

Approved by Decree No 1149 dated 7 December 2016
of the President of the Republic of Azerbaijan

Rules on establishing terms of execution of investment projects by investors with respect to construction and infrastructure facilities based on "Build-Operate-Transfer" model, requirements to investors depending on the types of construction and infrastructure facilities, specifications and terms of agreements, and ways of determination of the value of goods and services to be produced through investment

1 General Provisions

- 1.1 This document is prepared on the basis of Section 4 of the Law of the Republic of Azerbaijan, *On Implementing through Special Financing Investment Projects for Construction and Infrastructure Facilities*, (the "**Law**"), and, in accordance with Section 3.1 of the Law, sets out the terms of execution by investors of investment projects with respect to construction and infrastructure facilities based on "Build-Operate-Transfer" model, requirements to investors depending on the types of construction and infrastructure facilities, specifics and terms of agreements, and ways of determination of the value of goods and services to be produced through investment
- 1.2 The authorities of the authorised body envisaged by this Decree shall be discharged by the Ministry of Economy of the Republic of Azerbaijan according to Sub-Section 2.1 of Decree No 867, dated 20 April 2016, of the President of the Republic of Azerbaijan, *On Implementation of Law No 177-VQ, dated 15 March 2016, On Implementing through Special Financing Investment Projects for Construction and Infrastructure Facilities*.
- 1.3 The terms used herein shall have the following meanings
 - 1.3.1 **agreement** is a written agreement made with respect to an investment project between the authorised body and [investor] and setting out the obligations on set-up (installation, maintenance repair and overhaul, reconstruction, and rehabilitation), management, and transfer of construction and infrastructure facilities and the like (encompassing installations within such facilities) as envisaged by Sub-Section 3.1 of the Law;
 - 1.3.2 **bidding entity** is a resident or non-resident entity or its branch and representative office interested in implementing an investment project;

- 1.3.3 **initial feasibility study** is an instrument setting out technical, financial, economic, duration, ecological, social and legal aspects of feasibility, and assessment and allocation of risks and warranties;
- 1.3.4 **incumbent** is a state agency or institution or state-owned entity or entity with a controlling stake belonging to the State which, on its own initiative or upon application of the authorised body, makes a proposal on implementation of an investment project;
- 1.3.5 **tender commission** is a commission established by the authorised body pursuant to 5.3 hereof in order to run a tender;
- 1.3.6 **tender** is an action taken by the authorised body to select, in a transparent and competitive mode, an investor to invest under the "BOT" model as envisaged by section 5 hereof;
- 1.4 Other terms used herein shall have the meanings ascribed to them by the Civil Code of the Republic of Azerbaijan and the Law.

2 Terms of execution of investment projects and requirements to investors

- 2.1 [An incumbent entity may, on its own initiative or upon a request of the authorised body], make a proposal of an investment project to the authorised body. The proposal shall be discussed between the authorised body and the incumbent and should a preliminary agreement on implementation of the project be reached, the incumbent shall prepare the initial feasibility study and submit it to the authorised body. The authorised body shall assess that feasibility study and embark on implementation of the measures envisaged by 2.4 and 5 hereof in order to engage investors for executing an investment project having received a positive opinion. An in- depth feasibility study shall be prepared by bidders [while] design and estimate documentation shall be prepared by a winning bidder.
- 2.1.1. In case, designing of construction and infrastructure facilities and similar structures indicated in the article 3.1 of the Law is related to types of activities stipulated in the Annex of the Law of the Republic of Azerbaijan "On Environmental Impact Assessment", environmental impact assessment paper should be prepared for those facilities and that paper should go through state ecological screening.
- 2.2 The authorised body may itself initiate any investment project.
- 2.3 Based on specifics of an investment project, the terms and conditions of such

project and of the following tasks addressed to investors shall be defined:

- 2.3.1 nature, type and scope of investment project;
- 2.3.2 scope and terms of security to be provided by investor with respect to its participation in the tender and performance under the agreement;
- 2.3.3 investment project location, and manner and terms of commissioning of construction and infrastructure and similar facilities upon expiration or early termination of the agreement;
- 2.3.4 dates of start and completion of set-up (installation, maintenance repair and overhaul, reconstruction, and rehabilitation) of construction and infrastructure and similar facilities, and penalties for delay;
- 2.3.5 criteria for bidders (financial sustainability, experience, material and technical base, etc.) and list of bidding documents;
- 2.3.6 requirements to feasibility studies, plan of action on implementation of investment project, and bidders' financials;
- 2.3.7 requirements to the management and methodology principles;
- 2.3.8 requirements to preparation, submission, and assessment of bids, and rules and principles of execution of investment projects;
- 2.3.9 grounds for invalidation of bids;
- 2.3.10 sources for payment of costs for set-up (installation, maintenance repair and overhaul, reconstruction, and rehabilitation), management, and commissioning of construction and infrastructure and similar facilities, and other costs;
- 2.3.11 cases and terms of extending the term of agreement on condition that its term will not go beyond 49 years;
- 2.3.12 manner and terms of determination and payment of service fees in accordance with 2.0.6 of the Law and section 4 hereof;
- 2.3.13 depending on the field in which an investment project will be run, licenses and permits required pursuant to the Law of the Republic of Azerbaijan, *On Licenses and Permits*, and persons responsible for obtaining such licenses and permits;

- 2.3.14 dispute resolution procedure [to be used in tender] and investment project;
- 2.3.15 indication of whether the authorised body will or will not undertake a guarantee obligation as envisaged by Sub-Section 7.2 of the Law and, if it will, the scope and terms of its granting;
- 2.3.16 terms of sovereign guarantee to be issued in accordance with Sub-Section 10.1 of the Law and the Law of the Republic of Azerbaijan, *On Public Debt*, and
- 2.3.17 terms contemplated by the Law, the Civil Code of the Republic of Azerbaijan and other laws.
- 2.4 Depending on the type and specifics of investment projects, a tender commission shall prepare terms and requirements to a particular investment project and investors in accordance with 2.3 hereof.
- 2.5 For selecting an investor for an investment project, the authorised body shall use either of the following methods:
 - 2.5.1 competition among all bidders;
 - 2.5.2 competition among certain bidders; or
 - 2.5.3 direct contracting.
- 2.6 The competition among all bidders ensures full and equal participation of all bidders in the competition.
- 2.7 Depending on the specifics of an investment project, an investor may be selected not from among all bidders, but bidders having experience and technical and financial capabilities matching the investment project's specifics.
- 2.8 A competition among all bidders or certain bidders shall be deemed successful if at least three (3) bidders take part in the first such competition. If the first competition has less than three (3) participants, the competition shall be deemed failed and called for the second time.
- 2.9 It is not required to have minimum three (3) bidders in a repeated competition run among all or certain bidders. Should be it impossible to define an investor using those methods or should a competition fail, an investor shall be defined

by means of the direct contracting method.

- 2.10 Pursuant to the direct contracting method, a bidder and the authorised body shall hold negotiation and, depending on the outcome of such negotiation, make an agreement.
- 2.11 A winning investor shall set-up a separate entity for execution of an investment project. The scope of activities of such newly established entity shall be limited to the discharge of the investment project. Such entity may embark on any other activities only upon authorization of the authorised body.
- 2.12 Minimum 20 per cent of funding required for an investment project shall be provided by investor.

3 Specifics and terms of agreement made between authorised body and investor

- 3.1 An agreement shall be prepared in accordance with the Law, the Civil Code and other laws of the Republic of Azerbaijan, and international agreements to which the Republic of Azerbaijan is a party, and encompass the following terms:
 - 3.1.1 parties of the agreement;
 - 3.1.2 subject matter of the agreement;
 - 3.1.3 duration of the agreement;
 - 3.1.4 general principles of investment projects;
 - 3.1.5 standards and quality of goods and services to be supplied by investor;
 - 3.1.6 terms of maintenance of construction and infrastructure and similar facilities envisaged by the agreement;
 - 3.1.7 [sources and rules for [financing]] the costs of set-up (installation, maintenance repair and overhaul, reconstruction, and rehabilitation), management, and commissioning of construction and infrastructure and similar facilities pursuant to an investment project, and all other costs;
 - 3.1.8 methods of determination of service fees and value of goods and services produced as a result of investment and terms of defining a cooperative assistance (if envisaged);

- 3.1.9 terms of a sovereign guarantee to be issued in accordance with the Law and the Law of the Republic of Azerbaijan, *On Public Debt*, and, if a guarantee obligation will be undertaken, its amount and term;
- 3.1.10 term for set-up (installation, maintenance repair and overhaul, reconstruction, and rehabilitation) and commissioning of construction or infrastructure and similar facilities pursuant to an investment project, and operations launch date;
- 3.1.11 delays in set-up (installation, maintenance repair and overhaul, reconstruction, and rehabilitation) of construction and infrastructure and similar facilities under an investment project, and changes in construction costs triggered by, and penalties applied for, such delays;
- 3.1.12 information about licenses and permits to be obtained in accordance with the Law of the Republic of Azerbaijan, *On Licenses and Permits*;
- 3.1.13 guarantees to be provided by [investor];
- 3.1.14 regular (monthly, quarterly, and annual) reports, including financial statements, to be delivered by investor;
- 3.1.15 issues concerning independent audit;
- 3.1.16 HSE and other requirements derived by business activities;
- 3.1.17 force majeure circumstances;
- 3.1.18 insurance;
- 3.1.19 requirements to technical maintenance and repair during operation period;
- 3.1.20 grounds for termination of an agreement;
- 3.1.21 term and procedure for takeover of construction and infrastructure and similar facilities under an investment project upon expiration of an agreement;
- 3.1.22 term and procedure for takeover of construction and infrastructure and similar facilities under an investment project in case of early termination of an agreement;
- 3.1.23 terms of making borrowings for an investment project;
- 3.1.24 obligations and responsibilities of parties to an agreement, and indemnities;

- 3.1.25 legal acts and dispute resolution procedure to apply to an agreement;
 - 3.1.26 employees' trainings with respect to operation of construction and infrastructure and similar facilities under an investment project;
 - 3.1.27 terms of payment of costs incurred in preparing the agreement;
 - 3.1.28 parties' notification procedure with respect to issues arising out of the agreement;
 - 3.1.29 language of the agreement;
 - 3.1.30 rules and terms of making changes to the agreement;
 - 3.1.31 information about other agreements to be made in connection with the investment project;
 - 3.1.32 effective date of the agreement; and
 - 3.1.33 other terms envisaged by the Law, the Civil Code and other laws of the Republic of Azerbaijan and international agreements to which the Republic of Azerbaijan is a party.
- 3.2 The term of an agreement starts on the effective date and includes the term of set-up (installation, maintenance repair and overhaul, reconstruction, and rehabilitation), operation, and handover of construction and infrastructure and similar facilities under an investment project. This term may not extend beyond 49 (forty-nine) years for any reasons such as force majeure circumstances and circumstances caused by the authorised body.
- 3.3 Upon determining the [term of an agreement], a period to construct, return investment costs (including profit to be made) and repay loans taken for the investment as well as peculiarities of the project, amount of the investment, and principles of operating the facilities are considered.
- 3.4 An agreement shall specify an overall investment amount undertaken by an investor, indices to apply in price increases, terms for use of various loans if such would be borrowed, additional financial undertakings, ways to secure such, and issues concerning all types of borrowings to be used.
- 3.5 The agreement shall specify the terms of determination, pursuant to section 4 hereof, of service fees to be paid in exchange of goods and services to be produced through investment.
- 3.6 An investor willing to execute an investment project shall guarantee to the

authorised body:

- 3.6.1 that it will sign an agreement should it win the tender;
- 3.6.2 discharge of undertakings on set-up (installation, maintenance repair and overhaul, reconstruction, and rehabilitation) and commissioning of construction and infrastructure and similar facilities under an investment project at the times and in the manner specified by an [agreement]; and
- 3.6.3 discharge of undertakings on operation and handover at the times and in the manner specified by an agreement.
- 3.7 The amount of each security referred to in 3.6 hereof shall be determined by the authorised body and specified in terms and conditions applicable to an investment projects and investors and inserted into an agreement with an investor.
- 3.8 The amount of a security envisaged by paragraphs 3.6.1 and 3.6.3 hereof shall be determined by the authorised body while the amount of security referred to in 3.6.2 hereof shall be within ten per cent of the value of an investment project.
- 3.9 The security referred to in 3.6 hereof can take any of the forms provided by the Civil Code of the Republic of Azerbaijan.
- 3.10 The authorised body shall jointly with the Ministry of Finance of the Republic of Azerbaijan monitor the investor's performance under an agreement. The investor shall rectify any breaches within a time period specified in the agreement. An investor failing to so rectify the breaches shall bear the material liability in accordance with the Civil Code of the Republic of Azerbaijan and paragraph 3.1.11 hereof.
- 3.11 An investor may, [subject to a consent of the authorised body], during the term of an agreement fully or partially assign on same terms all its rights and obligations arising from the agreement to another investor matching the requirements specified herein. Upon assignment of rights and obligations arising from an agreement to another investor, all rights and obligations derived from other agreements made in connection with that agreement shall be deemed to have been assigned to that same investor.
- 3.12 The authorised body shall unilaterally terminate, in accordance with the Civil Code of the Republic of Azerbaijan, an agreement with an investor failing to perform, or defaulting under the terms of an agreement or going bankrupt or undergoing [liquidation].

- 3.13 An investor shall, on a free-of-charge basis, transfer to the authorised body's operation the construction and infrastructure and similar facilities that are subject of investment projects free of all debt and obligations in the condition fit, having due regard for depreciation, for designated use under management of the authorised body upon completion of the term provided for in an agreement. The authorised body shall set up a handover commission entrusted with evaluation of the conformance of the construction and infrastructure and similar facilities that are subject of investment projects with the requirements of the first sentence of this paragraph and other requirements set out in the agreement. The agreement shall specify the terms of a handover commission set-up, rules and principles of its activities, and terms of rectification of detected breaches.
- 3.14 In case of unilateral termination of an agreement by the authorised body, in accordance with 3.13 hereof, the issues concerning the handover of construction and infrastructure and similar facilities that are subject to investment projects, the obligations and responsibilities of the authorised body and the investor, and the terms of damages' payment shall be fixed in the agreement.
- 3.15 An agreement becomes effective upon fulfilling the terms for effectiveness thereof.
- 3.16 The annual budgets shall, in accordance with the Law of the Republic of Azerbaijan, *On Budget System*, allocate funds for the authorised body to finance a cooperative assistance or guarantee obligation as provided by Sub-Sections 2.0.5 and 7.2 of the Law. The rules for determining the amount of such funding shall be prepared and approved by the Ministry of Finance and the Ministry of Economy of the Republic of Azerbaijan, acting jointly.
- 3.17 Date of effectiveness of an agreement envisaging issuance of a sovereign guarantee in accordance with the Law of the Republic of Azerbaijan, *On Public Debt*, may not precede the date on which a decision to issue the guarantee was passed. A decision to issue a sovereign guarantee is passed by the Cabinet of Ministers of the Republic of Azerbaijan on the basis of a positive opinion of the Ministry of Finance of the Republic of Azerbaijan.

4 Method of determination of value of goods and services produced through investment

- 4.1 Value of goods and services (with the exception of goods and services, prices to which are regulated by the State) produced as a result of investment shall be agreed, based on types, quantity of consumption and use, quality, and safety of

goods and services and other criteria, between an investor and tender commission using the following methods:

- 4.1.1 cost-plus method. In this case, the costs shall be calculated based on the international financial reporting standards and principles for which purposes the criteria applicable to domestic producers of similar goods and services shall be considered. Profits shall be defined using the profitability rates used for the relevant sector in the domestic and international context for which purposes the criteria applicable to the domestic producers of similar goods and services shall be considered; or
- 4.1.2 price cap method. For the purposes thereof, an investor proposes a discount to a price formed by a market for (market price of) goods and services envisaged by an investment project and undertakes to preserve the discount during the term of the agreement. If the market price does not take account of actual costs or there is no reference price in the market, a price proposal offering the biggest discount shall be given the highest mark.
- 4.2 The tender commission, depending on the specifics of an investment project, may pass a decision to use any of the methods provided for in 4.1 hereof or a combination thereof. In such circumstances the bidders shall submit bids corresponding to the methods outlined by the tender commission. The tender commission shall be free to select any of those methods upon evaluating the bids.
- 4.3 If, due to the specifics of an investment project, the tender commission comes to a conclusion that the methods provided for in 4.1 hereof are inadequate, the value of goods and services to be produced through investment shall be defined using other domestic and international pricing methods, standards and principles. An investor accepting such pricing shall receive the highest score for the price element.
- 4.4 The terms of this section shall also be applied by the authorised body for determining and paying a cooperative assistance and guarantee [obligation].
- 4.5 A market price of goods and services to be produced through investment shall be defined in accordance with an agreement between the tender commission and the investor based on a report of independent appraiser prepared in accordance with the Law of the Republic of Azerbaijan, *On Evaluation Activity*.

5 Tender Procedure

- 5.1 The objective of a tender is to ensure that an investor for making an investment based on the "BOT" model is selected by the authorised body based on the principles of competition and transparency.
- 5.2 The subject of a tender is to make an agreement between an investor winning a tender and the authorised body. Any investor may participate in a tender.
- 5.3 The authorised body acts as organizer of a tender. The authorised body shall set up a tender commission for running a tender. A separate tender commission shall be set up for each tender and act until the agreement between the authorised body and winning bidder enters into force. The tender commission opens envelopes, examines bids, evaluates them, and selects a winner.
- 5.4 A tender commission shall include the representatives of the authorised body, incumbent, depending on the specifics of an investment project, and the Ministry of Finance of the Republic of Azerbaijan. A tender commission shall be composed of a single number of members but minimum five members. Chairman and secretary of the tender commission shall be appointed from among the representatives of the authorised body.
- 5.5 The period of a tender starting from a tender announcement and ending upon coming into force of an agreement between the authorised body and winning investor shall be defined by a tender commission depending on specifics of an investment project.
- 5.6 A tender commission shall prepare and announce terms of a tender in accordance with 2.3 hereof. The authorised body shall no later than 45 (forty five) days prior to the tender, place on its official website and in the official domestic and foreign media an announcement of time, place, order, place and period for collecting a set of tender documentation, criteria for evaluation of bids, main terms of the tender, and term of making an agreement with a winner.
- 5.7 The tender commission shall send individual invitations to investors matching the requirements set out in 2.3.5 hereof.
- 5.8 An investor willing to participate in a tender shall obtain the set of tender documentation setting tender terms by filing a request for the same with the commission.
- 5.9 The set of tender documentation shall include:
 - 5.9.1 terms and conditions defined by the tender commission in accordance with 2.3

hereof with respect to investment project and investor;

- 5.9.2 template of information form about participants;
- 5.9.3 template and term of validity of bids;
- 5.9.4 template of evaluation criteria of tender participants;
- 5.9.5 agreement template;
- 5.9.6 currency for calculating and quoting bids;
- 5.9.7 bids' opening place and time and point of contact;
- 5.10 A participant shall fill out, sign, and seal a bid proposal and information about bidder, make a copy of it, and place the original and the copy in separate sealed envelopes (and mark envelopes as "original" and "copy", respectively) and place them together with other documents in one single envelope;
- 5.11 Any bids received after the announced deadline for their submission shall not be considered; likewise, bidders having violated the documentation procedures provided by 5.10 hereof shall be debarred from participation in the tender;
- 5.12 No amendment or modification can be made to a bid registered by a tender commission;
- 5.13 Opening of envelopes, examination of bids, their evaluation, and selection of a winner shall be run in a public with participation of bidders and their authorised representatives.
- 5.14 A company willing to participate in a tender, before it submits its bid, may file an official request for clarification with a tender commission no later than 15 (fifteen) business days prior to the tender closing. The tender commission shall respond to such requests within seven (7) business days.
- 5.15 Envelopes shall be opened in the order in which they were registered.
- 5.16 The chairman of the tender commission opens envelopes with originals of the bids and information about bidders and makes the announcement of all those data and documents. The second envelope shall be kept by the commission unsealed. The members of the tender commission shall examine the bids and appended documents. Upon evaluating each item of the bid, the members of the tender commission shall apply the evaluation criteria developed by the tender commission in accordance with 2.3 hereof for a concerned investment project in

view of terms and conditions required to be met by the investment project and bidders.

- 5.17 Should be it established that a bid misses any documents or there are any omissions which are capable of being remedied without entailing any changes in the bids, a notice of the same is submitted to a bidder. If a bidder fails to remedy such shortcomings within a term assigned by the tender commission or it appears that it is impossible to remedy such bids or their remedying can entail changes in bids, a bidder shall be disqualified by a decision of the tender commission.
- 5.18 After opening of all envelopes, examining of bids and appended documents and evaluating the bids against relevant terms and conditions, each member of the tender commission shall approve the results of the evaluation by signing the sheet setting out all bids' evaluation criteria.
- 5.19 The tender commission shall determine the final bid score for each bidder, announce a bidder getting the highest aggregate score as a winner, and document the results of the tender by minutes. The minutes shall be signed by the members of the tender commission. Any member of the tender commission who disagrees with the results of the tender shall sign the minutes by enclosing his/her opinion to the minutes.
- 5.20 If two or more bidders will get equal points, the tender commission shall select a bidder having best experience, technical and financial capabilities.
- 5.21 An agreement shall be executed between the authorised body and the winning bidder pursuant to the minutes of the tender commission. Within five (5) business days of agreement delivery, the winning bidder shall submit to the tender commission a performance bank guarantee in the amount of five (5) per cent. of the agreement value.
- 5.22 Any refusal from making an agreement or breach of tender procedures shall be dealt with in accordance with the Law, the Civil Code of the Republic of Azerbaijan and this regulation.
- 5.23 Any bidder shall be entitled to receive a written response concerning outcome of its bid's examination and evaluation.

6 Authorities of authorised body in connection with execution of BOT model

- 6.0 The authorised body shall have the following authorities on execution of BOT model:

- 6.0.1 take measures on development of BOT [model];
- 6.0.2 supervise and evaluate agreements' performance;
- 6.0.3 coordinate investors' activities with state and municipal bodies and entities and individuals;
- 6.0.4 jointly with the Ministry of Finance,[take measures][?] on allocation of funds envisaged by 3.6 hereof, and determine the amount of financial undertakings of the State vis-a-vis investors, and run assessment of risks and their allocation;
- 6.0.5 in order to ensure that documents proving costs meet the legislative requirements, deliver to the Ministry of Finance of the Republic of Azerbaijan, through its own representative sitting in the tender commission, the documents submitted by bidders to the tender commission in accordance herewith;
- 6.0.6 agree with the Ministry of Finance of the Republic of Azerbaijan the draft of the investment agreement proposed to be made with the winning company, and feasibility study and design and estimate documentation prepared by such winning company, and deliver to the Ministry of Finance of the Republic of Azerbaijan a signed agreement within five (5) business days of signing; and
- 6.0.7 discharge other obligations incidental to the Law and this instrument.