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## **PUBLIC – PRIVATE PARTNERSHIP IN PARAGUAY (Hereinafter called “PPP”).**

The Paraguayan Government has been considering and promoting new investment policies as means for building infrastructure and providing better services to citizens, which would not be achievable with public resources exclusively.

Under this situation, the Public-Private Partnership modality was created through the enactment of Law No. 5102/13 "On Promotion of Investment in Public Infrastructure and Expansion and Improvement of Goods and Services by the State" and the Regulatory Decree No. 1350/14.

The following is a brief summary of the essential aspects of the law and regulations above mentioned.

### I. General

#### 1. Current Legal Framework

- a) Law No. 5102/13 of "Promotion of Investment in Public Infrastructure and Expansion and Improvement of Goods and Services in charge of the State".
- b) Law N ° 5567/16 that modifies article 52 of Law No. 5102/13
- c) Decree No. 1350/14 that regulates Law No. 5102/13
- d) DGPPPP Resolution No. 01/2020 "By which the procedure of the preliminary declaration of interest of the Contracting Administration is regulated".
- e) Handbook of procedures for the processing of public and private initiatives.

#### 2. Definitions and abbreviations

- a) Contracting Administration: State agencies or entities, as well as the companies with State participation that have the powers to issue initiatives and enter into public-private participation contracts.
- b) SNIP Code: an identification number that is given to projects that have been approved and that will identify them until their completion or abandonment.
- c) DNCP: National Directorate of Public Hirings.
- d) Awarded Bidder or Private Participant: the one awarded to sign the public-private participation contract.
- e) Bidder: any legal entity or group of legal entities, national or foreign, that competes in a tender procedure for a public-private project.
- f) Private Participant: the legal entities that participate in a public-private participation project.
- g) Private initiative proponent: is the one who submits a private initiative request in accordance with the legal provisions in force.
- h) STP: Technical Secretary of Economic and Social Development Planning.
- i) DGPPPP: General Directorate of Public-Private Participation Projects.

## II. Definition of Public-Private Partnership

Neither the Law nor the Regulatory Decree establish a precise definition of the term Public-Private Partnership (hereinafter “PPP”), however, taking into account the current regulations, we can define it as: “The mechanism by which a private participant and an entity of the Paraguayan State, voluntarily and as a result of a process, sign a long-term contract for the construction of infrastructure, manufacturing of goods and provision of services of social interest, distributing the obligations, risks and benefits between the parties”.

## III. PPP Projects

The following projects can be carried out through the PPP modality: infrastructure and service management projects such as road, rail, port, airport projects, waterway, dredging and maintenance of river navigability projects; those of social infrastructure; electrical infrastructure; drinking water supply and sanitation; among other projects that are cited in Law No. 5567/16.

However, as provided in Article 3 of Law No. 5102/13, only projects in which investment expenses exceed the equivalent of 12,500 monthly minimum wages (approximately USD 4,000,000), may be carried out under the PPP regime.

The STP, through the DGPPPP, is the agency in charge of investment projects under the PPP modality.

## IV. Public and Private Initiative

The projects that are wished to be carried out under the PPP modality may be submitted by the Contracting Administration (“Public Initiative”) or through the submission of a private proponent (“Private Initiative”).

“Initiative”, both public and private, consists in a formal and duly documented proposal about a project that is to be developed through the PPP.

It should be noted that projects that will not be allowed by Private Initiative are those that:

- a) Have been submitted by a previous proponent and said projects are under examination by the Contracting Administration;
- b) The Contracting Administration is carrying out the previous analysis for their promotion under Public Initiative;
- c) The Contracting Administration would have identified them and foreseen their planning with the express mention that they will be promoted ex officio by the Contracting Administration; and
- d) They contemplate money contributions or waiver of future revenues, when their current value exceeds in both cases 10% (ten percent) of the initial investment.

In the case that similar project initiatives are submitted, the one submitted first will be prioritized. The projects that are rejected may not be submitted again before 3 (three) years have passed since their rejection (article 48 of Law 5102/13).

## V. Initiatives' procedures

The law of the PPP provides the stages or procedures that the submitted initiatives must go through until the PPP contract is signed. Below the stages they must go through are explained:

### 1. INITIAL STAGE.

In general both initiatives are governed by the same provisions, but with certain differences that are pointed out below:

- a. Process for a Public Initiative:

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Submitting the project profile	The Contracting Administration that intends to promote a PPP project must inform the DGPPPP about the project profile that wishes to start. The DGPPPP will in turn communicate to the Ministry of Finance the project that the Contracting Administration wishes to promote.
Examination of Pre-feasibility	<p>Then, the Contracting Administration shall submit to the STP a pre-feasibility examination of the project that allows to assess the feasibility of it.</p> <p>The pre-feasibility examination will be evaluated by the DGPPPP and by the Ministry of Finance, both institutions issuing an opinion on the matter. The rejected examination will be returned to the Contracting Administration so it can be corrected and resubmitted.</p>
Feasibility examination	<p>If a favorable opinion is issued, the Contracting Administration must submit a feasibility examination of the project, which must again be approved by the DGPPPP and by the Ministry of Finance.</p> <p>In the event that the examination does not comply with the provisions of Decree No. 1350/14, the DGPPPP will reject it. If the examination is incomplete, it will be returned to the Contracting Administration to complete the missing requirements.</p>
Executive's Decree	Once the pre-feasibility and feasibility examinations are approved, the project will be sent to the Executive for its consideration, and the latter may make modifications to the received project, and approve it by means of a decree.
SNIP Code	The Ministry of Finance through the National System of Public Investment will grant the SNIP Code to the approved projects.

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b. Process for a Private Initiative:

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<b>Pre-feasibility Examination</b>	The private proponent interested in promoting a PPP project must submit the pre-feasibility examination of the project before the DGPPPP, who in coordination with the Contracting Administration and the Ministry of Finance will evaluate the submitted examination, and will issue an opinion on it, determining the approval, with or without modifications, or rejection of the project.
Declaration of Public Interest	If the project is approved, the project will be declared as an initiative of public interest. The declaration of public interest means that the project is socially profitable (priority of the general interest over the individual) and compatible with the public policies of the country, and therefore, is an efficient, effective and sustainable option for the management or use of infrastructure and provision of quality services.
Feasibility Examination	<p>Once the project is declared of public interest, the proponent must prepare and submit a feasibility examination, in accordance with the requirements that the DGPPPP and the Contracting Administration determine.</p> <p>The examination will be evaluated by the DGPPPP, the Contracting</p>

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	Administration and the Ministry of Finance, and they will issue an opinion in this regard.
Executive's Decree	In case the opinion is favorable, the project will be sent to the Executive for its consideration and eventual approval or rejection.
SNIP Code	The Ministry of Finance through the National System of Public Investment will grant the SNIP Code to the approved projects.

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It is important to mention that, before the Pre-feasibility Examination, the Private Initiative Proponent has the option to submit their project at profile level (without carrying out technical or economic examinations). However, said submission will require the "declaration of preliminary interest" by the Contracting Administration. The declaration of preliminary interest only represents the Paraguayan State's intention to learn more about the project submitted by the Private Initiative Proponent; also the Proponent must comply with the provisions mentioned in the Initial Stage for Private Initiatives (Resolution DGPPPP 01/2020).

## 2. Public tender

The public call for bids will be made once the PPP project is approved by means of an Executive's Decree (both for the Public Initiative and for the Private Initiative).

The public call for bids and the Tender Specifications and Conditions (the "Specifications") will be published on the website of the Contracting Administration, on the portal of the Public Procurement Information System and in a newspaper of mass circulation.

In general terms, the Public Tender is carried out in accordance with the following:

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Bid	<p>It is the proposal submitted by the Bidder in response to the call for bids.</p> <p>It includes the "Technical Offer", which contains the general background and technical documents required in the Specifications, and the "Economic Offer" (article 49 of Decree No. 1350/14).</p>
Submitting the bids	<p>Bidders must submit the bids on the day and time set in the Specifications, in separate envelopes indicating which corresponds to the technical offer and which corresponds to the economic offer.</p> <p>Bids must be submitted in Spanish or, alternatively, accompanied by an official translation, except in the case of technical annexes and brochures, which may be submitted in the original language.</p> <p>The costs associated with the preparation and submission of the bids are the sole responsibility of the Bidders.</p>
Opening of bids	<p>Bids will be received by an Opening Commission on the day, time and place indicated in the Specifications.</p> <p>During the opening of the bids, only the Technical Offer of each Bidder will be opened in order to verify if the requested background information has been included. The envelopes with the Economic Offer will be sealed and signed by each member of the Opening Commission, it will only be opened when the corresponding Technical Offer is accepted.</p> <p>The bids will be evaluated separately by an Evaluation Commission, which will issue an opinion in accordance with the magnitude of the</p>

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Evaluation of the bids	<p>project, its complexity or the required documentation.</p> <p>The Evaluation Commission will first evaluate the Technical Offer, will draft up a Qualification Act, in which it will determine if the submitted bid is technically acceptable or not. Bids that do not comply with the provisions of Decree No. 1350/14 and of the Specifications will be technically not acceptable. In the absence of technically acceptable bids, the Evaluation Commission will recommend that the tender is declared void.</p>
Evaluation of the Economic Offer	<p>The opening of the envelopes of the economic offers will take place on the day and at the time established in the Specifications, the result of the technical evaluation of the bids will be announced, and only the envelopes of the bids that have been declared technically acceptable will be opened.</p> <p>The Evaluation Commission will verify if the economic offers comply with the Specifications, otherwise they will be rejected. If there are no economically valid bids, the Evaluation Commission will recommend declaring the tender void.</p>
Awarding	<p>Once the recommendation of the Evaluation Commission has been received, the Contracting Administration will issue a resolution deciding the award of the tender, which will be notified to the Bidders and published in the Public Procurement Information System of the DNCP.</p> <p>The award of the tender will be decided based on a predetermined scoring system in the Specifications, based on factors established in the Law and in the Decree. In the absence of valid bids, the Contracting Administration will declare the tender void.</p> <p>However, the Contracting Administration may, after obtaining the opinion of the Ministry of Finance and the DGPPPP, withdraw from the project at any time before signing the contract for reasons of public interest, by means of a resolution. This decision will not generate liability of the Paraguayan State towards the Bidders.</p>

### 3. Incorporation of the Specific Purpose Company (SPC)

The awarded Bidder must, within the term established in the Specifications, incorporate a company in the Republic of Paraguay, with which the PPP contract will be concluded and formalized. The awarded Bidder will become the shareholder of the majority of the company, according to the percentage determined in the Specifications, which shall not be less than 51% (article 62 of Decree No. 1350/14). Said company will be incorporated solely and exclusively for the development and execution of the awarded project, with an accounting system independent and autonomous from that of the awarded Bidder. The company will last at least the duration of the PPP contract, plus 2 (two) years or the duration of the guarantee of the awarded works or services. The Specifications will determine the purpose and other requirements that the company must meet.

### 4. Formalization and signing of the PPP Contract

The Contracting Administration will prepare the draft of the PPP contract and will send it for evaluation to the STP, the Ministry of Finance and the Attorney General of the Republic. If the draft of the contract is approved by the aforementioned authorities, the Contracting Administration will sign the PPP contract with the Specific Purpose Company.

The PPP contract will clearly determine the rights, obligations and responsibilities of the parties. Among the most important points are, for instance: the financial regime of the project; the risk distribution regime; the remuneration of the Private Participant; the method of payment; the control system for the execution of the contract; the procedures for dispute resolution, modification, suspension and termination of the contract, among others. Some of the aforementioned points, and other contractual matters, are expressly regulated by Law No. 5102/13 and Decree No. 1350/14.

## VI. PPP Trust Fund

Law No. 5102/13, in its article 11, provides the creation of a Trust Fund of Guaranty and Liquidity for Public Private Participation Contracts (the "Trust Fund"), to fulfill the obligations that the Paraguayan State undertakes when signing a contract of PPP.

The Trust Fund will be incorporated as a regular Trust, in accordance with the provisions of Law No. 921/96 "On Trust Operations". The Paraguayan State, through the Ministry of Finance, will be the settlor, the Financial Agency of Development (AFD) will be the trustee and the beneficiary will be the Private Participant.

They will sign the Trust Agreement Contract of Management and Payment of the Guarantee and Liquidity Fund for Public Private Participation Contracts, known as the "Trust Contract". In said contract the conditions, rights and obligations of the parties will be set, as well as the other elements of the fiduciary regulations in force (article 15 of Decree No. 1350/14).

The resources of the Trust Fund will come firstly from the budget of the Contracting Administration (article 10, paragraph f. of Law No. 5102/13). However, as indicated in article 11 of the same law, the resources of the fund may come, among others, from:

- a) Up to 25% of the resources of the National Fund for Public Investment and Development (FONACIDE) with source from the Public Treasury and allocated for infrastructure works;
- b) A percentage of the Private Participant's payments to the Contracting Administration;
- c) Contributions resulting from payments by the Private Participant to the Contracting Administration in the event of surpluses or another particular case;
- d) Contributions from other entities;
- e) Profit obtained from the administration of the fund;
- f) Fines applied to the Private Participant.

In the event that the Trust Fund cannot answer for all the obligations, the Ministry of Finance will implement the legal and administrative measures for each case.

The resources transferred to the Trust Fund will not be returned to the Public Treasury and will remain in the Trust Fund and will continue to be destined to its objectives for the following fiscal years.

## VII. Incentives to submit Private Initiative projects

Proponents of private initiatives that submit proposals for PPP projects, provided that the projects are of interest to the Contracting Administration, shall enjoy the following rights and preferences, as indicated in article 50 of Law No. 5,102/13:

- a) Obtain, in the event that their projects are not awarded, reimbursement of the costs incurred in order to carry out the previous examinations;
- b) Obtain a prize consisting of a bonus of 3 to 10% of the score obtained with your bid, depending on the size and complexity of the project.

The method, amount and term for the reimbursement will be established in the Specifications. Regarding the bonus to be paid to the proponent, the scale provided in article 140 of Decree No. 1,350/14 will be applied.

The PPP rules also provide for the protection of any information submitted by private initiative Bidders. In this regard, article 51 of Law No. 5,102 / 13 mentions that: "All the information related to the private initiative submitted will remain confidential until the declaration of public interest or the rejection of the corresponding project."

VIII. Transparency, dissemination and control of the PPP

The PPP regulations establishes various mechanisms of transparency, dissemination, and control of the process through which a project to be promoted under the PPP modality will go through.

In this sense, a Public Registry of Public Private Participation Projects was created, being the responsibility of the DGPPPP to keep a record of all projects that are executed or that have been executed under the PPP modality.

The Registry is immediately accessible to the public through the official electronic dissemination site, which is the portal of the Public Procurement Information System managed by the DNCP.

Regarding the control mechanisms, the Law provides for the Paraguayan State the faculties of planning, control, penalization, regulation, supervision and monitoring of the execution of PPP contracts. The Contracting Administration, under the coordination of the DGPPPP of the STP, will be responsible for the supervision of the correct execution and the fulfillment of the obligations of the Private Participants, notwithstanding the supervision that corresponds to other state bodies such as the Ministry of Finance or the Attorney General of the Republic.

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