DOING PUBLIC-PRIVATE PARTNERSHIPS AND INFRAESTRUCTURE PROJECTS IN DOMINICAN REPUBLIC

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DOING PUBLIC-PRIVATE PARTNERSHIPS

AND INFRAESTRUCTURE PROJECTS IN DOMINICAN REPUBLIC

This guide is a publication of the Dominican Republic's law firm DMAC Despacho Jurídico, and it was prepared for anyone interested in Public-Private Partnerships (hereinafter "PPPs") and infrastructure projects. Provides summarized information about their regulation, including: the entire cycle of a PPP, from its planning, implementation, execution and completion of projects. This document will give to interested parties the framework and notion of existing regulation that governs PPP or any infrastructure project.

The guide does not constitute legal advice on the subject. It is recommended to seek legal counsel from a competent professional if consultation or collaboration is required.

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DMAC is a specialized law firm that provides personalized legal services in a proactive and comprehensive manner, in the national market and with international reach. DMAC's philosophy is based on positioning the customer as the center of its actions, to provide effective solutions from the core of the team, identifying their needs, minimizing risks and innovating in the service, staying at the forefront and always respecting ethical and legal principles, personalized attention, guaranteed delivery times, availability at all times, protection of your interests, teamwork, detailed and constant information, as well as total transparency in all of your processes.

Amongst its main fields of practice: **D**iligence towards customer calls, **M**otivation and willingness to offer excellent service, **A**ttention that is personalized for each situation and **C**ommitment that will never waver in order to comply with what is proposed, framed within the moral and ethical values. These are essential pillars of its continuous daily work that even make up the meaning of its name **DMAC**.

Amongst its main fields of practice: Public-Private Partnership Projects, infrastructure, public contracting and bidding, administrative law and regulated sectors, execution matters, arbitration and alternative dispute resolution, banking law and project financing, corporate law, tax planning, real estate law, among others. DMAC regularly advises public and private sectors on administrative and regulatory matters.

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PPPs, as well as infrastructures, are regulated by Law 47-20 dated February 10, 2020 (hereinafter "Law 47-20") and by Decree No. 434-20 dated September 1 of the year 2020 that approved its rules for application. Likewise, certain sectoral laws that impact public infrastructures intervene in its regulation. As a result of these new provisions, the General Direction of Public-Private Partnerships (hereinafter "DGAPP") was created. Different guidelines, guides and methodologies have been dictated for the entire cycle of a project executed under this modality. With this, a new stage begins in the country where favorable conditions are created for the participation of the private sector in the development of public infrastructures and provision of public services, under a scheme of trust, predictability, collaboration, and cooperation for the benefit of the community and the common good.

The PPP, as defined by Law 47-20, is the mechanism through which the private company collaborates with the public sector to carry out social improvement, through the voluntary signing of an agreement, which results after the undertaking of a competitive process, for the management or operation of goods or services in which there is total or partial investment by private agents and contributions by the public agent, distribution of risks and remuneration as agreed in the contract .

The Dominican Republic is committed to the development of necessary quality infrastructure and public services with a high-performance standard that would have a proportional impact on growth and social and economic development for the benefit of all. In this lies the importance of PPPs, because for certain projects, this modality would be more convenient to achieve said objective.

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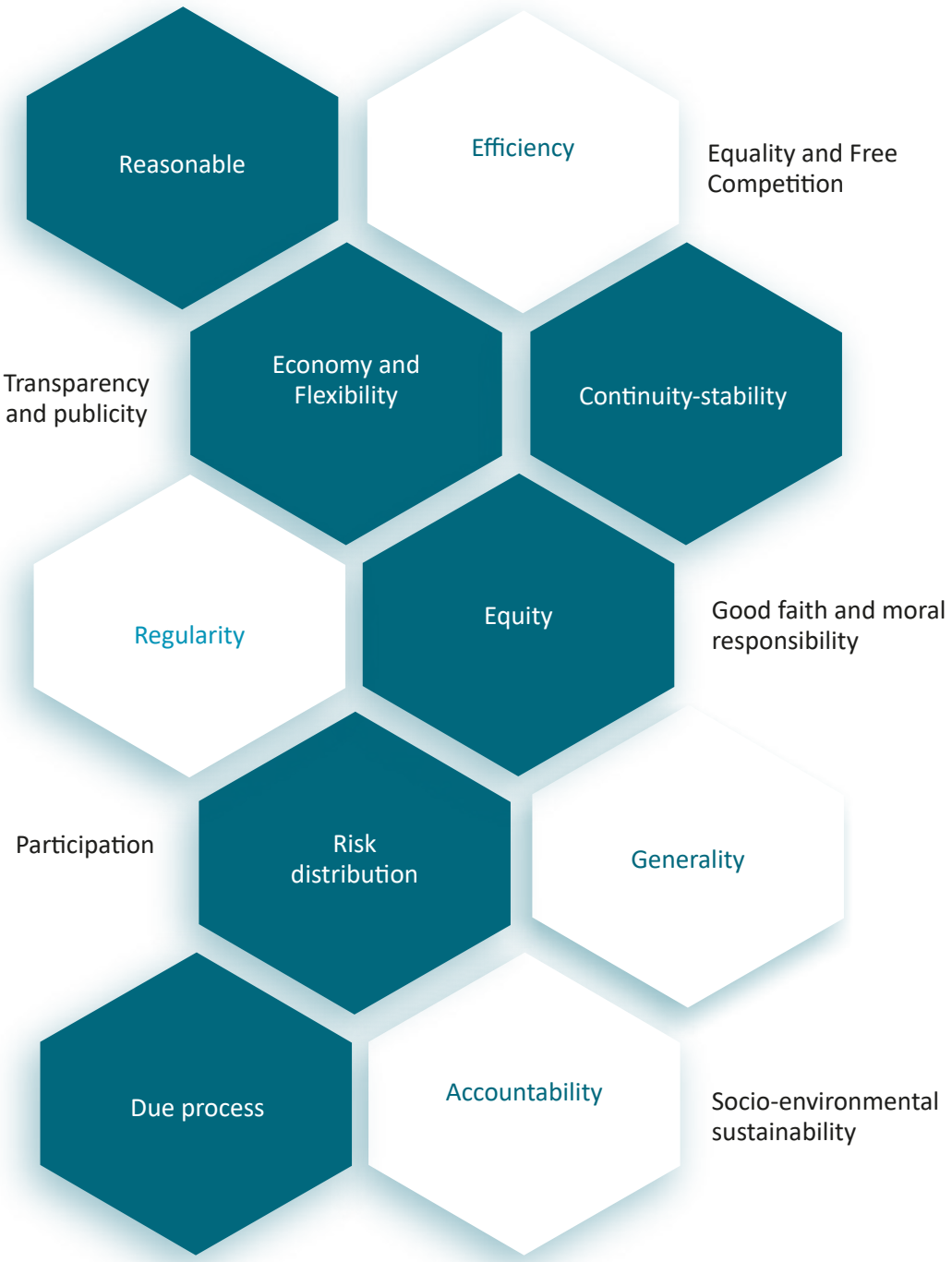
PRINCIPLES OF PUBLIC-PRIVATE PARTNERSHIPS AND INFRASTRUCTURE PROJECTS.

According to our current regulation, the principles that govern PPP's are as follows:



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GENERAL DIRECTION OF PUBLIC-PRIVATE PARTNERSHIPS.

Law 47-20 created the General Direction of Public-Private Partnerships (DGAPP, by its Spanish acronym) whose main objective is to ensure compliance with the law and supervise all agents involved in PPP projects.

The DGAPP is a decentralized administrative entity, invested with legal personality, with its own assets and administrative, jurisdictional, financial and technical autonomy. It is adhered to the Ministry of the Presidency. This institution is headquartered in the city of Santo Domingo, and its jurisdiction within the field of regulation and control of PPP's encompasses the complete national territory.

- **The administrative functions** consist of preparing the rules and regulations that must be issued by the Executive Branch regarding PPP matters. As well as to control and supervise the execution of PPP contracts, and resolve conflicts that may arise between the agents involved in PPP projects.
- **The technical functions** refer to conducting, evaluating and issuing decisions regarding the phases of the procedure for public and private initiatives, in addition to consolidating in a report the technical opinions of the different entities involved in a given process.
- Finally, **promotional functions** consist of promoting the PPP scheme as an appropriate instrument for the operation of services of social interest, as well as disseminating and preparing guides and instructions to facilitate knowledge of the PPP scheme.

ORGANIZATIONAL CHART OF THE GENERAL DIRECTION OF PUBLIC-PRIVATE PARTNERSHIPS

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NATIONAL COUNCIL OF PUBLIC-PRIVATE PARTNERSHIPS.

The National Council of Public-Private Partnerships (CNAPP) is the highest body of the DGAPP, which has the power to evaluate and decide on the relevance of the initiatives, issue a decision on the declaration of public interest of each public or private initiative, approve the specifications for each competitive selection process, decide on the works presented in the competitive selection processes of a successful bidder and approve each public-private partnership contract. The following can be noted amongst its most important functions:

1. Evaluate and decide on the relevance of the initiative based on the National Planning and Public Investment System, the national development policies and strategies, and the priorities established by the Government.
2. Evaluate and decide on the convenience of executing the initiative under the PPP scheme.
3. Decide on the declaration of public interest for each public or private initiative presented.
4. Approve the different drafts for the institutions internal regulations.
5. Analyze and recommend the requirements for the transfer of State resources, firm and contingent, throughout the lifetime of each initiative.
6. Decide on the bids submitted during the competitive processes for selecting the successful bidder, in coordination with the contracting authority.
7. Issue the verdict recommending advising the contracting authority whether or not to award the bidder the contract.
8. Specifically approve each PPP contract.

ATTRIBUTIONS OF THE DIFFERENT MINISTRIES AND AUTHORITIES WHICH COMPOSE THE NATIONAL COUNCIL OF PUBLIC-PRIVATE PARTNERSHIPS.

- Ministry of the Presidency

The Minister of the Presidency presides over the CNAPP. In this sense, he has the functions of summoning the other members to the different meetings, and if deemed necessary of also inviting other public institutions to participate within the Council. Moreover, said party also has any other function that may facilitate the application of the law.

- Ministry of Treasury

The Ministry of Treasury must assess the budget and fiscal implications of PPP projects. Likewise, it identifies fiscal costs and risks. In addition, it must issue a technical opinion where it approves or rejects the initiatives presented, and evaluates that the value of the PPP contracts does not exceed the limits established in the Budget Law, as well as including the allocation of resources that the different PPP contracts may require in the General State Budget.

- Ministry of Economy, Planning and Development

The Ministry of Economy, Planning and Development is in charge of evaluating the economic and social impact of each initiative and the correspondence of each one with respect to the National System of Planning and Public Investment. In this sense, they must issue a technical opinion stating the economic and financial viability of the proposed initiatives, and estimate the economic and social risks of each initiative before their declaration of public interest.

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- Legal Counsel to the Executive Branch

The Legal Counsel to the Executive Branch must evaluate if the CNAPP's acts are in accordance with the legal system.

- General Direction of Public Procurement

The General Direction of Public Procurement must issue a technical opinion regarding the design and structure of the competitive processes. Therefore, this member of the CNAPP has a voice and vote in regard to that part of the process.

- Executive Director of the DGAPP

The Executive Director of the DGAPP has the previously indicated functions. It is part of the CNAPP, and has a voice, yet not vote, it can present and comment on the incidences of the different initiatives that are deposited.

PUBLIC-PRIVATE PARTNERSHIP MODES.

Public-Private Partnership Modes

a. **Public Initiative:** Are those that originate from a State branch; these may be with or without the transfer of State resources.
b. **Private Initiative:** Are those that originate when privately owned companies propose a Public-Private Partnership to the Dominican State.
c. **Non-Profit:** It's the link between legal entities of public law and non-profit organizations in order to carry out collaborative activities for the provision of goods or services of social interest. The generation of economic benefits is not recognized within this mode.

The public agents that can introduce public initiatives are the State branches that compose the Public Administration; these may submit their initiatives to the CNAPP. On another end, the contracting authority is that public agent that due to the object of the PPP, it administers the contract.

GENERAL CONDITIONS FOR THE PRESENTATION OF AN INITIATIVE.

General Conditions for the Presentation of an Initiative:

1. Description of the situation to be resolved and the need for the good or service of public interest;
2. Description of the proposal to resolve the situation;
3. Justification of the need to provide the good or service;
4. Justification of the use of the PPP modality for the execution of the initiative;
5. Identification of the minimum requirements for the execution of the initiative;
6. Identification of the financing mechanism and indication if the transfer of State resources is required;
7. Risk analysis;
8. Possible social and environmental impacts, with sufficient information to prepare the socioeconomic analysis that will be carried out in the initiatives evaluation phase;
9. Pre-feasibility study and documentary background available at the time of the initiative.

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Additionally, PPP initiatives must be supported by current official statistics, which may be national or international. The terms of the phases and stages of the procedure will be defined in the specifications of each competitive process.

The initiatives must be registered in the National Public Investment System and have a SNIP code that identifies them throughout the competitive selection process for the successful bidder.

After depositing the documents at the DGAPP, the Executive Director must verify that the initiative presented contains all the information and documents required by the regulations, in order to proceed with its admission. When the Executive Director declares the admission of the initiative, the evaluation phase of the initiative begins; otherwise, the initiative is returned as incomplete, the applicant is granted a term to complete the information and proceed again with the deposit of the initiative.

In general, the procedure for presenting public and private initiatives is very similar, except for the expression of interest stage, which only occurs in private initiatives.

SPECIFIC CONDITIONS FOR THE PRESENTATION OF PUBLIC INITIATIVES AND PRIVATE INITIATIVES.

The presentation of the initiatives have common elements in regard to the content's of the presentation of the initiatives:

I. DESCRIPTION OF THE SITUATION AND THE PROPOSAL

1. Description of the Situation

The initiative must describe in a complete and precise manner what situation it is trying to solve, and describe the need for the good or service of social interest, including the characteristics of the context/background in which it is being produced. For this matter, the following information must be added:

- A description of how the situation has manifested itself and the population that is being affected, alongside its socioeconomical characteristics.
- Relevant actors in the area and their positions regarding the situation that must be resolved.
- Background information about the situation that must be resolved, as well as previous or current interventions to solve the same.
- Characteristics of the situation to be solved:
  - Pertinent indicators and variables for the description of the situation, which will later allow for the measurement of the projects performance or results.
  - Describe the possibility of using other variables and indicators.
  - Indicate the gaps in existing information in regard to other variables and indicators.
  - Sources of information and references used.

2. Description of the proposal to solve the situation

Present the initiative containing a description of at least one possible solution, and in case that the situation can be resolved through other ways, said alternative proposals to solve the situa-

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tion must be included, as well as a comparative analysis between, including:

- Description of the project and sufficient information to justify its execution.
- Description of the beneficiary population and mechanisms of commercial exploitation.
- Present the feasibility of implementation in the space where the intervention will be developed.
- Specify to what extent or magnitude the project will resolve the situation.
- In the case that, successful experiences when implementing similar projects, under similar situations, exist whether nationally or internationally, add them to the analysis, as well as the studies that demonstrated their efficiency

II. JUSTIFICATION OF THE USAGE OF A PUBLIC-PRIVATE PARTNERSHIP MECHANISM

1. Justification of the usage of a PPP as the most appropriate mode to execute the initiative

Present examples of PPP projects developed to solve similar situations that have carried out in similar countries. In addition to the responsibilities of the parties, the activities of the private agent and its method of remuneration must be described.

III. TECHNICAL ANALYSIS

1. Technical requirements, of engineering, design, operation and maintenance of the project

PSubmit a compendium of technical standards and requirements suitable for the type of project, including technical manuals issued by national authorities and international practical guides that have been implemented in other countries.

In addition, present the licenses, permits and authorizations that the project must obtain for its execution; indicating the competent authorities, legal requirements and the necessary procedure to obtain said licenses.

Finally, it must be indicated if there is availability of land or other conditions and the need to modify laws or regulations for the project.

2. Expected service levels and performance indicators

Presentar el nivel de servicio que se espera proveer y cómo se va a medir dicho servicio.

3. Development of relevant studies for the initiative

In the case of initiatives that involve construction, the engineering studies necessary for the development of said project, the technical requirements of said initiative, and the permits required for the same must be submitted.

IV. FINANCIAL ANALYSIS

1. Development of Demand Study

In this part, an estimate of the demand and income for the services that the project will provide must be made, comparing it with the current offer. Also, the ability of users to pay these fees must be evaluated. This analysis must include, at least:

a. The period of validity of the contract
b. The estimate of the current demand and the projection of the demand; the service's current interest must be identified, and a yearly projection of the study's demand must be

made.

c. The analysis of the existing Offer and the Projection of the Offer; similar services that may be competitors, and the current state of the remaining infrastructure must be identified.
d. The estimate of Direct Income; user fees and user revenue must be defined.

2. Presentation of the Financial Model

The financial model must be presented in a Microsoft Excel spreadsheet, including the formulas that were used to obtain said results. The model must contain several sheets, that include at the very least:

a. Usage Manuel: explaining the financial model's structure.
b. Macroeconomic Assumptions: exchange rate, inflation rate, tax rates, amongst others.
c. Costs associated to the project's investment phase: cost estimate of the investment.
d. Operation and maintenance costs: an estimate of the costs that will be incurred by the investor.
e. Project income and/or resources: estimate of the income that will be collected by the investor.
f. Financial structure assumptions: estimate of the costs or commissions of the debt structure.
g. Discount rate: interest rate to deduct from the future cash flow and an estimate of the same's present value.
h. Results: projection of the financial statements of the investor, summary of the income that the State could have and analysis of scenarios in which the DGAPP can analyze different financing structures for the project.

3. Project Financing

Specify the project's financing sources, and the long term financing proposal throughout the project's lifecycle.

V. RISK ANALYSIS

Analysis and distribution of risks, according to the methodology for the identification and evaluation of risks between a public and a private agent in a project carried out under the Public-Private Alliance method.

1. Identification and Quantification of the Risks

Carry out a risk analysis where all the events that can generate an impact on the development of the project are identified, and the elements that can negatively affect the term, cost and viability of the project. Then, the same must be classified identifying the probability of occurrence and its magnitude of impact.

2. Prioritization and Risk Allocation

Establish the most relevant risks based on the probability of concurrence and the magnitude of their impact, and the allocation of each one between the public and private agent with the percentages that each one must retain.

VI. ENVIRONMENTAL ANALYSIS

a. Describe the environment in the project area, including, when necessary, the impact that the project will have on the flora, fauna, soil, special protection areas, and their mitigation.
b. Provide information for the process of obtaining the necessary environmental authoriza-

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tion for the development of the project, if applicable.

c. Establish whether there is a need to socialize the project with the affected communities.

In addition to the requirements mentioned above, the presentation of the private initiative must contain the following:

VII. CONSIDERATIONS REGARDING THE COSTS OF THE PRESENTED STUDIES

The cost incurred to carry out the studies and documents presented must be indicated, all in US dollars. These studies must be endorsed by consulting companies with experience in the area, and the profile of the companies, professionals and technical personnel that participated in the preparation of the studies provided must be included.

The proposal submitted by the private agent remains confidential until the declaration of public interest and the start of the selection process.

PROCEDURE FOR THE PRESENTATION OF THE INITIATIVES.

The presentation of public initiatives is carried out in the following five phases: Presentation of Initiatives, Evaluation of initiatives, Declaration of public interest, Competitive process for selecting the successful bidder, and Award of the public-private partnership contract.

While the presentation of private initiatives will take place in six phases; namely: Presentation of Initiatives, Evaluation of initiatives, Declaration of public interest, Manifestation of Interest, Competitive process for selecting the successful bidder, and Award of the public-private partnership contract.

DIFFERENCES BETWEEN THE PROCUREMENT PROCESS OF PPP AND TRADITIONAL PROCUREMENT.

It is of interest to highlight that the PPP procurement process is different from the traditional procurement procedure since it is regulated by phases, unlike traditional contracting that is carried out in accordance with the procedures established in Law 340-06 on Purchases and Procurement of Goods, Services, Works and concessions and its modifications:

PPP PROCUREMENT – LAW 47-20	TRADITIONAL PROCUREMENT – LAW 340-06
The Executive Direction of the DGAPP admits (formal compliance according to guidelines) the initiative for analysis by the CNAPP.	The authority or contracting entity plans the procurement process before the public tender.
The CNAPP evaluates the same, using its pertaining supporting committees.	The purchases and procurement committee of the contracting entity evaluates the matter.
It is executed through a competitive process (similar to the procedure of a public tender).	It is carried out through the different ordinary procurement procedures, such as: Public tender Public Works Raffle Price Comparison Minor Purchases Reverse Auction They can also be carried out through special procedures, as would be the case of urgency or emergency.
Specifications must be approved by CNAPP. A contract proposal is included with the mandatory clauses according to articles 63 of Law 47-20 and 67 of Regulation No. 434-20.	Specifications must be approved by the purchases and procurement committee of the contracting entity. The minimum content must be established in the contract, according to Law 340-06 and Regulation 543-12.
The PPP contract must be approved by the CNAPP.	

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LEGAL IMPEDIMENTS AND ELIGIBILITY TO PARTICIPATE IN PUBLIC-PRIVATE PARTNERSHIPS.

IMPEDIMENTS	NON-ELIGIBILITY OF PRIVATE INITIATIVES
Dominican State Authorities and Officers (up to 24 months after leaving office).	An initiative similar (whether total or due to the fact that the object partially coincides) be it presented by public or private agents, to another initiative that is currently under evaluation or in its selection process.
A person who has acted as an advisor or participated, directly or indirectly, in the evaluation of any phase of approval of the initiative or selection of the successful bidder, both as a state official and as a person subcontracted for such purposes (up to 24 months after leaving office).	An initiative similar (whether total or due to the fact that the object partially coincides) to one that has already been evaluated and declared not of public interest, without having 2 years elapsed since its evaluation.
A person who has been sued by the State and condemned due to a contractual breach.	An initiative that is already registered in the PPP Project Bank or in the National System of Public Investment, and that the public sector is currently evaluating to develop the same under public initiative or public procurement.
A person who has been submitted to a restructuring plan or judicial liquidation process.	
legal person whose directors are under investigation, as defendants or serving sentences for crimes of falsehood, crimes against property, crimes of bribery, embezzlement of public funds, influence peddling, bribery, money laundering, financing of terrorism, prevarication, revelation of secrets, use of privileged information, crimes against public faith, crimes included in the international conventions to which the country is a signatory, or crimes against public finances, until a period equal to twice the sentence has elapsed.	
People who, for reasons of management, shareholding, or partnership, can be presumed to derive from those included in the above list.	

Public infrastructure projects that are not executed under the PPP mode, must be executed using traditional public procurement laws.

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NON-PROFIT PUBLIC-PRIVATE PARTNERSHIPS.

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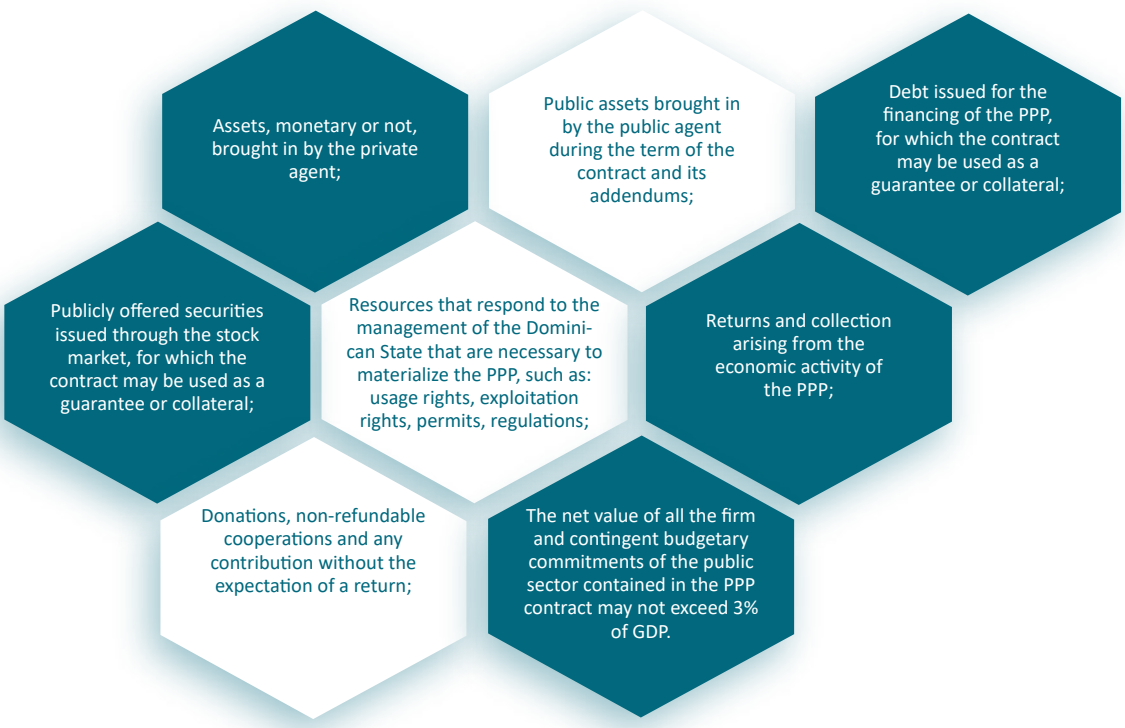
ADMINISTRATION AND FINANCING OF THE PUBLIC-PRIVATE PARTNERSHIPS.

It is important to point out that, according to the law, the PPP contract may only be entered into with legal entities whose corporate purpose is exclusively to carry out the activities described in the contract. The specifications will establish the minimum capital without the right to withdrawal, statutory limitations, and other requirements that the company must meet.

In those cases where there will be transfers of State resources, the contract will preferably provide for the creation of a PPP trust that manages the assets and rights contributed or that manages any aspect of the project. The PPP will have full and sufficient legal capacity to incur debts and grant guarantees on the assets that form part of its assets and their accessories, including the power to grant administrative subrogation rights, intervention rights in favor of its creditors or the State, as well as to issue and support issuances of public offering of securities made by the trustee, charged to the trust assets.

The trust will not have the power or effect of creating public debt, nor will the legal rules and procedures that apply to the contracting, accounting and registration of public credits apply to it. Likewise, the PPP trust will have the power to receive and claim, directly from the users of the services provided, the corresponding rates or charges, in accordance with the terms of the contract.

SOURCES OF KNOWN RESOURCES FOR THE EXECUTION OF PUBLIC-PRIVATE PARTNERSHIPS.



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PUBLIC-PRIVATE PARTNERSHIP RISKS.

In PPP's, the risks are identified as the most relevant threat factors that can affect the normal fulfillment of the contract, quality of the good or service or profitability of the project. They must be identified in the contract and assigned to one of the contractual parties for their management, control and administration, however, the law provides that all PPP's require the partial or total transfer of risks to the private agent. They are classified as: economic, social, political, institutional, legal, operational, financial, environmental, technological, among others.

This is one of the vital parts of the PPP contract that must provide for the risk identification mechanism, evaluation of the probability of occurrence, quantification, mitigation and treatment.

THE PUBLIC-PRIVATE PARTNERSHIP CONTRACT.

This document (the contract) is the one that will govern the terms and conditions that will basically regulate all aspects of the partnership, namely: management, operation, maintenance, administration, risk distribution, construction, provision, design, payments, remuneration, monitoring and control. They will always be signed by the contracting authority and the successful bidder. The maximum term of a PPP is **40 years.**

Law 47-20 establishes certain characteristics and requirements for the validity of the PPP contract, establishing specific provisions that it must contain.

CHARACTERISTICS FOR ITS VALIDITY:

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Alternative dispute resolution mechanisms may be agreed to, such as renegotiation, conciliation, mediation, arbitration (national or international) or, otherwise, they will be submitted to the contentious administrative jurisdiction.

- Currently there are no guidelines or guides for renegotiation processes or technical disputes. Local institutional arbitrations could be used (CRC of the Chamber of Commerce and Production of Santo Domingo) as well as international ones (such as ICC, AAA, UNCITRAL, CIAC, LCIA

Modifications to the PPP Contract: Any modification must be submitted to the PPP National Council, however, if it entails the alienation of State assets, affectation of national income, performance of public credit operations or tax exemptions, the modification must be approved by the National Congress.

Contract's Termination Causes:

- Mutual agreement established by the parties
- Fulfillment of its object
- Impossibility of executing the object
- Judicial or arbitral decision covered by an enforceable formula or that has already obtained a definitive and irrevocable character
- By the arrival of the term if no terms or extensions have been conferred

Causes for a unilateral and early termination by the contracting authority:

- Failure to comply with the obligations contracted by the successful bidder
- State of notorious insolvency of the contracting party
- As required by the public interest or national security
- Due to circumstances of fortuitous event or force majeure
- Due to omissions or falsehoods on the part of the successful bidder
- By the power of the State of unilateral resolution in which case it must compensate the successful bidder for the investment made and for consequential damages.

Claims during the selection phase of the successful bidders.

During the phase of the competitive process, the interested parties may present to the National PPP Council administrative appeals against the appealable acts issued within the framework of the competitive process for the selection of successful bidders, in accordance with the terms of Law 107-13 of August 6, 2013, regarding the Rights of People in their Relations with the Administration and Administrative Procedure and the Regulations for the Application of Law 47-20. Parties may also resort to the contentious-administrative jurisdiction

FISCAL TREATMENT OF PUBLIC-PRIVATE PARTNERSHIPS.

PPP Law establishes a refund of the Tax on the Transfer of Goods and Services (ITBIS) contemplated during the first 5 years of the project, for the purchase or rental of equipment, materials and supplies directly related to the construction, repair or expansion of the assets and infrastructure covered by the PPP contract. Also, an accelerated depreciation and amortization regime could be accessed in accordance with the Tax Code and its modifications.

The fiscal regime on income tax would be the ordinary one, unless some particularities of exemption are established in the project, which will require, together with other cases, the approval of Congress, such as: the constitution of a public-private alliance entails, in a firm or contingent manner, the alienation of State assets, the allocation of national income, the performance of public credit operations or when it implies tax exemptions.

INTERACTION OF PUBLIC-PRIVATE PARTNERSHIP PROJECTS OR INFRASTRUCTURE THAT IMPACTS REGULATED SECTORS.

In the case of regulated sectors, Law 47-20 establishes that projects carried out under sectoral laws will be regulated by sectoral provisions, unless a project in a regulated sector (telecommunications, energy, mining, etc.) is adapted to the PPP definition established by Law 47-20. It is not clearly specified in the regulations how it would be determined when PPP initiatives in regulated sectors fall within the definition of PPP and consequently Law 47-20 is applied, which is more robust, transparent and technical than some sectoral legislation.

In those cases, the DGAPP must interact with the sector regulator in the process of evaluating the PPP project. Notwithstanding the foregoing, it is understood from the provisions of Law 47-20 that the regulator should at least be consulted about the project, during the evaluation phase of the initiative to determine its eligibility to be executed under the PPP modality.

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