

Newsletter

March 2020

PUBLIC-PRIVATE ALLIANCES LAW NO. 47-20

On February 20, 2020, **Law No. 47-20** (the “**Law**”) was signed into law. This Law establishes a legal framework to regulate the commencement, selection, awarding, procurement, execution, follow-up, and extinction of public-private alliances in the Dominican Republic.

The Law seeks to **incentivize, promote, and guarantee the flow of necessary investments** to modernize in due course the different public services and goods networks.

The Law defines a public-private alliance (from now, referred to by its complete name or as “APP”) as a “...*mechanism whereby public and private agents voluntarily subscribe a long-term agreement, as a consequence of a competitive process, **for the provisioning, management, and operation of public interest goods and services** under which there exists a total or partial investments by private agents, tangible or intangible contributions by the public sector, risk distribution among both parties, and the remuneration is related to the performance as established in the agreement*”.

The Law provides that the Executive Branch must issue its application regulation within six (6) months of its signing into law.

I. SCOPE

This law applies to the following bodies and entities: i) those that form part of the Public Administration under the Executive Branch; ii) Non-financial autonomous and decentralized institutions; iii) social security institutions; iv) public sector non-financial companies or agents that task private agents with the construction, operation,

reparation, expansion, or maintenance of a public interest good or provisioning of an equal nature service under the scheme of a public-private alliance, and iv) town halls.

Paragraph I of Article 2 **excludes from its scope permits, licenses, authorizations, and so-called concessions** existing under sectorial laws when these do not correspond to the definition of a public-private alliance.

The Law reiterates that these excluded processes will continue to be governed by its sectorial law or Law No. 340-06 on Public Procurement. It is worth mentioning that the Law repeals Articles 46-64 of Law No. 340-06

II. CREATED BODIES

- **General Directorate of Public-Private Alliances**

This is the body charged with evaluating and qualifying the proposals presented by public and private agents and maintaining the publication registry of all public-private alliance projects among other technical, administrative, and promotional functions. The General Directorate of Public-Private Alliances (the “General Directorate”) is attached to the Ministry of the Presidency. In addition, the Directorate must promote and regulate the APPs and the legal regime applicable to them and mitigate the risk of the projects to be developed.

III. REQUISITES AND PROCESS

Two types of public-private alliances exist: **of public initiative or private initiative**.

The steps for the materialization of a public initiative APP are the following: i) presentation of proposals; ii) evaluation of proposals; iii) declaration of public interest; iv) competitive process for the selection of awardee, and v) awarding of the public-private alliance agreement.

The steps for the materialization of a private initiative APP are the following: i) presentation of proposals; ii) evaluation of proposals; iii) declaration of public interest; iv) manifestation of

- **National Council of Public-Private Alliances**

The National Council of Public-Private Alliances (referred to by its complete name or as “Council”) is the upper body of the General Directorate of Public-Private Alliances, whose main function is the evaluation and determination of the public-private alliance proposals presented under the Law. The Council is comprised by the following persons: i) Minister of the Presidency (whom presides it); ii) Ministry of Finances; iii) Ministry of Economy, Planning, and Development; iv) Legal Counsel of the Executive Branch; v) General Director of Public Procurement¹, and vi) Executive Director of the General Directorate of Public-Private Alliances².

The Council also approves the term sheet for each competitive process and must approve the general models used for the term sheets and APP agreements among other duties.

¹ With voice and vote exclusively on matters related to the design and structuring of competitive processes related to the selection of awardees.

² With voice, but without vote.

interest; v) competitive process for the selection of awardee, and vi) awarding of the public-private alliance agreement.

The APP agreement, in addition to establishing the terms and conditions applicable to the APP in a general sense, must establish an appropriate risk distribution between the public agent and the private agent in a way that the risks -in a significant part- pass to the latter. Likewise, the agreement must regulate the remuneration that could consist in the **charging of fees, rights, duties, transfer of State resources, payment due to availability, or any other agreed modality.**

The Law establishes the minimum content that the APP agreements must have, among these: i) APP financial model; ii) remuneration regime due to the compensation of services; iii) profit and utilities distribution scheme between the public agent and the private agent; iv) transfer of State resources for the development of the project; v) intervention of the public agent in case of breach, and iv) risk matrix including risk distribution and Force Majeure risk treatment schemes.

When private originators intervene, these will have an economic advantage never greater than 5% nor smaller than 2% according to the term sheet of each proposal. In case that the Council decides to proceed with a project under the public initiative modality, the private originator -provided he partakes in the awardee selection competitive process- will receive an advantage in the economic evaluation never greater than 5% nor smaller than 2% in his favor, as determined in the term sheet.

The aforementioned private originator's advantage in the economical evaluation cannot exceed 2% of the proposal's contemplated investment expenditures.

IV. TAX EXEMPTIONS

The Law establishes that during the first five (5) years after the commencement of the project's execution, awardee will have to right to be reimbursed for the sums paid as sales tax ("ITBIS") generated **as a result of the acquisition or leasing of equipment, materials, or supplies related directly with the construction, reparation, or expansion of the goods and infrastructure that form part of the APP agreement.**

Similarly, it is established that the application regulation of the Law will establish an accelerated depreciation and amortization regime.

Any other tax exemption that exists for specific cases, must be submitted to the National Congress.

V. OPTION OF INCORPORATING A TRUST FOR THE APP AND NON-PROFIT APPS

The Law provides that in case that an APP entails the transfer of State resources, a trust must be incorporated preferably for purposes of administrating the contributed goods and rights, as agreed by the parties. This trust will have full legal capacity to assume debts and grant guarantees over the goods that form part of its assets and its accessories. In the same manner it is established that the trust can grant administrative subrogation rights, intervention rights in favor of creditors or the State, and the issuance and endorsement of public offer securities undertaken by the trustee charged to the trust.

On the other hand, the Law establishes the figure of the non-profit public-private alliance that implies the bonding of public law legal persons and international cooperation and development organizations, or failing this, local non-profit organizations, for purposes of providing public interest goods or services without the generation of financial benefits.

VI. SANCTIONS

The Law establishes a series of infractions that are divided in mild, grave, and very grave. In case of mild and grave infractions, the administrative sanctioning dominion is exercised by the Executive Directorate, while in cases of very grave infractions, the Council carries out this role. These sanctions may exist in addition to any civil or criminal sanction that could be generated as a result of the infraction.