

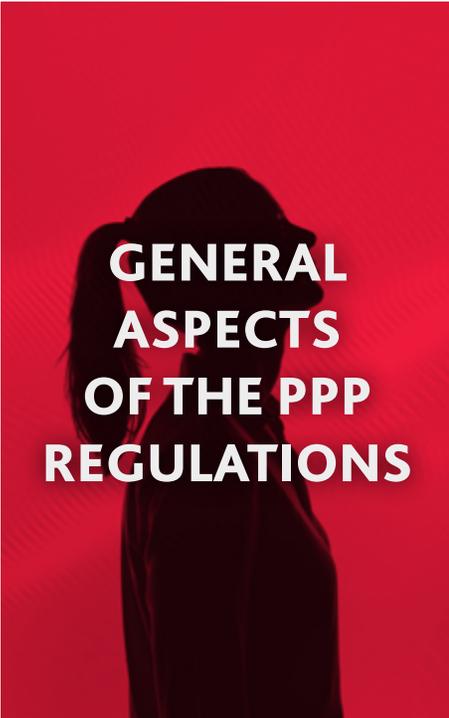
EXECUTIVE DECREE 840 OF DECEMBER 31, 2020

PUBLIC-PRIVATE PARTNERSHIP REGIME

EXECUTIVE DECREE 840 OF DECEMBER 31, 2020

Regulates the Public-Private Partnership Regime for the development of incentives for private and social investment and job creation.

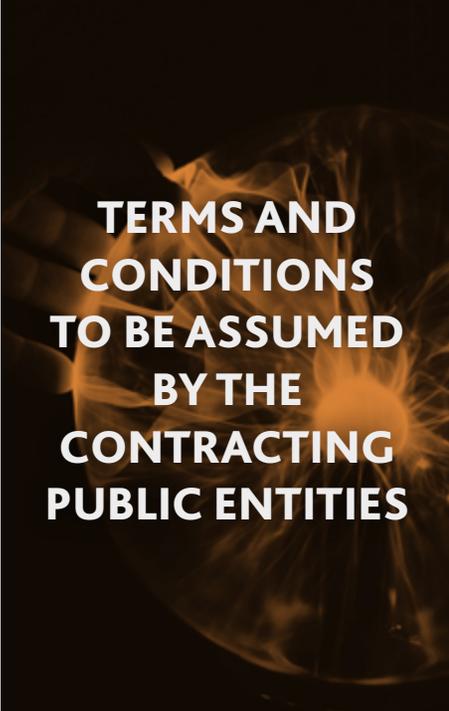
By Executive Decree No.840 of December 31, 2020, Law 93 of 2019 is regulated, which has, among its objectives, to promote the development of projects under the public-private partnership regime.



**GENERAL
ASPECTS
OF THE PPP
REGULATIONS**



**RELEVANT
ASPECTS**



**TERMS AND
CONDITIONS
TO BE ASSUMED
BY THE
CONTRACTING
PUBLIC ENTITIES**



**WHAT ARE THE
CAUSES FOR
TERMINATION
OF PPP
CONTRACTS?**

General aspects of the PPP regulations:

Scope of Application

El Decreto Ejecutivo No.840 de 2020 será aplicado a:

- ▶ To the Central Government
- ▶ Autonomous and semi-autonomous entities of the Non-Financial Public Sector
- ▶ Municipalities
- ▶ Commercial companies in which the State owns at least 51% of the capital stock.

Scope

PPP contracts may be entered into, provided their purpose is the financing, construction, development, exploitation, operation and improvement of public infrastructure, sectors or areas such as transportation, logistics, energy, communications, among others, which are the responsibility of the central government, or autonomous or semi-autonomous entities of the non-financial public sector, of fiscal social responsibility, municipalities and corporations in which the State owns at least 51% of the capital stock.

Who is excluded from structuring through PPP contracts?

- ▶ Provision of public security services
- ▶ Provision of medical health services;
- ▶ Provision of official education services;
- ▶ Concessions for the extraction of metallic minerals;

Those projects whose value is less than fifteen million balboas (B/.15,000,000.00).

How are PPP contracts signed between the contracting public entity and the contracting company or PPP contractors perfected?

The PPP contract entered into between the contracting public entity and the PPP contract holder or PPP contractor shall be deemed to be perfected with the endorsement of the Office of the Comptroller General of the Republic; therefore, its effectiveness shall be subject to such administrative act, which must be published in the Official Gazette within the following five calendar days. An order to proceed may only be issued when the contract is endorsed by the Comptroller General of the Republic.

Aspectos Generales del Reglamento de APP:

What will be the deadlines for PPP contracts?

The PPP contract will be granted for the term established for each case, based on the feasibility analyses carried out, and must be adequate to allow the PPP contractor to execute the investment, comply with its financing commitments, maximize the value for money, and obtain a return on such investment considered reasonable in view of the risks assumed, in accordance with the provisions for such purposes in the respective PPP contract.

PPP contracts may be extended one or more times for periods that, in the aggregate, may not exceed ten years. However, the term of the PPP contract may not be extended beyond five additional years based on delays.

What are the principles on which Executive Decree No. 840 of 2020 is based?

Integrity principle: will be applied to those who participate in the PPP contractor selection process and extends to all those who participate in the PPP contract execution process.

Accountability principle: the mechanisms for recording, reporting, supervision, evaluation and oversight will allow for the proper accountability of the PPP contractor for the benefit of the end user; and likewise, it will allow for the accountability of public officials involved in decision-making in the different phases of the PPP processes, from the beginning of the structuring to the termination of the PPP contracts.

Relevant Aspects

► All public initiatives of PPP projects, whether public or municipal entities, are subject to the fulfillment of the following four phases:

Phase 1: Pre-feasibility analysis and initial Approval;

Phase 2: Feasibility analysis and Approval to implement the PPP project;

Phase 3: Bidding and preparatory activities;

Phase 4: Contractual execution or fulfillment of the contract.

► The national PPP secretariat may carry out prior inter-institutional coordination actions necessary to facilitate decision-making by the governing body, as well as the verification of the technical sufficiency of the requests for approval of the guidelines and working guidelines. It may also support the contracting entities in the identification, analysis, structuring and promotion of PPP projects, under their respective areas of competence, with the different public institutions.

PPP Registration

The National PPP Secretariat is responsible for proposing regulations, establishing, managing, updating and making available to the public the information recorded in the PPP registry.

The registration in the PPP must contain the following:

1. All PPP projects Approved by the governing body;
2. The final technical reports of the contracting public entities;
3. The bidding documents of the prequalification or bidding process, together with the PPP contract signed together with its annexes;
4. The Approved contractual addenda;
5. The minutes of the opening of envelopes and the act of awarding the project bidding;
6. The Appointment of the members of the bid evaluation committee;
7. The arbitration awards issued on the occasion of disputes arising during the execution of PPP contracts;
8. The social pact, and the trust agreement;
9. The resolutions of the contracting public entity that establish the tariffs and other charges Applicable to the users within the scope of the PPP contracts;
10. Others determined by the regulations on the PPP registry, Approved by the governing entity;

Terms and Conditions to be assumed by the Contracting Public Entities:

- ▶ Feasibility analysis, preparation of all the final technical reports, and preparation of the bidding documentation models.
 - ▶ The national secretariat of the PPP will have a maximum of sixty (60) working days from the receipt of the information to carry out the analysis and prepare the recommendations for the analysis and subsequent pronouncement of the governing body.
 - ▶ The national secretariat of the PPP shall send the information received to the Ministry of Economy and Finance, so that the latter may issue its pronouncement.
 - ▶ Once Approval has been granted by the Ministry of Economy and Finance on the budgetary capacity of the contracting public entity, it shall be forwarded to the national PPP secretariat for analysis by the governing body.
 - ▶ PPP contracts may assume the condition of self-financing, in those cases in which the income obtained by the PPP contractor from the end users, resulting from the economic exploitation of the project under its responsibility, is sufficient to allow it to obtain a return on the investment made, considering it reasonable in relation to the risk assumed, as agreed in the PPP contract and its annexed documents.
 - ▶ In return for the activities undertaken under the respective PPP contract, the PPP contractor will receive remuneration which, depending on the type and characteristics of the project, may consist of revenues from end users, payments or contributions from the contracting public entity or other public entities, or mixed modalities.
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Constitution and operation of the PPP contractor, and of the trust for co-financed projects:

COMPANY

- The successful bidder of the PPP contract shall incorporate a company in accordance with the Applicable law of the Republic of Panama, which shall act as the PPP contractor. Its articles of incorporation shall include the provisions that may be necessary to comply with all the obligations placed upon it.
- The company's corporate purpose will be exclusive or limited to the fulfillment of the activities contemplated in the PPP contract, including those related, accessory or complementary to the same, which are necessary for the fulfillment of said contract.
- The term of the company must be longer than the term of the PPP contract; the latter must provide for an additional term of three (3) years from the date of liquidation of the PPP contract. Its registered office must always be in Panama.
- Amendments to the bylaws during the term of the PPP may only be made with the authorization of the contracting public entity, which may only refuse to grant such authorization in those cases in which such amendment would imply a breach of the provisions of the PPP contract.
- The successful bidder must subscribe and contribute the minimum initial capital foreseen for such purposes in the bidding documents. The minimum mandatory capital to be maintained during the term of the PPP contract shall be integrated in compliance with the schedule provided for such purposes in the PPP contract. At least 51% of the company's capital must be contributed by the successful bidder ("Controlling Shareholding Package ('PAC')"); however, the remaining 49% may be subscribed and contributed by the successful bidder or by other persons who do not have any impediments for this purpose ("Freely Available Shareholding Package ('PALD')").

TRUST

- The structuring of a co-financed PAP contract will require the constitution of a trust that will have the following purposes:
 - ▶ All public resources that the contracting public entity transfers to the PPP contractor as consideration for the PPP contractor are channeled through the PPP.
 - ▶ The raising of funds through indebtedness or other modalities that may be available to the public entity, for the purpose of paying all or part of the PPP contractor's consideration.
 - ▶ The collection of revenues from payments made by users or beneficiaries of the PPP project, such as prices or taxes.
 - ▶ The assets or rights that the contracting public entity or other public entities plan to assign to the contracting entity.
 - ▶ The costs of the supervision or control system of the PPP contract foreseen for the contractual execution phases.
 - ▶ Other contributions or transfers that are provided for in the scope of each PPP contract.
- It will be initially constituted by the successful bidder, prior to the signing of the PPP contract.
- The contracting public entity may be the trustor and/or beneficiary. An entity authorized for this purpose will act as trustee.
- The fiduciary patrimony is an autonomous patrimony and does not belong to the patrimony of the parties.

COMPANY

- The transfer of shares corresponding to the PAC may be voluntary or forced.
- This voluntary transfer of the PAC may be made with the prior authorization of the contracting public entity, the governing entity and the creditors beneficiaries of the special pledge; under the regime established for such purposes in the PPP contract, which may provide for differential requirements according to the stage or degree of progress in the development of the PPP contract.
- The compulsory transfer may take place in cases of enforcement of the special pledge regulated in these regulations, provided that such pledge has also been extended to the referred share package.

TRUST

- The trust shall be constituted in Panama for a term that shall be at least equivalent to the term of the PPP contract and its eventual extensions, plus an additional period of one year counted from the date foreseen for the termination thereof, and its sole purpose shall be the one foreseen in the scope of each PPP contract.

Bonds and insurances

- ▶ Bidders must provide bid bonds and performance bonds at the different stages of the bidding process and execution of the PPP contract.
- ▶ The bonds issued to guarantee the obligations arising from the PPP contracts will be regulated by the Office of the Comptroller General of the Republic, which will be the depository thereof.
- ▶ The PPP contractor shall contract the insurance policies required in the bidding documents of the PPP contract, including, without limitation, those required by the special laws that regulate the matter and are customary in the industry that is the object of the bidding.
- ▶ The insurance policies required by the contracting public entity may not be cancelled or modified by the insurance companies without prior written notice to the contracting public entity, and said notice must be delivered to the latter at least thirty (30) working days prior to the effective date of cancellation or modification.

Assets used in PPP contracts

The following are assets assigned to the project:

- ▶ Real or personal property owned by the contracting public entity, or other public institutions, whose right of use is granted to the PPP contractor.
- ▶ Real estate by nature, destination, adherence or accession that the PPP contractor builds or incorporates to the project area or to the contracting public entity.
- ▶ Movable property intended by the PPP contractor to fulfill its contractual obligations.

Non-compliance of the PPP contractor and Application of contractual penalties:

Any action or omission on the part of the PPP contractor with respect to the obligations foreseen in the PPP contract is considered a breach by the PPP contractor. PPP contracts must include the penalties and the procedure Applicable to the PPP contractor's non-compliance, and the penalties must be based on an incentive scheme, which may be incurred by the PPP contractor.

What are the causes for termination of PPP contracts?

Imputable to the contractor:

1. Serious non-compliance by the PPP contractor with the obligations undertaken in the PPP contract, if it is not remedied within the period established for this purpose.
2. Declaration of insolvency or liquidation of the PPP contractor.

Imputable to the contracting public entity:

1. Serious non-compliance by the contracting public entity with respect to the obligations contracted in the PPP contract, if it is not remedied within the term established for such purpose.
2. The administrative rescue of PPP contracts ordered by the contracting public entity for justified reasons of public interest.

Causes without specific imputation of liability:

1. Failure to comply with the term or expiration of the term indicated for its validity or that of its extension.
2. Mutual agreement between the contracting public entity and the PPP contractor, with prior authorization to that effect from the governing body.
3. The permanent impossibility in its contract, because of the existence of force majeure or fortuitous event, foreseen in the PPP contract.

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