

Enacted: February 20, 2020

**Law No. 47-20
Public Private Partnerships**

Law No. 47-20 on Public Private Partnerships

In response to the need for a specific regulatory framework for public private partnerships in the Dominican Republic, and in line with the National Development Strategy 2030, it was enacted on February 20, 2020, Law number 47-20 regulating public private partnerships (hereinafter, the “PPP Law”).

Without a doubt, this new legal instrument comes to fill an existing void in the context of operation and management of projects of social interest that concomitantly involve the public interest and the private interest. In particular, its purpose is to establish a regulatory framework that regulates the initiation, selection and award of partnerships, under certain institutional mechanisms; always within a clear and transparent competitive process, thus creating favorable conditions for the participation of the private sector in the development of infrastructure projects and provision of public services.

The importance of this text is that it provides us with a necessary structure (very expected by the different sectors of our economy) to implement public private partnerships, making it possible to obtain financing sources, which will allow us to continue with the development of projects of social interest, in spite of possible and potential limitations of the State (whether budgetary or otherwise).

Specifically, this legal text defines the public private partnership as a mechanism by which a public agent and a private agent (national or foreign) voluntarily sign a long-term contract (this being the document that constitutes the partnership and the term of such contract shall not exceed 40 years). The foregoing, as a result of a competitive process, for the provision, management or operation of goods or services of social interest in which there is total or partial investment by private agents, tangible or intangible contributions by the public sector, distribution of risks between both parties, and the remuneration is related to the performance, as established in the contract, being also possible its management and administration through a trust. From this definition that establishes the general framework of the new figure in our legal system, each partnership may have particular characteristics depending on the parties, the nature and, above all, the specific needs of the project, always in accordance with the criteria and parameters provided in the PPP Law.

It is vital to mention in this introductory phase of our summary that, Law No. 340-06 of August 18, 2006, on Purchases and Contracts for Goods, Services, Concessions and its regulations (hereinafter, “Law No. 340-06”), will not be applicable to public private partnerships. Moreover, now that the PPP Law is in force, any reference to the terms “concession” or “concessions” has been removed from this Law No. 340-06. However, respecting the constitutional principle of non-retroactivity of the law, the PPP Law provides that (i) those projects that were in execution at the time of its entry into force; and, (ii) the concessions, permits,

Law No. 47-20 on Public Private Partnerships

licenses and authorizations of goods or services granted by the Dominican State prior to the effective date of the PPP Law; will continue to be governed by the contract that constitute them and / or by the legal framework in force at the time of signing the contract, as applicable.

In the following lines, we will address certain aspects of the PPP Law. First, as a novelty, it is worth mentioning the creation of the General Directorate of Public Private Partnerships, as an autonomous and decentralized entity of the State, with legal personality, its own assets, administrative, jurisdictional, financial and technical autonomy, which will be attached to the Ministry of the Presidency. This will be the entity responsible for promoting and regulating public private partnerships created under the PPP Law and is composed by the National Council of Public Private Partnerships and an Executive Director, who will be appointed by the President of the Republic.

Likewise, the National Council of Public Private Partnerships (hereinafter, the "Council") is created under this new law, which will be comprised by (i) the Minister of the Presidency, who will preside; (ii) the Minister of Finance; (iii) the Minister of Economy, Planning and Development; (iv) Legal Advisor of the Executive Power; (v) the General Director of Public Procurement, who will have voice and vote, exclusively in regard to the design and structuring of the competitive processes for selecting the special awardee established in the PPP Law; and, (vi) the Executive Director of the General Directorate of Public Private Partnerships, with voice but no vote, and who will perform the duties as Technical Secretary of this Council.

Under the framework of this new law, said Council is constituted as the highest body of the General Directorate of Public Private Partnerships, being responsible for the functions of evaluation and determination of the suitability of public-private partnerships that are presented. Each Ministry member of the Council will have the specific functions that the PPP Law attributes independently in the context of public private partnerships.

Although the PPP Law as such is in force since its promulgation and publication, it provides for a period of twelve (12) months from the date of its entry into force for the creation and operation of the General Partnership Office Public Private; understanding that the Ministry of the Presidency will be in charge of the functions of said Directorate until it is formally created.

In a different order of ideas, another relevant aspect for the purposes of this executive summary is to understand which entities must adhere and observe the provisions of the PPP Law. These public entities are mentioned below; being expressly excluded from the scope of this law, permits, licenses, authorizations and concessions established in special laws, when they do not fall under the scope of the definition of private public partnerships mentioned above.

Namely:

- The entities conforming the Public Administration, which depend on the Executive Power;
- Decentralized and autonomous non-financial institutions;

Law No. 47-20 on Public Private Partnerships

- Social security institutions;
- Non-financial public sector companies or agents that hire private agents, under the modality of public private partnerships; and,
- The city councils.

On the other hand, in relation to important developments, we highlight that the PPP Law establishes two (2) types of public private partnerships: (i) of public initiative, which originates from public agents (as an initiative of the State); or, (ii) private initiative, for those cases in which the initial proposal of the partnership is originated by a private agent.

Regarding the procedure for the presentation and selection of public private partnerships by public initiative, this consists of five (5) phases detailed by the law: (i) presentation of the initiative by the public agent (entity of the State that intends to hire a private agent); (ii) evaluation of the initiative by the Council; (iii) declaration of public interest by the Council; (iv) competitive bidding selection process¹; and, (v) award of the public private partnership contract; phase that ends with the signing of the contract of the public private partnership in question between the successful awardee and the public agent that generated the initiative, that is, the contracting authority.

Additionally, the procedure for the presentation and selection of public private partnerships by private initiative has six (6) phases: (i) presentation of the initiative by the private agent; (ii) evaluation of the initiative by the Council in coordination with the public authority that is responsible for the purpose of the public private partnership proposed by the private agent; (iii) declaration of public interest by the Council, in which the Council has the prerogative of determining whether the proposed project would continue under the modality of private initiative or converted to public initiative (depending on what is most favorable to the interest public)²; (iv) public manifestation of interest, which will proceed if the Council determines that the initiative will continue as private, and whose manifestation would in turn serve to summon other private agents to participate in the competitive bidding process for selecting the awardee; (v) in the event that there is at least one private agent other than the private originator of the proposal that has responded to the summon and qualified as an offeror, a competitive bidding process for selection of the awardee shall proceed³; and, (vi) award of the private public partnership contract, which will finalize with the signing of the contract of the private public partnership in question between the awardee and the public agent⁴.

In accordance with our Constitution, if the incorporation of a private public partnership (or the amendment of a public private partnership contract⁵) entails, whether present or contingent, a transfer of assets owned by the State, affecting the national income, performing public credit operations or when it involves tax exemptions, the corresponding contract must be approved by the National Congress.

1. This phase, in turn, has three steps: (i) qualification of bidders; (ii) technical evaluation; and, (iii) economic evaluation.

2. In this scenario, the private agent that presented the initiative must be compensated for the cost of the studies initially provided in the initiative presentation phase, in accordance with the terms of the law.

3. This phase has three steps: (i) qualification of bidders; (ii) technical evaluation; and, (iii) economic evaluation. In the event that no private agent other than the originator of the initiative has been authorized as an offeror, the private originator will go directly to the technical and economic evaluation.

4. If the awardee is a private entity other than the originator of the initiative, the private agent that originated and presented the initiative must be compensated for the cost of the studies provided in the initiative presentation phase, in accordance with the terms of the law, which must be fully assumed by the awardee.

5. In any case, amending a contract of public private partnership must be submitted to the approval of the National Council of Public Private Partnerships.

Law No. 47-20 on Public Private Partnerships

As an important aspect, we must highlight the mention and use of the trust figure under the context of this legal framework. It is provided that when a public private partnership implies, presently or in contingent manner, the transfer of State resources, the public private partnership contract will preferably provide the establishment of a public private partnership trust, which manages the assets and rights contributed or that manages any other aspect of the project, as agreed between the contracting parties; thus guaranteeing transparency in the management of State resources by an impartial third party. The contract signed to constitute the public-private partnership must establish the terms and conditions under which the trust will be incorporated, and specifically mention the public and private assets that will be transferred to the trust.

When a trust is established for the management of the private public partnership, it will have full and sufficient legal capacity to contract debts and grant guarantees on assets that are part of its assets and its accessories, including the power to grant rights of administrative subrogation, intervention rights in favor of its creditors or the State. Likewise, the trust may issue and support public offering of securities made by the trustee, charged to the trust assets, in accordance with the law and regulations in force in this matter.

Due to the private nature of a trust, the aforementioned operations will not have the power or effect of a public debt, nor will the legal norms and procedures that govern the contracting, accounting and recording of public credits be applicable.

An important point that clearly represents an advantage for the process of creating a private public partnership, is that the PPP Law has expressly considered the conflict of interest, defining it as the situation in which the personal or economic interest of the public official or persons related to it, is (or may reasonably be) in conflict with the public interest. Consequently, the PPP Law provides that they cannot participate as private agents, as subcontractors of private agents or as trustees that manages public private partnership trusts, among other restrictions and impediments established in the PPP Law; the authorities and State officials, whether from the central government, autonomous entities, decentralized entities, local governments, public companies, other State powers and constitutional bodies, as well as their relatives up to the second degree of consanguinity, or the fourth degree, in case of the technical committee participants. This impediment will be maintained for twenty-four (24) months after the departing the public office. Likewise, this impediment shall apply to those persons who, for reasons of management, shareholding or partnership, may be assumed to be a continuation or that derive, by transformation, merger, assignment or succession, or in any other way, from those included in one of the causes established in the law.

The PPP Law provides that the awardee or the public private partnership trust that is incorporated, as applicable, will have the power to directly receive and claim the users of the public services provided through the partnership in question, the fees or corresponding charges, according to the terms and conditions provided in the contract.

Also, the sources of resources recognized by the law for the execution of public private partnerships are established. These could be financial, fixed assets, or any other type, among which are: (i) debt assumed for the financing of the private public partnership; and, (ii) public offering securities issued through the stock market; for which the possibility of pledging the private public partnership contract as collateral or guarantee is recognized.

Law No. 47-20 on Public Private Partnerships

In another order, as regards the fiscal aspect, the PPP Law has provided that during the first five (5) years, computed from the beginning of the execution of the project object of the private public partnerships, the awardee may opt for the refund of the Tax on the Transfer of Goods and Services (ITBIS, by its acronym in Spanish), in the purchase or rental of equipment, materials and supplies directly related to the construction, repair or expansion of the goods and infrastructure of the private public partnership contract. This, subject to compliance with the conditions and following the procedures established in the regulations to be issued.

As for the administrative infractions typified in the PPP Law, these are established as: minor, severe and very severe. Without prejudice to the civil, criminal or administrative sanctions that may apply, private agents that incur any of the infractions provided by law, will be liable to receive the administrative sanctions established, having the sanctioning power the General Directorate of Public Private Partnerships (in the case of minor and grave infractions) or the Council (for very grave infractions).

On the other hand, the public official who participates in the processes of presentation of public initiatives, evaluation of initiatives, selection and administration of the contract, will be responsible for the damages that due to his negligence or intent will cause to the public patrimony and will be liable to the sanctions contemplated in Law No. 41-08, of January 16, 2008, on Public Function and its regulations, regardless of the civil or criminal judicial actions that may arise from the commission of said acts or have been committed simultaneously.

Lastly, we emphasize that, according to the mandate of the PPP Law, the Executive Power must issue the regulations for the execution and application of this legal text in a period not exceeding six (6) months as of its entry into validity.



Alessandra Di Carlo
a.dicarlo@phlaw.com
(809) 541-5200

Member
LexMundi
World Ready