant to the rights and obligations of the public partner according to the contract.

- *Monitoring the implementation of the PPP contract and its risks*

The monitoring of the contract has the purpose of verifying the proper implementation of duties and compliance with standards of the private partner, as well as the implementation of duties and responsibilities by the contracting authority.

The monitoring can be based on reporting and data from private partner, on evaluations of independent experts or on the considerations of end users regarding the works and services that form the object of the PPP. The information sources that shall support the monitoring process must be identified and set out in the PPP contract. For instance, the contract must determine obligations such as: the performance of financial auditing and of periodic technical assessments, setting out the terms and the independent entities that shall perform those. Moreover, the contract must request that certain standards are respected, by determining specific standards and the related certifying bodies.

The PPP contract must clearly determine the responsibilities of the private partner, the characteristics of works, expected service levels, quality standards, modalities for their implementation and terms.

The efficient managing of the contract depends on the strict application of procedures, monitoring methods and schedules that are set out in the contract. This requires that the contracting authority and the private partner have clear monitoring and reporting modalities. For this reason, the contract must determine the reporting modalities and schedules to be followed by the private partner, as well as procedures and monitoring methods performed by the contracting authority.

- *Monitoring of contract risks*

Risk management aims to control the risks of a PPP contract by verifying that the planning of the allocation of risks determined in the contract are effectively implemented. This management shall be achieved by monitoring the risk levels, undertaking measures for the mitigation of risks or implementing sanctions when necessary.

An effective instrument used for this purpose is the drafting of a *risk management plan*, listing risks related to the project and determining which party shall carry such risks. Some of the contract risks can be exclusively assigned to the private partner, some others to the public partner, whilst some contract risks can be shared between the public and private partner.

For each of the identified risks, the information that shall be provided in order to monitor the actual risk must be determined, as well as the necessary actions to mitigate or avoid its consequences. This risk management plan and the reporting or monitoring method must be determined in the PPP contract.

Risk monitoring must aim to ensure the timely reaction and necessary measures in order to avoid serious consequences that may cause the failure of a PPP project.

- *The management of situations in which amendments to the PPP project are required*

This type of management must successfully face situations in which amendments to the contract need to be performed. As a rule, PPP contracts have a considerable duration of up to 35 years, and during this period, situations may be encountered which could not have been initially foreseen at the contract execution.

Moreover, it may happen that parties to the contract have disputes regarding discrepancies or the interpretation of the correct implementation of the contract, which may in turn cause the early termination of the contract. These potential situations often cannot be avoided but it is important that they be duly managed.

For this purpose the contract must provide, to the extent that is possible, cases and mechanisms for contract review, contract renegotiation, dispute resolution or cases of contract termination.

Among the most commonly used international mechanisms for managing changes is the mechanism based on “financial balance provisions”. Financial balance provisions grant to parties of the contract the right, in the case of unforeseen situations producing a negative impact on one of these parties, to request changes of the contract terms, to compensate and reinstate the financial balance foreseen at the moment of the contract execution. These changes and amendments are based on a financial balance model agreed by parties in the PPP contract.

- *Revisions and regulations*

Well-structured PPP contracts contain specific provisions which regulate consequences of some of the most often encountered factors. Three of the typical causes that ruin the financial balance are: Force Majeure cases (natural disasters or civil unrest), *factum principis* (government action) and *ius variandi* (unpredictable changes to the contract’s economic conditions as a result of the external factors).

- *Contract re-negotiation*

There exists the possibility for parties to renegotiate the contract terms. Changes as a result of the renegotiation are different from changes applied pursuant to mechanisms preliminarily provided in the contract.

In principle, the renegotiation mechanisms must be avoided to the extent possible by contracting authorities, as it changes the initial terms of the contract already agreed upon, risks distorting the market and may produce consequences for the free competition. For this purpose, the contracting authorities must determine to the extent possible in the contract the above mentioned mechanisms for the regulation of consequences and the contract amendments. Nonetheless, there are cases when the renegotiation cannot be avoided due to unforeseen situations that happen and when such is in accordance with the public interest and that of contracting parties.

- *Dispute resolution among parties*

Disputes may rise between parties with regard to the implementation of contract duties and responsibilities. In order to avoid consequences that may cause such disputes and even the early termination of the contract, the PPP contract must contain mechanisms for the dispute resolution among parties.

Typical mechanisms for the dispute resolution may be:

- The judicial system;
- The national or international arbitrage;

- A panel of experts (this option is often used to resolve particular issues, i.e. a technical financial issue can only be a temporary decision that can later on be repealed through the judicial or arbitration channels);
- Intermediation or settlement, and;
- A decision issued by a specialized regulatory body;

Aiming to avoid consequences and damages caused by disputes between parties, contracting authorities must:

- React swiftly as soon as issues are raised;
- Try to solve issues at the lowest hierarchical level;
- Have experienced teams that possess the required capacities and are at a suitable decision-making level to solve the issue;
- To follow meticulously the procedures set out in the contract;
- To look for solutions that satisfy both parties, in the best public interest and that of the contracting parties.

Contracting authorities must try to avoid the escalation of disputes which may cause the termination of the contract and project failure. The judicial dispute resolution shall be considered as a final resort, given that it leads to stagnation or creates situations which may present a risk to any of the involved parties.

- *The completion of the contract and handing over of assets*

The final stage in the PPP contract management is related to the management of transitory procedures at the conclusion of the contract.

This stage includes the hand over by the private partner to the contracting authority of works, services and assets that are object of the contract. Moreover, this phase includes the performance of all procedures and necessary actions that must be effectuated by parties, eventual payments, hand-over modalities or other aspects.

All transitory procedures and actions for the hand-over of contract assets at the moment of the finalization of the contract must be clearly detailed in the PPP contract.

- *The early termination of the contract*

Besides cases when the contract is successfully completed at the termination of the foreseen term, there also exists the possibility for contracts to be terminated prior to the termination of the determined term. The early termination of the contract may be caused by several factors, as:

- A consequence of default by the private partner;
- A consequence of a default by the public partner;
- A unilateral decision of the private partner;
- A unilateral decision of the public partner;
- The result of prolonged consequences caused by the Force Majeure;
- The mutual agreement of both parties.

The PPP contract must determine in detail the circumstances that allow parties to terminate the contract and the consequences of such termination. In particular, the contract should regulate cases when one of the parties has failed to complete its obligations as per the contract and which are of such importance that causes the termination of the contract.

As a rule, the contract termination is a drastic mechanism that causes the interruption of contractual relationship. Therefore, where possible the contract should provide for appropriate modalities and terms that enable the adjustment of contractual defaults in order to avoid the contract termination. In case it is not possible, or there are deficiencies or regular defaults on the contract provisions, the contract must first of all determine mitigation mechanisms regarding the negative impacts of such defaults, aiming to facilitate the swift repair of encountered issues and the due continuation of the contract. Secondly, the contract should determine the application of sanctions in the form of payment, penalties or fines concerning the identified defaults. These should be applied in proportion to the damage caused and the actual consequences that have been caused by such defaults.

The contract may provide also for situations when there is a repeated default on contractual obligations, determining the escalation of sanctions and imposed penalties. In addition, the contract must specify the number of defaults that leads to the contract termination.



## CHAPTER 14

## THE ASSESSMENT OF THE CONTRACT OUTCOMES FOLLOWING ITS COMPLETION

After the finalization of the PPP contract, even though it is not expressively set out in the existing legislation on PPPs, based on best practices and in the best interest of the contracting authority, it is necessary for this authority to also perform an assessment of the performed contract.

The purpose of this assessment is to perform an analysis of the contract implementation effects, aiming the identification of successful or unsuccessful aspects throughout the contract implementation. The results of such analysis shall serve as a lesson to the contracting authority to issue more suitable (better) decisions regarding the identification, drafting and implementation of PPP contracts in the future.

The assessment must analyze all contractual aspects and stages. The intent is to check if the results expected by the contracting authority at the initial stage have been successfully achieved in the best possible manner and has produced the expected impact. Also, the assessment should identify flaws, wrong choices or issues raised during the contract implementation.

Ex post evaluation requires the establishment of relevant criteria and methods and an evaluation of the capacity within the Contracting Authority to carry out the process. This analysis should also use the comparative criteria, therefore to verify if the results achieved by the PPP contract can be achieved by alternative contract.

In order for the assessment to be as accurate and as objective as possible, it is required that the analysis of contracts be performed by independent units and by persons who poses the proper expertise and professionalism. In some cases, national audit units undertake such studies and in other cases ex post evaluation can be contracted out to a consulting firm, especially when in-house expertise is not available within a public body.

Evaluations should be based on information gathered during the management stage of the contract, as per the contractual conditions regarding information gathering. The starting point for this ex post evaluation should therefore be to examine conditions set out in the original draft PPP contract.

Draft  
**CONCESSION CONTRACT**  
**FOR**  
**PUBLIC SERVICES**  
**between**  
**THE CONTRACTING AUTHORITY**  
**And**  
**PRIVATE PARTNER**

## SCHEDULES

Schedule 1	Definitions
Schedule 2	Tender Documents
Schedule 3	Concessionaire Bid
Schedule 4	Service Levels
Schedule 5	Implementation Plan
Schedule 6	Insurance
Schedule 7	Financials
Schedule 8	Contract Guarantee
Schedule 9	Key Personnel
Schedule 10	Handover and Acceptance
Schedule 11	Dispute Resolution
Schedule 12	Monitoring Procedures

**THIS AGREEMENT is made on \_\_.\_\_.2016, in Tirana, Albania**

**BETWEEN:**

\_\_\_\_\_ (hereinafter referred to as the “**Authority**”), represented by  
\_\_\_\_\_

**AND**

\_\_\_\_\_ : (hereinafter referred to as the “**The Concessionaire**”)

### **PRELIMINARY STATEMENTS**

*In accordance with the following:*

- Law 125/2013 “On Concessions and Public Private Partnerships”;
- Decision of the Council of Ministers no. 575, date 10.07.2013 “On the approval of rules for the assessment and granting by Concession/Public Private Partnerships”;
- Decision of the Contracting Authority \_\_\_\_\_;

*the Authority is authorized to stipulate this Agreement;*

### **WHEREAS**

- (A)** *the Authority has issued on \_\_.\_\_.2016 the Competitive Procedure Documents for the granting of the concession “\_\_\_\_\_” herein attached as Schedule 2 of this Agreement;*
- (B)** *the Concessionaire submitted on \_\_.\_\_.2016 a proposal in response to such bid concerning the Concession “\_\_\_\_\_”, herein attached as Schedule 3 of this Agreement, which proposal has been accepted by the Authority;*
- (C)** *the Authority delivered to the Concessionaire on \_\_\_\_\_ the “Notification of the Winner”, accepting the proposal submitted by the Concessionaire and assigning the Concession to the Concessionaire;*
- (D)** *the Authority and the Concessionaire enter this Agreement aiming to implement the Concession in accordance with the terms and provisions set out in this Agreement;*
- (E)** *the Concessionaire within 30 (thirty) days from the signature of this Agreement will establish a limited liability company (hereinafter the “Concessionary Company”), which, save for Clauses on Mother Company Undertakings and Warranty and Maintenance, will be the assignee of all the rights and obligations of the Concessionaire according to this present Concession Agreement;*

## 1. Definitions and Interpretation

1.1 In this Agreement the definitions and interpretations rules set out in Schedule 1 (Definitions and Interpretation) shall apply.

## 2. Due Diligence

2.1 The Concessionaire acknowledges that it:

- a) has made and shall make its own enquiries as to all matters relevant to its implementation and fulfillment of its obligations under this Agreement, including requesting all such information from the Authority as the Concessionaire believes it requires for such purpose;
- b) has raised all reasonable due diligence questions with the Authority before the Effective Date;
- c) has made itself aware as to the contents and requirements of the Authority's policies referred to in Schedules 2 (Tender Documents) and 3 (Concessionaire Bid), and
- d) has all expertise, rights, equipment, software, systems and personnel necessary in order to enable it to perform its obligations under this Agreement, including being able to comply with and meet the requirements of the Concessionaire Solution.

2.2 The Authority warrants, that all written data made available to the Concessionaire including the Tender Documents is accurate, true and correct.

## 3. Grant of Concession

3.1. Subject to and in accordance with the terms and conditions set forth in this Agreement and the attached schedules, the Authority hereby grants and authorizes the Concessionaire to perform the service of \_\_\_\_\_.

3.2 The Concessionaire shall provide the service of \_\_\_\_\_.

3.3 In addition, for the purpose of the provision of the services described above, the object of this Agreement shall also include:

- a) the construction by the Concessionaire of a Central Site located at \_\_\_\_\_ through the physical construction, adjustment to the security conditions and the technology to be used in accordance with specifications set out in Schedules 2 (Tender Documents) and 3 (Concessionaire Bid);
- b) the establishment of a network of offices \_\_\_\_\_
- c) \_\_\_\_\_

## 4. Concession Period

4.1 The Concession hereby granted is for a period of \_\_ (\_\_\_\_\_) years starting from the Effective Date and ending on the day of the \_\_\_\_ anniversary of the Effective Date (“Concession Period”). However, in the event of termination, the Concession Period shall mean and be limited to the period commencing from the Effective Date and ending on the termination date.

## 5. Effective Date of the Agreement

5.1 The Effective Date of this Agreement shall be the date on which all the following conditions are met:

- a) execution of this Agreement by both Parties on the Execution Date;
- b) \_\_\_\_\_.

5.2 In case the Effective Date does not occur within a period of 60 (sixty) days of the Execution Date of this Agreement, either Party shall have the right to terminate this Agreement by giving a Termination Notice to the other Party. Following receipt of such Termination Notice, the Parties to this Agreement shall have no further rights or obligations under this Agreement (other than such rights and obligations that by their express terms survive termination of this Agreement under Article 33 (Confidentiality) and Article 54 (Governing Law and Arbitration)).

## 6. Implementation Plan

6.1 The Concessionaire shall provide the Services in accordance with the Milestones and Timetable as specified in the Implementation Plan referred to in Schedule 5 (Implementation Plan).

## 7. Implementation Delays

7.1 If, at any time, the Concessionaire becomes aware that it will not achieve any Milestone by the Milestone Date it shall immediately notify the Authority of the fact of the Delay and summarize the reasons for it.

7.2 The Concessionaire shall, as soon as possible and in any event not later than 10 Business Days after the initial notification under Clause 7.1, give the Authority full details in writing of:

- a) the reasons for the Delay;
- b) the consequences of the Delay; and
- c) if the Concessionaire claims that the Delay is due to an Authority Default, the reason for making that claim.

7.3 Any disputes about or arising out of Delays shall be resolved through the Dispute Resolution Procedure. Pending the resolution of the Dispute both Parties shall continue to work to resolve the causes of, and mitigate the effects of, the Delay.

7.4 The Concessionaire shall submit a draft Correction Plan where:

- a) it becomes aware that it will not achieve a Milestone by the relevant Milestone date; or
- b) it has failed to achieve a Milestone by its Milestone date, whether that failure arises because of:
  - (i) a failure to submit any or all Deliverables in respect of that Milestone;
  - (ii) \_\_\_\_\_.

7.5 The draft Correction Plan shall identify the issues arising out of the Delay and the steps that the Concessionaire proposes to take to achieve the Milestone in accordance with this Agreement.

7.6 The draft Correction Plan shall be submitted to the Authority for its approval as soon as possible and in any event not later than 10 (ten) Business Days after the initial notification under Clause 7.1 or the issue of a Non-conformance Report.

7.7 The Authority shall not withhold its approval of a draft Correction Plan unreasonably. If the Authority does not approve the draft Correction Plan it shall inform the Concessionaire of its reasons and the Concessionaire shall take those reasons into account in the preparation of a further draft Correction Plan, which shall be resubmitted to the Authority within 10 Business Days of the rejection of the first draft.

7.8 The Parties agree that the obtainment by the Concessionaire and/or its subcontractors of all licenses, authorizations and permits required for the construction and renovation works regarding Central Site as set out in Schedule 3 (Concessionaire Bid) shall be of essential nature for the implementation of this Agreement. In case of delay of more than 45 (forty five) days in obtaining such licenses and authorizations after the date of submission by Concessionaire of the correctly completed application, Concessionaire shall not be considered in Default under this Agreement for those Defaults that arise from the delayed license and the Concessionaire shall be relieved of any penalties or consequences of Default under this Agreement that arise from the delayed license and the Concession Period shall be extended in accordance with the period of delay, if the Parties do not reach another solution.

## **8 Delays Due To Concessionaire Default**

8.1 If the Services does not meet the service levels criteria set out in Schedule 4 (Service Levels) and/or each of the Milestones set out in Schedule 5 (Implementation Plan) is not Achieved due to a Concessionaire Default, the Authority shall issue a Non-conformance Report to the Concessionaire setting out in detail the non-conformities of the Services. In the event of a Default, the Concessionaire shall have 30(thirty) days to remedy the Default.

8.2 \_\_\_\_\_.

## **9 Delays To Milestones Due To Authority Default**

9.1 Following a failure by the Concessionaire to Achieve a Milestone as a result of an Authority Default then the Concessionaire shall:

- a) subject to Clause 9.3, be allowed an extension of time equal to the Delay caused by that Authority Default;
- b) have no liability for Delay Payments in respect of the relevant Milestone to the extent that the Delay results from the Authority Default; and
- c) be entitled to claim for costs incurred by the Concessionaire due to the Authority Default.

9.2 The Authority shall:

- a) consider the duration of the Delay, the nature of the Authority Default and the effect of the Delay and the Authority Default on the Concessionaire's ability to comply with the Implementation Plan;
- b) consult with the Concessionaire Representative in determining the effect of the Delay and how to minimize such effect where reasonably practicable;
- c) fix a Revised Milestone Date; and
- d) if appropriate, make any consequential revision to subsequent Milestones in the Implementation Plan.

## 10 Services

10.1 The Concessionaire shall provide the Services and shall ensure that the Services

- a) comply in all respects with the Authority's Requirements as set out in Schedule 2 (Tender Documents);
- b) are supplied in accordance with the Concessionaire Solution provided in Schedule 3 (Concessionaire Bid);
- c) at all times comply with any time schedules set out in this Agreement including the Schedule 5 (Implementation Plan).
- d) are offered in accordance with Schedule 4 (Service Levels).

10.3 In the event of the Concessionaire's failure to provide the Service or to comply with its obligations in accordance with this Agreement, the Authority may, without prejudice to its other rights, require the Concessionaire to re-perform the Services or to comply with its obligations.

## 11 Service Levels

11.1 The Concessionaire shall provide the Operational Services to meet or exceed the Service Levels set out in Schedule 4 (Service Levels).

11.2 Any Disputes about or arising out of whether an Authority Default applies to the Concessionaire's failure to provide the Services in accordance with the Service Levels and/or this Agreement shall be resolved through the Dispute Resolution Procedure. Pending the resolution of the Dispute both parties shall continue to resolve the causes of, and mitigate the effects of such failure.



## 12 Standards

The Concessionaire shall comply with the Technical Standards listed or referred to in Schedule 2 (Tender Documents) and Schedule 3 (Concessionaire Bid), in force at the date of execution of this Agreement in performing its obligations under this Agreement.

## 13 Quality Assurance

13.1 The Concessionaire shall develop, Quality Plans that:

- a) ensure that all aspects of the Services are the subject of quality management systems; and
- b) are consistent with the technical standards (*e.g ISO \_\_\_\_\_* ) or any equivalent standard which is generally recognized as having replaced it.

13.2 The Concessionaire shall procure that the Services are carried out in compliance with the Quality Plans.

## 14. Monitoring of Service Delivery

14.1 The Authority may monitor the performance of the Services by the Concessionaire in accordance with the monitoring procedures described in Schedule 12 (Monitoring Procedure).

14.2. The Concessionaire shall co-operate, and shall procure that its Sub-contractors co-operate, with the Authority in carrying out the monitoring actions at no additional charge to the Authority.

14.3 If the Concessionaire believes that the Authority's monitoring of the Services is unreasonable the Concessionaire may escalate the issue with the Authority using the dispute Escalation Process set out in Schedule 11 (Dispute Resolution).

## 15 Service System

15.1 Unless otherwise agreed in writing by the Authority or as otherwise set out in this Agreement the System will be used by the Concessionaire solely for the purposes of providing the Services to the Authority and will not be used for the Concessionaire's own purposes or in providing any other services to third parties

15.2 Subject to any express provision of this Agreement to the contrary, the loss or destruction for any reason of the existing assets held on any Site shall not relieve the Concessionaire of its obligation to supply the Services in accordance with the Service Levels.

## 16. Concession Fee

16.1 The Concessionaire shall pay a fee (the "Concession Fee") amounting to \_ % of the total turnover (VAT excluded) on the yearly sales of Contract Services, to

the Authority for the rights and privileges granted in this Agreement, based on the audited financial statements of the Concessionary Company for each Financial Year.

16.2 The annual Concession Fee will be paid from the Concessionaire to the Authority within the first \_\_\_\_ (\_\_\_\_) months of each Financial Year based on the audited Financial Statements for the previous Financial Year.

### **17. Costs and expenses**

17.1 The Parties agree that any cost and expense regarding Concession implementation shall be in accordance with the provisions of Schedule 7 (Financials) of this Agreement.

17.2 Except as otherwise provisioned in this Agreement or elsewhere, each Party shall pay its own costs related, directly or indirectly, to the communication, negotiation, preparation and delivery of this Agreement.

### **18. Price per Unit of the Services**

18.1 The Price per Unit of the Services shall be the price offered by the Concessionaire and accepted by the Authority, as set out in this Agreement as Schedule 7 (Financials). The Price per Unit shall be net price (VAT excluded).

18.2 The Price per Unit will be paid to the Concessionaire by the End Users in advance for the provision of the services required.

### **19. Concession Financing**

19.1 The Concessionaire shall arrange for adequate funding for the purpose of financing the Concession and fulfillment of its obligations under this Agreement, and no authorization or approval of the Authority shall be required for such purpose save that the Concessionaire shall not charge, encumber or place a lien over the existing assets, the New Assets or the System without the prior written consent of the Authority.

19.2 Unless otherwise expressly provided in this Agreement, the Authority shall have no obligation to make contributions of any kind (financial or otherwise) in connection with the Concession.

### **20. Representatives**

20.1 The Concessionaire shall appoint the persons named as such in Schedule 9 (Key Personnel) as the Concessionaire Representative. The Concessionaire Representative shall have the authority to act on behalf of Concessionaire on the matters set out in, or in connection with, this Agreement.

20.2 The Authority shall appoint the Authority's Representative. The Authority's Representative shall have the authority to act on behalf of Authority on the

matters set out in, or in connection with, this Agreement in accordance with governance provisions as may be refined by the Parties or further agreed.

20.3 The Representatives shall be sufficiently senior within the organization of the appointing Party, and granted sufficient authority to ensure full cooperation in relation to the operation and the management of this Agreement.

## **21. Sub-Contracting**

21.1 The Concessionaire shall not sub-contract any of its obligations under this Agreement without the Authority's prior written consent, which, shall not be unreasonably withheld or delayed. The Concessionaire shall not subcontract without the prior written approval of the Authority more than \_\_\_\_% of the contract value.

21.2 The Authority may withhold or delay its consent where it considers, on reasonable grounds disclosed to the Concessionaire, that:

- a) the appointment of a proposed Sub-contractor may prejudice the provision of the Services; and/or
- b) the proposed Sub-contractor is considered to be unreliable and/or has not provided reasonable services to its other customers; and/or
- c) the proposed Sub-contractor employs unfit persons.

21.3 In making a request pursuant to Clause 21.1 the Concessionaire shall provide the Authority with the following information about the proposed Subcontractor:

- a) its name and address;
- b) the purposes for which the proposed Sub-contractor will be employed, including the scope of any services to be provided by the proposed Sub-contractor;
- c) any information reasonably requested by the Authority regarding financial standing and experience of Sub-contractors.

## **22. Audits**

22.1 The Authority may, not more than once in any Contract Year conduct audits for the following purposes:

- a) to verify the accuracy of number of service units issued;
- b) to review the Concessionaire's compliance with legislation applicable to and contractual Service Levels;
- c) to review the Concessionaire's compliance with its obligations on Services, Quality Assurance and Monitoring;
- d) \_\_\_\_\_

22.2 The Authority shall use its reasonable endeavors to ensure that the conduct of each audit does not unreasonably disrupt the Concessionaire or delay the provision of the Services.

22.3 Subject to the Authority's obligations of confidentiality, the Concessionaire shall promptly provide the Authority (and/or its agents or representatives) with all reasonable co-operation and assistance in relation to each audit, including:

- a) all information requested by the Authority within the permitted scope of the audit;
- b) reasonable access to any Sites controlled by the Concessionaire
- c) access to the Services system; and
- d) access to Concessionaire Personnel.

22.4 The Authority shall provide at least 15 Business Days notice of its intention to conduct an audit.

22.5 If an audit identifies that the Concessionaire has failed to perform its obligations under this Agreement in any material manner, the Parties shall agree and implement a remedial plan. If the Concessionaire's failure relates to a failure to provide any information to the Authority about the Concession Fee or the Concessionaire's costs, then the remedial plan shall include a requirement for the provision of all such information;

## **23 Records and Reports**

23.1 The Parties shall comply with the provisions of Schedule 2 (Tender Documents) and Schedule 3 (Concessionaire Bid) in relation to the keeping of records and the making of reports. The Concessionaire shall provide to the Authority on a regular basis in such form and manner and at such frequency as may be specified by the Authority.

## **24 Change in Law**

24.1 If after the Execution Day, any law, regulation, ordinance or procedure having the effect of law in the Republic of Albania enters into force, is issued or is amended and influences the contract terms, but excluding always such changes which impact on all Albanian businesses such as changes to tax law, the conditions or the service unit price shall be adapted to the extent the Concessionaire was affected in the fulfilling of his obligations stipulated in this Agreement according to the Change Control Procedure.

## **25. Key Personnel**

25.1 The Authority shall ensure it has sufficient personnel in order to assist and co-operate with the Concessionaire concerning Concession implementation and in compliance with requirements set out in this Agreement.

25.2 The Parties have agreed to the appointment of the Key Personnel listed in Schedule 9 (Key Personnel). Where possible, the Concessionaire must provide at least 3 months prior written notice of its intention to replace Key Personnel.

25.3 The Authority shall not unreasonably delay or withhold its consent to the appointment of a replacement for any relevant Key Personnel by the Concessionaire.

## **26. SPV Mother Company Undertakings**

26.1 SPV Mother Company of the SPV covenant and agree as follows:

- a) The Mother Company will remain as the sole shareholder in the Concessionary Company;
- b) Mother Company will transfer, charge or otherwise deal with its shareholdings in the Concessionary Company without the prior written consent of the Authority save that the Mother Company may sell its participation to third companies with the sole exception that Mother Company will in all cases retain at least 50.1% of the voting shares in the Concessionary Company. Any transfer shall be notified promptly to the Authority;
- c) The Mother Company will fully support and be involved in the implementation of the Concession by Concessionary Company throughout the Concession Period by, amongst other things:
  - (i) provision of required resources (including financing), expertise, technology and knowhow;
  - (ii) provision of subject matters experts;
  - (iii) on-going support for the Concessionary Company;
  - (iv) access to latest thinking and developments relevant to the Concession;

26.2 The authorized share capital of the Concessionary Company will be and will remain not less than \_\_\_\_\_ (\_\_\_\_\_) for the whole Concession Period which capital amount shall be reached within a maximum of 6 (six) months from the Effective Date of this Agreement.

26.3 Notwithstanding the transfer of this agreement to the Concessionary Company, the obligations set out in this Clause 26 will continue to be binding on the Mother Company.

## **27 Warranty and Maintenance**

27.1 The Concessionaire agrees that it will, for \_\_\_\_\_ year/s after the termination of this Agreement (Warranty Period), as so ever caused, provide the warranty on the System, for no additional charge;

27.2 *Warranty Coverage* \_\_\_\_\_

27.3 *Warranty Conditions* \_\_\_\_\_ -

## **28 Health and Safety**

28.1 The Concessionaire acknowledges that it will comply with all applicable statutory rules and regulations regarding to health and safety.

## **29. Intellectual Property Rights**

29.1 This Agreement does not assign any Intellectual Property Rights of either Party or their respective licensors in existence as at the Effective Date and, the Authority shall not acquire any right, title or interest in or to the Concessionaire Software.

## **30. Force Majeure**

30.1 Upon occurrence of any Force Majeure Event, the following shall apply:

- a) there shall be no Termination of this Agreement except as provided in Clause 41, hereinafter;
- b) in case the Force Majeure Event occurs before Effective Date, the deadline for achievement of Effective Date shall be extended by the period for which the Force Majeure Event shall subsist;
- c) in case the Force Majeure Event occurs after Effective Date, the Concession Period shall be extended for the duration of such Force Majeure Event;

## **31. Indemnity**

31.1 The Authority shall, indemnify, defend and hold harmless the Concessionaire against any and all proceedings, actions, third party claims for loss, damage and expense of whatever kind and nature arising out of breach by the Authority, its officers, servants and agents of any obligations of the Authority under this Agreement except to the extent that any such claim has arisen due to breach by the Concessionaire of any of its obligations under this Agreement.

31.2 The Concessionaire shall indemnify and keep the Authority indemnified during Concession Period from and against any and all proceedings, actions, third party claims for loss, damage and expense of whatever kind and nature arising out of breach by the Concessionaire, its officers, servants and agents of any obligations of the Concessionaire under this Agreement save to the extent that such loss or damage arises out of the breach of any of its obligations under this Agreement by the Authority or any State Entity or any deliberate act or omission of the Authority or any State Entity;

## **32. Mitigation of Loss**

32.1 The party causing an infringement of this Agreement shall take all necessary measures to mitigate the loss, damage which has occurred, provided that loss or damage alleviation may be performed without unreasonable inconvenience or cost.

### 33. Confidentiality

33.1 Except to the extent set out in this clause or where disclosure is expressly permitted elsewhere in this Agreement, each Party shall:

- a) treat the other Party's Confidential Information as confidential and safeguard it accordingly; and
- b) not disclose the other Party's Confidential Information to any other person without the owner's prior written consent.

33.2 Clause 33.1 shall not apply to the extent that:

- a) such information was in the possession of the Party making the disclosure without obligation of confidentiality prior to its disclosure by the information owner;
- b) such information was obtained from a third party without obligation of confidentiality;
- c) such information was already in the public domain at the time of disclosure otherwise than by a breach of this Agreement; or
- d) it is independently developed without access to the other Party's Confidential Information,
- e) such information is mandatory to be disclosed by the Law.

### 34. Limitations on Liability

34.1 Neither Party limits its liability for:

- a) death or personal injury caused by its negligence, or that of its employees, agents or Sub-contractors (as applicable); or
- b) fraud by it or its employees;

34.2 Subject to Clause 34.3, the Concessionaire's total aggregate liability:

- a) for all loss of or damage to the Sites, property or assets (including technical infrastructure, assets or equipment but excluding any loss or damage to the Authority's Data or any other data) of the Authority caused by Concessionaire's Default shall in no event exceed the amounts provided in Schedule 7 (Financials).
- b) in respect of Services Credits, Delay Payments and loss of Authority Data shall be limited in total for the whole Concession Period to a maximum of Euro \_\_\_\_;
- c) in respect of all other claims, losses or damages, whether arising from tort (including negligence), breach of contract or otherwise under or in

connection with this Agreement for the whole of the Project for its entire term shall in no event exceed Euro \_\_\_\_\_.

34.3 Nothing in this Clause 34 (Limitations on Liability) shall act to reduce or affect a Party's general duty to mitigate its loss.

### **35. Insurance**

35.1 The Concessionaire shall take out and maintain or procure the maintenance of the Insurances in accordance with the following provisions \_\_\_\_\_.

35.2 If at any time the Concessionaire is unable to maintain any of the Insurances, the Concessionaire shall promptly provide the Authority with equivalent cover by means of a letter of credit.

### **36. Rights and Obligations of the Concessionaire**

36.1 The Concessionaire shall be entitled, in addition to any other rights arising from the granting of the Concession, to:

- a) benefit the payments and profits for the services provided, based on the provision of the Concession Agreement and its Schedules;
- b) to obtain the necessary information and cooperation from the Authority during the execution of the services;
- c) to benefit the assistance of Authority in relation to the obtainment of the necessary permits and licenses, for the execution of the services according to the Concession Agreement;
- d) perform the necessary acts as it considers necessary to carry out the Concession Agreement, to comply with its obligations and to exercise its rights under this Agreement;
- e) \_\_\_\_\_  
\_\_\_\_\_

36.2 The Concessionaire shall:

- a) finance, project, construct, maintain and operate the services required by the contract, based on the technical specifications, requirements, modalities, timetables specified by this Contract and Schedules;
- b) at all times allocate sufficient resources to provide the Services in accordance with the terms of this Agreement;
- c) obtain, and maintain throughout the duration of this Agreement, all the consents, licenses and permissions (statutory, regulatory contractual or otherwise) it may require and which are necessary to enable the provision of the Services; and



- d) provide to the Authority's other suppliers as are notified to the Concessionaire periodically, such reasonable co-operation, information (including any Documentation), advice and assistance in connection with the Services and System to enable any such person to create and maintain technical or organizational interfaces with the Services and the System, on the termination of this Agreement for any reason, to enable the timely transition of the Services (or any of them) and System to any Replacement Concessionaire.
- e) implement the Concession in compliance with the provisions of this Agreement and its Schedules;
- f) bear costs and expenses associated with the performance of its obligations in accordance with this Agreement and its Schedules;
- g) appoint, supervise, monitor and control the activities of Sub-Contractors (under their respective contracts as may be necessary), in compliance with provisions of this Agreement and its Schedules;
- h) to construct, refurbish and operate the Central Site and the Application Offices, in accordance with requirements and deadlines provided in this Agreement;
- i) to design, establish, manage, maintain, operate and supervise the System during the Concession Period in accordance with the requirements and deadlines provided in this Agreement;
- j) to ensure high quality, reliability and durability of the System during the Concession Period;
- k) to inform the Authority on each circumstance that may harm the implementation process of the Concession;
- l) to report on a monthly basis to the Authority regarding the progress made in the development of the Concession, as provided in this Agreement;
- m) to take all necessary and appropriate measures in order to guarantee the work security conditions to its employees, as well as to observe the legislation relevant to the prevention of damages and misfortunes;
- n) after the termination of the Concession Period and in accordance with the provisions of this Agreement, all assets created or reconstructed or specifically developed or used by the Concessionaire and/or its employees and belonging to the Concessionaire during the Concession Period and for the purposes of the Concession implementation, shall be transferred to the Authority;
- o) \_\_\_\_\_  
\_\_\_\_\_

36.3 The Concessionaire is obliged to establish within 30 (thirty) days from the Execution Date of this Agreement the Concessionary Company, which shall have as the scope of activity the performance of the Concession;

### **37. Rights and Obligations of the Authority**

37.1 The Authority shall be entitled, in addition to any other rights arising from the granting of the Concession, to:

- a) benefit the payments of Concession Fee based on the provision of the Concession Agreement and its Schedules;
- b) monitor the proper implementation of the services, according to the procedures defined in the Schedule 12 Monitoring Procedures and Schedule 5 (Implementation Plan);
- c) verify, inspect and control the respect of the service standards and levels, as defined by Schedule 2, (Tender Documents), Schedule 3 (Concessionaire Bid) and Schedule 4 (Service Levels);
- d) to request and obtain from the Concessionaire the information and reports as defined by the Concession Agreement and its Schedules;
- e) to obtain the property of the assets and services constructed and operated by the Concession Agreement, at the end of the Concession period;
- f) to obtain the necessary information and cooperation from the Authority during the execution of the services;
- g) \_\_\_\_\_  
\_\_\_\_\_

37.2 The Authority shall:

- a) assist, inform and cooperate with the Concessionaire during the execution of the services;
- b) The Authority shall ensure that any State Entity under the Authority's direct authority, subject to receipt by the State Entity of a written notice by the Concessionaire, will issue to the Concessionaire the authorizations, licenses and permits regarding Concession implementation provided that the Concessionaire has complied with the requirements for the obtainment of such licenses, authorizations and permits.
- c) To the extent that the Authority or any State Entity (which is under the Authority's direct authority) is not entitled to issue authorizations, the Authority shall use its best efforts to ensure that relevant authorizations, permits and licenses are issued to the Concessionaire in accordance with this Agreement and Applicable Law, without unreasonable delay following a duly submitted application by the Concessionaire.

- d) The Authority shall ensure that all State Entities exercising their respective authorities in relation to the Concession are duly informed about the existence of this Agreement, and all State Entities exercising their respective authorities in relation to the Concession will, without unreasonable delay, cooperate with the Concessionaire regarding implementation of the Concession.
- e) \_\_\_\_\_  
\_\_\_\_\_

### 38 Warranties

38.1 The Authority represents and warrants that, as of the date of this Agreement and during the Concession Period:

- a) it has full power and authority to execute, deliver and perform its obligations under this Agreement and to carry out the transactions contemplated hereby;
- b) this Agreement constitutes its legal, valid and binding obligation enforceable in accordance with the terms hereof;
- c) the assets related to Concession implementation owned by the Authority are and shall remain free, during the whole Concession Period, from third party rights;
- d) shall defend and hold harmless the Concessionaire against all claims of third parties with regard to peaceful possession of Concession locations and assets;
- e) the execution, delivery and performance of this Agreement will not conflict with, result in the breach of, constitute a default under or accelerate performance required by any of the terms of any Applicable Laws or any covenant, agreement, understanding, decree or order to which it is a party or by which it or any of its properties or assets are bound or affected;

38.2 The Concessionaire represents and warrants to the Authority that, as of the date of execution of this Agreement and during the Concession Period:

- a) is duly organized and validly existing as a company established under the laws of Albania/or \_\_\_\_\_;
- b) this Agreement constitutes its legal, valid and binding obligation enforceable against it in accordance with the terms hereof;
- c) has full power and authority to execute, deliver and perform its obligations under this Agreement and to carry out the transactions contemplated hereby;

- d) has taken all necessary corporate authorizations and other action under Applicable Laws and its constitutional documents in order to consent the execution, delivery and performance of this Agreement;
- e) has the financial standing and capacity to undertake the Concession;
- f) no representation or warranty contained herein or in any other document furnished by it to the Authority or to any State Entity in relation to the Concession contains or will contain any untrue statement of material fact or omits or will omit to state a material fact necessary to make such representation or warranty not misleading;
- g) shall perform its obligations with the required professional diligence; .
- h) it is not insolvent and it is in full compliance with Applicable Laws and the provisions of this Agreement;

### **39. Hand-back of Concession**

39.1 Upon the expiry of the Concession Period, the Concessionaire shall hand-back vacant and peaceful possession of Concession locations (facilities) to the Authority, in accordance with the Hand Back Procedure.

39.2 The process of handing back shall be initiated at least 6 (six) months before the expiry date of the Concession Period by a joint inspection by the Authority and the Concessionaire.

### **40. Hand-back Procedure**

40.1 The Parties agree that following the expiry date of the Concession Period, any right or title granted to the Concessionaire in respect of the Concession locations (premises), assets and facilities shall expire and the Concessionaire shall:

- a) transfer to the Authority any right or title regarding Concession locations (premises), existing and New Assets including all components, systems;
- b) deliver to the Authority all documents and data in its possession relating to all and any items in connection with the operation of the Concession by the Concessionaire for no fee, charge or further payments.

40.2 The Authority agrees and undertakes that within 30 (thirty) days upon transfer of rights, titles regarding Concession locations (premises), existing and New Assets, including transferring all components, systems, software and delivery of relevant documents as provided under paragraph (ii) above it shall issue and deliver the Hand-back Certificate, according to Schedule 21 (Handover and Acceptance) of this Agreement, to the Concessionaire.

40.3 The Concessionaire shall ensure that all property, assets, rights and other items referred to under this Clause, which are vested in or transferred to the Authority shall be in good working order and in a good state of repair such that

shall be able to function under normal conditions, for a further three years without having to replace any component other than Consumables.

40.4 The Concessionaire, upon written agreement of its suppliers, will transfer to the Authority, with similar terms and conditions as provided to Concessionaire, all maintenance contracts with regard to the property and assets.

40.5 Whilst all assets of the Concessionaire including all components that make up the System shall be transferred to the Authority on the expiry date of Concession Period, the Concessionaire itself shall not be transferred to the Authority.

#### **41. Termination**

41.1 The Authority, if it is not otherwise provided in this Agreement, is entitled to terminate this Agreement when:

- a) the Concessionaire is in material breach of its obligations under this Agreement and such breach remains unremedied after a period of 60 (sixty) days written notice notifying the breach;
- b) there is a transfer of shares not in compliance with the Concession Agreement;
- c) an Insolvency Event affecting the Concessionaire occurs.

41.2 The Concessionaire if it is not otherwise provided in this Agreement, is entitled to terminate this Agreement when the Authority is in material breach of its obligations under this Agreement and such breach remains unremedied after a period of 60 (sixty) days written notice notifying the breach;

41.3 If a Force Majeure Event continues or is, in the reasonable judgment of the Parties, likely to continue for a period longer than \_\_ consecutive months, in addition to the provisions of Clause 30 (Force Majeure), each Party may terminate this Agreement by giving a Termination Notice to the other Party.

41.4 Each of the Parties terminating this Agreement in accordance with this Clause 41 shall do so upon a prior written notice of 30 days sent to the other Party (Termination Notice). The Termination Notice shall contain:

- a) appropriate details on the underlying Event of Default;
- b) the Termination Date which shall be a date occurring not earlier than 30 days from the date of Termination Notice;
- c) the estimated Termination payment including the details of computation thereof and;
- d) any other relevant information.

## **42. Consequences of Termination**

42.1 Following the service of a Termination Notice for any reason the Concessionaire shall continue to be under an obligation to provide the Services to the required Service Levels and to ensure that there is no degradation in the Service Levels or other standards of the Services until the date of the termination.

42.2 In the event of termination or expiry, the Concessionaire shall \_\_\_\_\_:

42.3 The expiry, other termination of this Agreement (howsoever caused) shall not affect any accrued rights or liabilities of either Party, nor shall it affect the coming into force or the continuance in force of any provision in this Agreement, which is expressly or by implication intended to come into or continue in force after such expiry, or termination.

42.4 The termination of the Concession Period or of this Agreement shall be of no prejudice to all rights and obligations which have been obtained by the Authority or the Concessionaire under the provisions of this Agreement and its Schedules.

## **43. Exit Management**

43.1 The Authority and the Concessionaire shall comply with the exit management requirements set out in this Agreement and any subsequent agreed exit plan.

## **44 Authority Step-In Rights**

44.1 The Authority may take action under this clause in the following circumstances:

- a) there is a Default entitling the Authority to terminate in accordance with Clause 41 (Termination);
- b) there is a Default by the Concessionaire that is materially preventing or materially delaying the performance of the Services or any part of the Services and such default has not been cured within 30 days following written notice from the Authority;

## **45. Action to be taken prior to exercise of the Step-In Right**

45.1 Before the Authority exercises its right of step-in it shall permit the Concessionaire the opportunity, for a term of not less than 15 days, to demonstrate to the Authority's reasonable satisfaction that the Concessionaire is still able to provide the Services in accordance with the terms of this Agreement and/or remedy the circumstances giving rise to the right to step-in without the requirement for the Authority to take action.

45.2 If the Authority is not satisfied with the Concessionaire's demonstration pursuant to Clause 45.1, the Authority may:

- a) where the Authority considers it expedient to do so, require the Concessionaire by notice in writing to take those steps that the Authority reasonably considers necessary or expedient to mitigate or rectify the state of affairs giving rising to the Authority's right to step-in;
- b) appoint any person to work with the Concessionaire in performing all or a part of the Services (including those provided by any Sub-contractor); or
- c) take the steps that the Authority acting reasonably considers appropriate to ensure the performance of all or part of the Services (including those provided by any Sub-contractor).

#### **46. Exercise of Step-in Right**

46.1 If the Authority takes action pursuant to step in Clause, the Authority shall serve notice ("Step-in Notice") on the Concessionaire. The Step-in Notice shall set out the following:

- a) the action the Authority wishes to take and in particular the Services it wishes to control;
- b) the reason for and the objective of taking the action;
- c) the date it wishes to commence the action;
- d) the time period which it believes will be necessary for the action;
- e) whether the Authority will require access to the Concessionaire's premises and/or the Sites; and
- f) to the extent practicable, the effect on the Concessionaire and its obligations to provide the Services during the period the action is being taken.

#### **47 Contract Guarantee**

47.1 The Concessionaire shall, at its own expense, provide to the Authority a Contract Guarantee (Performance Bond) from a reputable bank or insurance company approved by the Authority for a sum equal to Euro \_\_\_\_ (\_\_\_\_\_) substantially in the form set forth in Schedule 8 (Contract Guarantee). Such Contract Guarantee shall remain valid and in full force and effect for the Term.

47.2 If the Concessionaire is in default of its obligations and does not remedy it within 60 days following receipt of a written notice from the Authority the Authority may, without further reference to the Concessionaire, terminate this Agreement.

47.3 The Authority shall release the Contract Guarantee to the Concessionaire within 30 days following the date of termination on expiry of this Agreement provided that the Concessionaire is not in default of its obligations under this Agreement.

47.4 The Contract Guarantee will be reduced by the Concessionaire according to the following formula:

- a) \_\_\_\_\_ Euro within 30 days from the \_\_ anniversary of the Effective Date;
- b) \_\_\_\_\_ Euro within 30 days from the \_\_ anniversary of the Effective Date;
- c) \_\_\_\_\_ Euro within 30 days from the \_\_ anniversary of the Effective Date;
- d) For the remaining duration of the contract there shall be \_\_\_\_\_ Euro in force to guarantee the Concessionaire performance until the end of the Concession Period.

47.5 In the event of the Concessionaire is in Default regarding fulfillment of its obligations as per this Agreement following the notification the Authority shall, without prejudice to its other rights and remedies hereunder, be entitled to demand any sum of money under the Contract Guarantee which the Concessionaire is liable to pay to the Authority under this Agreement. The Contract Guarantee shall not be demanded by the Authority in case of events of Force Majeure or events of Default or Insolvency affecting the Authority.

#### **48. Assignment**

48.1 Except for the provisions of Clauses on Mother Company Undertakings and Warranties and Maintenance of this Agreement, the Parties agree that this Agreement shall be assigned by the Concessionaire to the Concessionary Company, according to the provisions of this Agreement. For such purpose, subject to registration of the Concessionary Company with the Commercial Register held by National Registration Centre, the Concessionaire shall promptly notify in a written form the Authority.

48.2 Except for the abovementioned case, the Parties shall not be entitled to assign or transfer this Agreement, or any rights and obligations, arising under or pursuant to this Agreement or any benefit or interest herein without the prior written consent of the other Party.

#### **49. Waiver and Cumulative Remedies**

49.1 The rights and remedies provided by this Agreement may be waived only in writing by the relevant Representative in a manner that expressly states that a



waiver is intended, and such waiver shall only be operative with regard to the specific circumstances referred to.

49.2 Unless a right or remedy of a Party is expressed to be an exclusive right or remedy, the exercise of it by this Party is without prejudice to this Party's other rights and remedies. Any failure to exercise or any delay in exercising a right or remedy by either Party shall not constitute a waiver of that right or remedy or of any other rights or remedies.

49.3 The rights and remedies provided by this Agreement are cumulative and, unless otherwise provided in this Agreement, are not exclusive of any right or remedies provided at law or in equity or otherwise under this Agreement.

## **50. Severance**

50.1 If any provision of this Agreement is held invalid, illegal or unenforceable for any reason by any court of competent jurisdiction, such provision shall be severed without effect to the remaining provisions. If a provision of this Agreement that is fundamental to the accomplishment of the purpose of this Agreement is held to any extent to be invalid, the Concessionaire and the Authority shall immediately commence good faith negotiations to remedy that invalidity.

## **51. Entire Agreement**

51.1 This Agreement, together with the documents referred to in it, constitutes the entire agreement and understanding between the Parties in respect of the matters dealt with in it and supersedes, cancels and nullifies any previous agreement between the Parties in relation to such matters notwithstanding the terms of any previous agreement or arrangement expressed to survive termination.

51.2 Each of the Parties acknowledges and agrees that in entering into this Agreement and the documents referred to in it does not rely on, and shall have no remedy in respect of, any statement, representation, warranty or undertaking (whether negligently or innocently made) other than as expressly set out in this Agreement. The only remedy available to either Party in respect of any such statements, representation, warranty or understanding shall be for breach of contract under the terms of this Agreement.

## **52. Notices**

52.1 Any notices given under or in relation to this Agreement shall be in writing, signed by or on behalf of the Party giving it and shall be served by delivering it personally or by sending it by pre-paid, recorded delivery or registered post or by fax to the address and for the attention of the relevant Party notified for such purpose or to such other address as that Party may have stipulated in accordance with this clause. Notices shall not be sent by e-mail.

50.2 Any Change Request shall be in writing and signed for.

52.3 A notice shall be deemed to have been received:

- a) if delivered personally, at the time of delivery; and
- b) in the case of pre-paid first class post, three Business Days from the date of posting.

52.4 In proving service, it shall be sufficient to prove that the envelope containing the notice was addressed to the relevant Party at its address previously notified for the receipt of notices (or as otherwise notified by that Party) and delivered either to that address or into the custody of the postal authorities as pre-paid first class post, recorded delivery, registered post or airmail letter.

### **53. Language**

51.1 This Agreement shall be drafted and signed in the Albanian language and in the English language. In case of discrepancies, controversies, disputes, claims arising between the Albanian text of this Agreement and the English text of this Agreement, the \_\_\_\_\_ version of this Agreement shall prevail and be the sole binding version. Documents referred or delivered pursuant this Agreement shall be in the English/Albanian language, as required.

### **54. Governing Law and Arbitration**

54.1 This Agreement shall be governed by and construed in accordance with laws of the Republic of Albania.

54.2 Disputes shall first be dealt in accordance with the Dispute Resolution Procedure set out in Schedule 11 and if they cannot be resolved they shall be finally settled by arbitration in accordance with the \_\_\_\_\_(e.g. *ICC Arbitration Rules*).

54.3 The number of arbitrators shall be 3 (three). Arbitrators shall be nominated in accordance with the \_\_\_\_\_(e.g. *ICC Arbitration Rules*). The place of arbitration shall be \_\_\_\_\_(e.g. *Geneva, Switzerland*). The language of the arbitration shall be \_\_\_\_\_(e.g. English). The costs of arbitration will be determined by the arbitration tribunal.

54.4 Subject to application of arbitration proceeding, the Parties waive irrevocably and unconditionally their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made.

*IN WITNESS of which this Agreement has been duly executed by the Parties.*

CONTRACTING AUTHORITY

# FEASIBILITY STUDY

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NAME OF PROJECT

Company's name in the case of unsolicited proposal

\_\_\_\_/\_\_\_\_/\_\_\_\_\_

*This document serves as a guide for the preparation of the feasibility study of a concession/PPP project in accordance with the rules of evaluating and granting them. The documents may be found in the official website of the Concession Treatment Agency (ATRAKO); [www.atrako.gov.al](http://www.atrako.gov.al)*

**Introduction**

*Short description of the project and its main goals*

**The starting point of the project**

*Description of the starting point of the identification of the potential concession/public private partnership project, which could be:*

- 1.1. National, regional/local or sector level planning process;
- 1.2. Analysis of infrastructure situation, identification of lack of services and/or investment needs; or
- 1.3. Project ideas driven by policy priorities.

**Current Situation**

*When describing the current situation the feasibility study may refer to the actual points by using them according to the type and nature of the project.*

- 2.1. A description of the current situation, assessment of the fundamental shortcomings or of development opportunities, improvement context and, if appropriate, an overview of the market;
- 2.2. Medium and long term projections of needs;
- 2.3. General description of the project;
- 2.4. The legislation governing the scope of investment;
- 2.5. In the case of a project, which involves carrying out of an institutional function, the nature of the institutional function in question and the extent, to which this institutional function, both legally and by its nature, may be performed by a private party;
- 2.6. In the case of a project, which involves the use of state property, a description of the state property in question, its uses, if any, subject to which is currently such state property, and a description of the types of use, in which a private entity may get legally involved;

2.7. The strategic and operational benefits expected from the project;

## Technical Project

*Technical Analysis is part of the feasibility study and its main objective is to demonstrate that the project can be implemented by means of using the proposed technologies and without unreasonable technical risks.*

### Technical Analysis

*Technical analysis must contain the following information:*

3.1.1. Project background.

3.1.2. Location and the plot.

3.1.3. Local conditions.

3.1.4. Technical, construction and functional description of the project.

3.1.5. Estimated timeline of construction (in months).

### 3.2. Environmental and social impacts

*Environmental and social impact of the project should be prepared in accordance with the legislation in force.*

- *The study identifies the possible negative or adverse effects on the environmental components but, which are not limited only to the following: population, air, soil, water, landscape, fauna, flora, aspects of biodiversity, including endangered species, sensitive ecosystems and the identification of those, which are legally protected. It should also show the preventive measures to be taken to ensure compliance with EU standards of environment.*
- *The study takes into account social aspects, such as protection of human rights and the health of communities, safety, labor issues and, where appropriate, impacts on disadvantaged groups or needy groups, land acquisition and involuntary resettlement, protection of cultural property and heritage.*

### 3.3. Economic and financial analysis

*Economic and financial analysis should consists, at least, of the following elements*

- Direct costs of investment
- Direct costs of maintenance
- Direct operating costs associated with the daily operation
- Indirect costs of the project
- Incomes of the project shall be derived from the following:
- Qualitative and quantitative risk analysis in order to identify and assess the range of risks that may affect the project.
- Sensitivity analysis.

IN ORDER TO ACCEPT THE UNSOLICITED PROPOSAL IN A "DEVELOPED FORM", THE STUDY SHOULD BE PREPARED ON THE BASIS OF LAW 125/2013 "ON CONCESSIONS AND PUBLIC PRIVATE PARTNERSHIPS", AS AMENDED, DECISION OF THE COUNCIL OF MINISTERS NO. 575, DATED 10 JULY 2013 "ON THE APPROVAL OF RULES FOR THE EVALUATION AND GRANTING OF CONCESSION/PPP" AND ABOVE FORMAT UP TO THIS POINT.

IN ORDER TO ACCEPT THE UNSOLICITED PROPOSAL IN A "DEVELOPED FORM", THE STUDY SHOULD BE PREPARED ON THE BASIS OF LAW 125/2013 "ON CONCESSIONS AND PUBLIC PRIVATE PARTNERSHIPS", AS AMENDED, DECISION OF THE COUNCIL OF MINISTERS NO. 575, DATED 10 JULY 2013 "ON THE APPROVAL OF RULES FOR THE EVALUATION AND GRANTING OF CONCESSION/PPP" AND ABOVE FORMAT INCLUDING REASONING OF THE DECISION AS SET OUT BELOW.

#### **Reasoning of the Concession/PPP decision**

Based on the results of the analyses as undertaken under the Decision of the Council of Ministers no. 575/2013, the study must justify if viability and sustainability of the project is confirmed; and if the concession/PPP form appears as the most appropriate model for implementation.

The reasoning of the of the concession/PPP decision is performed by starting with the public sector comparator and by using appropriate financial models, such as Public Private Comparator methodology or "Shadow" model.

## ANNEX 3

### GUIDELINES FOR DRAFTING THE SUMMARY REPORT AND THE FEASIBILITY STUDY

#### 1. The report on the draft proposal

The PPP commission performs the preliminary evaluation of the submitted draft proposal. At the finalization of this preliminary evaluation the commission drafts a summary report regarding the eventuality for the performance of the project. This report contains necessary information related to the necessity of the project realization, the appropriateness of implementing the project idea as well as takes into consideration the options and alternatives of its realization.

The report must contain basically at least the following crucial elements:

- A description of the current sector situation, to present the project, description that identifies and evaluates the encountered shortcomings as well as needs and areas in need of development, the improving context and in those cases when necessary contains also a market expose;
- Midterm and long term forecasts of the specific sector needs and of the contracting authority;
- A general description of the submitted project;
- The identification of the legal basis that regulates the proposed investment field objective;
- In the event that the submitted project foresees the performance of an institutional function by a private partner, the report must identify the type of the institutional function as well as to evaluate the amount up to which this institutional function is permitted and can be performed by a private partner, based on the legal framework and on the project type;
- In the event when the submitted project foresees the use of state property, the report must determine the state properties proposed to be included in the project, by identifying their current use as well as to evaluate and describe the type of usage of these properties, for which the legislation authorizes the involvement of the private partner;
- Identification and evaluation of strategic and operational benefits foreseen to be achieved by the implementation of the submitted project;
- The project coordination with general policies of sector or regional investments;

- A forecast of technical and economic scenarios which must be implemented toward the achievement of project objectives;
- A preliminary evaluation of project costs and of the financial sustainability;
- A preliminary financial and/or economic analysis of the submitted project;
- Proposals related to alternatives for the allocation of the financial, technical and operational risk, through the public and private partnership;
- Conclusions and recommendation related to implementation methods, including the provision of operational directives and the description of implementable and suitable models for the project realization;
- In case of unsolicited proposals submitted by an interested party, the commission report must contain also the proposal regarding the opportunity of granting or not of the bonus in favor of the proposing entity as well as of the percentage of this bonus' points. This proposal is formed based on technical and financial results of unsolicited proposals.

After the drafting of the report on the draft proposal, with all above listed elements, the concession/PPP commission sends it for assessment at the competent contracting authority.

The contracting authority based on the information of the summary report drafted by the concession/PPP commission resolves in relation to the assessed project.

Following the review of the summary report the authority may select one of the here below alternatives:

- To refuse the project implementation

The decision of the contracting authority to refuse the implementation of the project is usually related to the negative assessment of the project. This refusal may depend by several various causes and reasons which can be the negative assessment for example of the projects' legality, suitability, need, feasibility and profitability.

- To postpone the project implementation

The contracting authority may interrupt or postpone the implementation of a project due to various reasons. These reasons may relate to the impossibility or difficulty of the contracting authority to implement the project within the period during which it has been assessed, or the need for the integration into the project of information, data or elements which are not available at the moment, or because the project is not considered as necessary for the time being, due to other priorities of the contracting authority.

- To return for completion the unsolicited proposal



The unsolicited proposal is returned for completion to the proposing entity in cases when it does not comply with the minimum requirements of article 10 of DCM 575. According to this provision in order to be evaluated by the competent contracting authorities the unsolicited proposals must fulfill the following minimum requirements:

- The proposed project must concern sectors for which the legislation allows the possibility to implement concession/PPP projects;
- The unsolicited proposal must not relate to projects for which at the moment the unsolicited proposal is submitted, has already commenced or has been initiated a concession/PPP procedure;
- The unsolicited proposal must be submitted to the competent contracting authority as per the legal provisions;
- The unsolicited proposal must be presented as per the format required by the law, thus either in the developed format<sup>2</sup>, or by a feasibility study.

The entity that has submitted the unsolicited proposal is guaranteed a 30 day term to complete the unsolicited proposal, term that commences from the date such proposal is returned back by the contracting authority.

- Continuation of procedures for the project implementation

In case that the contracting authority issues a positive evaluation on the submitted project, then such authority resolves on the continuation of legal procedures regarding the project implementation. Further procedures related to the implementation of the project are effectuated by the same commission established for the assessment of the submitted project.

Following the finalization of the summary report by the concession/PPP commission, in case when the contracting authority has resolved positively on the implementation of the submitted project, the commission continues its work performing the further actions foreseen by the legislation that shall be detailed here below.

## **2. The feasibility study**

The following chronologic action, part of the concession/PPP project assessment procedures is drafting of a feasibility study on the presented project.

Drafting of a feasibility study by the commission aims putting at the disposal of the contracting authority a document that contains an analysis of all composing aspects of a proposed project, based on which the contracting authority will issue its decision (positive or negative one) on its engagement on the respective project.

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<sup>2</sup> In accordance with the criteria determined at Article 11 of DCM 575.

As regards the form and its composing elements, the feasibility study is drafted based on the template and as per the standard form prepared and published by ATRAKO in its web page.

At the practical level, as regards its content, the feasibility study is a document that contains an ulterior more detailed and thorough assessment of the information and data contained in the summary report of the commission.

Firstly, the feasibility study must assess general conditions which relate to the assessment of the fact if there exist or not a public interest for the realization of a concrete project, and the fact if the project is compliant with the national and sector strategic objectives set out by the planning documents, such as policies, strategies, or plans approved by the central or local government.

Moreover, the feasibility study must identify the main characteristics of the project under assessment, that are accompanied by a deep analysis of integral elements which include technical, economic, financial aspects as well as the project's social and environmental impact.

Lastly, the study must produce a reasoned assessment based on the analysis if the project under evaluation is more economically advantageous to be implemented under the concession/PPP form compared to the traditional alternative of the public procurement.

#### ***a) Timelines for drafting the feasibility study***

The latest amendments to the concession/PPP legislation aimed to determined clear timelines and to shorten the procedure for the assessment of projects. As a consequence of these provisions<sup>3</sup> the feasibility study must be drafted by the concession/PPP commission within a term of 60 working days, term that commences from the date of the establishment of the commission. In those cases when the project under assessment results to be very complex the above 60 days term can be extended up to a maximum of 30 additional working days.

Exceptionally, if the object of the concession/PPP is related to a hydro power plant, the above deadlines start from the date of receipt of technical opposition prepared by the responsible state structures.

#### ***b) The content of the feasibility study***

With regard to the content, the feasibility study should contain the following elements:

- A general description of the assessed project;
- The summary of operational stages necessary for its implementation;

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<sup>3</sup> Article 4 of DCM 575, as amended by DCM no. 313, date 27.04.2016

- A detailed technical analysis;
- The detailed economic and financial analysis;
- A detailed legal analysis;
- Environmental studies, impact, consequences and implications to the nature;
- Commission conclusions and recommendation with regard to the assessed project.

The legislation pays special attention and details by specific provisions to some integral elements of the feasibility study, respectively to: the technical analysis, the economic and financial analysis and the social and environmental impact.

*i. Technical analysis*

As regards the technical analysis which should be part of the feasibility study, special provisions<sup>4</sup> determine that the aim of such document is to evaluate and prove by way of a detailed analysis that the assessed project can be implemented by using the proposed technologies and free of any unreasonable technical risks.

In relation to the content of the technical analysis, this document should contain the following information:

A general technical description of the project referring to the performed preliminary studies, such as studies performed prior to the investment, support studies, researches or land surveys. This information should also describe the concept, the project idea, main objectives as well as to identify the project beneficiaries.

The technical analysis should contain information in relation to immovable properties where the project shall be developed. In particular, should contain information on the proposed location of the land or of facilities where the project is proposed to be developed, as well as the list of respective alternatives, if any. This information should determine their total surface as well as if the use of immovable properties is envisaged to be indefinite or for a temporary period of time. The information on immovable properties should also include information on the legal status and the ownership of immovable properties to be used, including also cases when it is foreseen the use of public immovable properties.

All the same, the technical analysis should contain data related to the local conditions of the project. These data include information related to the climate, the natural phenomenon specific to the area, topographic studies, geotechnical studies, the network, roads, and infrastructure situation and the need for connectivity services or for improving the infrastructure and network.

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<sup>4</sup> Article 5 of the DCM 575, as amended by DCM no. 313, date 27.04.2016

The analysis should also contain a technical description in relation to the technical, functional and constructive aspect of the project. This information is mainly related to the results that are expected to be achieved by the project, and it does not describe in detail how it will be achieved.

This technical description identifies in particular the main civil works to be performed, respective construction methods, their technology and equipment to be used, the main project parameters such as: capacities, surfaces, volumes, length, and other particular indicators, as well as lists technical standards that should be implemented for the execution of the project.

The technical analysis should be concluded by an assessment of terms and periods forecasted for the performance of constructions as per the project, which need to be expressed in months.

In case when it is scheduled the performance of civil works the technical analysis should also contain as sketches the location design in the scale: 1:25000 - 1:5000, the general design in the scale 1: 2000 - 1:500, as well as general designs and sections of the architecture, resistance, installations; special designs, longitudinal profiles, transverse profiles, according to the request and needs of the specific project.

#### *ii. The social and environmental impact*

One of the most important elements of the feasibility study is related to the identification and assessment of the social and environmental impact of the project. For this purpose the analysis of the social and environmental impact should identify the impact, consequences and potential effects resulting of the project, which can cause negative or harming environmental consequences or alterations. The analysis of consequences should be focused in particular at the most important environmental components such as the population, air, land, landscape, fauna and flora, biodiversity, and endangered species, sensitive and legally protected ecosystems.

Following the identification of eventual consequences the environmental impact assessment should also identify preventive measures to be undertaken for the protection of the environment in accordance with the standards and specific provisions of the Albanian legislation and those of the European Union.

The analysis must be also integrated with the identification and assessment of the social impact that may be caused by the project. This analysis is focused at the study of the social aspects that include among others the protection of human rights, the health of the population and of the community, the safety, employment, consequences on sensitive groups or categories in need, changes in the status of the land, and the involuntary resettlement as well as the protection of the cultural property and heritage.

#### *iii. The economic and financial analysis*

The aim of the economic and financial analysis is to determine the “value for money” of the project. Based on the legal definition the term “value for money” is used with the aim to determine if the contracting authority it received the maximal possible profits by a public private partnership project.

As the value for money of the project it shall not only be considered the value of works or of public services of a project. This term includes also the analysis of other financial and economic elements of the project, which include the quality, costs, the use of resources, the fitness of the contract purpose and objective as well as the necessary time for its performance.

The final assessment of the economic and financial analysis serves to determine if all these elements combined throughout the duration of the project constitute the best economic value.

The economic and financial analysis as part of the feasibility study includes the analysis of a variety of elements described as follows:

- *Direct investment costs*

These costs focus in the construction of new developments and assets. These costs include among others the initial costs for the project preparation, including the financial, legal, financial, and procurement costs, technical costs and those for the project management, design costs, costs of the land or for the purchase of a new asset, costs for the preparation of the land, construction costs and those for putting into function, including raw materials, equipment, installations, the workforce, the management and training and other circumstances.

- *Direct maintenance costs*

These costs include the costs for the maintenance of assets throughout the entire duration of the project, taking into consideration the need to maintain satisfactory levels and able to reach the required outcome of the project. These costs include the costs of raw materials, of equipment and tools, staff costs as well as costs dedicated to maintenance.

- *Direct operational costs*

Direct operational costs are related to the daily functioning of the project. These costs include the full cost of the staff, in which are included salaries, benefits, pension contributions, social contributions, costs of training and specialization, annual leave, travel costs or other extra expected costs. Moreover, are included also costs of services, raw materials and consumer materials, direct management costs as well as insurance costs, always in relation to the project operation.

- *Indirect project costs*

Shall be considered indirect project costs a part of administrative costs which include the cost of the time and labor of senior executives, personnel, accounting,

invoicing, legal services, rent, communications and other institutional resources used by the project.

- *The project income*

The income of a public private partnership can be earned from or by end users, under the form of payments for the received service or for part of it and/or by the use of assets that for the object of the PPP.

Besides the evaluation of costs and income, the economic and financial analysis includes the assessment of certain economic and financial elements described here below:

- *The economic viability of the project*

Economic viability of the project is assessed by the financial performance indicators which may be: the Cash-Flow, the net paid value (NPV), the internal return rate (IRR), the payback period (PBP), and the cost benefit analysis (CBA).

- *The affordability*

The project affordability intends to indicate if the general project income is within the possibility of users and the contracting authority or of the both, in order to cover the payment of service tariffs or objects that are realized or used as per the PPP. This element includes the control of the project's fiscal costs, from the point of view of regular payment as well as from that of the fiscal risk, as well as determining if such can be adjusted within the limited budgeted and other fiscal obligations.

- *The financial fitness*

The financial fitness should determine if the project can attract qualitative funding entities as guarantors, financial supporters or lessors guaranteeing also for a reasonable financial return.

- *The risk analysis*

Another necessary element that needs to be included in the economic and financial analysis is related to the identification and evaluation of risk elements of the PPP project.

The identification of the project's risks serves also for drafting risk management strategies as well as for the allocation of risks between the public partner and the private one. The risk analysis includes among others the assessment of the following factors:

- Risks concerning the plot of land, related to the availability and the quality of the project location such as: the cost and the timeframe for receiving the plot of land, the necessary permits or for insuring the right to pass at a road,

the effect of geological conditions or of other land terms as well as costs regarding fulfillment of medical standards;

- Risks related to the design, construction and operation, related to situations when the construction lasts longer and costs more than foreseen, or in which the quality of the design or the construction means that the asset is not sufficient to fulfill the project requirements;
- Functioning risks related to the success of operations including the risk of the service interruption or the availability of assets, the risk that any network interaction does not function as anticipated, or that operation costs and the maintenance costs are different than expected;
- The demand risks and other trading risks related to situations where the use of the facility is different than expected, or that revenues were not collected as expected;
- Economic and financial risks related to changes in interest rates, exchange or inflation rates negatively influencing the project results;
- Asset's ownership rights related to asset's ownership including the risk for the technology wearer or that the value of assets at the end of the contract to be different from the expected one;
- Political risks related to political decisions that may negatively impact on the project;
- Risks of changes in the legal framework, related to events when such a change in the law or in the general rules impacts negatively on the project, such as: changes in the tax system, changes regarding rules governing the currency exchange, or changes of rules regarding repatriation of profits;
- Force majeure risks related to events that go beyond the control of the parties to the contract, such as: natural catastrophes, war or civil unrest that affect the project.
- *The sensitivity analysis*

The sensitivity analysis provides information in order to be accurately understood what is being alleged as a essential requirement, and that final outcomes would be affected by changes under such allegations. This is achieved by performing various sensitivity tests and by comparing results to those based on different allegations on the essential requirement, resulting in at least three feasibility variations, in particular when the project income are produced by users.

In cases when as a result of the feasibility study results drafted in accordance with composing elements and the above methodologies it is concluded that the project under assessment is profitable and sustainable then the commission for the

assessment and granting of the concession/PPP proceeds with the legal procedure as set out by the legal provisions.

**c) *The assessment of the project implementation model: PP or PPP***

After the conduction of the analysis of the feasibility study, the results are satisfactory, the PPP commission continues with the administrative procedure.

The next procedural step is the assessment to be performed by the commission to find out if the most suitable model for the project implementation is its execution by way of a concession/PPP.

For this purpose the commission uses the Public Sector Comparator, as well as uses suitable financial models like the methodology of the Public Private Comparator or the "Shadow" model. The Public Sector Comparator performs the calculation of the current net value of the total net costs of the project, like in the case when it is performed through a traditional procurement method. The Public Sector Comparator is composed of cash flow influxes related to:

- The basic public sector comparator, presenting total expenses that include calculations of direct investment costs, direct maintenance costs, direct operative costs and indirect project costs, minus the value of the income that may be collected by the project, determined in the feasibility study as per the above rules.
- The adaptation of the competitive neutrality representing the net competitive advantage in favor of the public sector due to its status; and
- The adaptation of project risks depending on its allocation to the public and private partnership

All future cash flows of the project are transformed in net current costs by the implementation of the appropriate discount rate.

In general risk sharing among parties is based on the principle that the party that shall carry the risk is the one in the best position to face or minimize its risks. The risk is divided into three categories: "the withheld risk" is the one that remains with the contracting authority, "the transferable risk" is the risk transferred to the private partner and the "joint risk": shall be considered risks held by both parties as defined in the contract.

The risk allocation is used also toward the assessment if the concession/PPP is classified as "within" or "outside" of the state budget, based on rules of the European Statement of Accounts (ESA95) as per the combination modality of allocations in the three following risks: the construction risk, the availability risk and the demand risk.

This commission assessment intends to indicate through comparative analysis which one among the two alternatives for the implementation of the project



allows the execution of the project at the best value for money, thus the public procurement alternative or the concession/PPP alternative.

As a result, in case that the performed analysis indicates that the second solution provides best value for money the contracting authority may issue the decision to prepare the procedure for granting a contract by concession/PPP. Whilst, in cases when the comparison between the public procurement alternative and the concession/PPP alternative indicates that the second solution does not provide for best value for money, then the contracting authority reevaluates the possibility to execute the project by using the public procurement alternative.

The final assessment of all legal requirements for the implementation of the project is made together with an assessment of the inter capacity of the implementing institution and that of other institutions that undertake various tasks related to the project implementation.

After the detailed description of the above information, and after the assessment and reasoning of the above results of the assessment, the feasibility study should conclude with findings regarding the following elements:

- The determination of the type and object of the concession/PPP to be implemented;
- Assessments regarding direct financial risk of the project and respective implications at the central and local state budgeted;
- The determination of the forecasted value of the contract;
- Assessments on the criteria to be applied regarding the selection and granting of the concession/PPP;
- The duration of the proposed contract;
- Other necessary information regarding drafting of the tender documents.

#### ***d) Conclusions of the Feasibility Study***

In conclusion, based on the information, the assessment and the above mentioned actions, the feasibility study must result in a document that indicates and reasons if:

- The project is suitable, necessary and if it fulfills the contracting authority requirements and policies;
- The project is feasible, from the technical, economical, financial and commercial point of view
- The project does not have a negative social and environmental impact;

- The alternative envisaged for the conclusion of the project by granting a concession/PPP contract is more profitable compared to the alternative of granting a public procurement contract.

Only in case when as a result of the conclusions of the feasibility study it is attested the project does fulfill all these requirements, it can be proceeded with the procedure for granting the concession/PPP or to be submitted for approval at the Ministry of Finances, in cases when it is required financial support, in compliance with article 42 of the law 125/2013.

## ANNEX 4

## LIST OF ABBREVIATIONS

PPP	Public Private Partnership
PP	Public Procurement
SPV	Special Purpose Vehicle
CA	Contracting Authority
PPA	Public Procurement Agency
PPC	Public Procurement Commission
ATRAKO	Agency for Concession and PPP Treatment
MF	Ministry of Finance
EU	European Union
DCM	Decision of the Council of Ministers
Law 125/2013	Law no. 125/2013 “On Concessions and Public Private Partnerships”, as amended

DCM 575

Decision of the Council of Ministers no. 575, date 10.07.2013 “On the approval of rules for the assessment and granting by Concession/Public Private Partnerships”, as amended

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