



## FOURTH CONSTITUTIONAL GOVERNMENT

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**DECREE-LAW NO. 42/2012**

**DATED 7 September**

### **Legal Regime on Public-Private Partnerships**

Acknowledging the need to have the private sector participating in the construction of the country's infrastructures, it is important to establish a legislative framework setting the legal regime for agreements between the State and private entities, i.e. public-private partnership agreements.

Therefore, this diploma sets a framework that enables a public sector body and a private partner to become parties in a public-private partnership agreement, promoting the creation and development of public infrastructures.

Along with public-private partnership agreements it is important to establish the process and criteria for identifying projects that are adequate for public-private partnership funding; to establish means and ways of promoting and implementing such projects in a sustainable manner, to promote fair, equitable, transparent, competitive, efficient and accountable procedures in terms of selection, procurement, management, operation, monitoring and evaluation, as well as to create a special procurement regime for public private partnerships for hiring technical officers advising the Government on public-private partnership agreements and on the selection of private partners.

Thus, pursuant to Article 115.1 (e) and Article 116 (a) of the Constitution of the Republic, the Government enacts the following that shall have the force of law:

#### **Chapter I General provisions**

##### **Article 1 Subject**

This decree-law sets the principles and instruments for establishing partnerships between the Government and private entities regarding public infrastructures, as well as the competences and procedures for identifying, assessing, procuring and building of those infrastructures.

## **Article 2 Definitions**

1. For the purposes of this diploma
  - (a) *public-private partnerships* are agreements by which private entities, hereinafter known as private partners, commit to the Government in a long-term manner to ensure the construction and execution of an infrastructure project, where the funding and responsibility for the investment and the operation are borne, in full or in part, by the private partner.
  - (b) *Direct agreement* means the agreement between the Government and the lenders in a public-private partnership whereby the conditions to be followed in case the agreement is terminated are determined, as well as the rights of the Government and of the lenders in relation to the public-private partnership.
2. This diploma does not cover the licencing, renting or other rights in relation to forests, mining, minerals, hydrocarbons including oil and gas, air space and any other subject covered by specific legislation or licensing procedures.

## **Article 3 Competence for approving and signing agreements**

1. The Public Private Partnership Agreements are approved by the Council of Ministers.
2. The Government member responsible for Finance shall negotiate and sign all public-private partnership contracts and other direct agreements, upon authorization of the Council of Ministers, which may approve other additional signatories representing the State.
3. The Ministry of Finance is responsible for the financial evaluation of any public-private partnership agreement.
4. Public-private partnership contracts may include the following:
  - (a) Collection of user fees, determined by law;
  - (b) Government payment, which may take on the form of lump sums, fixed payments, payments related with demand or use, sustainability support in the shape of cash allowances, capital grants, minimum use guarantees, payment guarantees, results or others, with the Government also providing a basis and a method for setting, changing or adjusting them; or
  - (c) A combination of user fee and Government payment.
5. Public-private partnership agreements may include the estimation of fees to be paid by the private partner towards the full or partial recovery of costs incurred with the development of the project, transaction or monitoring conformity costs by all parties in the public-private partnership agreement during the validity of the agreement.

6. Invitations to bid shall specify the nature and method for determining any fee, as well as the terms and conditions concerning the payment of fees.
7. Fees specified in invitations to bid shall be considered as binding obligations.

**Article 4**  
**Tasks and responsibilities**

1. The public-private partnership agreement grants the private partner the right to exert activities leading to the satisfaction of a collective need, as specified in the terms and conditions agreed.
2. Activities performed by private partners resulting from public-private partnership agreements under the present diploma may be carried out:
  - (a) Only by the private partner responsible for the relevant public sector body;
  - (b) Only by the relevant public sector body;
  - (c) Divided between the relevant public sector body and the private partner, as agreed.
3. Attributing a public activity to a private partner under a public-private partnership agreement does not affect the responsibility of the public sector body concerning the performance of that task.

**Article 5**  
**Guidance regarding public-private partnership agreements established by public companies or companies with public capital**

In relation to a company owned in full or in part by the Government, the Government member responsible for Finance may, upon authorization of the Council of Ministers, guide the company in terms of:

- (a) Negotiation, management, accountability, accounting and financial matters of the company and its participation in a public-private partnership agreement;
- (b) Policy to be followed concerning a public-private partnership agreement.

**Article 6**  
**Reviewing the project and the respective procurement**

1. In order for an infrastructure project to be considered for procurement and to be developed under a public-private partnership agreement it must have been submitted to pre-feasibility and feasibility studies and risk analyses and to the required financial and legal studies, being issued for procurement under the terms set in this decree-law.
2. The methods and procedures for selecting private partners, awarding contracts and signing public-private partnership contracts, as well as for identifying public-private partnership advisors, are subjected to the special procurement regime set in this diploma.
3. The special procurement procedure is to be handled according to principles of justice, equality, transparency, competition, efficiency and accountability.

4. Special procurement for public-private partnerships shall comply with the following criteria:
  - (a) Better cost efficiency;
  - (b) Better risk sharing between public and private entities;
  - (c) Better project sustainability.
5. Risk sharing between the State and the private partner must be clearly defined by contract and comply with the following principles:
  - (a) The different risks inherent to the partnership must be shared between the parties according to their capability to manage those risks;
  - (b) The establishment of the partnership should imply a significant and effective risk transfer to the private sector;
  - (c) Risks that cannot be justified with the significant reduction of other already existing risks should be avoided;
  - (d) The risk that the partnership is not financially sustainable due to a cause not imputable to non-compliance or to unilateral changing of the contract by the public partner, or to an act of God, should be, inasmuch as possible, transferred to the private partner.
6. A public-private partnership's financial sustainability is assessed by the users' capability and availability to pay service user fees when applicable and by the State's capability to meet the costs related with the public-private partnership project throughout the project.

#### **Article 7** **Procedures for approving projects**

1. The list of infrastructure projects shall be submitted to the Ministry of Finance, which will assess and study them and issue its opinion.
2. The Public-Private Partnership Unit, to be created by decree-law, drafts an opinion on funding possibilities in relation to the submitted projects.
3. Should a project be classified as to be funded by way of public-private partnership, the project – including the respective funding modality – will be submitted to the Administrative Council for the Infrastructure Fund for approval.
4. The submission of projects to the Public-Private Partnership Unit should be done 10 days before the day when the project is scheduled to be discussed.

#### **Article 8** **Financial feasibility study**

The financial feasibility study for public-private partnership projects should include:

- (a) Forecast future payments and revenues for the next 25 years, including fees for a concession or operating lease;
- (b) Detailed forecasts regarding payments or revenues, including shadow tolls, profit-sharing and the estimated value of these payments and revenues, as well as events that may cause an agreement to be renegotiated;

- (c) Amount and terms of financing for public private partnership agreements directly or indirectly provided by or in representation of the State;
- (d) The impact of public private partnership agreements on the budget deficit and public debt, as well as the identification of the assets resulting from the agreements;
- (e) Information on any security provided by the State or in representation of the State, including a description of the security's nature, intended purpose, beneficiaries, expected duration, financial exposition of the State and estimated financial cost of the securities, security fee revenues or other revenues.

### **Article 9 Reports**

Each reports on public-private partnership agreements shall include the following information:

- (a) A description of the public-private partnership project;
- (b) Terms of the public-private partnership agreement liable for affecting the amount, timing and certainty of future financial flows;
- (c) The nature and extension of:
  - i. rights to use assets;
  - ii. obligations or rights expected in the delivery of services;
  - iii. obligations to acquire or build property, facility or equipment items;
  - iv. obligations to deliver or rights to receive specified assets at the end of the agreement;
  - v. renewal and termination options;
  - vi. other rights and obligations foreseen in the agreement, including important repairs, changes and maintenance liable to take place during the reporting period.

### **Article 10 Reporting**

1. The reporting on public-private partnership agreement must comply with Law no. 13/2009, dated 21 October, on Budget and Financial Management.
2. Subject to the previous paragraph, reports must also include:
  - (a) Information on each public-private partnership agreement;
  - (b) Information on the procedure through which a public-private partnership agreement was procured and on the criteria leading to the decision to sign the agreement.

## **Chapter II Public-private partnership special procurement regime**

### **Article 11 Principles**

1. The identification and selection of a private partner for a public-private partnership agreement is done by means of competitive public tender, except for any exceptional circumstances foreseen in the law.
2. The public-private partnership procurement procedure follows a special regime, to be approved by means of a decree-law, and is not subject to the Legal Regime on Procurement.
3. The procedure described in the previous paragraph may consist of the following:
  - (a) Open competitive tender through which any interested economic operator may submit a bidding proposal;
  - (b) Restricted competitive tender through which any economic operator may express interest or submit a response to a request for qualifications, but only those that satisfy objective selection criteria and are short-listed and invited by the Government may submit a bidding proposal;
4. A two-stage procedure may be applied when it is not considered to be feasible to describe fully the characteristics of the public private partnership project in the initial Request for Proposals.
5. In exceptional circumstances where a project is particularly complex, a competitive dialogue process may be applied seeking to enable various approaches that meet the project requirements.
6. In certain circumstances a design competition may be appropriate, mainly in the fields of town and country planning, architecture and engineering or data processing, which enables the Government to obtain a plan or design selected by a jury after being put out to competition with or without the award of prizes.

#### **Article 12 Exceptions**

Exceptions to competitive tenders may be considered in the case of procurement procedures for partnerships:

- (a) In the area of national defence or national security;
- (b) Where there is only one entity capable of providing the necessary service or where the service delivery requires the use of intellectual property, trade secrets or other exclusive rights belonging to or controlled by one person or jointly by a group of persons;
- (c) If pre-qualification documents or invitations to bid have been issued but no responses have been received, or if none of the responses meets the evaluation criteria indicated in the invitations to bid, and if it is considered that the issuing of new pre-qualification documents and new invitations to bid would not be likely to result in awards within the necessary time limit;
- (d) If lenders or the State exert replacement rights, in accordance with the public-private partnership agreement and the direct agreement.

#### **Article 13 Unsolicited proposals**

Unsolicited proposals in relation to public-private partnerships can only be considered and assessed in the following cases:

- (a) Do not concern projects identified by the Government as strategic projects or projects being considered for admission by the Government in the public-private partnership project cycle; and
- (b) Are created and developed independently by the candidate;
- (c) Are prepared without supervision or involvement by the Ministry of Finance;
- (d) Are submitted correctly to and accepted by the Ministry of Finance;
- (e) Include sufficient details and information to enable a public-private partnership feasibility study.

**Article 14**  
**Tender guarantees**

The candidate may lose a guarantee previously provided in order to participate in public-private partnership procurement processes in the following cases:

- (a) Withdrawal or modification of bids beyond a set time limit;
- (b) Refusal to sign a public-private partnership agreement after the bid has been accepted;
- (c) Refusal to provide the necessary guarantee in fulfilment of the public-private partnership agreement after the bid has been accepted or in order to meet any other requirement prior to the signing of the public-private partnership agreement, as foreseen in the invitation to bid.

**Article 15**  
**Awards, revisions and appeals**

Candidates may request the revision of awards or present appeals in relation to decisions made in the course of the public-private partnership project cycle according to the valid administrative procedure.

**Chapter III**  
**Special regime for public-private partnership contracts**

**Article 16**  
**Special regime for contracts**

Public-private partnership contracts and related agreements are subjected to a special legal regime and are not covered by the Legal Regime on Public Contracts.

**Article 17**  
**Contents of contracts**

1. Attachment II to the present diploma, which is part of it, contains the provisions that must be featured in public-private partnership contracts.
2. Public-private partnership contracts must particularly foresee risk distribution between the State and the private partner, applying the risk sharing principles foreseen in the diploma.

**Chapter IV**  
**Confidentiality**

**Article 18**

### **Access to information**

All relevant information concerning public-private partnership agreements is to be provided to the Ministry of Finance upon request, namely information required for assessments and opinions on partnerships, as well as for providing reports under the law.

### **Article 19**

#### **Disclosure of interests**

1. Any person involved in Public-Private Partnership assessment and procurement processes must disclose in writing to the Ministry of Finance all material personal interests it holds or acquires and that enter or may enter into conflict with the good performance of their duties.
2. The disclosure indicated in the previous paragraph is to take place as soon as possible after the person in question becomes aware of the relevant facts, and is inserted into a file kept by the Ministry of Finance.
3. A person disclosing an actual or possible conflict of interests regarding a subject related with a public-private partnership agreement cannot be present during any deliberation on the subject and cannot take part in any recommendation or decision on the subject.

### **Article 20**

#### **Confidentiality**

Participants in procedures related with public-private partnership agreements are subjected to the duty of confidentiality in relation to information conveyed to them or of which they become aware during such procedure.

### **Chapter V**

#### **Final provisions**

### **Article 21**

#### **Regulation**

1. The tasks and composition of the Public-Private Partnership Unit, as well as the structures required for implementing this diploma, are approved by means of decree-law.
2. Other subjects referred to in This diploma may be regulated by means of Government decree.

### **Article 22**

#### **Effect**

This decree-law applies to public-private partnerships is diploma enters into force.

### **Article 23**



**Entry into force**

The present Decree-Law enters into force on the day after its publication

Approved by the Council of Ministers on 15 February 2012.

The Prime Minister,

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Kay Rala Xanana Gusmão

The Minister of Finance,

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Emília Pires

Promulgated on 5/9/2012

Let it be published.

The President of the Republic,

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José Ramos-Horta

## **ANNEX I INFRASTRUCTURES**

The following infrastructures are susceptible of being funded through public-private partnerships:

1. Facilities for supplying power or electricity (whether provided directly to the public or to any intermediate entity) including generation, transmission, distribution and supply and ancillary facilities including dams for hydro power;
2. Facilities for gas transmission and public distribution, gas and gas works, oil and gas pipelines;
3. Transportation, including airport runways, air traffic control, terminals and other air side and land side facilities, rail, roads, bridges, highways, tunnels and other road facilities, port or harbour facilities on water or land, canals, dams, channel dredging and terminals, traffic management;
4. Telecommunications, including fixed or mobile local telephony, domestic long-distance telephony, and international long-distance telephony, internet and broadband and facilities related to the launching, operation or use of satellites, broadcasting facilities;
5. Facilities, equipment and systems for the supply, distribution and delivery of potable water, desalination, water or waste water treatment or disposal facilities, drainage, irrigation, sewerage and sewage collection and treatment facilities, solid waste management including waste collection and disposal;
6. Real estate, land reclamation projects, environmental management, remediation and clean-up projects, urban development, industrial estates, housing including social housing, street lighting, government and public buildings including office accommodation, prisons, courts, sport, recreation and leisure facilities, tourism development projects, trade fair complexes, convention, exhibition and cultural centres, public markets, gardens and parks, warehouses, property management;
7. Facilities and services in the health sector including hospitals;
8. Facilities and services in the education and training sector including schools, colleges, universities and residential facilities, training, research and development.

## **ANNEX II**

### **CONTENTS OF A PUBLIC-PRIVATE PARTNERSHIP AGREEMENT**

In addition to the issues that the parties consider to be appropriate, a public private partnership Agreement shall provide for:

- (a) the definition and description of the nature and scope of services to be provided, the function to be discharged or the facility to be developed, improved or managed by the private partner;
- (b) specify the commercial terms of the public private partnership agreement including the basis on which payments will be made and how charges may be set;
- (c) the allocation of risks between the State, the private partner and other participants and the protection each party has from exposure to the assumed risks of the other party;
- (d) elements concerning competition;
- (e) the private partner's right to implement and manage the project over the life of the agreement with limits on powers, rights and obligations of parties spelt out in the agreement;
- (f) the right, if any, that the private partner or the State or both shall have over income, in connection with the function, service or facility, or any property in the public private partnership agreement;
- (g) the return of assets, if any, to the State, at the termination or expiry of the public private partnership Agreement;
- (h) the source and structure of the project's financing and plans for development, design, building, rebuilding, repair, replacement, improvement, maintenance, operation or administration of a facility;
- (i) the duration of the agreement that allows lenders to be repaid and investors to earn a reasonable return on investment;
- (j) ensure the public private partnership agreement is affordable to the State and to the users over the lifetime of the agreement;
- (k) the support agreements and assistance that the State may provide to the private partner in obtaining licences and permits to the extent necessary for the implementation of the public private partnership project, incentives;
- (l) address concerns that arise for investors and lenders generally such as investment protection, the right to maintain on-shore and off-shore foreign currency accounts, convertibility of revenues, availability of foreign exchange, repatriation of profits, the use of insurance proceeds, protection against political risks or governmental interference, and the ability to pledge and transfer shares in the project company;

- (m) the rights, performance indicators and verification mechanisms available to the State to establish if value for money is being obtained from the public private partnership agreement, to assure compliance by the private partner with the conditions of the public private partnership agreement, including compliance with clearly defined service requirements and quality standards, adequate maintenance of the facility, compliance with the approved design and other standards for building, repair or improvement projects, and if there is a failure to achieve requirements or standards to fulfil the terms of the public private partnership agreement the provisions for penalties, termination or other events;
- (n) the rights and obligations of the parties upon expiry or termination of the public private partnership agreement, remedies in the event of default by either party, State step-in rights and lender step-in rights, and the manner for calculating compensation due to either party in the event of termination of the public private partnership Agreement;
- (o) the extent to which either party may be exempt from liability for failure or delay to comply with any obligation under the agreement owing to circumstances beyond its reasonable control;
- (p) guarantees of performance, bonds or other security to be provided and insurance policies to be maintained by the private partner in connection with the implementation of the public private partnership agreement;
- (q) procedures for the review and approval of engineering designs, construction plans and specifications by the State and the procedures for testing and final inspection, approval and acceptance of the public private partnership Project;
- (r) the rights of the State or by whoever represents it to inspect the works to be performed and services to be provided by the private partner, and the conditions and extent to which the State or whoever represents it may order variations in respect of the works and conditions of service, or take such other reasonable actions as they may find appropriate to ensure that the public private partnership Project is properly operated and the services are provided in accordance with the applicable legal and contractual requirements;
- (s) sustainability of project, environmental, social and community related provisions;
- (t) the extent of the private partner's obligation to supply to the Government or to the regulatory agency, as appropriate, reports and other information on its operations;
- (u) provisions for managing change over the period of the agreement, mechanisms to deal with additional costs and other consequences that might result from any order issued by the Government or a regulatory agency, including any compensation to which the private partner may be entitled and the circumstances under which the public private partnership agreement may be modified in order to maintain economic and financial balance between the parties;
- (v) any rights of the Government to review and approve major contracts to be entered into by the private partner, in particular with the private partner's own shareholders or other affiliated persons;
- (w) the rights and obligations of the parties with respect to confidential information;
- (x) the governing law;
- (y) dispute resolution mechanisms.