

**Disclaimer**

This document is the literal English translation of the decrees which were initially written and published in French.

It does not hold any legal value.

This translation was produced for ease of understanding of the legal framework in which Public Private Partnerships are operated in Cote d'Ivoire.

DECREE N° 2012-1151 OF 19 DECEMBER 2012 ON  
PUBLIC-PRIVATE PARTNERSHIP CONTRACTS

THE PRESIDENT OF THE REPUBLIC

Upon a report by the Prime Minister, Minister of the Economy and Finance,

Having regard to the Constitution,

In view of Order N° 2012-487 of 07 June 2012 on the Investments Code,

In view of Decree N° 2009-259 of 6 August 2009 on the Code governing public procurement,

In view of Decree N° 2009-260 of 6 August 2009 on the organisation and functioning of the National Authority for the Regulation of Public Procurement (ANRMP),

In view of Decree N° 2011-222 of 07 September 2011 on the organisation of the Ministry of the Economy and Finance,

In view of Decree N° 2012-625 of 06 July 2012 assigning functions to the members of the Government,

In view of Decree N° 2012-1118 of 21 November 2012 appointing the Prime Minister,

In view of Decree N° 2012-1119 of 22 November 2012 appointing the members of the Government,

In view of Decree N° 2012-1123 of 30 November 2012 laying down the procedure for the enforcement of Order N° 2012-487 of 07 June 2012 on the Investments Code,

**THE COUNCIL OF MINISTERS MEETING,**

**DECREES:**

**CHAPTER I: GENERAL PROVISIONS**

**SECTION I: DEFINITIONS**

**Article 1:** For the purposes of this Decree:

**Leasing:** The mode of management of a public service through which the Contracting Authority entrusts, for a fixed period of time, by contract, to a third party, the Management of a public service, at its own risk, through the work the Contracting Authority gives the third party, against payment of counterparty, in the form of royalty

or lease, deducted from the resources from the operation of the said service.

**Call for tender:** Refers to the procedure through which the Contracting Authority selects, after being put out to competitive tender, the lowest compliant proposal, on the basis of the pre-established criteria specified in the bid document.

**Two-stage tendering process:** Refers to the process comprising two phases for the awarding of a partnership contract through which the Contracting Authority decides to solicit, by means of open or restricted invitation to tender, the know-how of professionals, to participate in the competition to carry out a project. These two phases in the selection process are materialised by a first bid phase of technical proposals and a second phase of submission of technical proposals, with a price. Only the bidders selected after the first phase are invited to participate in the second phase.

**Open invitation to tender:** The procedure for the awarding of a partnership contract in which any applicant who is not excluded from public procurement, under the applicable regulations, can submit a proposal.

**Restricted invitation to tender:** The procedure for the awarding of a partnership contract in which only those applicants the Contracting Authority decided to invite, in accordance with the applicable regulations, can submit a proposal.

**International call for tender:** The procedure for the awarding of a partnership Contract through means of publicity at the international level aimed at natural and legal persons meeting the eligibility and qualification criteria defined in the tender documents.

**National call for tender:** The procedure for the awarding of a partnership Contract through means of publicity at the national level aimed at natural and legal persons meeting the eligibility and qualification criteria defined in the tender documents.

**Contracting Authority:** The public legal person with the authority to conclude a partnership contract with an operator for the execution of a project falling under the scope of this Decree.

**Intangible property:** A property or economic value, which has no physical reality and is essentially characterised by the provision of a technical or intellectual capacity or knowledge.

**Private property:** Property that is neither necessary nor essential to the management of the public service and that remains the property of the operator at the end of the contract.

**Property for recovery of possession:** Property which, whilst being an integral part of the partnership contract, is not essential for the operation of the project and remains the property of the operator throughout the term of the contract and only becomes the property of the Contracting Authority if the latter decides to purchase it at the end of

the contract. It is also called “property affected by an optional clause of recovery of possession”.

**Public-private partnership focal unit:** The internal body of the Contracting Authority in charge of the management of partnerships from the time of their identification up until the monitoring of their execution.

**Concession contract:** The contract through which a Contracting Authority instructs the Concessionaire, whether this be a legal person governed by public or private law, either to carry out a public infrastructure or make investments in such infrastructure and operate it, in order to deliver a public service, or only operate an infrastructure or public equipment, in order to deliver a public service. In any case, the Concessionaire operates the public service on his/her own behalf and at his/her own risk by receiving remunerations from the users of the infrastructure facility or the beneficiaries of the concessionary service.

**Design, Build, Finance and Operate Contract (DBFO):** The partnership contract entered into with an operator to design, build, finance and operate infrastructure, work or public equipment for a certain period, after which the said infrastructure, work or public equipment go to the Contracting Authority. Throughout the entire contract period, the infrastructure, work or equipment is the property of the private partner who recovers his/her investments through tolls or payments made by the Contracting Authority.

**Build, Operate and Transfer Contract:** The contract through which the Contracting Authority entrusts the Operator with building, financing, operating and maintaining infrastructure and the Operator receives in return his/her remuneration from the fares paid by the users, in order to recover his/her costs. The user may be a public entity. The facility is transferred to the State on expiry of the contract. The BOT contract is subject to several versions:

- **BT:** Build and transfer,
- **BOO:** Build, own and operate,
- **BLT:** Build, lease and transfer,
- **BTO:** Build, transfer and operate,
- **CO:** Contract, add and operate,
- **DOT:** Develop, operate and transfer,
- **ROT:** Rehabilitate, operate and transfer,
- **ROO:** Rehabilitate, own and operate.

**Partnership contract with public funding:** The contract through which a Contracting Authority entrusts to a third party, for a fixed period, a global mission including the development, that is the building, rehabilitation or transformation or tangible and intangible investments, as well as their maintenance, operation or management and, if need be, other services contributing to the performance by the Contracting Authority concerned of the public service mission it is responsible for. The term of the partnership contract is determined according to the depreciation period of the investments or the modalities of their financing. The Contractual Partner receives from the Contracting Authority a remuneration spread over the term of the contract. This remuneration may be tied to performance targets assigned to the Contractual Partner.

**Public service delegation contract:** The contract through which one of the legal entities, governed by public law, referred to in Article 3 of this Decree, entrusts the management of a public service falling within its competence to a delegate, whose remuneration is tied to or substantially based on the results of the operation of the service.

**Competitive dialogue:** The procedure through which, given the complexity of the project, the Contracting Authority, objectively not capable of satisfying the needs or objectives or able to specify the legal or financial make-up of the project conducts a dialogue with the selected bidders, with a view to developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the selected bidders are invited to submit a tender.

**Public procurement Directorate:** The administrative structure reporting to the Minister responsible for public procurement, whose mission is to ensure the *a priori* monitoring of compliance with the regulations governing the public procurement procedures and following-up on their implementation.

**Tender documents:** Documents sent to the Applicants by the Contracting Authority and which contain all the information and documents prepared by the latter, and in which the Applicants will find the information necessary for submitting their bids and the preparation of their offers.

**Project management:** All the consulting, planning and civil engineering services a professional provides on behalf of a client called Project Owner, in order to undertake work related to the architectural, technical and economic aspects for the building of infrastructure, works, buildings and technical equipment in conformity with the requirements of the specifications contained in the tender documents.

**Direct negotiation:** The exceptional public procurement procedure, as defined in Article 12 of this Decree.

**Operator:** Natural or legal person, or group of natural or legal persons entering into a partnership contract with the Contracting Authority.

**Public entity:** Entity established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character and having legal personality.

**Works:** The outcome of building or civil engineering works taken as a whole that is sufficient of itself to fulfil an economic or technical function. It may include in particular construction, reconstruction, demolition, repair or renovation operations, such as the site preparation, earthmoving works, the construction, the installation of material or equipment, the decoration and finishing, as well as ancillary services to the work, if the value of the said services does not exceed the value of the work.

**Public-private partnerships, PPPs in abbreviated form:** All forms of contracting between public and private partners, in order to carry out a project falling within the scope of application of this Decree, as part of a partnership contract. The main types of PPPs are as follows: third party management, leasing, concession of public services, the build,

operate, transfer (BOT) contract in various forms, the design, build, finance and operate contract (DBFO), the partnership contract with public financing, institutional partnerships developed in the form of a company with public minority financial participation.

**National Development Plan:** The strategic planning instrument serving as a reference for public interventions.

**Proposal:** All the technical and financial information included in the tender file and constituting an Applicant's response to a procurement procedure.

**Unsolicited proposal:** A proposal for the implementation of a partnership project without any request for proposals from the Contracting Authority as part of a selection procedure.

**Tender:** The written act through which an Applicant or partnership bidder discloses his/her conditions and commits to complying with the applicable specifications. The tender is a compulsory element of the proposal and will be, should the bidder be selected, a constituent part of the Contract.

## SECTION II: PURPOSE AND SCOPE

**Article 2:** This Decree lays down the rules for public-private partnership contracts, PPPs in abbreviated form, entered into as part of the implementation of development projects to be carried out.

It sets out the framework for monitoring the actions of the Contracting Authorities in the conduct of projects, lays down the procedures pertaining thereto and establishes the follow-up mechanisms of PPP contracts.

**Article 3:** Are concerned by this Decree PPP contracts developed in the State's or Local Authorities' public and private domain, whose purpose is to achieve the following missions: Design, build, transform, rehabilitate, finance, operate, service, maintain or manage infrastructure or public infrastructure, buildings, equipment or intangible property and performance of services pertaining thereto, as well as the development or operation of public or private domains, or general interest programmes or projects.

**Article 4:** PPP contracts may be entered into in all areas of economic, social and cultural activity, in both the commercial and non-commercial sectors, between the Contracting Authority and the legal entities governed by private or public law.

## CHAPTER II: INSTITUTIONAL FRAMEWORK

**Article 5:** A PPP institutional steering framework has been created. The PPP Institutional Steering Framework includes:

- The PPP National Steering Committee, CNP-PPP in abbreviated form,
- The PPP Executive Secretariat, SE-PPP in abbreviated form,
- The PPP Support Unit, CA-PPP in abbreviated form.

The powers, organisation and functioning of the PPP institutional steering Framework shall be determined by decree taken by the Council of Ministers.

### **CHAPTER III: FOUNDING PRINCIPLES OF THE GOVERNANCE FRAMEWORK OF PPP CONTRACTS**

**Article 6:**

The founding principles of the Governance of PPP contracts are:

- Free access to public procurement procedures and equal treatment of Applicants,
- Transparency of public procurement procedures through their rationality and traceability,
- The competitive nature of the public procurement procedures,
- Optimisation of public expenditure in the contractual and financial choices for the performance of the partnership project,
- The promotion of PPP contracts as a tool for developing a network of Ivorian companies throughout the country, including small and medium-sized companies, creating growth and jobs, especially through the integration of youth and capacity building of local actors,
- The balance of the economic, financial and social interests of the PPP contracting parties in the development of project, as well as in the execution of the contract for the beneficiaries or users,
- The equitable distribution of the risks of the partnership project, as well as the benefits generated in the execution of the PPP contract,
- The balanced management of the financial flows generated by the PPP contract.

### **CHAPTER IV: PPP PROCUREMENT**

**Article 7:**

The Contracting Authorities shall identify the projects that are likely to be developed under PPP contracts, in collaboration with the Ministry of Planning, the Ministry of the Economy and Finance, and the CNP-PPP.

This identification procedure involves carrying out basic technical, economic, legal, financial, social and environmental feasibility studies, as well as the compulsory inclusion of the partnership projects in the National Development Plan.

The Contracting Authorities, as part of the implementation of the projects, shall carry out basic feasibility studies with the support of the CA-PPP, using, if necessary, external expertise.

These studies shall be sent to the SE-PPP and validated by the CNP-PPP.

The public procurement procedures provided for by the Public Procurement Code are applicable to the award of PPP contracts.

**Article 8:**

The Contracting Authorities shall, with the support of the CA-PPP, prepare tender documents, before launching any PPP contract award procedures. These tender documents, prepared in compliance with the standard tender documents adopted by the CNP-PPP, and in collaboration with the line ministries, shall be adapted to the special conditions of the project and sent to the SE-PPP for validation by the CNP-PPP, in the

presence of the representative of the Public Procurement Directorate.

## **SECTION I: MODES OF AWARDING PPP CONTRACTS**

**Article 9:** This Decree asserts the open invitation to tender as the preferred mode of awarding PPP contracts.

**Article 10:** The invitation to tender may be open or restricted, in one or two phases, and shall be the subject of publicity at the national and international levels. The procedures for awarding PPP contracts may be subject to a pre-selection phase.

### **SUB-SECTION 1: OPEN INVITATION TO TENDER**

**Article 11:** In the open invitation to tender, any company interested may lodge an application.

In this procedure, a pre-selection phase may be resorted to, during which no dialogue can be had with the Applicants, apart from seeking clarifications. At least three Applicants must be selected at this stage of the procedure.

In case of receipt of less than three tenders, the procedure can be continued, as long as the conditions of publicity and competition are complied with.

**Article 12:** The procedure of open invitation to tender can be carried out in one or two phases: The first phase consists only in receiving technical proposals from Applicants. In the second phase, the bidders selected submit their final proposals together with their financial offer.

### **SUB-SECTION 2: RESTRICTED INVITATION TO TENDER**

**Article 13:** The Contracting Authority may, by derogation from the principle of open invitation to tender, resort to the restricted invitation to tender and only select a maximum of three Applicants when:

- The requirements to be met are a matter of specialised work, supplies or services, or require a special technique,
- The requirements to be met are a matter of specialised work, supplies or services very few Applicants are able to provide,
- The conditions for resorting to this procedure are validated by the CNP-PPP.

**Article 14:** The procedure of the restricted invitation to tender can be done in one or two phases. The first phase consists only in receiving technical proposals from the Applicants. In the second phase, the bidders selected submit their final proposals together with their financial offer.

## **SECTION II: DEROGATIONS TO THE MODES OF AWARDING PPP CONTRACTS**

**Article 15:** PPP contracts may be awarded by way of derogation by resorting to:

- Competitive dialogue in the procedures of invitation to tender as provided for in Article 16 of this Decree,

- The direct negotiation procedure in cases provided for in Article 17 of this Decree,
- Resorting to any mode of awarding contracts by way of derogation, including in cases of restricted invitation to tender must be exceptional and justified by the Contracting Authority and authorised in advance by the Minister of the Economy and Finance, after advice from the CNP-PPP.

**Article 16:** The Contracting Party may resort to competitive dialogue. Resorting to competitive dialogue must be governed by a Charter adopted by the CNP-PPP, who defines the modalities of the said dialogue. Given the peculiarity of this procedure, the Contracting Authority may be assisted, for its implementation, by an independent firm recruited by the CNP-PPP.

**Article 17:** The direct negotiation procedure may be resorted to when:

- Extreme urgency motivated by unforeseen circumstances or force majeure make it impossible to comply with the timelines provided for in the procedures of public procurement and requires immediate action, in order to ensure the continuity of service.
- The project concerns defence or national security,
- Only one source of supply is able to provide the service required, especially when the service provision requires the use of an intellectual property right, professional secrets or other exclusive rights that one or several persons possess or hold the property of.
- An invitation to the pre-selection proceedings or a request for proposals has been issued but no applications or proposals were submitted or all proposals failed to meet the evaluation criteria set forth in the request for proposals, and if, in the judgment of the contracting authority, publishing a new invitation to tender for pre-selection or issuing a new request for proposals would be unlikely to result in a project award within the required time frame.

The negotiated procedure shall be implemented according to a scoping document for the examination of tenders that will be subject to the prior opinion of the CNP-PPP and the approval of the Council of Ministers.

### **SECTION III: REVIEW OF PROPOSALS**

**Article 18:** The competent committee of the Contracting Authority shall compare and assess each proposal against the evaluation criteria, the weight accorded to each evaluation criterion and the evaluation procedure set forth in the request for proposals.

This evaluation shall take into account the technical and financial aspects, as well as the potential for economic and social development the Applicant's proposal offers.

The Applicants must provide a financial plan that is realistic enough in their proposal.

**Article 19:** The Contracting Authorities shall be authorised to review unsolicited proposals from Operators provided that:

- These proposals are not related to a project for which they have begun or announced the pre-selection procedures,

- The procedure implemented complies with the principle of the competitive nature of the procedures.

Unsolicited proposals from Operators must be in conformity with a Charter adopted by the CNP-PPP, which defines the modalities pertaining thereto.

#### **SECTION IV: SIGNING OF PPP CONTRACTS**

**Article 20:** Pursuant to the provisions of Article 181 of the Public Procurement Code, the ad hoc Committee established by the Contracting Authority shall invite the bidder, whose proposal has been found to be the most economically advantageous to finalise the PPP contract. The negotiations shall be conducted by the Contracting Authority, with the assistance of the CA-PPP and the SE-PPP.

**Article 21:** After putting the finalisation or negotiations, the Contracting Authority shall submit the draft PPP contract to the non-objection opinion of the CNP-PPP. The contracts shall then be signed by the selected Operator or his/her legal representative, then by the Contracting Authority and the Minister of the Economy and Finance.

The PPP contracts signed by the State shall be approved by Decree taken at the Council of Ministers.

The PPP contracts entered into by other legal entities and public organisations acting on behalf of the State or a Local Authority shall be signed by their legal representative, again after a non-objection advice from the CNP-PPP, in application of the regulatory texts which govern them, the authorities which govern them and approved by the Minister of the Economy and Finance.

After the approval procedure, the Contracting Authority shall ensure the publication of a contract award notice which specifies its holder and contains a summary of its main clauses.

#### **CHAPTER V: THE PPP CONTRACT**

##### **SECTION I: CONTENTS OF THE PPP CONTRACT**

**Article 22:** PPP contracts shall be drafted according to the regulations in force. They shall contain mandatory provisions, including those on:

- The nature and scope of the work to be carried out,
- The conditions of service delivery,
- The legal status of properties,
- The obligations of the parties,
- The term of the PPP contract and the conditions of its extension,
- The procedures and modalities of control of the service delivery,
- The spread of all the risks.

**Article 23:** The State shall guarantee the Operators a stable tax, customs and financial regime over the full term of the PPP contract. Changes to the applicable tax and financial regulation

must not lead to changing the economic and financial balance of the PPP contract and the criteria used for determining its financial model, except if the Operator is to benefit from the provisions relating to the contract review.

## **SECTION II: MONITORING OF PPP CONTRACT PERFORMANCE**

**Article 24:** Without prejudice to the powers exercised by the State supervisory bodies, the Contracting Authority shall exercise, on a permanent basis, all powers of on-the-spot checks, to ensure the smooth running of the service entrusted, the satisfactory performance of the PPP contract and the implementation by the Operator, in accordance with the contractual schedule, of the means necessary fulfil all his/her obligations.

PPP contracts shall be subject to regular audits every three years at least by the bodies empowered for that purpose, in accordance with the procedures laid down by the legislation in force.

## **SECTION III: CHANGES, REVISIONS AND AMENDMENTS TO THE PPP CONTRACT**

**Article 25:** In the accordance with the principle of the economic and financial balance of PPP contracts in case of economic disruption or imbalance, changes or revisions may be made to a PPP contract.

For this reason, the PPP contract provides the circumstances under which the contract may be modified, as well as the procedures to be followed, if necessary.

**Article 26:** PPP contracts may be subject to amendments aimed at changing:

- 1) The scope of the perimeter of activities of the Operator or his/her contractual obligations,
- 2) The financial conditions in the cases provided for in Article 23 of this Decree,
- 3) The term of the PPP contract for the following reasons:
  - On the grounds of public interest,
  - On the grounds of late completion or interruption of the management of services due to the occurrence of unforeseen events outside of the intent of the parties,
  - When the Operator is forced, for the smooth performance of the service covered by the contract, and upon request by the Contracting Authority, or after its approval, to carry out new work not provided for in the initial contract and likely to change the overall economy of the contract,

The length of extension shall be limited in these cases to the time limits necessary for rebalancing the financial balance of the PPP contract and preserving the continuity of the public service.

The extension shall be subject to an amendment to the initial contract. This amendment shall be submitted to the procedure of authorisation, signing and approval set out in this Decree, after advice from the CNP-PPP.

#### **SECTION IV: TERMINATION OF THE PPP CONTRACT AND COMPENSATION**

**Article 27:** The PPP contracts entered into by the State and legal entities governed by public law, except for Local Authorities and companies with publicly-owned majority shareholdings, may be terminated by the Minister of the Economy and Finance, after having obtained the opinion of the CNP-PPP.

Regarding Local Authorities, the responsibility for the termination lies with, as the case may be, to the executive and decision-making body or the collegiate executive body.

In the case of companies with publicly-owned majority shareholdings, termination of the PPP contract falls within the competence of the Board of Administration.

**Article 28:** The termination of a PPP contract, be at the initiative of the Contracting Authority or the private operator shall be made in accordance with the procedures in force.

Furthermore, the parties have the right to terminate the PPP contract by mutual agreement.

The Contracting Parties shall provide for indemnification provisions.

#### **SECTION V: DISPUTE RESOLUTION**

**Article 29:** The PPP contract is governed by Ivorian law, unless otherwise provided for in the contract.

**Article 30:** The National Authority for the Regulation of Public Procurement shall have exclusive competence to adjudicate disputes on the procedures for awarding PPP contracts, without prejudice of possible actions before the competent courts or, if necessary, before the sectoral regulatory bodies.

The procedures of dispute resolution in the award of PPP contracts shall be implemented in accordance with the regulatory provisions in force.

Any dispute between the Contracting Authority and the Operator shall be settled in accordance with the dispute settling mechanisms as agreed by the Parties to the PPP contract.

#### **CHAPTER VI: TRANSITIONAL AND FINAL PROVISIONS**

**Article 31:** Partnership projects, whose public procurement procedures have not yet been launched, shall be subject to these provisions.

The Contracting Authorities shall apply all the above-mentioned principles and provisions to the negotiations in progress.

**Article 32:** The totality of the commitments made and risks taken by the State for a PPP contract are necessarily recorded in the State Budget.

**Article 33:** The Prime Minister, Minister of the Economy and Finance, shall be responsible for the execution of this Decree, which shall be published in the Official Gazette of the Republic of Côte d'Ivoire.

**Done in Yamoussoukro on 19 December 2012**

**Alassane OUATTARA**

Certified true copy of the original  
The General Secretary of the Government

(Illegible signature and Stamp)

Sansan KAMBILE  
Magistrate