



MEMORANDUM

SUMMARY OF ADVANTAGES OF THE PUBLIC-PRIVATE PARTICIPATION CONTRACT

(LAW 27,328 AND DECREE 118/17)

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Confidential

This report summarizes the different advantages that the regime of the Public-Private Participation Contract, as approved by Law No. 27,328¹ and its regulation contained in Decree No. 118/17² (the “PPP Regime”), implies for investors, contractors and financiers.

In that respect, we have elaborated the following report, in which, summarily, we have identified the main advantages of the mentioned regime.

For that purpose, we analyze separately the scope of application of the PPP Regime, as well as the proceedings for choosing the contractors, the obtaining and repayment of external financing, the mitigation of public privileges and the alternatives for dispute resolution.

1. Scope of application.

1.1. *Purpose*: The regulation adopts a broad criterion as to the projects that may be carried out under the PPP Regime. In that sense, the following areas are mentioned:³

- a) Infrastructure;
- b) Housing;
- c) Services and activities;
- d) Productive investment;
- e) Applied investigation;
- f) Technological innovation.

The enumeration is merely indicative (non-exhaustive), so that under the PPP Regime any project which the State considers justified to be developed under this modality can be carried out; including projects linked to infrastructure as regards telecommunications, assuming those are of the particular interest of ADIMRA or its members.

¹ Enacted on Nov 16, 2016 and published in the Official Gazette on Nov 30, 2016.

² Issued on Feb 17, 2017 and published in the Official Gazette on Feb 20, 2017.

³ Section 1, Law 27,328.

1.2. *Parties*: Contracts under the PPP Regime can be entered into between:⁴

- a) As hiring party, the bodies and entities that compose the National Public Sector, in the extent stipulated in Section 8 of Law No. 24,156, as amended⁵; and
- b) As contractor, private or public subjects.

2. Contracting procedures.

Only the following procedures can be adopted in order to award contracts under the PPP Regime⁶, as these procedures are considered to guarantee a reasonable degree of competence, publicity and equality:

- a) National or international bidding process; and
- b) National or international public tender.

This limitation shows differences with other regimes for public hiring (such as the public-work regime, supply, etc.), in which other mechanisms apply, such as private bidding process, price tender and direct hiring. In the PPP Regime, direct hiring is expressly forbidden.

In the selection procedures:

- a) The participation of small and medium enterprises (PyMEs, for its Spanish acronym) must be promoted, and national industry and local employment must be encouraged;⁷
- b) The bidding terms and conditions must stipulate that the goods and services have, at least, 33% of national components. There may be exceptions for this condition in certain cases;
- c) The preferences of Law No. 25,551 (“national purchase” regime), in favor of goods of national origin, shall apply;
- d) The mechanisms of private initiative shall also apply.⁸

It is worth mentioning that the preferences in favor of national companies and PyMEs can be granted even in cases where those national companies and PyMEs are associated with foreign companies, in which case the national companies and PyMEs must maintain a participation of at least 30% in such association or consortium.⁹

⁴ Id.

⁵ Section 8 of Law 24,156 includes: a) The National Administration, composed by the Central Administration and the Decentralized Agencies, including within the latter the Social Security Institutions; b) State-Owned Companies and Public Companies, including State-Owned Companies, Public Companies, Majority-State-Owned Corporations, Mixed Economy Companies and any other business organizations where the National State has a majority stake or control; c) Public Entities expressly excluded from the National Administration, comprising any non-business-state organization with financial autarchy, legal personality and own patrimony, where the National State has the control over the majority of such patrimony or over the decision making, including those non-state public entities where the National State has control over the decision making; and d) Fiduciary Funds totally or mainly funded with assets and/or funds of the National State.

⁶ Section 12, Law 27,328.

⁷ Id.

⁸ Section 17, Law 27,328.

⁹ The National Congress is currently discussing a Bill of Law intended to amend the “national purchase” regime, which amendment sets forth as a condition for contractors the entering into productive cooperation agreements for the acquisition of local products and services for up to 20% of the value of the offer. This Bill of Law was already approved by the Chamber of Deputies and is waiting debate by the Senate (File Senate CD 51/17).

3. Financing.

The external financing to be obtained by the contractor can be established as a condition to the offer, which financing -according to the bidding terms and conditions- may be repaid by the contracting party during the term of the project, either by:

- a) Monetary contributions.
- b) Assignment of funds obtained through public credit operations.
- c) Ownership of assets.
- d) Ownership of budgetary, fiscal or contractual credits.
- e) Tax benefits.
- f) Subsidies.
- g) Franchises.
- h) Concession of use or exploitation of public domain assets.
- i) Any type of concession or other contribution capable of being disposed by the National Government.

4. Mitigation of typical public prerogatives.

Unlike traditional public agreements (such as public-work agreements), under the PPP Regime the State can waive, in the bidding terms and conditions, certain ordinary public prerogatives, and also recognize in favor of the contractor certain specific protections against those prerogatives. For instance, the following provisions may be set forth in the bidding terms and conditions:¹⁰

- a) Limitations to the state power to unilaterally amend the agreement. Amendments may only be introduced in relation to the completion of the project and up to a maximum limit, in more or less than 20% of the total value of the agreement, provided that the contractor is adequately compensated, preserving the economic-financial balance of the agreement and the conditions and possibilities of the financing.
- b) The contractor can be authorized to assign the agreement or to grant as security the credit rights arising from the agreement (the right to receive the price committed by the contracting party, and other payments and indemnifications), including the possibility to instrument securitizations of the relevant receivables.
- c) The power of the contractor to temporarily suspend the fulfillment of its obligations in the event of non-compliance of the obligations of the contracting party;
- d) The power of the contractor to assign, in whole or in part, the agreement to a third party, provided that the assignee meets similar requirements of the assignor and at least 20% of the original term of effectiveness of the agreement or of the committed investment has been accomplished, whichever occurs first;
- e) The power of the contractor to subcontract the works, with prior communication to the contracting party and with its approval and consent;
- f) In the event of termination of the agreement by the State for reasons of public interest (i.e., reasons of opportunity or convenience), the termination must be approved by an executive order of the Executive Branch and the compensation to the contractor must be complete (that is to say, it must include direct damages and lost profits) and in no event be less than the amount of the non-amortized investment;

¹⁰ Section 9, i, Law 27,328.

- g) The suspension or termination of the agreement by the State for reasons of illegitimacy must be requested to courts and declared by a competent judge, not being admitted the termination or suspension of the agreement for this reason by the mere decision of the administrative authorities;
- h) In any case of early termination, the State cannot take possession of the work or project without prior payment of the corresponding compensation to the contractor.¹¹
- i) Indexation of prices is permitted and the contracting party cannot invoke the right to pay in local currency if the contractual obligations were undertaken in a foreign currency.¹²

5. Dispute resolution.

The PPP Regime sets forth different ways for alternative dispute resolution, other than the traditional judicial or administrative systems:

- a) For conflicts of a technical, interpretative and monetary nature, a "technical panel" can be constituted, composed of professionals and/or representatives of national or foreign universities, in all cases of proven independence, impartiality, consistency and national and international trajectory in the relevant matter, which panel may subsist throughout the term of the agreement to solve the issues of such nature that arise between the parties;¹³
- b) For other type of disputes, it is set forth the possibility to opt for alternative mechanisms of settlement or arbitration;¹⁴
- c) The ICSID dispute resolution system of Bilateral Investment Treaties could also apply in those cases where the contractor belongs to a country that has a Bilateral Investment Treaty in force with Argentina.

6. Advantages and protections for contractors, investors and financiers.

In virtue of all the aforesaid, it can be affirmed that the new PPP Regime grants significant advantages and strong protections to the private contractor, the investor and financier, as those have been specially taken into account by the drafters and promoters of the legislation.

In that sense, the PPP Regime was elaborated based on the positive experience of other countries in Latin America and the rest of the world, such as Brazil, Chile, Colombia, France, Japan, Peru, Spain, U.K. and Uruguay, thus adopting the best regional and international practice in this field.

As an evidence of the special attention that the PPP Regime puts on the interests of the private sector, we can quote the following paragraphs of the Motives with which the regime was presented to the National Congress: "...that public works have an harmonic compatibility with the interests and possibilities of the private sector" and "...the proposed regime is within the scope of the national policies that intend to generate incentives to Private Investment".

Having said that, in the following chart we summarize the main advantages and protections offered by the PPP Regime for contractors, investors and financiers, as described so far:

¹¹ Section 10, Law 27,328.

¹² Section 31 of Law 27,328.

¹³ Section 9, x, Law 27,328.

¹⁴ Section 25, Law 27,328.

**MAIN ADVANTAGES AND PROTECTIONS OF THE PPP REGIME
FOR CONTRACTORS, INVESTORS AND FINANCERS**

- ✓ It is a flexible regime, applicable and adaptable to any kind of project.
- ✓ It allows the development and financing of long-term projects.
- ✓ It ensures transparency, competence and equality in the selection process.
- ✓ It allows associations with local companies to obtain the benefits of the national production.
- ✓ It privileges the private initiative.
- ✓ It allows the financing of the project through securitizations or *project financings*.
- ✓ It prevents the unilateral alteration of the contract by the State.
- ✓ It guarantees the preservation of the economic and finance terms of the contract.
- ✓ It allows the indexation, update and sustainability of the economic value of the contract.
- ✓ It ensures that the payment of the price will be made in the agreed currency.
- ✓ It grants protections and exit alternatives in case of breach of contract by the State.
- ✓ It prevents the State from terminating the contract in an arbitrary manner.
- ✓ It guarantees full indemnification in case of termination or expropriation of the contract.
- ✓ It prevents confiscation of the project by the State.
- ✓ It promotes the impartial and professional resolution of technical controversies.
- ✓ It enables alternative mechanisms for dispute resolution out of the local judicial system.
- ✓ It has force of federal law and it cannot be amended by a mere presidential decree.

This report was prepared and issued just for the knowledge and benefit of ADIMRA and its members, and it shall not be disclosed to third parties (except for eventual foreign partners or investors, on a promotional basis only) or submitted to courts or arbitrators, without the prior written consent of Estudio Beccar Varela.

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