

**DECREE-LAW NO.42/2012
OF 7TH SEPTEMBER**

**LEGAL REGIME OF THE
PUBLIC- PRIVATE PARTNERSHIPS**

To acknowledge the need for the participation of the private sector in building of the country infrastructures, calls for a legislative framework that defines the legal regime of the agreements celebrated between the State and private entities, the public- private partnerships.

Hence, the present diploma will establish the framework that will allow a public entity and also an entity from the private sector to become part of a public-private partnership agreement. This will promote job creation and the development of public infrastructures.

Also linked to the public-private partnership agreement, is the need to adopt the procedure and criteria that identify the projects that fit into the public-private partnership financing strategy; adopt ways and means to implement and promote those agreements in a sustainable way; promote fair, equitable, transparent, competitive, efficient and accountable, at the level of selection, procurement, management, operations, monitoring and evaluation. There is also the need to establish a special regime of procurement of the public-private partnership, so to allow the recruitment of experts, who will advise the government on public-private agreements and on the selection of private partners.

Thus, the Government decrees, under subparagraph e) of paragraph no.1 of article 115 and subparagraph a) of article 116 of the Constitution of the Republic, the following to be enforced as law:

Chapter 1 General Procurement

**Article 1
Subject Matter**

The present decree-law defines the principles and instruments for the establishment of partnerships between the Government and private entities involved in public infrastructures, as well as the expertise and procedures to identify, evaluate, the procurement and constructions of the referred infrastructures.

**Article 2
Definitions**

1. For the purpose of this diploma it is considered:

a) *Public-private partnership*, the agreement by which private entities chosen by private partners, have a long-term commitment towards the Government to ensure the construction and execution of an infrastructure project and whereas the financing and the responsibility for the investment belong to the private entity.

b) *Direct agreement* the agreement between the government and the lenders in a public-private partnership that establishes the terms to be followed in case the agreement is repealed and the rights of the Government and the lender in relation to the public-private partnership.

2. It shall be excluded from the scope of this law licenses issuing, lease or other rights in relation to forests, mining, minerals, hydrocarbons, including oil and gas, airspace, as well as any other subject to special legislation licensing.

Article 3

Power to approve and sign agreements

1. The Public-Private Agreements are approved by the Council of Ministers.
2. It is incumbent upon the member of the Government responsible for the field of Finance to negotiate and sign all contracts for public-private partnerships, as well as direct agreements, after authorization by the Council of Ministers, which may approve additional signatories representing the State.
3. The Ministry of Finance shall be responsible for the financial evaluation of any public-private partnership agreement.
4. In a public-private partnership agreement may be agreed:
 - a) A user fee to be charged in accordance with the law;
 - b) Payment by the Government, which may take the form of unitary payments, fixed payments, payments related to demand or use, sustainability support in the form of cash subsidies, capital grants, minimum use guarantees, payment guarantees, and provide a basis and a method for establishing, amending and adjusting them; or
 - c) A mix of user fee and payment from the Government.
5. A public-private partnership agreement may include the prevision of fees to be paid to the private partner for the full or partial recovery of costs incurred in the development of the project, transaction costs or monitoring compliance by all parties to the public-private agreement, through the duration of the agreement.
6. The nature and method used to determine any fee must be specified with the proposal request as well as the terms and conditions applicable to the payment of such fees.
7. The fees that come with the proposal request are legally binding.

Article 4

Functions and Responsibilities

1. During its duration, a public-private partnership agreement confers on the private partner the right to pursue activities aimed at meeting a collective need as specified in the agreement and under its terms and conditions.
2. An activity by a private partner under the terms of the present diploma may be executed:
 - a) Solely by a private partner with the oversight of a relevant public sector entity;
 - b) Shared between the relevant public sector entity and the private partner, under the terms of the agreement.

3.The allocation of a public activity to a private partner through a public-private partnership agreement shall not affect the responsibility of the public sector entity in the performance of that function.

Article 5

Guidelines on public-private partnership agreements developed by public companies or companies with public funding

The member of the government that is responsible for the area of finance may issue guidelines to a company which is overseen wholly or in part by the Government, preceding authorization of the Council of Ministers, regarding to:

- a) Negotiation, management, responsibility, accounting and financial issues of the company that is participating in a public-private participation;
- b) Policies to be followed regarding public-private partnership agreement.

Article 6

Project analysis and Procurement

1.For an infrastructure project to be considered for procurement and developed through a public-private partnership agreement, it must have been analyzed thoroughly for its partnership pre-feasibility and feasibility, as well as being subject to the necessary financial and legal risk analysis. It will be sent for due processing according to the terms of this decree-law.

2.The methods and procedures for the selection of private partners, awarding of concessions and signing of public-private partnership contracts, as well as the identification of public-private partnership advisers, shall be subject to the special procurement regime established by this law.

3.The special procurement procedure shall be conducted in accordance with the principles of fairness, equality, transparency, competition, efficiency and accountability.

4.The special procurement of public-private partnerships should follow the subsequent criteria:

- a) Best quality/price ratio;
- b) Best balanced risk sharing between public and private entities;
- c) Better project sustainability.

5.The sharing of risks between the State and the private partner should be clearly stated in the contract and adhere to the following principles:

- a) The different risks inherent to the partnership must be re-divided between the parties according to their ability to manage those same risks;
- b) The establishment of the partnership shall entail a significant and effective transfer of risk to the private sector;
- c) The creation of risks that are not adequately justified in significantly reducing other already existing risks, should be avoided
- d) The risk of financial unsustainability of the partnership, for reasons not due to a breach or unilateral modification of the contract by the public partner or due to reasons of *force majeure*, should be transferred, as much as possible, to the private partner.

6. The financial sustainability of a public-private partnership is assessed by the ability and willingness of users to pay service charges when they apply and by the State's ability to bear the costs related to a public-private partnership project over the project's life span.

Article 7

Procedures for project approval

1. The list of infrastructures' projects shall be submitted for evaluation, study and technical advice to the Ministry of Finances.
2. The Public-Private Partnerships Unit, to be established by decree-law, shall develop an opinion addressing the financing possibilities for submitted projects.
3. If a project is being classified to be financed through a public-private partnership, such a project including the respective modality of funding shall be submitted to the Management Board of the Infrastructure Fund for approval.
4. The projects shall be submitted to the Public-Private Partnerships Unit, within 10 days before the scheduled date for its discussion.

Article 8

Financial feasibility study

The study on financial feasibility of a public-private partnership project will include:

- a) Payments' estimates and future revenues for the next 25 years, including leasing or operations' rental fees;
- b) Detailed forecast of payments or future revenues, including virtual tolls, profit sharing and the estimated value of these payments and revenues, as well as possible triggering factors leading to the renegotiation of an agreement;
- c) Amount and terms of the financing of public-private partnership agreements directly or indirectly provided by or on behalf of the State;
- d) Impact of the public-private partnerships agreements on the budget deficit and public debt, as well as the identification of assets resulting from the agreement;
- e) Information about any guarantees given by the State, or on behalf of the State, including the description of the guarantee's nature, its purpose, beneficiaries, expected duration, the State's financial exposure, and the guarantees estimated financial cost, the revenues from guarantees' fees and other revenues.

Article 9

Reports

Each report on public-private partnership agreement, shall include the following information:

- a) A description of the public-private partnership project;
- b) The terms of the public-private partnership agreement, which may affect the value, time-frame and the certainty of future cash flows;

- c) The nature and extension of:
 - i. Rights of using assets;
 - ii. Expected obligations or rights derived from the procurement of services;
 - iii. Obligation to acquire or built property components, installations or equipment;
 - iv. Delivery obligations or right to get specified assets by the term of the contract;
 - v. Options for renewal and cancellation;
 - vi. Other rights and obligations, laid down in the Agreement, including important compensations, alterations and maintenance, which may occur during the reporting period.

Article 10

Accountability

1. The accountability related to the public-private partnerships' agreements, shall abide by the Law number 13/2009, of 21 October, addressing the Budget and Financial Management.
2. Without prejudice to the established in the previous point, the report shall also include:
 - a) Information about each public-private partnership agreement;
 - b) Information regarding the process through which a public-private partnership agreement was procured, and the criteria that assisted in the decision to sign such an agreement.

Chapter II

PROCUREMENT SPECIAL REGIME OF PUBLIC-PRIVATE PARTNERSHIPS

Article 11

Principles

1. The identification and selection of a private partner, so to integrate a public-private partnership agreement, takes place through a competitive process, with the exception of special circumstances, as foreseen by law.
2. The process of procurement of public-private partnerships is based on a special regime, to be approved by Decree-Law, not applicable to the Procurement Legal Regime.
3. The process mentioned in Principle 2, may be composed of:
 - a) An open competitive tender, allowing any economic operator to submit a proposal;
 - b) A closed competitive tender, allowing any economic operator to express interest or submit a reply to a qualifications' request, having in mind that solely those meeting the selection criteria, are on a short list and invited by the Government, will be able to submit a proposal.
4. A staged approached process might be used if it becomes unfeasible to fully describe the elements of the public-private partnership in the initial proposal request.

5. Under exceptional circumstances, in which a project becomes particularly complex, a competitive dialogue process can be used aiming at achieving different approaches, so to meet the project requirements.

6. Under specific circumstances, it might be appropriated to consider a graphic or an illustration tender, especially in the areas of planning, architecture and urban or rural engineering, as well as data-processing. This will allow the Government to obtain a plan or illustration, selected by a jury, after going through a tendering process, with or without awarding prizes.

Article 12

Exceptions

Competitive tendering may be exempted when procurement procedures are carried out for partnerships:

- a) In the area of national defense or security;
- b) If there is only one entity capable of providing the necessary service that requires procurement of intellectual property, trade secrets or other exclusive rights owned or controlled by one or more persons together;
- c) If pre-qualification documents or a request for proposals have been issued but with no replies received, or if none of the answers meets the evaluation criteria indicated in the request for proposals, and when the issuance of new pre-selection documents or the request for proposals fails to produce a procurement within the time framework required.
- d) In the case of substitution rights have been exercised by the lenders or the State, based on what has been set-forth in the public-private partnership agreement and in the direct agreement.

Article 13

Unsolicited Proposal

An unsolicited proposal for a public-private partnership can only be considered and evaluated if:

- a) It does not concern a project that has been identified by the Government as a strategic project or that is being considered for admission by the Government in the cycle of public-private partnerships projects; and
- b) Is independently created and developed by the applicant;
- c) It is properly presented and accepted by the Ministry of Finance;
- d) Include sufficient details and information to allow a feasibility study of public-private partnership.

Article 14

Guarantees of the Proposals

The applicant may lose a guarantee which he/she was obliged to provide when participating in the public-private partnership procurement procedures, in accordance with the following circumstances:

- a) Withdrawal or modification of a proposal beyond a specified period;

- b) Refusal to sign the public-private partnership agreement after the proposal has been accepted;
- c) Refusal to provide the necessary assurance of compliance with the public-private partnership agreement after the proposal has been accepted, or to comply with any other condition before signing the public-private partnership agreement as specified in the request for proposals.

Article 15
Allocation, review, and resources

An applicant may request the review of an allocation or appeal of decisions taken in the course of the public-private partnership project process under the current administrative terms and procedures.

Chapter III
SPECIAL REGIME CONTRACTS
OF PUBLIC-PRIVATE PARTNERSHIPS

Article 16
Special Regime of the contract

The public-private partnership agreements and related agreements are subject to a special legal regime, to be approved by Decree-Law, and the Legal Regime of Public Contracts is not applied.

Article 17
Contract Content

1. The provisions to be included in a public-private partnership contract are defined in Annex II, also an integral part of this diploma.
2. Public-private partnership contracts shall in particular will delegate the distribution of risk between the State and the private partner, and the principles of risk-sharing as mentioned in this diploma

Chapter IV
CONFIDENTIALITY

Article 18
Access to information

All relevant information regarding public-private partnership agreements, in particular that are necessary for the assessment and opinion on a partnership, as well as accountability under the law, should be provided to the Ministry of Finance whenever requested.

Article 19
Interests Disclosure

1. Anyone involved in the processes of evaluation and procurement of Public-Private Partnerships shall disclose in writing to the Ministry of Finance all personal and material interests that they hold or acquire which enter or may conflict with the proper performance of their duties
2. The disclosure mentioned in the previous paragraph should be done as soon as the person involved is informed of the facts relevant and be registered with the Ministry of Finance.

3. Anyone who discloses any possible conflict of interest that concerns a matter related to the public-private partnership agreement cannot be present during any deliberation or decision on the matter.

Article 20

Confidentiality

Those involved in a public-private partnership agreement are subject to adhere to confidentiality of any information transmitted to them during the course of the proceedings.

Chapter V

FINAL DISPOSITIONS

Article 21

Regulation

1. The powers and composition of the Public-Private Partnerships Unit, the special supply system, and the structures necessary for the implementation of this law are approved by Decree-Law.

2. In the remaining matters this diploma can be regulated by decree of the Government.

Article 22

Scope

The present decree-law is applicable to public-private partnerships agreed to, prior entry to force of the current diploma.

Article 23

Entry into force

The present decree-law will enter into force on the day following its publication.

Approved by the Council of Minister on the 15th of February of 2012

The Prime Minister-

Kay Rala Xanana Gusmão

The Minister of Finance-

Emília Pires

Promulgated in 05/09/2012

To be Published.

The President of the Republic-

Taur Matan Rua

ANNEX 1 - INFRASTRUCTURE

Infrastructures that can be financed through public-private partnerships:

1. Facilities for the supply of energy or electricity (directly to the public or to any intermediate entity), including generation, transmission, distribution, supply and attached installations, including hydropower dams;
2. Installations for gas transmission and distribution to the public, gas and oil pipelines;
3. Transport including: airport runways, air traffic control, terminals and other facilities on the air and land side, railways, roads, bridges, motorways, tunnels and other road, Sea or land, canals, dams, dredging of channels and terminals, traffic management;
4. Telecommunications including: local landline telephones, mobile phones, domestic telephones for long distance, broadband internet. Facilities relevant to satellite launching and operations.
5. Facilities, equipment and system for supply, distribution and supply of potable water, desalination, water and wastewater treatment plants, drainage, irrigation, sewage collection and treatment facilities, solid waste management.
6. Properties land reclamation projects, environmental management, urban development, industrial complex, housing including social housing, street, governmental public, and private lighting, Tourism development projects, Fairtrade companies, convention centers, cultural exhibitions, public markets, gardens and parks, warehouses, and property management;
7. Health services and facilities, which include hospitals;
8. Educational and training facilities and services, which includes colleges, universities and residential facilities, training, research and development.

ANNEX II - PUBLIC-PRIVATE PARTNERSHIP CONTENT

A Public-Private Partnership agreement should contemplate, beyond relevant issues considered by the parties, the following:

- a) Definition and description of the nature of the services provided, the function to be implemented or the facility to be developed, improved or managed by the private partner;
- b) Specification of commercial terms of the public-private partnership agreement, including the basis on which payments will be made, and whether these terms will imply costs;
- c) The allocation of risks between the State, the private partner and other parties, as well as the protection that each party will enjoy vis-a-vis the risks that the other party incurs;
- d) Elements regarding competition;
- e) The right the private partner has to implement and manage the project for the duration of the agreement, bearing in mind that the latter should set limits to the powers, rights and obligations of the parties;
- f) The right, if it is the case, the private partner, the state, or both, will have over revenues related to the function, service or installation of any property set forth in the public-private partnership agreement;
- g) The return of remaining assets to the State, following the cancellation or the termination of the public-private partnership agreement;
- h) The project' source of financing and its structure, and the plans of development, design, construction, reconstruction, repairing, replacement, improvement, maintenance, operation or administration of an installation;
- i) The duration of the agreement, which will allow the lenders to be reimbursed, and the investors to obtain a reasonable return of their investment;
- j) A guarantee that the public-private partnership agreement is accessible to the State and users, during the course of its duration;
- k) The support, assistance and incentives provided by the State to the private partner, to obtain the licenses and permits necessary to the implementation of the public-private partnership project;
- l) The reply to possible concerns posed by investors and lenders, related to the protection of the investment, the right to keep foreign currency accounts, in the country or abroad, convertibility of revenues, existence of exchange rates, profit repatriation, use of insurance income, protection against the political risks derived from government interference and capacity to undertake and transfer shares of the project company;
- m) Available rights, performance indicators and monitoring mechanisms that will allow the State to determine whether the public-private partnership agreement shows a good quality/cost

ratio, to ensure that the private partner abides by the conditions set forth in the public-private partnership agreement, including conformity with the service requirements, and clearly defined quality standards, adequate maintenance of the facility, compliance with the approved design standards, and others, addressing construction projects, repairing or improvements, as well as procurements concerning penalties, cancellation and other situations derived from non-compliance of requirements or terms of the public-private partnership agreement;

- n) Rights and obligations of the parties following the cancellation or term of the public-private partnership agreement, corrections in case of non-compliance by any of the parties, State replacement rights and lenders replacement rights, and the way adopted to calculate compensations due to the parties when the public-private partnership agreement expires;
- o) A procurement in which any on parties can be exempted from the responsibility of failure or delay in compliance with any obligation according to the agreement due to circumstances beyond its control
- P) The Private partner will oversee the performance bonds, securities and insurance policies are maintained in relation with the implementation of the public-private partnership agreement;
- q) Procedures for analysis and approval of engineering designs, construction plans by the State, as well as procedures for testing and final inspection;
- r) The State and/or its representatives will have the rights to supervise the private partner's activities and and services. The State and/or its representatives has the power to change the assignments and conditions and/or develop actions they deem reasonable. All to ensure that public-private partnership is functioning properly and the services it provides is in accordance with legal and contractual requirements;
- s) Sustainability of the project and its environmental, social, and community procurements;
- t) The extension of the private partner obligation to assist the Government or the regulatory body as appropriate.
- u) Procurements to manage the changes for the duration of the agreement, mechanisms to deal with additional costs and other consequences resulting from any directive from the Government or a regulatory body, including any compensation due to a private partner and the circumstances under which, the public-private partnership agreement may be modified to keep the economic and financial balance between the parties;
- v) Any Government rights to analyze and approve large contracts to be signed by the private partner, and especially with shareholders of the private partner or other affiliated persons;
- w) The rights and obligations of the parties regarding confidential information;
- x) The applicable law;
- y) Conflict resolution mechanisms.