

SENEGALESE BILL ON PARTNERSHIP CONTRACTS

EXPLANATORY MEMORANDUM

The achievement of high growth or development targets, channels through the implementation of important structural infrastructure projects requiring the mobilisation of considerable financial funds.

Faced with the importance of investments to be made, a decline in development assistance and insufficient growth, the state budget as the main source of infrastructure financing, seems to show its limitations. In this context, a paradigm shift in meeting the financing needs of the economy is needed. It's about finding funding mechanisms that relieve the state budget. In this regard, the new proposals highlight the need to appropriate the benefits offered through innovative financing.

With Law No. 2004-13 dated March 1, 2004 relating to contracts for infrastructure build-operate-transfer, called BOT law, as amended by the law No. 2009-21 of May 4, 2009 and No. 2011-11 of 28 April 2011, Senegal has adopted a legislation permitting the construction and operation in public-private partnerships, infrastructure, public policy designed to meet the needs of populations in urban and intercity mobility.

However, faced with a growing need for financing structures and equipment necessary to carry out public service and after ten years of operation, it was found necessary to make an assessment of the institutional and legal framework of that Act.

This assessment highlighted the very limited scope of the BOT law which comes down to only infrastructures constituting dependencies of the artificial public domain. It also led to the formulation of many recommendations including:

- Widening the scope of the law to cover all priority sectors;
- Strengthening the participation of the domestic private sector and job creation;

- The introduction of incentives for companies in WAEMU region;
- Easing the terms and conditions for handling unsolicited offers, to better capture investment opportunities;
- The establishment of a body to support the implementation of public-private partnerships.

These recommendations have inspired the adoption of mechanisms that allow public authorities to carry out their missions in almost all areas of public policy, with the exception of those in the energy, telecommunications and mines that have already specific legislation montages of "public-private partnership" kind.

It is also planned to ease the processing mechanism into force of the unsolicited offer that, despite the financial compensation under the BOT law, failed implement a single project of public-private partnership, partly because of the reluctance of private to share with competitors the studies they conducted prior to submitting their offer operators.

Based on this finding and its negative consequences in terms of attracting investment, it is expected, under certain circumstances, to waive the tender, which is the principle.

This exemption is part of the Government's desire to benefit from, with much more efficiency, opportunities for productive investments that could not be entered because of the mandatory provisions of the BOT law applicable to unsolicited offers. However, it is subject to the satisfaction of stringent preconditions to ensure the transparency of procedures.

To take into account the concerns expressed by the domestic private sector, provision encourages greater participation of undertakings for the right to draft partnership contracts were introduced, including as an obligation for the parties to book in at least 20% national ownership stake in the company to complete the project. Similarly, there is an obligation to the private operator to commit to ensure the transfer of technology and to promote the use of local labour.

Taking advantage of these innovations, the bill must facilitate the involvement of the national private sector in the development of a new generation of great public interest projects while remaining attractive to the international private sector.

In addition, some adaptations are planned, by regulation, to the procedures for the award described in this bill for partnership contracts from local authorities on the one hand and, on

the other hand, for those of other public authorities does not reach a certain threshold specified by decree.

Particular emphasis is also placed on support and technical supervision of the public authorities with the creation of a national agency under the Ministry of Partnerships and whose mission, among other things will be to:

- Validate the reports of discretionary projects prepared by the contracting authorities;
- Provide support to public sector entities in the preparation, negotiation and monitoring of partnership agreements;
- Disseminate public-private partnerships and promoting it.

Finally, the Infrastructure Council is the body responsible for regulating the system of contracting partnership and settlement of disputes relating to their award or execution. Such is the structure of the proposed bill.

CHAPTER I: GENERAL PROVISIONS

Section 1: Definitions and Scope

Article 1.- Definitions

For the purposes of this Act, the following definitions apply:

Bidding unsuccessful: tender under which, in the opinion of the Appeals Committee competent to tender or no offers have been given to the expiration of the deadline for submission of tenders, or it has been proposed that non-responsive or non-compliant offers.

Contracting Authority: means the legal entity referred to in Article 2 of this Act

National Support Committee for Public-Private Partnerships : agency of the Ministry in charge of Partnerships and whose mission is to validate prior evaluations of projects prepared by the contracting authorities to provide support to public sector entities in the preparation, negotiation and monitoring of public-private partnerships and ensure the dissemination and promotion.

Infrastructure Council: body responsible for regulating the system of contracting partnership and the resolution of disputes relating to the award or performance of such contracts.

Partnership contract: contract by which a contracting authority entrusts to a trader, legal person of private law for a specified period, depending on the depreciation of investments or arrangements for successful funding period, a global mission aimed at the construction or alteration, upkeep, maintenance, operation or management of works, equipment and intangible assets necessary for the public service, the contracting authority is responsible, and all or part of their funding.

It can also focus all or part of the design of these structures, equipment or intangible as well as services contributing to the exercise by the contracting authority of the public service mission entrusted to it.

The other party of the public entity is the maitre d'oeuvre to perform the work.

Community enterprise: company whose head office is located in a member of the Economic Community of West African state.

Unsolicited Proposal: on the initiative of a private operator the execution of a partnership agreement is not submitted in response to a call for tenders issued by the Contracting Authority. The project concerned with the unsolicited offer should not be registered, or completely or partially in the three-year Public Investment Plan of the State.

Emergency: a situation particularly serious due to an unforeseeable event and external to the contracting authority that causes a delay prejudicial to the public interest, fundamentally affect the construction of public amenities or the exercise of a public service and that requires a diligent response from the contracting authority.

Extreme urgency: making emergency timeliness of competition impossible, and in which the causal link between the event unpredictable and extreme urgency resulting is apparent.

Article 2: Scope

This Act applies to partnership contracts concluded by the State, a local authority, a public institution, an agency, a company majority public ownership, a national company and any other organization or legal entity of public law and associations formed by these corporations.

Contracts for investments of less than a threshold set by decree and awarded by local government contracts are subject to the provisions of this Act, subject to adjustments provided for by decree.

The provisions of this Act apply to all sectors of economic and social life, with the exception

of sectors subject to special regulations, including the energy, mining and telecommunications.

This Act does not apply to contracts awarded by a contracting authority with a legal person of public law or a public company with majority state participation of Senegal contracts.

CHAPTER II ORGANIZATIONS GOVERNANCE PARTNERSHIP CONTRACTS

Article 3: National Support Committee for Public Private Partnerships

There is an established National Support Committee for Public Private Partnerships responsible for:

- Validating the screening assessments of projects prepared by the contracting authorities;
- Providing support to public sector entities in the preparation, negotiation and monitoring of public-private partnerships;
- Popularise and promote public-private partnerships.

The composition, organisation and functioning of the National Support Committee for Public Private Partnerships are established by decree.

Article 4: regulator and dispute resolution

The Infrastructure Council is the body responsible for regulating the system of contracting partnership and settlement of disputes relating to the award or performance of such contracts.

Article 5: tender Commission

A Commission of bid opening and evaluation of bids, whose composition and functioning are defined by decree, is made by the Contracting Authority.

CHAPTER III: SPECIFICATIONS AND FORM OF PARTNERSHIP CONTRACTS

Article 6: Characteristics of partnership contracts

The remuneration of the contractor, under a partnership contract comes primarily from payments by the public entity for the duration of the contract. It is linked to performance targets assigned to the other party or the availability of books and / or equipment.

The partnership agreement may be possible for the other party to receive income based on related activities.

The partnership agreement may provide for a term of the contracting authority to the other

party to cash in the name and on behalf of the public authority, the payment by the end user benefits accruing thereto.

When a project falls within the jurisdiction of simultaneously several public figures, they may determine by agreement from among themselves who performs the appraisal, led the procurement process, sign the contract and eventually follows execution. This agreement specifies the conditions for the transfer of skills and the fixed term.

When a partnership contract wins occupation of public property, it is authorized to occupy this area for its duration. Unless otherwise provided in the contract, the owner has property rights on books and equipment it carries. These rights give it the powers and duties of the owner, under the conditions and limits set by the contract provisions designed to ensure the integrity and purpose of the public domain.

Article 7: Content Partnership Contracts

A partnership agreement will necessarily include clauses relating to:

- 1) its duration;
- 2) the conditions under which it is established risk sharing between the contracting authority and the operator of the project;
- 3) performance objectives assigned to the project operator, especially regarding the quality of services, quality of structures, equipment and intangible assets, the conditions under which they are made available to the contracting authority, and, where appropriate, their level of attendance;
- 4) the pay of the project operator and the conditions under which are recognised and distinguished for its calculation, the cost of investment in particular including engineering costs and design and related costs to the construction and borrowing costs, operating costs and costs financing and, where applicable, the revenue that the project operator may be authorized to obtain by exploiting the field, structures, equipment or intangible assets, in connection with operations foreign to public-service of the public authority and does not prejudice them, the reasons and conditions of its variations during the term of the contract and the terms of payment, including the conditions under which, each year, the amounts owed by the public authority to the operator of the project and those it owes in penalties or sanctions are subject to compensation;
- 5) if applicable, the tax schedule specifying the facilities for the completion of the investment project;
- 6) the conditions under which the contracting authority finds that the investments were made in accordance with the provisions of the partnership agreement;

- 7) the obligations of the project operator designed to ensure compliance with the assignment of structures, equipment and intangible assets to public service whose contracting public entity is responsible and that the requirements of the public service are adhere to;
- 8) mechanisms for control by the public authority for the execution of the partnership agreement, including compliance with performance targets particularly in terms of sustainable development, as well as the conditions under which the project operator uses other companies for contract performance; including the conditions under which it is fulfilling its commitment to allocate a portion of the contract to small and medium enterprises and artisans;
- 9) sanctions and penalties applicable to the project operator for breach of its obligations, including cases of non-compliance with performance targets;
- 10) the conditions under which it can be made to amend certain aspects of the contract, by amendment or by a unilateral decision of the contracting authority for reasons of public interest, or is terminated, in particular to take account of the changing needs of the public entity, technological innovations or changes in financing terms obtained by the operator of the project;
- 11) to the control exercised by the contracting authority direct or indirect, partial or total transfer of the partnership agreement;
- 12) the conditions under which, in the event of failure of the project operator, the continuity of service is ensured, especially when the termination of the partnership is pronounced;
- 13) the impact of late, early or not, of the contract of partnership, particularly as regards the ownership of books, equipment and intangible assets;
- 14) modalities for the prevention and settlement of disputes and the conditions under which it may, where appropriate, be made use of arbitration, with the Senegalese law enforcement;
- 15) the conditions under which the contracting authority may have to ask the private operator, in addition to the primary purpose of the partnership agreement, the completion of works and related services of general interest.

The contract must include a budget schedule showing all the commitments under the partnership agreement. This schedule must show, in particular, the components of remuneration paid to the holder of the contract period.

The holder of the partnership agreement provides, at the request of any service which it is called upon to fulfill the contract, a bond with a financial institution to ensure that the provider so requests the payment of amounts due.

CHAPTER IV.- PROCEDURES FOR THE AWARD OF CONTRACTS FOR PARTNERSHIP

Section 1 - Conditions precedent to the conclusion of partnership agreements

Article 8: Prior assessment of partnership contracts

Partnership contracts give rise to prior assessment by the Contracting Authority with the assistance of the National Support Committee for Public-Private Partnerships, revealing the reasons of an economic, financial, legal and administrative leading contracting authority to initiate the procedure for the award of such a contract.

The National Support Committee for Public-Private Partnerships elaborates in its area of expertise, methodology determining the design criteria of this assessment under the conditions laid down by order of the Minister of Partnerships.

This evaluation includes a comparative analysis of different options, particularly in terms of overall cost, risk sharing and performance, and with respect to the concerns of sustainable development.

When it comes to dealing with an emergency situation, this assessment may be brief.

Article 9: Conditions of use of partnership agreements

Partnership agreements may be concluded only if at the end of the screening assessment, at least one of the following conditions is met:

- a) given the complexity of the project, the public entity is not objectively able to define in advance and only the technical means to meet their needs or establish the legal or financial package for the project;
- b) the project is of urgency when it comes to make up for a delay prejudicial to the public interest affecting the construction of public amenities or the exercise of a public service mission, whatever the causes of the delay, or to cope with an unpredictable situation;
- c) be given the characteristics of the project, the requirements of public service that the public person is charged or shortcomings and difficulties observed in the completion of similar projects, the use of such contract shall provide a balance between the benefits and disadvantages more favorable than those of other public procurement contracts. The criterion of deferred payment cannot alone be determinative.

Article 10: Review and prior authorisations at the launch of the partnership contracts

The procedure for the award of partnership contracts may be instituted only after a favorable opinion of the Council of Infrastructure, favorable opinion of the Minister of Finance and authorised by the Prime Minister on referral to the National Support Committee for Public-Private Partnerships if the contracting authority is the state or the governing body of the other legal entities referred to in Article 2.

The view of the Infrastructure Council shall include an assessment of the project's compliance with the overall strategy of infrastructure development, environmental standards and land use.

The view of the Minister of Finance deals with:

- The project's compliance with the objectives of the overall fiscal policy;
- The Assessment of the budgetary implications of the project and the analysis of its long-term sustainability of public finances;
- The property tax base of the investment project, if any.

Section 2 - Selection of the project operator.

Article 11: General Principles of awarding contracts partnership

The signing of a partnership agreement is subject to the principles of freedom of access and equal treatment of applicants and transparent procedures. These principles ensure the effectiveness of public order and the proper use of public funds.

It is preceded by an advertisement for the presentation of several competing offers under conditions prescribed by this Act.

Article 12: Prohibition of bid

Cannot bid on a contract of partnership:

- a) legal entities which candidates have been finally sentenced for an offense related to their work or the making of false statements or misrepresentations as to their qualifications for the performance of a contract relating public order;
- b) Legal persons who have a temporary disqualification from obtaining public contracts resulting from a decision of an administrative body empowered to do so, a court or legislative provision;
- c) a person in a state of preventive regulation, receivership, liquidation of assets or have been subject to equivalent procedures governed by foreign law;

d) Persons who on 31 December of the year preceding the year in which occurs the launch of the consultation, did not support the statements imposed on them as tax and social security or have not paid taxes and contributions due on that date.

The provisions of this article shall apply to legal entities which are candidates as well as those who are members of a candidate and third party operators group on which the applicant relies to justify its capabilities and whatever the legal link .

Article 13: Choice of procurement procedure

Partnership agreements can be made, either by tender or by private treaty or by negotiated procedure, according to the conditions defined by this Act.

Subject to the provisions contained in Chapter 5 of this Act, the selection of the project operator has gone through international tender in two stages preceded by a pre-qualification.

However, the contracting authority may opt for a tender in one step with pre-qualification. It must, in this case, obtain the opinion of the Council of Infrastructure on the basis of a note justifying the choice of such a procedure.

It indicates the choice of procedure in the notice of advertising.

In the cases of unsuccessful bids, a restricted tender could take place in the manner specified by decree.

Section 3: Procedure for tendering

Section 14: Selection criteria for candidates

The contract is awarded to the bidder whose bid is the best bid evaluated in light of the selection criteria set out in the tender documents.

Several companies can come together in a group to make an offer. However, the same company may be a member of only one candidate group.

Article. 15.- Criteria and Requirements for Prequalification

Partnership agreements may be concluded with a candidate with sufficient technical and financial capabilities.

The pre-qualification of candidates is exclusively based on their ability to perform the contract and according to the following criteria:

- Specific technical experience;

- Material and human resources candidates have to complete the contract means; and
- Financial capacity.

To assess the capability of candidates based on the above criteria, the following information or documents may be requested from candidates include:

- References for similar contracts;
- The statement of the staffing, tools, plant and technical equipment available to the applicant for the execution of the partnership agreement;
- Certified and annual reports for the last three years financial statements;
- The statement concerning the overall turnover and, where applicable, net income for benefits referred to in the contract, during the last three years;
- The appropriate bank statement or proof of insurance for occupational hazards;
- The balance sheet or extracts from balance sheets for the past three years, operators for which the establishment of the balance sheet is required under the law;
- The certificates of qualification issued in accordance with objective and transparent criteria by the certifying official body corporate;
- Certificate of Senegalese or foreign authorities establishing that the applicant is up to date with its tax and social security obligations; and
- Certificate of Senegalese and foreign authorities stating that the candidate, key executives of the candidate or the candidate undertaking business have not been the subject of a criminal conviction related to their professional activity.

When several companies present in the applicant group, the conditions for pre-qualification apply in consideration of the capacity of each member of the group to determine if the combination of their skills can meet the needs of all phases of the project.

Article 16: Procedure for Prequalification

The prequalification process is conducted by the Contracting Authority assisted by the tender commission under section 5 of this Act. The commission meets at the request of the Contracting Authority.

A pre-qualification is issued by the Contracting Authority. This publication is issued in printed media, electronic or audio-visual, domestic and foreign, specialised or not. The dissemination of the notice of prequalification is made to inform all potential candidates of the existence of the project.

The pre-qualification contain at least the following information:

- A description of the project object of the partnership agreement;
- Any other information on the essential elements of the project;
- The place where the record of pre-qualification can be removed, the place of deposit and the date on which the file prequalification should be submitted.

The time allowed for candidates to respond to a record of pre-qualification cannot be less than thirty (30) days.

The pre-qualification is issued by the Contracting Authority. It contains at least the following elements:

- The set of instructions for the preparation of applications for pre-qualification;
- A description of the contractual structure;
- Parts list and other information requested from candidates to provide evidence of their ability;
- The specific criteria under which the pre-qualification is performed.

A maximum of forty five (45) days shall be granted to applicants submitting applications for pre-qualification. This period may be extended up to a maximum of forty five days authorized by the Infrastructure Council reasoned request from the Contracting Authority.

The contracting authority shall act after consulting the tender commission on the qualification of each candidate who applied. It rules only on the basis of the criteria stated in the record of pre-qualification.

The Contracting Authority draws up a list of companies and business groups that bid and are allowed to submit their tenders.

The decision of the contracting authority is the subject of a report.

The contracting authority shall inform each applicant of the decision taken against him. It communicates to any candidate who so requests the reasons for rejection of his application.

The number of candidates for pre-qualification procedure cannot be less than three unless the Contracting Authority provides evidence to the Infrastructure Council that despite the wide publicity measures it has implemented and efforts it has made to attract the interest of potential candidates, it has not been possible to identify at least three candidates who meet the criteria for pre-qualification.

In this case, the authorization of the Infrastructure Council, the Contracting Authority may proceed with the two pre-qualified candidates.

The Contracting Authority invites candidates retained by the request for pre-qualification to tender in accordance with Articles 17, 18 and 19 of this Act.

Article. 17.- Initial tender dossier

The contracting authority shall file tender for each pre-qualified candidate.

The pre-qualified candidates have to submit their offer, for a period to be determined by the tender dossier, which may not be less than forty five days.

The tender dossier include a draft contract and supporting documents indicating at least:

- The settlement of the tender;
- The specifications or models of schedules to the contract;
- Models of guarantees and letters to be provided;
- The detailed functional program;
- The place and the deadline for submission of bids and the timing of the evaluation of tenders.

Tenders must be signed by the candidates or their agents duly authorized.

Article 18: Procedure for tender in two stages

Subject to the exceptions provided for in Article 13, paragraph 3, the evaluation of tenders is done in two steps.

In a first step, the candidates submit to the Contracting Authority technical proposals, including their possible observations on the proposed contract and or specifications. As part of this first stage, the contracting authority shall examine the technical proposals and the opportunity to ask candidates supplementary information or clarification of their contents. Talks begin between the contracting authority and each candidate. The result of trade is provided by the Contracting Authority to all candidates.

The Contracting Authority shall ensure equal treatment of all candidates. In particular, it refrains from provide discriminatorily information that can benefit candidates over others or to reveal the solutions proposed or confidential information of a candidate without the consent of the latter.

The tender committee is kept informed by the Contracting Authority of the progress of this first step.

After this first stage, the contracting authority may make changes to specifications originally set by adjusting the terms of the tender dossier, the draft contract and the signature (s) of reference.

The appeal adjusted rates is given to candidates who have a period not less than forty-five days to file, with the tender commission, a comprehensive offer that includes detailed technical proposals, a financial offer and a draft final contract.

In the case of a tender in one step within the meaning of Article 13, applicants who have a period less than forty five days only, can file with the commission of tender, a comprehensive offering that includes detailed technical proposals, a financial offer and a draft contract.

Bids are evaluated by the tender committee under the conditions laid down in Article 20

Article 19. Presentation and analysis of bids

The offer contains all of the components of a candidate's response to a call for tenders. It necessarily involves a written document under which the applicant agrees to abide by the contract and the one or more specifications. If the candidate is accepted, the written instrument becomes a component part of the contract.

The complete proposals of the candidates are placed in a sealed envelope marked with the tender to which they relate and containing two separate envelopes with, as appropriate, the word 'technical proposals "and" Financial Bid "and the candidate's name.

The envelopes containing the technical proposals and financial offers are sent either by mail, by registered post or by hand against receipt to determine with certainty the date and time of receipt and guarantee confidentiality and authenticity. Upon receipt, the folds are stored in their order of arrival in a special register.

Only bids that have been received no later than the date and time limit specified in the tender dossier will be open.

In the first stage, the technical proposals are opened publicly by a person designated by the contracting authority, in the presence of this authority and the candidates or their duly authorized representatives for this purpose.

In the second stage, the financial bids are opened in public session by the Committee tender in the presence of the contracting authority and candidates or their representatives invited for this purpose.

At the end of each opening of bids, a signed record will be set out for the first step, by the person designated by the Contracting Authority and, for the second stage by the members of the appeal board of tender.

Article 20: Evaluation of bids

The tender commission evaluates complete offers. Initially, the committee evaluates the technical proposals and then makes an assessment of the financial offers of the candidates whose technical bids were found to be consistent on the basis of financial criteria outlined in the tender dossier.

The financial proposals of candidates who have submitted technical bids evaluated non-compliant are not open.

The partnership agreement is reached with the candidate who has submitted the most economically advantageous tender on the basis of the optimal combination of different assessment criteria laid down in the tender offers and possibly related, including:

- At cost, the amount and the rationality of funding available;
- Any other income that the equipment or methods are likely to provide the Contracting Authority;
- The value of lending facilities, if any;
- The rates charged to users or donated to the contracting authority;
- The value of direct payments that the contracting authority is required to carry out and the terms of payment;
- The quality of the organisation put in place to ensure continuity of service;
- Specifications and performance standards planned or proposed;
- The level of quality of services;
- The potential for socio-economic development of the project itself;
- Compliance with environmental standards;
- The portion of the contract that the applicant agrees to assign to local businesses;
- Arrangements for the transfer of technology and skills transfer proposed;
- The level of use of local materials;
- The level of employment of local labour available.

The criteria used must be listed in the tender documents and be expressed in monetary terms or in the form of qualifying criteria.

The tender commission classifies all responsive bids. It transmits this ranking and the record of its proceedings to the contracting authority who must receive the favorable opinion of the National Support Committee for Public-Private Partnerships.

The contracting authority shall inform the applicant in writing of their classification.

Article 21: Margins of preference

As part of the evaluation of the full tender, the tender commission considers the following incentives unless more favorable incentives provided by laws or regulations:

- A margin of preference to nationals operators UEMOA region between 5 and 10%;
- A margin of preference shall not exceed 10% candidates groups having in their midst a national operator of the UEMOA;
- Preferential treatment of 5% minimum and 10% maximum combined with preference margins under the above for any candidate is firmly committed in the form of an irrevocable statement to subcontract at least thirty percent (30%) of the total value of supply contracts and contracts under the implementation of the partnership agreement to EU companies work.

A margin of preference shall not exceed 2% may be awarded to any candidate who is committed to enhancing contracting with small and medium enterprises in the WAEMU/UEMOA region or with associations of small community operators.

The first two lines of preferences are not cumulative.

Article 22: Implementation Partnership Contract

The contracting authority, after receiving the classification by the Tender Committee as well as the minutes of its proceedings, proceed to the implementation of the partnership agreement with the candidate ranked first in order to halt the final terms.

This implementation may have the effect of altering the fundamentals of supply or essential characteristics of the partnership agreement, the variation is likely to distort competition or have a discriminatory effect.

In case of failure of the implementation, the contracting authority reserves the right to nominate the next candidate, after consulting the Board of Infrastructure and initiating a clarification with it.

The end of the implementation process is completed by a report issued with the aid of the contracting authority. The final partnership agreement, along with the minutes of the closing implementation and the tax schedule, if necessary, shall be forwarded for approval to the Minister of Finance, after consultation with the National Support Committee for Public Partnerships -Private.

The partnership agreement, once approved by the Minister of Finance, is forwarded for information to the Council of Infrastructure and National Support Committee for Public-Private Partnerships.

Partnership agreements are being published in the Official Journal with the exception of clauses relating to confidentiality.

The contracting authority may, at any time terminate the tender procedure. This decision is not subject to any appeal by the applicants; they may nevertheless, if necessary, receive financial compensation. The amount of compensation is determined by the Infrastructure Council, based on an independent appraisal.

Section 4 - Project Company

Article 23: Constitution of the project company

The operator of the project must be established three months at the latest after the signing of the partnership agreement, in the form of a company under Senegalese law whose capital consists of a minimum of twenty percent (20%) contributions from national economic operators.

The offering of securities is made after determination or valuation of securities by an independent expert selected by the operator and the public person by agreement or by an expert chosen by the Council of Infrastructure, within a period of up to three weeks by advertising the public entity or investment mandate with a bank.

After pricing of securities, the sale takes place during a period of forty five (45) days. The operator or authorized third party shall notify the Council of Infrastructure of the list of buyers, the number of shares purchased and their prices and the number of shares not sold to the expiration of this period.

Securities not acquired by domestic investors at the end of the period specified in the preceding paragraph shall remain the property of the operator unless the State of Senegal decides to acquire temporarily. In this case, the state must sell the securities to national operators within two years or transfer to the operator.

CHAPTER V. - SPECIAL SELECTION PROCEDURES for the PROJECT OPERATOR.

Section 1 - Spontaneous offer

Article 24: General Principle treatment Unsolicited

A private operator has the option to send a contracting authority an unsolicited offer. In this case, the operator carries out feasibility studies in order to present a coherent project with adequate technical proposals and solutions related financing.

An unsolicited offer may also include the completion of a project whose studies were carried out by the contracting authorities when such studies are clearly obsolete or have been made at least sixty (60) months prior to the filing date of the unsolicited offer.

They are the subject of a negotiated procedure with the authorisation given by the Prime Minister or by the legislative body of other legal entities referred to in Article 2, based on the advice of the National Support Committee for Public-Private Partnerships and the Minister of Finance.

However, unsolicited bid for projects for which a tender process is underway cannot be accepted.

Article 25: Admissibility of unsolicited offers

Spontaneous bids must be on a project whose total estimated cost exceeds an amount specified by decree and meet at least two of the following conditions:

- The share of private funding for the project is at least seventy percent (70%) of the initial capital costs of the project. In this case, the holder of the unsolicited proposal must provide concrete evidence that the project is financially viable throughout its life evidence;
- The project is competitive with general market conditions;
- The project is a technological innovation or advanced technology and provides essential viable economic and ecological solutions to the contracting authority.

In all cases, the project owner must agree to reserve a significant part to the use of local labor, promote technology transfer and outsourcing of national economic operators.

Article 26: Form and content of unsolicited offers

The holder of the unsolicited offer submits a dossier to the contracting authority comprising of:

- A note describing the extent and duration of the work to be performed;
- Description of the proposed technical solutions;
- Competitiveness of the project;
- Economic and financial benefits expected from the project;
- An analysis of project risks;
- A distribution pattern and mitigation of these risks between the parties;
- The total estimated cost of the project;
- A financing plan for the project with a projected financial model;
- Details of additional studies to be performed and their estimated cost and mode and source of funding;
- A draft contract.

The unsolicited offer is accompanied by documents evidencing the financial and technical capabilities of the operator to carry out the proposed project.

After considering the unsolicited offer, especially as regards to the competitiveness of the proposed project and its financial viability, the contracting authority may request additional information, classify the offer without further action, or decide to give him a favorable response.

Upon acceptance of the spontaneous bid, the contracting authority shall refer to the National Support Committee for Public-Private Partnerships and the Minister of Finance for review and advice on the basis of documents submitted by the holder of the unsolicited offer.

The opinions of the National Support Committee for Public-Private Partnerships and the Minister of Finance will intervene no later than the ninety days (90) business days following receipt of the request.

The National Support Committee for Public-Private Partnerships, after verifying the compliance of the offer to one of the conditions specified in Article 25, gives an opinion on the following points:

- The overall coherence of the project and its compliance with the policy of the State;
- The quality and relevance of technical solutions;
- The cost / benefit analysis of the project;
- The economic rate of return of the project;
- Competitiveness of the financing;
- The rational allocation of risk between the parties;
- The potential for job creation;
- Arrangements for technology transfer;
- The quality of contractual and financial arrangements proposed.

The opinion of the Minister of Finance focuses on fiscal sustainability commitments of the State under the project. This includes ensuring that the project is financially and economically viable.

The National Support Committee for Public-Private Partnerships and the Minister of Finance may use an independent appraisal as part of the evaluation.

Article 27: Negotiation and contract signing

Based on the opinions obtained, the contracting authority shall refer to the Prime Minister or the legislative body of the local authority, a request for authorisation to proceed with contract negotiations with the holder of the unsolicited offer.

When the contracting authority obtains such permission, it began negotiations with the holder of the unsolicited offer to signing the final contract.

The draft contract negotiated together with its schedules and the minutes of completion of negotiations is transmitted to the National Support Committee for Public-Private Partnerships and the Minister of Finance who shall have 15 days to issue opinions or observations.

In case of favorable opinions, contracts are subjected, after signature by the parties, to the approval of the Prime Minister.

A copy of the contract is approved and forwarded for information to the National Support Committee for Public-Private Partnerships and Infrastructure Council within 15 days following approval.

When an unsolicited offer is subject to negotiation under this section, no other offer can be accepted on the project in question, unless if the failure of negotiations launched is sanctioned by the closing minutes signed by the parties.

Article 28 Treatment of spontaneous bids in an open procedure

Spontaneous bids that do not meet the conditions listed in Article 25 are subject to a competitive bidding as provided in Section 3 of Chapter 4 if the contracting authority intends to implement them.

The holder of the unsolicited bid participates in the tender under the same conditions as other candidates. It can benefit in some cases, of a margin of preference on the advice of the National Support Committee for Public Private Partnerships.

The modalities of implementation of the provisions of Articles 24 to 28 are specified by decree.

Section 2 - Direct Contracting, additional contract addendum and furnished procedures

Article 29: Conditions for the award by direct agreement

A contract governed by the provisions of this Act can be passed by direct agreement by a contracting authority, after consultation with the Infrastructure Council on referral to the National Support Committee for Public Private Partnerships in the following exceptional circumstances:

- Where the provision or operation of a facility or facilities related to a work must be performed under conditions with the characteristics of extreme urgency, to ensure the continuity of public service under conditions of possible conflict with the implementation of the tender under this law proceedings, and that the contracting authority cannot provide the service itself.

The imperative must be justified by circumstances of the contracting authority. In this case, the contract has a period not longer than two years;

- Where the infrastructure cannot be made or used, for technical reasons or for reasons connected with protection of exclusive rights, by a single trader.

Article 30: Conditions for the award of a supplementary contract

An additional contract to a partnership contract may be awarded by direct agreement by a contracting authority when running project has been a partnership contract and that for reasons of economic, social or cultural need or for reasons related to the need for consistency in the technical and financial management of the project, the Contracting Authority shall decide on its extension.

Authorisation to award the contract by supplemental agreement is given by the Prime Minister, upon referral to the National Support Committee for Public-Private Partnerships, after consulting the Board of Infrastructure and Minister of Finance.

Supplementary benefits will not change the overall nature of the contract.

The prior notification and permission must be requested upon presentation of a report justifying the appropriateness of works, supplies or services, the extension objects and their relationship to the original project.

Special procedures for the award of additional contracts by local authorities are set by decree.

Article 31: Conditions for the award of endorsements

Subject to the provisions of Article 30, any changes of works, goods, services or time of the original contract by the owner or contracting authority should be subjected to a prior agreement between the parties in an amendment to the partnership agreement.

Changes can be substantial. Failing a new award procedure is required. A change is considered substantial:

- When it introduces conditions which, had they been included in the initial award procedure, would have allowed the selection of a candidate other than the one initially selected;
- When it changes the economic balance of the contract of partnership for a partner for not less than thirty percent cost (30%) of the original amount of the financial offer accepted;
- When it significantly changes the scope of the partnership contract.

This is particularly the case when the amendment has the effect or purpose of substituting another contract for the initial contract is upsetting the economy, either by changing the subject.

Any amendment must be previously authorised by the Infrastructure Council, after consulting the Minister of Finance and the National Support Committee for Public-Private Partnerships.

Article 32: Procedures for awarding appointed

When a development partner, including an international agency, helps fund a work that is the subject of a partnership agreement, subject to this Act, the procedure for tendering described in Section 3 of chapter 4, can be adjusted to take account of procedures specific to that development partner.

These adjustment measures are discussed by the Contracting Authority with the development partner and are subject to the Council's Infrastructure' s approval.

These adjustment measures, can only have the effect of strengthening the internal device procurement, are described in the notice of pre-qualification and, as applicable, specified in the notice of tender. They can in no way weaken the procedures in this Act.

CHAPTER VI: PERFORMANCE OF CONTRACTS OF PARTNERSHIP SANCTIONS AND TERMINATION.

Article 33: Contracting Authority relationships with funding institutions.

The Project operator or owner of the partnership agreement, selected at the end of the procurement procedure prescribed by this Act, is personally responsible for his execution. Nevertheless, it may entrust the execution of some of its obligations to third parties under its responsibility. The contracting authority may establish direct contractual relationships with the institutions that financed all or part of the project.

Article 34: Transfer of a partnership in an ongoing contract

Project operator may not transfer the partnership contract to any person without the prior consent of the public authority, and under the conditions specified in the contract. The partnership agreement may allow for a transfer either to the institutions that financed all or

part of the project or to a third party proposed by these institutions.

The third party, to which the partnership contract is transferred, must have sufficient financial, technical and legal guarantees and, depending on the contract in question, able to ensure continuity of service and equality before the public service users.

Article 35: Termination of partnership

The partnership agreement may provide grounds for termination, including:

- Serious breaches of the contracting authority: the termination is made by the judge at the request of the operator of the project, as provided in Chapter 7 the Project operator can then claim damages from the Contracting Authority;
- Gross negligence of the operator of the project, the Contracting Authority may itself terminate the contract of partnership. The contracting authority may seek to judge the responsibility of the operator of the project because of the mistakes he has made. The partnership agreement may nevertheless provide that, in this case, the contracting authority shall pay financial compensation related to the recovery of infrastructure;
- A pattern of general interest: the termination is then delivered by the contracting authority. The operator of the project has, in this case, the right to an allowance to cover expenses incurred and lost profits;
- In case of force majeure on the initiative of either party, as provided by the contract;
- When questioning the financial stability of the project resulting from an action or decision of the Contracting Authority. The termination is made by the judge at the request of the operator of the project in accordance with Chapter 7 the Project operator can then claim damages to the Contracting Authority.

The project operator has the opportunity to challenge before an arbitral tribunal or national courts, as provided in Chapter 7, the termination of the partnership and the amount of compensation owed by the Contracting Authority. However, the judge has no authority to overrule a decision of termination decision made by the Contracting Authority; it can only award compensation to the operator of the project.

CHAPTER VII: LITIGATION AND AUDIT PARTNERSHIP CONTRACTS

Section 1: Dispute

Article 36 Settlement of disputes arising from the formation of the partnership agreement

Disputes arising from selection procedures of the project operator in the partnership contracts are referred to the Infrastructure Council.

The appeals process is set by the Board of Infrastructure.

The decisions taken by the Council of Infrastructure, pursuant to this section shall be subject to appeal for abuse of power.

Only unsuccessful bidding candidates in the selection process of the project operator in the partnership contracts are authorized to refer to the Infrastructure Council for an objection. This must be addressed within 15 days of notification of the decision of selection of the project operator.

The Infrastructure Council rules on any disputes, at the latest within 30 days of referral. Disputes relating to the award of the contract of partnership can only give rise to compensation for the unsuccessful candidate or candidates.

Article 37: Settlement of disputes during the execution of the partnership agreement

Disputes relating to the execution or interpretation of partnership contracts are within the jurisdiction of Senegalese courts or arbitration tribunals, failing an amicable settlement.

Arbitration is conducted in accordance with the terms of the arbitration clause in the partnership contract.

Section 2: Evaluation and audit of partnership contracts

Article 38: Ex-post evaluation of the partnership contracts

Partnership agreements are subject to periodic evaluation by the National Support Committee for Public-Private Partnerships on terms laid down by decree.

Article 39: Audit partnership contracts

Partnership agreements are subject to periodic audit by the Infrastructure Council on terms laid down by law.

Article. 40: Transitional Provisions

Where on the date of entry into force of this Act, a Contracting Authority has already begun discussions with a third party for the purpose of awarding a contract of partnership, the Infrastructure Council determines the level of progress of studies possibly made by the third party.

The same Board determines, based on an independent appraisal, the level of compensation to which that party is entitled in respect of studies and work he carried out. This award is supported by the Contracting Authority. The contracting authority shall initiate a tender procedure for the award of the contract as provided by this Act. As part of the tender, the Contracting Authority shall inform all candidates of studies and previous work done.

This Act is applicable to contract projects in respect of which a consultation is committed to its effective date.

Article 41: Final Provisions

Are repealed Law No. 2004-13 dated March 1, 2004, as amended by Acts No. 2009-21 of May 4, 2009 and No. 2011-11 of April 28, 2011, the provisions of paragraph 2 of Article 10 of Law No. 65-51 of 19 July 1965 on the Code of Obligations of the Administration, as amended by law No. 2006-16 of 30 June 2006, to Articles 30 to 32 of the Act relating to contracts partnership, and all contrary laws.