
DECREE No. 379

THE LEGISLATIVE ASSEMBLY OF THE REPUBLIC OF EL SALVADOR,

WHEREAS:

- I.- Article 101 of the Constitution of the Republic establishes that the economic order must essentially respond to principles of social justice, which aim to ensure an existence worthy of human beings for all of the people of the country, where the State is in charge of promoting economic and social development through greater production, productivity and the rational use of resources, as well as of promoting all of the different productive sectors and to defend the interests of consumers.
- II.- Article 102 of the Constitution of the Republic guarantees economic freedom, to the extent that it is not contrary to the public interests.
- III.- Article 113 of the Constitution of the Republic sets out the promotion and protection of associations of an economic nature that tend to increase national wealth through a better use of natural and human resources, and to promote a fair distribution of profits from their activities, and that this kind of associations may allow the participation of individuals and of the State, of municipalities, and of public utility entities.
- IV.- Productive and economic development is one of the main objectives of the Government of the Republic, specifically with regards to economic initiatives with spillover potential, so that it may incentivize the generation of jobs and income, as well as strengthening the creation of wealth in the territory in order to favor a more equitable distribution thereof.
- V.- Promoting public investment jointly between the State and private investors will enhance the development of large national public interest projects on public works, public services and activities, which will boost the national economy and social development, by increasing the rates of public investment, the productive capacity, allowing the State to increase social investment.
- VI.- Public private partnership contracts properly regulated by law shall, under a framework of legal certainty, grant the State the infrastructure and equipment that is deemed necessary and strategic for achieving its goals; under a framework of collaboration with the private sector, which shall provide resources, skills and knowledge for the undertaking of projects that will benefit the population.

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- VII.- Public private partnerships are medium and long-term investment modalities, which incorporate techniques, risk distribution, objectives and resources that are preferably private in nature.
- VIII.- For the reasons set out above, it becomes necessary to issue a law that allows for the establishment of a regulatory framework for the development of projects, of Public Private Partnerships, for the provision of public interest infrastructure and public services, in an effective and efficient manner.

THEREFORE,

in the exercise of its constitutional powers and at the behest of the President of the Republic, through the ministers of Finance and of the Economy,

The following is DECREED:

SPECIAL LAW ON PUBLIC PRIVATE PARTNERSHIPS

**TITLE I
GENERAL PROVISIONS**

SOLE CHAPTER

Purpose of the Law

Art. 1.- This Law aims to establish the regulatory framework for the development of Public Private Partnership projects for the provision of infrastructure and general and public interest services in an effective and efficient manner. Within a framework of legal certainty, the private sector will provide the financial resources, skills, and knowledge necessary so that, jointly with the State, said projects can be undertaken for the benefit of the population.

Authorized Institutions

Art. 2.- Public Private Partnership projects may be undertaken by the Executive Branch and its agencies, autonomous institutions, including the Executive Hydroelectric Commission of the Lempa River, as well as municipalities. Hereinafter, said institutions will be called Contracting State Institutions.

Scope of Application

Art. 3.- This Law is applicable to all contracts in which State entities commission, from a private investor, the design and construction of infrastructure and associated services, or the construction, repair, improvement or equipment thereof; activities all of which

involve the operation and maintenance of said infrastructure. They may also pertain to infrastructure for the provision of public services or the operation or performance of an activity of general interest.

That the capital expenditure and the operation and maintenance expense at its present value for of the Public- Private Partnership project must exceed the equivalent of forty-five thousand times the currently valid minimum monthly wage for the trade and services sector.

The following are excluded from the scope of this Law: projects in the fields of health, social security, including the Salvadoran Social Security Institute (ISSS, for its Spanish initials), public security, justice with regards to custody, rehabilitation, and prison work of interns, water, education, including the University of El Salvador.

Contract Modalities for Public Private Partnerships

Art. 4.- Public Private Partnership Contracts may adopt any of the following modalities or combinations thereof; they must also include ancillary stipulations to the main modality described in each case:

- a) Partnerships in which in the contracting State institution delivers to the private participant goods or material works that are public domain so that, as the case may be, they can build, expand, equip, repair, or maintain an infrastructure that will be utilized and aimed at providing a public service, through a concession of the public infrastructure. These Partnerships are divided into:
 - i) Those involving the delivery of goods or material works that are national assets for public use.
 - ii) Those involving the delivery of goods or material works that are fiscal assets.
- b) Partnerships in which the private participant allocates its own assets in order to provide a public service, through a public service concession. These Partnerships are divided into:
 - i) Those that do not affect private assets within the contract and, therefore, said assets will not be transferred to the State upon completion thereof.
 - ii) Those affecting assets used by the private entity and, therefore, said assets will be transferred to the State upon completion of the contract, by operation of law.
- c) Partnerships involving the utilization or undertaking of a general interest activity. These are divided into:
 - i) Those involving handing over fiscal assets to the private entity for their utilization, including those belonging to autonomous institutions and municipalities.

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- ii) Those involving the private entity allocating its own assets.

The Attorney General of the Republic shall represent the State in contracts pertaining to the purchase of real estate in general and movable property, subject to competitive bidding; furthermore, The Attorney General of the Republic will ensure that concessions of any kind granted by the State meet the requirements, conditions, and objectives set out therein and conduct all actions related thereto, in accordance with the provisions of Article 193, paragraphs 5 and 10 of the Constitution of the Republic.

Art. 4-A.- THE ATTORNEY GENERAL OF THE REPUBLIC SHALL REPRESENT THE STATE IN PUBLIC PRIVATE PARTNERSHIP CONTRACTS DEVELOPED UNDER ANY OF THE MODALITIES REFERRED TO IN ART. 4 OF THIS LAW, AND SHALL FURTHERMORE ENSURE THAT, IN CONCESSIONS OF ANY KIND GRANTED BY THE STATE, THE REQUIREMENTS, CONDITIONS AND GOALS SET FORTH THEREIN ARE MET AND SHALL CONDUCT ALL ACTIONS RELATED THERETO, IN ACCORDANCE WITH THE PROVISIONS OF ARTICLE 193, PARAGRAPHS 5 AND 10 OF THE CONSTITUTION. (1)

Public Private Partnership Contracts Addressing the Economic Characteristics of the Project

Art. 5. Taking into account their economic characteristics, the contracts from the previous article shall be classified into:

- a) SELF-SUSTAINABLE: THOSE IN WHICH REVENUES FROM FEES OR SECURITIES CHARGED DIRECTLY TO USERS COVER PROJECT COSTS DURING THE PERIOD OF THE CONTRACT AND ALLOW THE PRIVATE PARTICIPANT TO OBTAIN A PROFIT THAT IS ADEQUATE WITH REGARDS TO THE RISK THAT IT TAKES ON AND FOR THE CONDITIONS OF THE MARKET, WITHOUT DEMANDING ANY RESOURCES OR GUARANTEES OF ANY KIND FROM THE STATE. ASSETS THAT ARE OWNED BY THE STATE BEFORE PROJECT APPROVAL MAY BE DELIVERED BY THE PROESA BOARD OF DIRECTORS UNDER THE TERMS OF THE PREVIOUS ARTICLE WITHOUT THIS BEING IN DETRIMENT OF DEEMING THE PROJECT SELF-SUSTAINING. (1)
- b) Co-financed: those in which the economic sustainability of the project, during the entirety or some part of the contract, demands resources or guarantees from the State of one of the following types, or a combination of both:
 - i. Those entailing firm fiscal expenditure.
 - ii. Those entailing contingent fiscal expenditure.

The criteria to specify this classification must be set out in the respective tender guidelines.

The Responsibility of the State in Public Private Partnership contracts will always be limited to its investment.

Definitions

Art. 6.- For purposes of interpretation of this Law, the following definitions shall be used:

- a) General interest activities: those aimed at the promotion of strategic sectors of the economy by promoting technology, science, and innovation, as well as research and development;
- b) Value for money analysis: qualitative or quantitative assessment which helps to determine whether the proposed Public Private Partnership is, from a social and economic standpoint, the best modality for providing public services or infrastructure.
- c) Tender Guidelines: documents with the participation, technical, economic, and legal rules based on which the bidders will compete;
- d) Act of God or *force majeure*: event that is unforeseen by the parties at the time of submitting the bid and which, upon happening, makes it physically and totally impossible to comply with all or some of the obligations under the Public Private Partnership contract;
- e) Public Private Partnership Contract or contract: agreement signed between one or more contracting State institutions and the private participant, whose goal is, through the various contract modalities described in Article 4 of this Law, to provide infrastructure and to efficiently provide public services, of a general interest, as well as other private services complementary thereto;
- f) Technical standards: technical characteristics that the works and services must meet for the undertaking of a Public Private Partnership project and which enable compliance with a given level of service;
- g) Construction phase: period between the date of commencement of the period to build the infrastructure or facility in question, by the private participant, and the completion of facilities or infrastructure works that enables the committed service to start being delivered;
- h) Operational phase: period between the start of service delivery and termination of the Public Private Partnership contract;
- i) Service levels: set of measurable results, in terms of functionality, that a work or service of a Public Private Partnership project must present during its operational phase, in accordance with the provisions of the Public Private Partnership contract;
- j) Bidder: domestic or foreign legal entity or entities competing in the tender process for a Public Private Partnership project;
- k) Private Participant: Legal entity who has signed a contract for the implementation of a Public Private Partnership project;

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- l) Public Private Partnership Project or project: proposal to implement a series of activities that enable the provision of infrastructure, public services of general interest, subject to the Public Private Partnership contract, under any one of the modalities set forth in Article 4 of this Law;
 - m) Project Supervisor: natural person or legal entity appointed by the State Contracting institution or institutions who has the function of ensuring the proper management of the contract during the construction phase of the project;
 - n) User: natural person or legal entity who benefits directly and in common with other persons from the services of a Public Private Partnership project and its additional and complementary services, according to its objective and goal; and,
 - o) Regulating entity or sector inspector: competent agency to regulate and inspect a specific sector, such as: the Civil Aviation Authority (AAC, for its Spanish initials), the Maritime Port Authority (AMP, for its Spanish initials), the General Superintendency of Electricity and Telecommunications (SIGET, for its Spanish initials), and other sector-specific regulators.

Other Authorizations

Art. 7.- The licenses, authorizations, approvals, or similar complementary acts, including the concessions of natural resources governed by special laws, as may be necessary for performing certain activities under a contract, must be obtained prior to signing said contract, without detriment to those which, by their very nature, must be arranged at a later point in time.

General Principles

Art. 8.- All actions related to the provisions of this Law, shall observe the following general principles:

- a) Legality: government institutions, private investors, whether acting as bidders, contractors, or subcontractors, employees and public officials and any natural person or legal entity involved in contracting or undertaking public-private partnership projects and in the development, implementation, and enforcement of the respective contracts; must act subject to domestic law;
- b) Constitutional supremacy: in the implementation of this law and its regulations, strict compliance with the provisions of the Constitution of the Republic must be observed;
- c) Supremacy of the public interest: in the implementation of this law, the public interest shall prevail over private interest;

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- d) Directorship of the State: Public Private Partnership projects will be conducted under the principle that only the State possesses directorship, competence and powers for planning, control, sanction, punish, regulate, supervise, and monitor the performance of the respective contracts through the corresponding institutions. The State shall ensure the common good in the exercise of its directorship;
 - e) Temporality: contracts must provide for a maximum period, which under no circumstance, including any extensions thereof, may exceed forty years. All contracts exceeding the maximum period or which omit setting forth said period shall be declared null and void;
 - f) Principle of preservation of State Ownership: when the Public Private Partnership project requires the concession of assets belonging to the State for the construction of the work or provision of service, the State will retain, at all times, ownership over said assets; the State and the private participant may not, under any circumstances, transfer the ownership of the asset under the concession;
 - g) Investment incentive: Public Private Partnership projects seek to encourage, by way of the existence and respect for clear and transparent legal norms, private investment in public works projects, and public or general interest services, that will benefit the development of the country as well as effectively fulfilling the needs of citizens;
 - h) Transparency, advertising, and social audit: the public private procurement procedure must include mechanisms to ensure advertisements for the actions and to enable the adequate performance of social audits, in order to ensure the protection and promotion of the rights of users and of the population at large. All actions relating to Public Private Partnership projects and actions involving fiscal commitments from the State and effects on users will be public and subject to strict accountability measures;
 - i) Social profitability: Public Private Partnership projects must respond to achieving the common good, clearly establishing the general and specific objectives as well as the benefits that the State intends to provide to citizens;
 - j) Economic efficiency: the mechanisms contemplated for carrying out Public Private Partnership contracts shall be approved only when it is proven, through economic studies and expert advice, that they are an efficient, effective, and sustainable option for the development of infrastructure and the provision of services;
 - k) Risk distribution: Public Private Partnership contracts shall clearly set out the risks specifically taken on by the contracting State institution and the private participant;
 - l) Competition: tender processes must be transparent and competitive, in order to promote the participation of the largest amount of economic agents, respecting the principles of non-discrimination, equality, and widespread dissemination, and thus enable selecting the private participant who can offer the work, service, or activity of general interest in the most efficient and effective manner;

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- m) Legal certainty: this principle acknowledges the certainty of law and is deemed to pertain to public interest, the unrestricted enforcement of the obligations related to the actions and contracts covered under this Law. Contracting parties that fail to comply or that alter any of the provisions of Public Private Partnerships contracts, shall be liable for damages in accordance with current legislation, and shall be sanctioned accordingly;
 - n) Fiscal responsibility: it is expressed both in the assessment of the payment capacity of the State, prior to the acceptance of commitments through Public Private Partnership contracts, as well as in the exercise of the power to verify that contracting entities include future obligations and strict compliance with the limits of future commitments in their planning;
 - o) Oversight and inspection by the state: it is the effective verification that has the intention of fulfilling the commitments made through the Public Private Partnership contract. In addition to the oversight responsibility given to the contracting State institution, independent inspections shall also be taken into consideration, aimed at safeguarding both the general public interest and the general interest of users, and which will be entrusted to the Public Private Partnerships Inspection Entity or whoever acts in this capacity;
 - p) Corporate Social Responsibility: during all phases of implementation of Public Private Partnership contracts, private participants must incorporate and maintain best practices in the field of corporate social responsibility;
 - q) Environmental Sustainability: Public Private Partnership projects must be designed and bid upon taking into consideration the highest environmental standards and compliance with regulation on environmental impact; the projects must be performed by the private participant in full compliance with all enforceable environmental standards; and,
 - r) Worker protection principle: all Public Private Partnership contracts must stipulate the obligation of the parties to respect and protect the rights of workers; all private participants, contractors and the administrative authorities entrusted with the responsibility for the enforcement of this Law must promote the creation and maintenance of adequate working conditions for their workers.

Worker Rights

Art. 9. The enforcement of this Law shall not imply weakening or reducing the protections afforded in international treaties and agreements and in currently valid labor legislation; consequently, the State cannot waive these regulations as a way to encourage investment in Public Private Partnerships.

Private participants must ensure compliance with the following fundamental rights and principles:

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- a) Freedom of association and freedom to unionize, and the effective acknowledgement of the right to collective bargaining;
 - b) The elimination of all forms of forced or compulsory labor;
 - c) The effective abolition of child labor; and,
 - d) The elimination of discrimination pertaining to employment and occupations.

These obligations shall also be applicable to the subcontractors of private participants, and the latter will be responsible for ensuring their compliance.

Contracting State institutions must ensure full respect for these principles and rights in the Public Private Partnership contracts that are signed. They must also ensure that, in the assignment of contracts authorized by this Law, the private participant transferor has complied with all its labor obligations and that the assignee ensures the same working conditions agreed upon with workers of the Public Private Partnership project.

**TITLE II
INSTITUTIONAL FRAMEWORK**

**CHAPTER I
ADMINISTRATIVE AUTHORITIES AND THEIR FUNCTIONS**

Contracting State institutions and their Functions

Art. 10.- Contracting State institutions, in their quality of procuring institutions and contract managers, shall have the following functions:

- a) Within the framework of the Contracting State institution's planning for the provision of services, to identify the Public Private Partnership projects and prepare all respective studies;
- b) Develop the tender process, awarding, and signing the contract;
- c) Ensure that Public Private Partnership contracts duly stipulate the underwriting of bank surety bonds, guarantees, or insurance by the private participant in accordance with the provisions of this Law and the risk allocation set forth in the tender guidelines and in the respective contract, where appropriate;
- d) Fulfill contractual obligations;
- e) Oversee that the private participant fulfills its contractual obligations;
- f) Oversee the proper development of the construction works, and to report to the governing body all

contractual breaches during this phase;

- g) SHOULD A BREACH OF THE OBLIGATIONS OF THE PRIVATE PARTICIPANT BE DETECTED DURING THE OPERATIONAL PHASE, NOTIFICATION MUST BE GIVEN TO THE OFAPP IN ORDER FOR IT TO PROCEED TO ASCERTAIN THE REPORTED EVENT AND, IF IT IS RATIFIED, TO TAKE ALL NECESSARY MEASURES OR APPLY ALL CORRESPONDING SANCTIONS OR PENALTIES; and, (1)
- h) All other functions or powers that this Law or the Regulation assigns thereto.

Creation of the DAPP

Art. 11.- REPEALED (1)

Agencies of the DAPP

Art. 12.- REPEALED (1)

Composition of the DAPP Board of Directors

Art. 13.- REPEALED (1)

FUNCTIONS OF THE PROESA BOARD OF DIRECTORS (1)

Art. 14.- THE PROESA BOARD OF DIRECTORS SHALL HAVE THE FOLLOWING FUNCTIONS, IN ALL MATTERS THAT PERTAIN TO THIS LAW:

- a) PROPOSE PUBLIC PRIVATE PARTNERSHIP POLICIES TO THE PRESIDENT OF THE REPUBLIC;
- b) APPROVE PUBLIC PRIVATE PARTNERSHIP PROJECTS, THEIR TENDER GUIDELINES, AND DRAFT CONTRACTS, AS WELL AS CONTRACTUAL MODIFICATIONS IN THE TERMS SET FORTH IN THIS LAW, IN THE EVENTS IN WHICH IT IS APPLICABLE;
- c) WITH THE COMPETENT AUTHORITIES, PREPARE AND COORDINATE ALL PLANS, POLICIES, AND STANDARDS FOR THE UNDERTAKING AND GOOD PERFORMANCE OF PUBLIC PRIVATE PARTNERSHIP CONTRACTS IN ALL ITS VARIOUS FORMS;
- d) ENSURE THE PROPER DEVELOPMENT OF PUBLIC PRIVATE PARTNERSHIP POLICIES;
- e) DEFINE THE APPROPRIATENESS OR INAPPROPRIATENESS OF HOLDING ANOTHER TENDER PROCESS, ONCE THE VALIDITY OF THE CONTRACT HAS COME TO AN END OR IF THE CONTRACT HAS BEEN TERMINATED DUE TO ANY OTHER CAUSE, UPON THE PROPOSAL OF THE STATE CONTRACTING INSTITUTION;
- f) TO REPORT ANNUALLY TO THE PRESIDENT OF THE REPUBLIC AND THE LEGISLATIVE

ASSEMBLY ON ITS ADMINISTRATIVE, FINANCIAL, AND TECHNICAL MANAGEMENT, AS WELL AS ON THE TRANSPARENCY MECHANISMS AND ACTIONS IMPLEMENTED IN PUBLIC PRIVATE PARTNERSHIP CONTRACTS SIGNED; AND,

- g) CONDUCT ALL OTHER POWERS AND COMPLY WITH ALL OTHER FUNCTIONS OR ATTRIBUTIONS THAT THIS LAW OR THE REGULATION ASSIGN THERETO. (1)

FUNCTIONS OF PROESA (1)

Art 15.- WITHOUT DETRIMENT TO THE POWERS CONFERRED THERETO WITHIN OTHER LAWS, PROESA SHALL HAVE THE FOLLOWING FUNCTIONS, IN REGARDS TO THIS LAW:

- a) TO ADVISE THE CONTRACTING STATE INSTITUTIONS, THAT AIM TO FOSTER PUBLIC PRIVATE PARTNERSHIP PROJECTS, IN ITS RESPECTIVE FIELDS OF COMPETENCE;
- b) IDENTIFYING OPPORTUNITIES AND PROMOTING THE PUBLIC PRIVATE PARTNERSHIP MECHANISM IN PUBLIC INSTITUTIONS CAPABLE OF PROVIDING THE SERVICES PRIORITIZED BY THE PROESA BOARD OF DIRECTORS;
- c) PROMOTING THE PUBLIC PRIVATE PARTNERSHIP MECHANISM AND THE PROJECT PORTFOLIO AMONG INVESTORS AND POTENTIAL FINANCIERS AND THE COMMUNITY AT LARGE;
- d) APPOINT THE MEMBER THAT SHALL REPRESENT PROESA IN THE ASSESSMENT COMMISSIONS FOR THE TENDER PROCEDURES;
- e) TO PUBLISH IN ITS INSTITUTIONAL WEBSITE ALL ACTIVITIES AND RESOLUTIONS RELATED TO PROJECTS, CONTRACTS, AND THEIR IMPLEMENTATION, ACCORDING TO THE INFORMATION RECEIVED FROM CONTRACTING STATE INSTITUTIONS;
- f) MAINTAINING A WIDESPREAD POLICY ON PUBLIC INFORMATION AND ACCOUNTABILITY TO THE CITIZENRY; AND,
- g) TO FULFILL ALL OTHER FUNCTIONS OR POWERS THAT THIS LAW OR THE REGULATION ASSIGNS THERETO. (1)

On the Executive Director

Art. 16. - REPEALED (1)

Functions of the Legal Unit

Art. 17.- REPEALED (1)

On the Executive Director

Art. 18.- REPEALED (1)

Functions of the Ministry of Finance

Art. 19.- The Ministry of Finance, by itself or through its agencies, and without detriment to the powers conferred thereto by other laws, shall have the following functions with regards to this Law:

- a) Assess risk allocation and fiscal impacts of Public Private Partnership projects;
- b) REQUEST AND OBTAIN THE NECESSARY INFORMATION FROM PROESA, FROM THE STATE CONTRACTING INSTITUTION, OR FROM ANY OTHER APPLICABLE STATE INSTITUTION IN ORDER TO FULFILL ITS ROLE OF EVALUATING PROJECTS; (1)
- c) Verify and issue an opinion on the value for money assessment;
- d) Issue a favorable or unfavorable financial ruling on the fiscal implications of the tender guidelines and the contract, as well as any amendments thereto in accordance with Article 63 of this Law;
- e) Issue a favorable or unfavorable financial ruling on the early termination of a Public Private Partnership contract and on whether to hold another tender process for a contract that comes to an end for any reason;
- f) Verify the fiscal consistency of quantifiable firm and contingent future payment commitments, arising from each Public Private Partnership project corresponding to the Executive Branch;
- g) For every project from the Budget Law, to verify that the Contracting State institutions include the corresponding allocation of the necessary resources to meet the commitments arising from Public Private Partnership contracts;
- h) Verify that the Contracting State institutions of the Executive Branch keep a record of quantifiable firm and contingent future payment commitments arising from the signing of each Public Private Partnership contract; and,
- i) Conduct all other powers and comply with all other functions or attributions that this Law or the Regulation assigns thereto.

Fiscal Obligations Arising from the Contracts

Art. 20.- IN THE EVENTS WHERE THE CONTRACT, OR ITS MODIFICATIONS, STIPULATE PAYMENTS FROM THE STATE TO THE PRIVATE PARTICIPANT OR PAYMENTS FROM THE PARTICIPANT TO THE STATE THAT EXCEED ONE FISCAL YEAR, DURING THE DURATION OF THE CONTRACT THE RESPECTIVE STATE CONTRACTING INSTITUTION SHALL INCLUDE IN ITS PROPOSED BUDGET FOR EACH FISCAL YEAR THE ALLOCATION EQUIVALENT TO THE PAYMENT THAT HAS BEEN STIPULATED, AS WELL AS AN ESTIMATE OF THE INCOME TO BE RECEIVED AS PAYMENTS FROM THE PRIVATE PARTICIPANT, IF APPLICABLE.

FIRM OBLIGATIONS EXCEEDING THE FISCAL YEAR MUST BE TREATED AS PUBLIC DEBT ONLY FOR FISCAL ACCOUNTING PURPOSES. THE MINISTRY OF FINANCE MUST ISSUE THE NECESSARY ACCOUNTING STANDARDS NECESSARY FOR THE VALUATION AND REGISTRATION OF FIRM AND CONTINGENT COMMITMENTS. IN ADDITION, AN UPDATED CONTROL OF THESE COMMITMENTS MUST BE KEPT. THE PROESA BOARD OF DIRECTORS WILL ENSURE THAT AN INDEPENDENT EVALUATION BE PERFORMED AT LEAST EVERY THREE YEARS ON THE EXPECTED AMOUNT OF THE CONTINGENT COMMITMENTS.

THE ACCRUED AMOUNT OF QUANTIFIABLE FIRM AND CONTINGENT PAYMENTS, NET OF CONTINGENT INCOME, INCURRED UNDER PUBLIC PRIVATE PARTNERSHIP CONTRACTS, CALCULATED TO PRESENT VALUE, CANNOT EXCEED THREE PERCENT OF THE GROSS DOMESTIC PRODUCT FOR THE IMMEDIATELY PRECEDING YEAR. (1)

CHAPTER II

INSPECTION AGENCY FOR PUBLIC PRIVATE PARTNERSHIPS

Creation and Domicile

Art. 21.- Creation of the Inspection Agency for Public Private Partnerships, hereinafter OFAPP (for its Spanish initials), as a public institution with legal status, its own assets, of a technical nature, and with administrative autonomy to exercise the attributions and duties referred to in this Law.

Its domicile shall be the city of San Salvador, without detriment to any agencies it might establish in other cities.

Objective

Art. 22.- The OFAPP shall have the objective of conducting the technical supervision of Public Private Partnerships under this Law. In addition, it shall promote the exercise of the rights of users established therein.

In areas where sectoral regulating or supervisory entities may exist, the powers of the OFAPP referred to in this Law shall be exercised by said sectoral entities.

The specific regime of each sectoral regulator or supervisor shall be supplemental to the implementation of the technical supervision and regulation regime for Public Private Partnership

contracts under this Law. Should conflict arise between the technical supervision and regulation regime created by this Law and the specific regime of each sectoral regulator or supervisor, the former shall prevail, except for punitive actions, for which the corresponding sanctions regime of each sectoral regulator or supervisor shall be applied in a preferential manner.

Each time this Law refers to the functions and powers of OFAPP to regulate, supervise, and impose sanctions and penalties, it is understood that it also refers to existing sectoral regulatory or supervisory entities.

Start of Operations of OFAPP

Art. 23.- OFAPP SHALL START OPERATIONS WHEN THE PROESA BOARD OF DIRECTORS APPROVES THE APPROPRIATENESS OF THE FIRST PUBLIC PRIVATE PARTNERSHIP PROJECT, FOR WHICH, UNDER THE LEGAL SYSTEM, THERE ARE NO SECTORAL REGULATING OR INSPECTION ENTITIES.

PROESA SHALL BE RESPONSIBLE FOR INFORMING THE AUTHORITIES THAT WILL APPOINT THE OFAPP BOARD OF DIRECTORS SO THAT THEY MAY PROCEED WITHIN A PERIOD NOT EXCEEDING NINETY DAYS AND APPOINT ITS MEMBERS UNDER THE TERMS SET FORTH IN ARTICLES 24 AND 25 OF THIS LAW. (1)

On the Members of OFAPP

Art. 24.- The OFAPP shall consist of four members who meet the following requirements:

- a) Be fully able to exercise their civil rights;
- b) Possess ten years of relevant professional experience and be renowned in fields related to Public Private Partnership contracts, such as economics, legal sciences, business administration, public accounting, engineering, and other related fields;
- c) Not be subjected to any of the following disqualifications:
 - i) Having a criminal record or have been convicted at an audit trial.
 - ii) Having accepted an inheritance, bequest, or donation from any of the parties involved in a Public Private Partnership contract subject to the technical supervision of OFAPP.
 - iii) Being a partner in any bidder or private participant subject to the technical supervision of OFAPP.
 - iv) Being a part or have an interest in any litigation, act, contract, or guarantees

linked to the signing or performance of Public Private Partnership contracts, or be related to companies that find themselves in the described situation in projects subject to the technical supervision of OFAPP.

- v) Being related to the fourth degree of consanguinity or to the second degree of affinity to any private participant subject to the supervision of OFAPP or to the highest authority of the Contracting State institution subject to the supervision of OFAPP.

Appointment of the Members of OFAPP

Art. 25.- OFAPP members shall be appointed as follows:

- a) One regular member who will chair it and their respective alternate, appointed by the President of the Republic;
- b) One regular member, and their respective alternate, appointed by the Supreme Court of Justice;
- c) One regular member, and their respective alternate, appointed by the Ministry of Public Works, Transportation, Housing and Urban Development from a list proposed by the engineering faculties of legally accredited universities; and,
- d) One regular member, and their respective alternate, appointed by the president of the Central Reserve Bank of El Salvador, from a list proposed by the legally incorporated public accounting unions.

In the event of absence or impediment, the alternate members will replace the respective regular members. Apart from these cases, they may attend all meetings of the entity; they may be granted the floor, but shall have no vote.

The mechanism for the election of the members of the OFAPP shall be based on criteria of suitability and competence, and will be selected through a transparent and public process to ensure their independence, which will be regulated by each of the institutions or agencies.

The shortlists shall be proposed within thirty days prior to the end of the period of the regular member. If no shortlists are submitted during the aforementioned period, the chairman of OFAPP shall propose them.

The first members of OFAPP shall hold office for the following periods:

- a) The member appointed by the President of the Republic and their respective alternate, for a period of eight years;
- b) The member appointed by the Supreme Court of Justice and their respective alternate, for a period of six years;

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- c) The member appointed by the Ministry of Public Works, Transportation, Housing, and Urban Development and their respective alternate, for a period of four years; and,
 - d) The member appointed by the Central Reserve Bank of El Salvador and their respective alternate, for two years.

Hereinafter, the term of office for officials will be eight years. Under no circumstance may the regular and alternate members be reelected for their position.

Duration, Dedication, Removal, and Remuneration

Art. 26.- The president of OFAPP shall have an exclusive dedication. The other three members may conduct other activities that do not involve any of the grounds for disqualification described in the previous article.

Additionally, the four members may not be affected by the grounds for disqualification described in Article 24, paragraph c), subparagraphs i) and iii) for the duration of their appointment to the position, which shall be considered grounds for incompatibility. Said circumstances, should they occur during their term in office, shall constitute sufficient grounds for removal, in accordance with the procedure set out in the Regulation of this Law.

OFAPP members must also leave their positions due to:

- a) Expiration of the term for which they were appointed;
- b) Resignation
- c) Physical or psychological incapacity to perform the duties of the position; and,
- d) Serious offenses in the fulfillment of their obligations as members. Serious offenses shall mean the unjustified failure to attend three consecutive sessions or six sessions during a calendar semester.

The Chairman of OFAPP shall receive a salary, while the other three members shall receive a *per diem* for each meeting they attend, as set forth in the Regulation.

Sessions

Art. 27.- OFAPP sessions shall be held with the attendance of at least three of its members and the decisions will be made by the majority of attendees. In the event of a tie, the deciding vote shall be that of the Chairman.

OFAPP members must abstain from hearing cases involving any of the grounds for disqualification set forth in Article 24, paragraph c), subparagraphs ii), iv) or v) of this Law.

The Regulation shall establish the necessary standards for the operation of the OFAPP and for the proper performance of the functions entrusted thereto; and shall determine, among other things, the rules for the notice of meetings, adoption of decisions, and the like.

Functions

Art. 28.- The functions of OFAPP are as follows:

- a) To supervise, in a technical and specialized manner, all Contracting State institutions and private participants in the performance of their functions, relating to the compliance of service levels, technical standards, and rules pertaining to the rates committed to under Public Private Partnership contracts;
- b) To issue an opinion regarding the tender guidelines that may be submitted thereto under Article 38 of this Law;
- c) TO REQUEST ALL NECESSARY INFORMATION FROM CONTRACTING STATE INSTITUTIONS AND PRIVATE PARTICIPANTS IN ORDER TO FULFILL THEIR DUTIES. IF SAID REQUIREMENTS ARE NOT ADDRESSED, THE OFAPP MAY INITIATE THE RESPECTIVE SANCTIONING PROCEDURE; (1)
- d) To entrust operational tasks for the inspection or verification of compliance with the standards of its competence to qualified third parties that are duly certified under the Regulation;
- e) To contract the services of third parties for the purposes described in paragraph a) of this article; and,
- f) All others set forth established by the Law and the Regulation.

The functions of the Chairman of the OFAPP shall be as follows:

- a) To legally represent the institution;
- b) TO INITIATE PROCEDURES TO IMPOSE SANCTIONS AND PENALTIES AGAINST CONTRACTING STATE INSTITUTIONS AND PRIVATE PARTICIPANTS BEFORE THE OFAPP, DUE TO ALLEGED BREACHES OF THEIR OBLIGATIONS STEMMING FROM THE LAW OR THE CONTRACT, RESPECTIVELY. (1)
- c) To hire personnel and define its internal regulation;
- d) To execute the resolutions that were issued by the members of the OFAPP;
- e) To ensure the optimal administrative operation of the OFAPP; and,

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- f) To frequently review its procedures, in order to ensure that they comply with their objective of efficiency and efficacy and that they are consistent with existing policies.

Assets

Art. 29.- The assets of the OFAPP shall be comprised as follows:

- a) An initial contribution from the State;
- b) The contributions annually assigned thereto by the Budget Law and those allocated under other general or special laws;
- c) The contributions from international cooperation received in order for it to conduct its activities;
- d) The proceeds from the sale of publications, whose value shall be determined by resolution of the entity;
- e) Donations made thereto and inheritances or bequests accepted thereby;
- f) Movable or immovable property, either tangible or intangible, transferred thereto or acquired on any basis and the proceeds from said property; and,
- g) The proceeds from the sale of assets, as well as interests and other income earned in the exercise of its functions.

Donations and allocations received by the OFAPP shall be exempt from all taxes and all payment or liens affecting them. Under no circumstance shall the OFAPP receive donations from private participants.

TITLE III

ON THE RIGHTS AND OBLIGATIONS OF THE PRIVATE PARTICIPANT

SOLE CHAPTER

Rights of the Private Participant

Art. 30. - The private participant shall possess the following rights, without detriment to others set forth under this Law and its regulations, the tender guidelines, and the contract:

- a) To receive, as sole compensation for the performance of the contract, the payments and revenue for services agreed therein;
- b) To obtain funding for the project in the way it deems convenient, including by placing securities of any kind in a market public offering. It may, also be the originator, issuer,

subcontractor, and carry out all activities aimed at obtaining financing through the securitization of payments, income, or rights under the contract;

- c) To be granted extensions either in the total or the partial timeframes of the contract if the delay or stoppage thereof is attributable to the State; in this case, the deadlines must then be extended to achieve periods that are equal to the delay or stoppage, without detriment to all appropriate compensation;
- d) To fully assign or transfer the contract once it is in the operational phase. This assignment or transfer can only be made to those who fulfill the requirements established in the tender guidelines, and subsequent to the approval of the contracting State institution and of the OFAPP, who shall have a maximum period of one hundred and twenty days to authorize or deny the assignment or transfer. Should neither institution make a statement during this period, the assignment or transfer shall be deemed to have been approved; and,
- e) To subcontract third parties for the execution of works or to provide services, in as much as it is not prohibited by the contract. At all times, the private participant shall be liable to the State and to the users in the event that the subcontractors breach any obligations.

Obligations of the Private Participant

Art. 31.- The private participant shall possess the following obligations, without detriment to others set forth under this Law and its regulations, the tender guidelines, and the contract:

- a) To execute the contracted work or to provide the services or general interest activities contracted, taking on all levels of risks set forth in the contract to comply with the contractual obligations;
- b) For the contractual modalities that so provide, to make payments to the State based on the profits obtained from the operation of the project;
- c) To fulfill the obligations, service levels, and technical standards set forth in the tender guidelines, the contract, this Law, and other relevant laws;
- d) To allow and facilitate inspections and audits aimed at verifying the correct performance of project implementation, and monitoring compliance with the conditions of quality, financial compensation, and technical adaptation thereof, in the terms defined in the Law;
- e) To annually submit to the contracting State institution, its financial statements audited by an external company, so that they can be published through the electronic channels of the contracting State institution;
- f) To submit to the contracting State institution reports on the development and

implementation of the contract, under the formal and temporary conditions set out in the tender guidelines, the contract, this Law, and its Regulation;

- g) To respond for the loss or deterioration of State assets involved in the awarded contract, if applicable;
- h) To formalize and register the contracts of its subcontractors, before they initiate work and services;
- i) To obtain municipal licenses or others that may be required for the undertaking of the Public Private Partnership project;
- j) To address the instructions issued by the OFAPP in the exercise of its powers of supervision and regulation; and,
- k) To comply with the existing body of law.

**TITLE IV
ON THE TENDER PROCESS**

**CHAPTER I
ACTIONS PRIOR TO THE TENDER PROCESS**

Project Feasibility Study

Art. 32.- IN ORDER TO INITIATE THE PROCEDURE FOR UNDERTAKING A PUBLIC PRIVATE PARTNERSHIP PROJECT, THE CONTRACTING STATE INSTITUTION SHALL SUBMIT, TO THE PROESA BOARD OF DIRECTORS, A FEASIBILITY STUDY FOR THE PROJECT, WHICH MUST CONTAIN, AT A MINIMUM:

- a) THE ECONOMIC FEASIBILITY OF THE PROJECT: IT MUST PROVE THAT THE PROJECT GENERATES SOCIAL ECONOMIC VALUE, AND USE A VALUE FOR MONEY ASSESSMENT TO DETERMINE THAT THE PUBLIC PRIVATE PARTNERSHIP MODALITY IS THE MOST EFFICIENT AND EFFECTIVE WAY TO ACHIEVE THE OBJECTIVES SOUGHT AFTER. IN PARTICULAR, IT MUST JUSTIFY THE SUITABILITY OF USING THE PUBLIC PRIVATE PARTNERSHIP MECHANISM AS AN ALTERNATIVE TO TRADITIONAL FORMS OF PUBLIC INVESTMENT. THE STUDY MUST CLASSIFY THE PROJECT ACCORDING TO ITS ECONOMIC NATURE AS SELF-SUSTAINABLE OR CO-FINANCED, PURSUANT TO THIS LAW;
- b) FISCAL IMPACT ASSESSMENT: IT MUST CONTAIN, AMONG OTHERS, THE ESTIMATED BUDGET AND FINANCIAL IMPACT DURING THE FISCAL YEARS IN WHICH THE PUBLIC PRIVATE PARTNERSHIP CONTRACTS ARE INTENDED TO BE PERFORMED, THE FINANCIAL PLANS THAT WILL BE CREATED TO UTILIZE ITS OWN BUDGET

ALLOCATIONS TO FINANCE THE PERFORMANCE OF THESE CONTRACTS; SIMILARLY, IT MUST INCORPORATE THE OBLIGATIONS THAT THE STATE WILL ACQUIRE UNDER THE PERFORMANCE OF THE RESPECTIVE CONTRACTS, IN ACCORDANCE WITH WHAT IS REGULATED UNDER THIS LAW; AND,

- c) SOCIAL IMPACT ASSESSMENT: AN ANALYSIS MUST BE CONDUCTED ON THE SOCIAL IMPACTS AND THEIR RESPECTIVE MITIGATION MEASURES.

WITHOUT DETRIMENT TO THE FOREGOING, AND IN THE CASES IN WHICH IT IS REQUIRED BY APPLICABLE LEGISLATION, THE FEASIBILITY STUDY MUST INCORPORATE A PRELIMINARY ANALYSIS OF ENVIRONMENTAL RISKS AND THEIR RESPECTIVE MITIGATION MEASURES, AS WELL AS ENGINEERING STUDIES AND OTHERS THAT ARE COVERED BY THE REGULATION.

THE CONTRACTING STATE INSTITUTION MUST SEND THE FEASIBILITY STUDY TO THE PROESA BOARD OF DIRECTORS, WHICH WILL VERIFY THAT IT MEETS THE REQUIREMENTS SET FORTH IN THE REGULATION. THE PROESA BOARD OF DIRECTORS SHALL ISSUE A RESOLUTION REGARDING THE ACCEPTANCE OF THE STUDY WITHIN NO MORE THAN FIVE DAYS FROM ITS RECEIPT. SAID RESOLUTION MUST BE PUBLISHED IN THE PROESA INSTITUTIONAL WEBSITE.

WITHIN A TIMEFRAME NOT EXCEEDING FIVE DAYS FROM THE ISSUANCE OF THE ACCEPTANCE RESOLUTION, THE PROESA BOARD OF DIRECTORS MUST SEND A COPY OF THE STUDY TO THE MINISTRY OF FINANCE, SO THAT IT MAY ISSUE ITS RULING, WHICH MUST BE PERFORMED WITHIN A TIMEFRAME NOT EXCEEDING FORTY-FIVE DAYS; THE STATEMENT OF THE MINISTRY OF FINANCE WITHIN THE AFOREMENTIONED TIMEFRAME WILL BE MANDATORY; SHOULD IT NOT BE ISSUED, A SANCTION WILL BE IMPOSED UNDER THIS LAW FOR BREACH OF THIS OBLIGATION ON THE EMPLOYEES OR OFFICIALS RESPONSIBLE THEREFOR.

WITH THE FAVORABLE RULING FROM THE MINISTRY OF FINANCE, THE PROESA BOARD OF DIRECTORS SHALL EITHER APPROVE OR REJECT THE PUBLIC PRIVATE PARTNERSHIP PROJECT. THE PROESA BOARD OF DIRECTORS SHALL ISSUE ITS RESOLUTION WITHIN A TIMEFRAME NOT EXCEEDING TWENTY DAYS FOR PUBLIC INITIATIVE PROJECTS, AND WITHIN A TIMEFRAME NOT EXCEEDING NINETY DAYS FOR PRIVATE INITIATIVE PROJECTS. WHEN THE PROESA BOARD OF DIRECTORS APPROVES THE PROJECT, IT SHALL ALSO AUTHORIZE THE INITIATION OF THE TENDER PROCESS IN THE SAME RESOLUTION. REJECTED PROJECTS SHALL BE RETURNED TO THE CONTRACTING STATE INSTITUTION THAT SUBMITTED THEM, WHICH MAY REFORMULATE THEM AND SUBMIT THEM AGAIN, IN COMPLIANCE WITH THE REQUIREMENTS OF THE LAW. (1)

Approval of the Prefeasibility of the Project

Art. 33. - FOR THE CASES IN WHICH THE CONTRACTING STATE INSTITUTION DOES NOT HAVE A FEASIBILITY STUDY, IT MAY SUBMIT TO THE PROESA BOARD OF DIRECTORS A PROJECT PREFEASIBILITY STUDY. IF THE PROESA BOARD OF DIRECTORS APPROVES IT, IT SHALL PROCEED TO CONDUCT THE FEASIBILITY STUDY. THE APPROVAL OF THE PREFEASIBILITY STUDY WILL HAVE A VALIDITY OF ONE YEAR, WHICH MAY BE EXTENDED BY A REASONED RESOLUTION. IF THE PROESA BOARD OF DIRECTORS REJECTS THE PREFEASIBILITY STUDY, IT SHALL BE RETURNED TO THE CONTRACTING STATE INSTITUTION,

WHICH MAY REDRAFT IT. THE PROESA BOARD OF DIRECTORS SHALL HAVE A PERIOD OF SIXTY DAYS FOR THE APPROVAL OR REJECTION OF THE PREFEASIBILITY STUDY.

IN THE CASE OF PUBLIC PRIVATE PARTNERSHIPS UNDER PARAGRAPH C) OF ARTICLE 4 OF THIS LAW, PRIOR TO THE PRESENTATION OF THE PROJECT TO THE PROESA BOARD OF DIRECTORS, THE CONTRACTING INSTITUTION MUST SUBMIT THE PRE-FEASIBILITY STUDY FOR THE APPROVAL OF THE SUPERINTENDENCY OF COMPETITION IN ORDER TO COMPLY WITH THE PROVISIONS OF SAID ARTICLE. THE SUPERINTENDENCY OF COMPETITION SHALL HAVE A PERIOD OF THIRTY DAYS, COUNTED FROM ITS SUBMISSION, TO ISSUE ITS RESOLUTION. IF THIS PERIOD EXPIRES WITHOUT ISSUING ITS RESOLUTION, IT SHALL BE PRESUMED AS FAVORABLE.

THE CONTENT OF THE PREFEASIBILITY STUDY SHALL BE REGULATED BY THE REGULATION. THE FEASIBILITY STUDY MAY BE PERFORMED BY AN INDEPENDENT SPECIALIZED INSTITUTION. PROESA MAY PROVIDE TECHNICAL SUPPORT TO THE CONTRACTING STATE INSTITUTION TO PERFORM THE FEASIBILITY STUDY. (1)

Cooperation Agreement

Art. 34.- ONCE THE AUTHORIZATION RESOLUTION IS ISSUED BY THE PROESA BOARD OF DIRECTORS, THE CONTRACTING STATE INSTITUTION AND PROESA SHALL SIGN AN AGREEMENT TO ESTABLISH THE SCOPE OF THE FUNCTIONS THAT THE LATTER WILL PERFORM DURING THE TENDER PROCESS. THE AGREEMENT SHALL PROVIDE THAT PROESA SHALL PARTICIPATE IN THE DESIGN OF THE TENDER GUIDELINES AND OF THE CONTRACTS, AS WELL AS IN THE PROCESSES FOR THE PROMOTION OF PRIVATE INVESTMENT.

EXCEPTIONALLY, THE CONTRACTING STATE INSTITUTION AND PROESA MAY ALSO SIGN A COOPERATION AGREEMENT ONCE THE PROJECT PREFEASIBILITY STUDY IS APPROVED, UNDER THE TERMS OF THE PREVIOUS ARTICLE. (1)

CHAPTER II TENDER REGIME

Prequalification of Bidders and Competitive Dialogue

Art. 35.- The tender process may have an initial prequalification stage in which national and international bidders may participate, in order to select those that possess the experience and financial capacity that is specific and relevant to the project. For this stage of the process, a document of terms and conditions will be drafted which shall define the requirements for prequalification. During the prequalification phase, equal treatment shall be ensured among the bidders and no arbitrary or unjustified differentiation shall be made.

The prequalification documents shall allow prequalified bidders to propose to the contracting State institution any improvements, additions, or adjustments they deem appropriate to be made to the draft tender guidelines and to the contract, especially to their service levels and technical standards, at the request of the contracting State institution and at the meetings that may be

attended by all prequalified bidders.

During that procedure and within the period specified in the terms and conditions, bidders and the contracting State institution may ask questions and seek clarification, which must be made known to all bidders. The contracting State institution must ensure the transparency of the process and equal treatment and opportunities for all participants of the competitive dialogue. This stage will be governed by the Regulation of this Law.

The prequalification terms and conditions may require the submission of a preliminary technical project. At this stage, the contracting State institution may make observations to each project with regards to compliance with service levels and minimum technical standards.

The prequalification terms and conditions shall establish whether at the end of this stage, bids may only be submitted by those who participated therein, or if the submission of bids shall be open to all interested parties. In the latter case, the tender guidelines may establish preferences for those who participated in the competitive dialogue.

Competitive Dialogue

Art. 36.- The Contracting State institution may conduct a competitive dialogue process with the applicant or applicants who, having shown up to the prequalification process, meet the requirements of technical and economic solvency stated therein.

All aspects of the contract may be discussed during this procedure in order to contribute to the definition of the specific terms and conditions.

The prequalification documents will allow prequalified bidders to propose to the contracting State institution any improvements, additions, or adjustments they deem appropriate to make to the draft tender guidelines and to the contract, especially to their service levels and technical standards, at the request of the contracting State institution and at the meetings that may be attended by all prequalified bidders.

During the process, equal treatment shall be given to all participants and, in particular, no information shall be provided in a discriminatory manner which may grant advantages to certain participants over others. The solutions proposed by a participant or any other confidential information communicated thereby may not be revealed to the other participants without the prior consent of the participant.

During said process and within the period specified in the terms and conditions, bidders and the contracting State institution may ask questions and seek clarification, which must be made known to all bidders, without detriment to the provisions of the preceding paragraph. The contracting State institution must ensure the transparency of the process and equal treatment and opportunities for all participants of the competitive dialogue.

The competitive dialogue process shall continue until it is possible to determine, after comparing them, if necessary, the solutions that are appropriate for the objective of the tender process.

After declaring that the competitive dialogue has come to an end and communicating this to all participants, the call for the submission of bids shall be issued according to what is set out in the special terms and conditions.

In all cases in which the competitive dialogue process is applied, the prequalification terms and conditions must previously specify if, at the end of this stage, bids may only be submitted by those who participated in it or if the submission of bids will be open to all interested parties. In the latter case, the tender guidelines may establish preferences for those who participated in the competitive dialogue.

In the event in which only one single applicant participated in the competitive dialogue process, the submission of bids must be open to all interested parties.

Studies Conducted During Prequalification Phase

Art. 37.- The prequalification terms and conditions may set out that the prequalified bidders must assume, in equal parts, the required funds for the studies that the contracting State institution deems necessary. The contracting State institution shall commission these studies from independent entities.

The awarded bidder shall reimburse the amount contributed by all other bidders to finance the studies that were contracted, in accordance with the preceding paragraph. Said reimbursement shall be made in accordance with the provisions of the prequalification terms and conditions. The same obligation shall apply to the contracting State institution should it desist from the tender process once the prequalification has been completed.

Tender Guidelines

Art. 38.- THE CONTRACTING STATE INSTITUTION, JOINTLY WITH PROESA, SHALL DRAFT THE TENDER GUIDELINES, WHICH MUST BE APPROVED BY THE PROESA BOARD OF DIRECTORS, SUBSEQUENT TO THE FAVORABLE RULING FROM THE MINISTRY OF FINANCE ON THE FISCAL IMPLICATIONS OF THE PROJECT, AND SUBSEQUENT TO THE OPINION OF THE OFAPP ON THE SERVICE LEVELS, TECHNICAL STANDARDS, AND REGIME FOR RATES, RESPECTIVELY. FOR THIS PURPOSE, PROESA SHALL REQUEST THE RULINGS FROM BOTH INSTITUTIONS, WHICH MUST BE ISSUED WITHIN A TIMEFRAME NOT EXCEEDING THIRTY DAYS. SHOULD THEY NOT BE ISSUED WITHIN THE PRESCRIBED TIMEFRAME, THEY SHALL BE DEEMED TO BE FAVORABLE.

AT THE SAME TIME, AND WITHIN THE SAME TIMEFRAME AS IN THE PRECEDING PARAGRAPH, PROESA SHALL SEND COPIES OF THE TENDER GUIDELINES TO THE SUPERINTENDENCY OF COMPETITION, SO THAT, IN THE EXERCISE OF ITS LEGAL POWERS, IT MAY ISSUE A NON-BINDING OPINION ON WHETHER THESE TENDER GUIDELINES MAY LIMIT, RESTRICT, OR INHIBIT COMPETITION IN A SIGNIFICANT MANNER.

DURING THE TENDER PROCESS, BIDDERS MAY ASK QUESTIONS REGARDING THE TENDER GUIDELINES, WHICH MUST BE ANSWERED BY THE PROCURING ENTITY AND WHICH SHALL BE MADE PUBLIC. (1)

Nature of the Tender and Capacity of the Participants

Art. 39.- Tenders, without exception, shall be of a public and international nature, and may allow the participation of domestic and foreign persons and entities who meet the provisions of the tender guidelines, this Law, its Regulation, and all valid additional legislation.

Prohibitions

Art. 40.- No natural persons or legal entities, either in person or by proxy, nor their legal representatives, may participate in the tender process, or enter into contracts or subcontracts linked thereto, in the following cases:

- a) The President, Vice-President, Ministers and Vice-Ministers, legislative representatives, judges of the Supreme Court of Justice, the Court of Accounts, the Supreme Electoral Tribunal, heads of State institutions, autonomous or municipal institutions, as well as their relatives to the fourth degree of consanguinity and second of affinity;
- b) OFFICIALS AND EMPLOYEES OF THE CONTRACTING STATE INSTITUTION, OF PROESA, OF THE OFAPP, OR SECTORAL REGULATORS; (1)
- c) Those who are deprived of their civil rights by a final judgment;
- d) Those who have participated directly or indirectly in the preparation, review, or approval of the tender guidelines, as well as their relatives to the fourth degree of consanguinity and second of affinity; and,
- e) Legal entities whose shareholders or legal representatives are included in any of the cases referred to in the preceding paragraphs of this article.

These prohibitions shall also apply to private initiative applicants.

Minimum Content of the Tender Guidelines

Art. 41.- The tender guidelines shall contain, at a minimum, the following items:

- a) Overview and objectives of the Public Private Partnership project;
- b) Conditions for the submission of the bid, including the need for submitting a technical bid and a financial bid by the bidders and accreditation of the legal, technical, and financial capacity of the bidders, as well as their employment records;
- c) Accurate description of the outcomes expected from the Public Private Partnership contract, including service levels and related technical standards, and risk allocation and distribution;
- d) Criteria to be used by the evaluation committee to assess the technical proposal and the

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- financial bid of the bidders;
- e) Term of the contract;
 - f) Requirement of the Bid Surety Bond;
 - g) Requirement and formalities of the bidder's affidavit stating that it is not a Debtor in Arrears of the State, of its autonomous institutions, municipalities where the project will be undertaken, nor of the pension system, as well as any certificates and legal evidence necessary to prove these conditions;
 - h) Requirements and formalities of the affidavit wherein the bidder states to know and understand the national and international legislation to protect the rights of workers, and the bidder's commitment to respect them;
 - i) Requirements and formalities of the affidavits that the special purpose vehicle, incorporated for the purposes of this Law, as well as its shareholders and administrators must submit prior to signing the contract in order to prove the conditions stipulated in the previous two subparagraphs, as well as the certificates and legal evidence to prove these conditions; and,
 - j) The draft contract.

Evaluation Committee

Art. 42.- TECHNICAL AND ECONOMIC BIDS SHALL BE EVALUATED BY A COMMITTEE WHICH WILL BE COMPOSED OF ONE REPRESENTATIVE FROM PROESA, ONE REPRESENTATIVE FROM THE MINISTRY OF FINANCE, AND TWO REPRESENTATIVES FROM THE STATE CONTRACTING INSTITUTION. (1)

The members of this committee must have specialized expertise pertaining to the subject-matter of the contract, within their respective powers. The evaluation committee may also hire expert advisors who must sign confidentiality agreements to provide advice.

The decisions of the evaluation committee shall be made by three agreeing votes.

The following may not be members of an evaluation committee or expert advisors:

- a) Those who have a criminal record or have been convicted at an audit trial;
- b) Those who have a conflict of interests with bidders or private participants in the respective process;
- c) Those who are part of or have a stake in any litigation, act, contract, or guarantees related to the signing or performance of Public Private Partnership contracts, or who are

related to companies that are undergoing the described situation;

- d) THOSE WHO HAVE KINSHIP TO THE FOURTH DEGREE OF CONSANGUINITY OR SECOND OF AFFINITY WITH ANY BIDDER, WITH THE HIGHEST AUTHORITY OF THE CONTRACTING STATE INSTITUTION, THE PROESA OR OFAPP BOARD OF DIRECTORS; (1)
- e) Those who have accepted an inheritance, bequest, or donation from any of the bidders in the tender process; and,
- f) Those who are partners or investors of any bidder.

Factors for the Award

Art. 43.- To award a contract, objective, quantifiable, and easily provable factors must be used for the different economic-financial proposals of the bidders. The criteria taken into consideration in the technical evaluations or in the bidder qualification or pre-qualification assessments may not be used as factors for the award.

The definition of the factors and their manner of application will be set out in the tender guidelines. Said guidelines may consider the use of multiple factors for the award. The use of factors that minimize payments from the Government to the private participant or the rates charged to users shall be preferred.

Factors for the awards involving payments from the private participant to the State may only be used for projects involving the utilization of natural resources or where the State provides fiscal or public use assets.

Evaluation of Bids and Award

Art. 44.- The evaluation committee shall determine the bidders whose technical proposals meet the conditions set out in the tender guidelines. Should there be no technical proposal that meets those conditions, the committee shall recommend that the tender be declared void. If there is one or more valid technical proposals, the committee shall assess the financial proposals from the respective bidders.

The committee shall evaluate the financial bids taking into consideration the factors for the award set out in the tender guidelines and shall submit its recommendation to the head of the Contracting State institution. The committee will recommend the award to the winner or, should there be no valid financial bids, shall recommend the bid be declared void. The evaluation and recommendation must be made within the timeframes set forth for each case in the tender guidelines.

The contracting State institution shall approve or reject the recommendation of the evaluation committee within a maximum period of five days. Should there be no valid bids, the tender shall

be declared void. If the recommendation for award is approved, the contract will be awarded to the winning bid. If the recommendation for award is rejected, this shall be done so in a reasoned manner and shall declare the process as completed.

The Regulation shall establish the way in which the evaluation committee will work and the manner in which publicity and transparency will be given to its assessments.

The award shall not be firm until five days after its notification to all bidders, period during which appeals may be lodged.

Appeals

Art. 45.- The party aggrieved by the award decision may lodge a review appeal to the contracting State institution within a period of five days, counted from the date of the respective notification. The appellant must file the challenge surety bonds set forth in the tender guidelines for this purpose.

The acceptance of the appeal shall be resolved within a period not exceeding three days from its submission. Once the appeal has been accepted, it shall be resolved by the head of the Contracting State institution within a period not exceeding twenty days. The head of the contracting State institution may be assisted by specialists in order to analyze the arguments contained in the appeal. The reasoned decision shall be notified to the appellant within no more than two days after it has been issued. The validity of the challenge surety bonds shall be established in the tender guidelines and, in all cases, must always be more than thirty days counted from the date when the review appeal was lodged. Challenge surety bonds shall be enforced if the resolution is unfavorable to the interests of the appellant. The resolution of the review appeal shall exhaust all administrative remedies.

Special Purpose Vehicle

Art. 46.- The bidder who has been awarded the contract, shall be forced to create a joint-stock company, of Salvadoran nationality, whose purpose is to carry out all activities related to the Public Private Partnership contract. The capital of this company shall at all times be composed of registered shares and shall meet all other requirements set out under company law, this Law, its Regulation and the tender guidelines. No public institution may, either directly or indirectly, be a shareholder this company.

The incorporation of the company shall be conducted with the same partners, shareholders, or members of the consortium and with the same shares they held on the date of award of the tender. In the case of individual bidders, minority shareholders shall be chosen at the discretion of the former, but under no circumstance may they be other bidders who participated in the tender process, nor exceed the percentage of shares set out by the tender guidelines. The tender guidelines shall set out the timeframes and conditions under which the shareholding structure of the special purpose vehicle may be modified.

The purpose of the company shall be determined in the tender guidelines, in accordance with the specific characteristics of the works or services tendered. Its duration shall be the longest time between the period that the Public Private Partnership contract lasts plus two years, or the validity period of the surety bond

for the works and services to be performed.

Right to Withdraw

Art. 47.- The contracting State institution may withdraw from the project at any time before signing the contract for reasons of public interest and through a duly substantiated resolution. The exercise of this right will not generate any liability for the State.

CHAPTER III PRIVATE INITIATIVE REGIME

Nature of the Private Initiative

Art. 48.- The private initiative shall only be accepted with regards to projects:

- a) THAT, BECAUSE OF THEIR FINANCIAL NATURE, HAVE BEEN QUALIFIED AS SELF-SUSTAINABLE BY THE CONTRACTING STATE INSTITUTION AND THE PROESA BOARD OF DIRECTORS; (1)
- b) THAT DO NOT PERTAIN TO WORK THAT, AT THE TIME OF THE SUBMISSION OF THE PRIVATE INITIATIVE PROJECT, IS BEING STUDIED BY PROESA OR BY ANY CONTRACTING STATE INSTITUTION IN ORDER FOR IT TO BE CARRIED OUT UNDER A PUBLIC PRIVATE PARTNERSHIP MODALITY. FOR THESE PURPOSES, PROESA AND ALL OTHER INSTITUTIONS MENTIONED MUST MAINTAIN A PUBLIC LIST OF PROJECTS BEING STUDIED WITH THE INTENT OF SUBJECTING THEM TO THIS MODALITY; AND, (1)
- c) That incorporate innovative practices in the economic sector that the project corresponds to and with regards to traditional public provision.

All legal entities, whether national or foreign, as well as any kind of associations among them, may submit a private initiative project.

Competence to evaluate a Private Initiative Project

Art. 49.- The prefeasibility study of the private initiative, in compliance with the requirements set out by the Regulation, shall be submitted by the proponent to the Contracting State institution.

THE CONTRACTING STATE INSTITUTION SHALL HAVE A MAXIMUM PERIOD OF SIXTY DAYS TO RULE ON SAID PREFEASIBILITY STUDY. IF THE CONTRACTING STATE INSTITUTION DOES NOT DEEM THE PROJECT TO BE OF INTEREST, IT SHALL NOTIFY SO IN WRITING TO THE PROPONENT. IF THE CONTRACTING STATE INSTITUTION DEEMS IT OF INTEREST, IT SHALL REQUEST A RULING FROM THE PROESA BOARD OF DIRECTORS. (1)

THE RULING REQUESTED BY THE CONTRACTING STATE INSTITUTION TO THE PROESA BOARD OF DIRECTORS, SHALL BE BINDING AND MUST BE ISSUED WITHIN NO MORE THAN FORTY FIVE DAYS. WITH THE POSITIVE RULING FROM THE PROESA BOARD OF DIRECTORS, THE CONTRACTING STATE INSTITUTION SHALL ISSUE A FORMAL STATEMENT OF INTEREST IN THE PROPOSAL AND SHALL NOTIFY SO TO THE PROPONENT. IF THE RULING FROM THE PROESA BOARD OF DIRECTORS IS UNFAVORABLE, THE STATE CONTRACTING INSTITUTION SHALL ISSUE A STATEMENT OF NON-INTEREST AND NOTIFY SO TO THE PROPONENT. (1)

While the respective statements are not made and notified, the proponent may not unilaterally make changes or expansions which, at the discretion of the contracting State institution, substantially alter the draft private initiative that was submitted. During that period, the contracting State institution, as well as any other public institution and officials who have knowledge thereon, shall maintain the confidentiality of the private initiative and shall be civilly and administratively liable for breaching this obligation, as the case may be.

Feasibility Stage and Statement of Interest

Art. 50.- STATEMENTS OF INTEREST SHALL BE PUBLISHED ONE SINGLE TIME IN TWO NATIONAL NEWSPAPERS, AS WELL AS IN THE INSTITUTIONAL WEBSITE OF THE CONTRACTING STATE INSTITUTION AND OF PROESA, SO THAT THIRD PARTIES, IN A MAXIMUM PERIOD OF SIXTY DAYS, MAY STATE THEIR INTEREST REGARDING THE IMPLEMENTATION OF AN ALTERNATIVE PROJECT RELYING UPON ANY ASSET BELONGING TO THE STATE, IDENTIFIED IN THE ORIGINAL PROPOSAL.

PROESA AND THE CONTRACTING STATE INSTITUTION, SHALL BE ENTITLED TO UNDERTAKE THE PROMOTION ACTIVITIES THEY DEEM CONVENIENT AND WHICH THEY BELIEVE SHALL FOSTER THE PARTICIPATION OF INTERESTED THIRD PARTIES.

SHOULD THERE BE NO THIRD PARTIES INTERESTED IN THE IMPLEMENTATION OF AN ALTERNATIVE PROJECT, THE PROPONENT OF THE PRIVATE INITIATIVE MUST SUBMIT THE FEASIBILITY STUDIES UNDER THE TERMS OF ARTICLE 32 OF THIS LAW, WITHIN A ONE-YEAR PERIOD. THIS PERIOD MAY BE EXTENDED THROUGH A REASONED RESOLUTION.

SHOULD THERE BE ONE OR MORE PARTIES INTERESTED IN THE IMPLEMENTATION OF AN ALTERNATIVE PROJECT, THEY MUST GUARANTEE THAT THEY WILL SUBMIT A PREFEASIBILITY STUDY WITHIN NO MORE THAN NINETY DAYS. ONCE THE STUDIES HAVE BEEN RECEIVED, THE CONTRACTING STATE INSTITUTION, IN COORDINATION WITH THE PROESA BOARD OF DIRECTORS AND IN A MAXIMUM PERIOD OF FORTY-FIVE DAYS, MUST SELECT THE DULY SUBSTANTIATED PROPOSAL THAT OFFERS THE PROJECT EXHIBITING THE MOST SOCIAL PROFITABILITY. IN ADDITION, THE RESPECTIVE PROPONENT SHALL BE REQUIRED TO SUBMIT THE FEASIBILITY STUDY UNDER THE TERMS OF ARTICLE 32 OF THIS LAW.

ALL PROPONENTS WHO PARTICIPATED IN THE PROCESS MUST BE NOTIFIED OF THE DECISIONS MADE JOINTLY BETWEEN THE CONTRACTING STATE INSTITUTION AND THE PROESA BOARD OF DIRECTORS.

ALL RESOLUTIONS ISSUED DURING THIS PROCESS, INCLUDING THE STATEMENTS OF INTEREST OR NON-INTEREST, SHALL NOT ADMIT ANY APPEAL OR ANY CLAIM BY THE PROPONENTS, AND SHALL NOT GENERATE ANY LIABILITY FOR THE CONTRACTING STATE INSTITUTION OR FOR ANY OTHER PUBLIC ENTITY INVOLVED IN THE EVALUATION.

(1)

Rights of the Bidder Proposing the Project

Art. 51.- The bidder whose private initiative proposal was accepted, may participate in the tender process under the same terms and conditions as other individuals, but with the following rights over other bidders:

- a) The right to match the best bid, in which case a definitive tiebreaker shall be held between the proponent and the bidder who ranked first, each of them submitting a better bid based on the competition factor. This tiebreaker must be conducted no later than fifteen days after the opening of financial bids; and,
- b) To be reimbursed for expenses incurred in the development of the private initiative proposal, should they not be awarded the tender. This reimbursement shall be made by the awarded bidder, in the event that the original proponent is not the awardee; this must be done after the contract has been signed. In the event that the proponent does not participate in the selection procedure that is publicized, they will lose the right to seek reimbursement for the expenses in which they incurred in preparing the proposal.

In the tender guidelines, the contracting State institution shall indicate the reimbursement amount that the proponent bidder is entitled to, which must be properly supported in accordance with the provisions of the Regulation.

Period in which the Contracting State Institution cannot make a Call for Bids

Art. 52.- If the contracting State institution has issued a final resolution for the statement of non-interest, it cannot call for bids for the private initiative project or any other that has the same objective or which is substantially similar, in a period of two years counted from the notification of the resolution.

If the contracting State institution decides to open a tender process with regards to the project described in the preceding paragraph, it must reimburse the proponent of the private initiative for expenses incurred in the preparation of the proposal, under the terms provided for in the Regulation of this Law.

**CHAPTER IV
LEGISLATIVE APPROVALS**

Power to Commit Payments from Future Years

Art. 53.- THE LEGISLATIVE ASSEMBLY WILL BE RESPONSIBLE FOR EMPOWERING THE EXECUTIVE BRANCH TO HOLD TENDER PROCESSES FOR PUBLIC PRIVATE PARTNERSHIP PROJECTS INVOLVING FIRM AND CONTINGENT COMMITMENTS FOR FUTURE FISCAL YEARS, WHICH MUST BE APPROVED WITH, AT A MINIMUM, THE FAVORABLE VOTE OF ONE HALF PLUS ONE OF ALL ELECTED REPRESENTATIVES, PROJECTS WHICH WILL CONTAIN THE WORK OR SERVICE TO BE PERFORMED AND THE LOCATION, THE TIMEFRAME FOR THE PROJECT, THE MAXIMUM AMOUNT OF THE PROJECT, AND THE FINANCIAL AND SOCIAL JUSTIFICATION FOR THE PUBLIC PRIVATE PARTNERSHIP. THE CONTRACTS THAT THIS PROVISION REFERS TO, INCLUDING THE FIRM AWARD RESOLUTION, SHALL BE BROUGHT TO THE ATTENTION OF THE LEGISLATIVE ASSEMBLY, WHICH WILL BE APPROVED WITH THE FAVORABLE VOTE OF ONE HALF PLUS ONE OF THE ELECTED REPRESENTATIVES.

NON-AUTHORIZATION BY THE LEGISLATIVE ASSEMBLY SHALL NOT GENERATE THE PAYMENT OF FINANCIAL COMMITMENTS FROM THE STATE TO BIDDERS OR AWARDEES. (1)

Approval of Concessions of Public Assets

Art. 54.- THE LEGISLATIVE ASSEMBLY WILL BE RESPONSIBLE FOR APPROVING CONTRACTS NOT INVOLVING FIRM AND CONTINGENT COMMITMENTS FOR FUTURE FISCAL YEARS; IN THE EVENT THAT THESE INCLUDE THE CONCESSION OF PUBLIC WORKS, INVOLVING THE DELIVERY TO THE PRIVATE PARTICIPANT, FROM ANY CONTRACTING STATE INSTITUTION, OF ASSETS OR MATERIALS WORKS THAT ARE NATIONAL ASSETS OF PUBLIC USE, THE CONCESSION SHALL BE SUBJECT TO THE APPROVAL OF THE LEGISLATIVE ASSEMBLY, IN ACCORDANCE WITH THE PROVISIONS OF ART. 120 OF THE CONSTITUTION OF THE REPUBLIC.

TO THAT END, THE PRESIDENT OF THE REPUBLIC SHALL FORWARD THE DRAFT CONTRACT AND THE SIGNED RESOLUTION OF AWARD BY THE CONTRACTING STATE INSTITUTION TO THE LEGISLATIVE ASSEMBLY IN ORDER TO PROCEED WITH THE APPROVAL OR DISAPPROVAL OF THE CONTRACT.

IN THE EVENT THAT THE LEGISLATIVE ASSEMBLY DOES NOT APPROVE THE CONCESSION CONTRACT, THIS SHALL NOT CREATE ANY TYPE OF FINANCIAL COMMITMENT BETWEEN THE STATE AND PRIVATE PARTICIPANTS, IN THEIR CAPACITY AS BIDDERS; THEY WILL PARTICIPATE IN THE RESPECTIVE ADMINISTRATIVE PROCESSES AT THEIR OWN RISK AND EXPENSE. (1)

**TITLE V
SIGNING AND CONTENT OF CONTRACTS
FOR PUBLIC PRIVATE PARTNERSHIP**

SOLE CHAPTER

Manner, Signing, and Content of the Contract

Art. 55.- Public Private Partnership contracts shall be awarded in a public document and will be entered into by the contracting State institution, through its head, and the special purpose vehicle, within the period set forth in the tender guidelines.

If said period elapses and the contract is not signed due to the responsibility of the awardee, the contracting State institution shall declare the award void, enforcing the Bid Surety Bond, and it may award the contract to the next best bid or, if absence thereof, make another call for bids for a new public tender under the terms regulated by this Law.

Provisions in the Contracts

Art. 56.- Without detriment to the provisions agreed upon according to the nature of each contract, the following rules shall apply to Public Private Partnership contracts:

- a) The contracts must contain the requirements and conditions under which the issuance, transfer, and assignment of shares of the special purpose vehicle may be authorized by the contracting state institution at any stage of the contract;
- b) Contracts shall provide for the possibility to assign them during the operational phase, and must contain explicit conditions to be met by the assignee company during that period;
- c) Contracts must contain the possibility that the private participant can finance itself through the placement of securities or bonds of any kind in a market public offering. In the case of debt securities, no securities or bonds may be issued if their total or partial redemption period ends on a date that is subsequent to the contract period of validity;
- d) Contracts must stipulate a system of contractual obligations and the penalties to be imposed as a result of the transgression thereof, which must include those resulting from the violation of the rights of workers;
- e) In order to insure the finalized contracts, the parties may agree to be subjected to the rules of insurance of renowned multilateral organisms and institutions offering investment guarantees. In this case, conflicts arising from said insurance shall necessarily be resolved by dispute settlement systems set forth by said multilateral organisms and institutions that offer investment guarantees, without detriment to disputes arising between the contracting State institution and the private participant being resolved by the dispute resolution system established in Title IX of this Law;

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- f) Contracts should stipulate that the assets and rights acquired by the private participant under any capacity, and which are involved in the activity of the contract, may not be sold separately, or mortgaged, or subjected to liens of any kind, without the consent of the contracting State institution. In all cases, said assets will be freed of any lien when they are transferred back to the Ministry of Finance or to the contracting State institution, by operation of law, upon completion of the contract; and,
 - g) Contracts must establish that the start of its validity shall be counted from the date of signing thereof between the contracting State institution and the special purpose vehicle.

The Contract may not alter any objective conditions established in the tender guidelines.

Bank Guarantees and Insurance

Art. 57.- All bank guarantees, insurance, or surety bonds that must be submitted by the private participant or the contracting State institution for the performance of the contract and in relation to their respective obligations, shall be governed by the provisions of this Law, its Regulation, the tender guidelines, and the specific contract.

Special Pledged Guarantee

Art. 58.- In the contract, the parties may agree on the establishment of special Public Private Partnership pledges, which will be used without the displacement of the pledged rights and assets. These may be agreed upon between the private participant and the financial creditors of the project or for the issuance of debt of the special purpose vehicle. The pledge may be based on:

- a) The rights arising from the contract for the private participant;
- b) All payment commitments from the State to the special purpose vehicle, under any capacity, under the signed contract;
- c) Revenue or assets of the special purpose vehicle; and,
- d) Shares of the special purpose vehicle.

This pledge must be recorded in a public document and be registered at the Trade Register, making marginal notations on the registration of the special purpose vehicle in said register.

When this pledge is based on shares of the special purpose vehicle, it shall be recorded in all other relevant records ordered by the legislation.

The Public Private Partnership contract shall establish mechanisms that allow creditors to exercise their rights on the guarantees, without hindering the construction work and the normal provision of

services to users.

TITLE VI
PERFORMANCE OF THE PUBLIC PRIVATE PARTNERSHIP CONTRACT
SOLE CHAPTER

Delivery of Assets for the Concession Period

Art. 59.- The Public Private Partnership contract shall specify the assets that will remain the property of the State and those that will be the property of the private participant, where appropriate. Under no circumstance shall ownership of the assets of the State be transferred to private participants. The Public Private Partnership contract shall specify the assets belonging to the following categories:

- a) The assets that the private participant is required to return or transfer to the State at the end of the contract; and,
- b) The assets that the private participant may retain or those that might be disposed of upon completion of the contract.

In implementing the Public Private Partnership contract, private participants may make procurements of goods and services at their convenience and without having to follow a specific procurement and contracting regime.

Control During the Project Construction Phase

Art. 60.- During the construction phase of the project, the contracting State institution will appoint a project supervisor whose function will be to ensure compliance with the obligations corresponding to that stage.

The contract shall regulate the procedures so that the supervisor can conduct the inspection and issue the corresponding instructions during the construction phase.

The project supervisor must have credentials certifying their expertise in the project areas that they will be concerned with, and have recognized expertise in the field.

The updated log of the project must be available on the institutional website of the contracting State institution. The tender guidelines shall regulate their requirements and use.

Compensation for Supervening Acts

Art. 61.- The private participant may not request additional financial compensation from the one taken under consideration in the tender guidelines and under the contract.

However, the private participant may request compensation in case a supervening act of public authority occurs which adversely and materially affects the financial balance of the contract, when said act of authority complies strictly with the following requirements:

- a) It occurs after the signing the contract and had not been provided for in the tender guidelines; and,
- b) It is an administrative measure, a legislative or regulatory change issued after signing the contract, with specific effects for the Public Private Partnership project in question.

If the supervening act occurs after notification of the award, but before signing the contract, the awarded bidder shall be entitled to withdraw its bid, without the Bid Surety Bond being enforced. In this case, the awardee is not entitled to any compensation.

The financial compensation referred to in this Article must be expressed in one or more of the following elements:

- a) Financial compensation provided by the State;
- b) Modification of the present value of the total revenue of the project, in the event that it was a factor for the award;
- c) Alteration of the contract period, provided it does not exceed the maximum period provided for in this Law; and,
- d) Modification of the tariffs or any other factor of the economic regime of the contract.

Guarantees during the Performance of the Contract

Art. 62.- The contract shall determine the mechanisms to ensure that the private participant fulfills its obligations, such as:

- a) The adaptation of the service to respond to actual demand;
- b) Continuity and regularity of service; and,
- c) Availability of service for users under conditions that prevent arbitrary discrimination in their provision, except in cases where the tender guidelines authorize it for reasons of public interest.

Compensation for Variations of the Contract

Art. 63.- THE CONTRACTING STATE INSTITUTION, WITH THE APPROVAL OF THE PROESA BOARD OF DIRECTORS, GRANTED PRIOR TO THE FAVORABLE RULING FROM THE MINISTRY OF FINANCE FROM THE FINANCIAL PERSPECTIVE AND FROM OFAPP WITH REGARDS TO MATTERS WITHIN ITS COMPETENCE, MAY REQUIRE THE MODIFICATION OF THE CHARACTERISTICS OF THE WORKS OR SERVICES CONTRACTED IN ORDER TO INCREASE THE SERVICE LEVELS AND THE TECHNICAL STANDARDS SET FORTH IN THE TENDER GUIDELINES, OR FOR ANY OTHER DULY SUBSTANTIATED REASONS OF PUBLIC INTEREST. FOR THIS PURPOSE, PROESA SHALL REQUEST THE RULINGS FROM BOTH INSTITUTIONS, WHICH MUST BE ISSUED WITHIN A TIMEFRAME NOT EXCEEDING THIRTY DAYS. IF THIS PERIOD PASSES WITHOUT ISSUING THEIR RULINGS, THEY SHALL BE PRESUMED AS FAVORABLE. (1)

The tender guidelines shall establish the maximum investment amount that the contracting State institution may require from the private participant and the deadline for ordering the modification of the works or services. In any event, the maximum amount of these new investments may not exceed fifteen percent of the final investment budget for the work or service, as applicable. This maximum amount will be updated to the date when the modification is submitted using the consumer price index. This modification may not be required at a later date when two-thirds of the period of the contract has elapsed.

The contracting State institution shall be entitled to conduct competitive and transparent procedures in order to perform the modifications outlined in the previous paragraph.

The contracting State institution shall compensate the private participant for these demands for change in the contract, to the extent that such changes imply adversely affecting the financial balance of the contract.

The financial compensation referred to in this article, must be expressed in one or more of the following elements:

- a) Financial compensation provided by the State;
- b) Voluntary payments made directly to the private participant by third parties who are interested in the performance of the work;
- c) Modification of the present value of the total revenue of the project, in the event that it was used as a factor for the award;
- d) Alteration of the contract period, provided it does not exceed the maximum period provided for in this Law; and,
- e) Modification of the tariffs or any other factor of the economic regime of the contract.

Contract Modifications

Art. 64.- THE CONTRACTING STATE INSTITUTION, WITH THE APPROVAL OF THE PROESA BOARD OF DIRECTORS, GRANTED PRIOR TO THE FAVORABLE RULING FROM THE MINISTRY OF FINANCE FROM THE FINANCIAL PERSPECTIVE AND FROM OFAPP WITH REGARDS TO MATTERS WITHIN ITS COMPETENCE, MAY

REACH AN AGREEMENT WITH THE PRIVATE PARTICIPANT ON THE MODIFICATION OF THE CHARACTERISTICS OF THE WORKS OR SERVICES CONTRACTED IN ORDER TO INCREASE THE SERVICE LEVELS AND THE TECHNICAL STANDARDS SET FORTH IN THE TENDER GUIDELINES. FOR THIS PURPOSE, THE PROESA BOARD OF DIRECTORS SHALL REQUEST THE RULINGS FROM BOTH INSTITUTIONS, WHICH MUST BE ISSUED WITHIN A TIMEFRAME NOT EXCEEDING THIRTY DAYS. IF THIS PERIOD PASSES WITHOUT ISSUING THEIR RULINGS, THEY SHALL BE PRESUMED AS FAVORABLE. (1)

The tender guidelines shall establish the maximum amount of investment that the contracting State institution and the private participant may agree through contractual modifications, as well as the maximum period within which it may be performed. In any event, the maximum amount of these new investments may not exceed twenty percent of the final investment budget for the work at any phase of the contract. This amount will be updated to the date when the modification is submitted using the consumer price index.

The contracting State institution shall be entitled to conduct competitive and transparent procedures in order to perform the modifications outlined in the previous paragraph.

The contracting State institution must compensate the private participant for the changes agreed upon in the contract, to the extent that said changes imply adversely affecting the financial balance of the contract and in accordance with the terms set forth in the tender guidelines. The financial compensation referred to in this Article must be expressed in the same terms of the compensation from the previous article.

Firm and Contingent Commitments

Art. 65.- The commitments taken on by the State under Public Private Partnership contracts can be classified as follows:

- a) Firm commitments: obligations of the State to pay the private participant a consideration for the performance of the activities laid out in the contract. The following payments are considered firm commitments:
 - i) Periodic fees that are intended to repay the investment in which the private participant incurs.
 - ii) Periodic fees that are intended to compensate the operation and maintenance activities in which the private participant incurs for the provision of the service.
- b) Contingent commitments: potential payment obligations from the State to the private participant, corresponding to the guarantees and surety bonds granted by the former, in order to improve the risk profile of the project and to encourage private participation. For registration purposes, only quantifiable contingent commitments shall be taken into account.

Liquidity Fund for Public Private Partnerships

Art. 66. Create a liquidity fund at the Development Bank of El Salvador in order to meet obligations arising from firm and quantifiable contingent commitments to which the State has committed itself, through signing Public Private Partnership contracts. The fund will be composed of a separate capital, for specific purposes, and will be managed by said Bank.

For the purposes of this Law, it shall be understood that the assets of the Development Bank of El Salvador shall not respond in any way to the obligations contracted and the operations carried out with the fund's resources, which constitutes a special capital managed by the Development Bank of El Salvador and which is independent thereof.

Resources of the Fund

Art. 67.- The resources of the fund will come from:

- a) An initial contribution from the State;
- b) Special contributions from the State and autonomous institutions to maintain, at a minimum, the equivalent of one hundred percent of the fraction that corresponds to the next fiscal year for the firm commitments of each Public Private Partnership contract;
- c) Special contributions from State and autonomous institutions to maintain, at a minimum, the equivalent of one hundred percent of the fraction that corresponds to the next fiscal year for the contingent commitments that have become firm commitments for each Public Private Partnership contract;
- d) Contributions made by other public entities and multilateral agencies;
- e) International cooperation funds; and,
- f) Profitability obtained by the management of resources.

Special Powers of the Development Bank of El Salvador with Resources from the Liquidity Fund

Art. 68.- To comply with the purposes of the fund, the Development Bank of El Salvador shall have the following special powers:

- a) To pay whoever is legally due, charged to the fund's resources, and by instruction of the contracting State institution, the values derived from firm and quantifiable contingent commitments to which the State has committed itself through the signing of Public Private partnership contracts;
- b) To perform all sorts of actions and enter into contracts, agreements, operations, and, in general, any other action that requires the exercise of its powers or

fulfillment of their obligations;

- c) To enter into contracts or agreements with other national or foreign entities carrying out activities with the same or similar purposes to those of the fund;
- d) To only invest the funds in low risk and high liquidity fixed interest instruments issued by the State;
- e) To keep deposits of any currency in the Central Reserve Bank of El Salvador and entities authorized by the Superintendency of the Financial System to collect funds from the public; and,
- f) To contract rebonding for the surety bonds granted under any modality.

The regulation shall determine the type of management and aspects pertaining to the mechanisms of its investment, among others.

In the Budget Law, budgetary resources shall be allocated to the net replacement of the amounts of the fund that may have been used in the previous fiscal year.

TITLE VII SUSPENSION AND TERMINATION OF THE CONTRACT

SOLE CHAPTER

Suspension of the Contract

Art. 69.- THE CONTRACTING STATE INSTITUTION, PRIOR AUTHORIZATION FROM THE PROESA BOARD OF DIRECTORS, MAY TEMPORARILY SUSPEND THE CONTRACT DUE TO:

- a) DULY PROVEN ACTS OF GOD OR *FORCE MAJEURE* IN ACCORDANCE WITH THE STIPULATIONS OF THE TENDER GUIDELINES AND THE CONTRACT; AND,
- b) DUE TO ANY OTHER CAUSE SET OUT IN THE TENDER GUIDELINES.

FOR THE SUSPENSION OF THE CONTRACT, THE CONTRACTING STATE INSTITUTION MUST ISSUE A REASONED RESOLUTION; THE SUSPENSION MAY NOT EXCEED FORTY-FIVE DAYS COUNTED FROM THE ISSUANCE OF SAID RESOLUTION. THE CONTRACTING STATE INSTITUTION MAY GRANT AN EXTENSION FOR THE SAME AMOUNT OF TIME, PRIOR AUTHORIZATION OF THE PROESA BOARD OF DIRECTORS. THE TEMPORARY SUSPENSION OF THE CONTRACT SHALL NOT GENERATE ANY LIABILITY FOR THE CONTRACTING STATE INSTITUTION. (1)

Termination of the Contract

Art. 70.- The Public Private Partnership contract shall be terminated due to:

- a) Expiry of the period or the occurrence of any condition subsequent stipulated in the contract;
- b) ABANDONMENT OF THE PROJECT OR GRAVE BREACH OF CONTRACTUAL OBLIGATIONS, DEFINED IN THE TENDER GUIDELINES, DECLARED BY THE CONTRACTING STATE INSTITUTION, PRIOR APPROVAL OF THE PROESA BOARD OF DIRECTORS; (1)
- c) Duly proven Acts of God or *Force Majeure* in accordance with the stipulations of the tender guidelines and the contract;
- d) Early termination due to public interest causes;
- e) Mutual agreement; and,
- f) Other causes stipulated in the tender guidelines and in the contract.

If the Act of God or *force majeure* event only affects the partial fulfillment of contract obligations, and to the extent that the rest of the contract is subject to compliance, the parties shall agree, in accordance with the definitions of the contract, to adjust the legal, technical, and financial stipulations of the contract, in order to bring it into compliance with the remaining obligations.

Early termination of the Contract due to Public Interest

Art. 71.- IF THE PUBLIC INTEREST SO DEMANDS IT, THE CONTRACTING STATE INSTITUTION MAY TERMINATE THE CONTRACT IN AN EARLY MANNER. TO DO SO, IT MUST APPLY FOR THE APPROVAL OF THE PROESA BOARD OF DIRECTORS, WHO MAY GRANT IT PRIOR FAVORABLE RULING FROM THE MINISTRY OF FINANCE FROM THE FISCAL PERSPECTIVE AND FROM THE OFAPP ON MATTERS WITHIN ITS COMPETENCE. TERMINATION MAY ONLY BE REQUESTED IF SOME OF THE FOLLOWING REASONS ARE MET: (1)

- a) That the work or service become unnecessary to satisfy the public needs that motivated the Public Private Partnership project; and
- b) That the work or service demand a redesign or complementary works, so that the additional investments needed to adjust the work to the new conditions exceed twenty percent of the initial budget for the work or service, and it is proven that the economic and social benefits exceed the cost that would lead the State to an early termination. This amount will be updated to the date of submission of the request for approval, using the consumer price index.

The resolution declaring the early termination shall specify the period and conditions under which the private participant must deliver the work or service to the Contracting State institution. In all cases, the private participants are entitled to compensation. Public Private Partnership

contracts must stipulate the criteria and procedures for calculating said compensation, under penalty of nullity.

Early Termination for a New Tender

Art. 72.- WITH THE OBJECTIVE OF INCREASING THE SERVICE LEVELS AND IMPROVING THE TECHNICAL STANDARDS OF THE PROJECT, THE CONTRACTING STATE INSTITUTION AND THE PRIVATE PARTICIPANT MAY AGREE ON TERMINATING THE CONTRACT BY MUTUAL AGREEMENT. TO DO SO, THEY MUST APPLY FOR THE APPROVAL OF THE PROESA BOARD OF DIRECTORS, WHO MAY GRANT IT WITH THE PRIOR FAVORABLE RULING FROM THE MINISTRY OF FINANCE FROM THE FISCAL PERSPECTIVE AND FROM THE OFAPP ON MATTERS WITHIN ITS COMPETENCE. ONCE THIS APPROVAL HAS BEEN OBTAINED, THE CONTRACTING STATE INSTITUTION MUST CARRY OUT A TENDER TO AWARD A NEW CONTRACT, PERTAINING TO THE SAME PROJECT. IN ALL CASES, THE ORIGINAL CONTRACT SHALL CONTINUE TO BE VALID AND IN EFFECT UNTIL THE BEGINNING OF THE NEW PERIOD.

(1)

Early termination for the new tender will occur during the operational phase, once two thirds of the period of validity of the original contract have elapsed and when the project demands a redesign or complementary works in such a way that the additional investments needed to adjust to the new conditions exceed its initial budget by twenty percent. This amount will be updated to the date of submission of the request for termination, using the consumer price index. The contracting State institution will hold a new tender under the terms of this Law and the private participant may compete therein.

In all cases, the private participant that agrees on the early termination for a new tender shall be entitled to compensation for the termination of the contract using the criteria and procedures to which the preceding article refers, which must be stipulated in the Public Private Partnership contracts, under penalty of nullity.

The private participant shall provide to the contracting State institution all the necessary information for developing the tender process in a competitive manner.

Grave Breach or Abandonment of the Project

Art. 73.- In accordance with the terms stipulated in the contract, the contracting State institution shall declare the termination of the contract in the event of a serious breach of contract or abandonment of the project by the private participant. The contracting State institution shall appoint a comptroller who shall have the powers to ensure compliance with the Public Private Partnership contract. This comptroller must fulfill its obligations with the diligence of a good businessman who owns his own business and shall respond civilly, criminally, and administratively for the actions or willful or negligent omissions that may take place during the performance of the duties of the position.

WITHIN ONE HUNDRED AND EIGHTY DAYS AFTER THE STATEMENT OF BREACH OR ABANDONMENT, THE CONTRACTING STATE INSTITUTION SHALL APPOINT A NEW PRIVATE PARTICIPANT FROM A LIST MADE UP BY THE MAJORITY OF CREDITORS. MEMBERS OF SAID LIST MUST FULFILL THE REQUIREMENTS ESTABLISHED IN THE TENDER GUIDELINES, REQUIREMENTS WHICH

MAY BE MODIFIED BY RESOLUTION OF THE PROESA BOARD OF DIRECTORS, UNDER NEW CONSIDERATIONS REVEALING THAT THE ORIGINAL ONES WERE INSUFFICIENT. (1)

IN THE EVENT THAT THE REPLACEMENT HAS NOT TAKEN PLACE DURING THAT TIME, THE CONTRACTING STATE INSTITUTION SHALL HOLD A TENDER PROCESS FOR THE CONTRACT FOR THE REMAINING PERIOD OR FOR A NEW ONE, PRIOR APPROVAL OF THE PROESA BOARD OF DIRECTORS. (1)

The statement of breach shall lead to the enforcement of the surety bonds set out under this Law, the Regulation, and the contract.

Reception

Art. 74.- The reception procedure must be set out in the contract, taking into account the nature of the project.

The contracting State institution shall ensure that, in compliance with the provisions for each case in the tender guidelines and the contract, the private participant:

- a) Delivers the assets that the private participant is required to return or transfer to the State at the end of the contract
- b) Transfers the technology used in the work, good, or service in question as well as all innovations introduced therein;
- c) Provides timely training to the corresponding public officials, as successors in the operating activities and maintenance of services and infrastructure; and,
- d) Provides support services, advice, and resources, including the provision of spare parts, whenever necessary, for a reasonable period to be determined in the tender guidelines, from the delivery of the infrastructure to the contracting State institution.

Settlement

Art. 75.- According to the procedure set out in the contract, the contracting State institution shall conduct the settlement thereof and establish the amount of the payments or charges to be made to the private participant.

The contracting State institution must also ascertain that the private participant has fulfilled its labor obligations and that it has made all the provisions necessary for the fulfillment of those that are still pending until the end of the contract.

TITLE VIII

**ON THE INSPECTION
SOLE CHAPTER**

Inspection

Art. 76.- The OFAPP shall be responsible for the technical inspection of compliance with the obligations under the Law, in the tender guidelines and in public private partnership contracts during the operational phase of the project. The inspection shall be imposed on service levels, the regime for tariffs, and the rights of users, in accordance with the tender guidelines and the contract.

The inspection powers granted under this Law shall not be construed as prejudicing the constitutional and legal powers of the Court of Accounts of the Republic, or the powers conferred to the Ministry of Finance by other legal provisions.

On the Service Levels

ART. 77.- FOR PURPOSES OF INSPECTING THE SERVICE LEVELS, OFAPP MUST VERIFY COMPLIANCE WITH TECHNICAL STANDARDS LINKED TO SAID LEVELS, IN ACCORDANCE WITH THE REQUIREMENTS OF THE TENDER GUIDELINES AND OF THE CONTRACT. PROESA MUST ALSO IMPLEMENT THE PENALTIES ARISING FROM THE BREACH OF THEIR RESPECTIVE OBLIGATIONS, IN ACCORDANCE WITH THE STIPULATIONS OF THE CONTRACT. (1)

On the Tariff Regime

Art. 78.- In accordance with the existing legal regime, the OFAPP must regulate and approve the tariffs that are applicable to the use of the public works or to the provision of the public service. In addition, it must verify that the user fees are in line with what has been regulated and approved.

Services whose prices are not regulated shall be subject to the stipulations of the contract.

User Rights

Art. 79.- The rights of the users of the services are as follows:

- a) To use the service in accordance with the levels committed to by the private participant;
- b) To access accurate, complete, and timely information associated with the utilization of a work or service, under the terms of this Law;
- c) To receive dignified treatment without arbitrary discrimination by the private participant and the contracting State institution;
- d) To receive information on the services that the private participant grants, in order

to have the option use them in full;

- e) To receive information about any circumstance that alters the normal use of works or services and complementary services;
- f) To know the approved tariff regime and its modifications;
- g) To receive a timely response by the private participant and the contracting State institution with regards to their queries, questions, or requirements;
- h) To complain to the OFAPP about violations of their rights, in accordance with the procedure under this Law and its Regulation, without detriment to their rights under the competent consumer protection institutions; and,
- i) To submit the duly substantiated suggestions they deem pertinent with the intent of improving the provision of the service.

It will be up to OFAPP to verify compliance with the obligations of the private participant and the contracting State institution to the users of the good or service, and report to the Consumer Protection Agency in the event of breaches to the rights of users.

User Duties

Art. 80.- The duties of the users of the services are as follows:

- a) To pay the appropriate tariff;
- b) To pay for the complementary services they receive, as applicable;
- c) To use the work and services, while respecting existing legislation;
- d) To avoid damaging the work or infrastructure with which services are delivered, even having to respond for slight negligence;
- e) To pay for the damages attributed thereto that are caused to the work and its facilities, as well as to the infrastructure to be used for the provision of services; and,
- f) To pay for damages caused to third parties during the use of the work or infrastructure.

Inspection Contribution

Art. 81.- The OFAPP shall receive contributions from private participants in the form of fees for inspection activities. The conditions of these contributions will be established in the tender guidelines and the contract for each case, and shall not exceed one percent of the value of the gross annual total revenue

for each project.

Power to Require Information to the Inspected Persons

Art. 82.- The OFAPP shall be empowered to request to the contracting State institution and to the private participant, the information necessary to exercise its inspection powers related to Public Private Partnership contracts.

The private participant and the contracting State institution shall report any relevant facts regarding the inspected activity to the OFAPP, no later than three days after becoming aware thereof, even if no requirement has been set out for that institution.

For purposes of the preceding paragraph, relevant shall be understood to mean any fact that might seriously affect the service levels of the Public Private Partnership projects.

Power to Access

Art. 83.- The OFAPP regular members, alternates, and delegates, as applicable, in the exercise of their inspection functions, shall have free access to the works, their offices, and, in general, to any building or facility of the private participant and of the contracting State institution, which are directly intended for the utilization of the work or service subject to inspection, trying not to interfere with the normal development of the respective activity. The obstruction of these functions will be duly punished.

Power to subpoena

Art. 84.- The OFAPP may summon representatives, directors, managers, consultants, and dependents of the private participant and of the contracting State institution and witnesses with regards to some fact for which their knowledge is deemed necessary for the performance of the duties of the OFAPP. This statement must be recorded in the minutes, which must be signed by the person summoned to testify and by the official authority which summoned them.

Power to Address Complaints from Users

Art. 85.- The OFAPP must address the complaints filed by users for the violation of their rights within a maximum period of thirty days. The resolution of the complaint, be it favorable or unfavorable, must be substantiated and be communicated in writing to the affected user, sending a copy thereof to the contracting State institution and to the private participant.

For the resolution that was issued, the user may lodge a review appeal, which must be resolved by the OFAPP in a maximum period of fifteen days.

Audit function

Art. 86.- The OFAPP may perform technical audits to the contracting State institution and the private participant for the sole purpose of verifying compliance with their legal and contractual obligations. The audit procedure shall be governed by the Regulation.

Function of Imposing Penalties and Sanctions

Art 87.- THE OFAPP SHALL IMPOSE SANCTIONS TO THE CONTRACTING STATE INSTITUTION OR TO THE PRIVATE PARTICIPANT, AS APPLICABLE, FOR THEIR RESPONSIBILITY IN THE FOLLOWING INFRACTIONS:

- a) SERIOUS INFRACTIONS:
 - i) OBSTRUCTING THE INSPECTION FUNCTIONS OF THE OFAPP.
 - ii) THEIR PERSONNEL NOT APPEARING JUSTIFIABLY TO APPOINTMENTS WITH THE OFAPP.
 - iii) NOT HEEDING, WITHIN THE PRESCRIBED PERIOD, THE INSTRUCTIONS AND INFORMATION REQUIREMENTS MADE BY THE OFAPP.
 - iv) VIOLATE THE RIGHTS OF USERS, AS SET OUT UNDER THIS LAW.
 - v) REFUSE TO PROVIDE INFORMATION REQUIRED BY THE OFAPP.
- b) VERY SERIOUS INFRACTIONS:
 - i) PROVIDING FALSE INFORMATION.
 - ii) COLLECTING RATES IN A NON-REGULATED MANNER.

PENALTIES FOR SERIOUS INFRACTIONS WILL CONSIST OF FINES THAT MAY BE EQUIVALENT TO ANYWHERE FROM TWENTY-FIVE TO FIVE HUNDRED TIMES THE CURRENT MONTHLY MINIMUM WAGE FOR THE TRADE AND SERVICES SECTOR. PENALTIES FOR VERY SERIOUS INFRACTIONS WILL CONSIST OF FINES THAT MAY BE EQUIVALENT TO ANYWHERE FROM FIVE HUNDRED TO ONE THOUSAND TIMES THE CURRENT MONTHLY MINIMUM WAGE FOR THE TRADE AND SERVICES SECTOR; TO DETERMINE IT, THE OFAPP MUST BE AWARE OF THE MAGNITUDE OF THE DAMAGE CAUSED BY THE INFRACTION, THE RECIDIVISM OF THE INFRACTION, THE BENEFIT RESULTING FROM THE INFRACTION, AND THE FINANCIAL CAPACITY OF THE OFFENDER.

SANCTIONS WILL BE IMPOSED, WITHOUT DETRIMENT TO THE ACTIONS THAT THE AFFECTED PARTY MAY ENGAGE IN AGAINST THE RESPONSIBLE PARTY, IN ORDER TO REPAIR THE DAMAGE CAUSED DIRECTLY BY THE INFRACTION, SHOULD THERE BE ANY.

PUBLIC PRIVATE PARTNERSHIP CONTRACTS MAY SET FORTH THE AMOUNT OF THE PENALTIES THAT WOULD BE IMPOSED AS A CONSEQUENCE OF THE BREACH OF EMINENTLY CONTRACTUAL OBLIGATIONS.

DURING THE OPERATIONAL PHASE, THE OFAPP SHALL IMPOSE SANCTIONS FOR BREACH OF LEGAL OBLIGATIONS OR PENALTIES FOR BREACH OF CONTRACTUAL OBLIGATIONS PRIOR TO ANY ADMINISTRATIVE PROCEDURE THAT MAY BE INITIATED BY ITS OWN INITIATIVE OR UPON REQUEST FROM ANOTHER PARTY.

ONCE THE PROCEDURE HAS BEEN INITIATED, THE OFAPP MUST NOTIFY THE ALLEGEDLY RESPONSIBLE PARTY OF THESE CHARGES, WHO WILL HAVE FIFTEEN DAYS COUNTED FROM THE DATE OF THE NOTIFICATION TO SET FORTH THEIR DEPOSITION AND SUBMIT ALL PERTINENT EVIDENCE. ONCE THE PERIOD GRANTED FOR THIS PURPOSE HAS EXPIRED, THE OFAPP SHALL RULE AND NOTIFY ITS RESOLUTION WITHIN THE FOLLOWING FIFTEEN DAYS.

FOR THE RESOLUTION OF THE OFAPP, A REVIEW APPEAL MAY BE LODGED WITH THIS SAME AGENCY, WITHIN A PERIOD NOT EXCEEDING FIVE DAYS COUNTED FROM THE DATE OF NOTIFICATION OF THE RESOLUTION. THE OFAPP SHALL RESOLVE AND NOTIFY THE APPEAL IN A MAXIMUM PERIOD OF FIFTEEN DAYS COUNTED FROM THE DATE IN WHICH IT WAS FILED. THE RESOLUTION OF THE REVIEW APPEAL SHALL COMPLETELY EXHAUST ALL ADMINISTRATIVE MEASURES. (1)

Approval of the Service Manual

Art. 88. It will be the responsibility of the contracting State institution to approve the service manual provided by the private participant. In order to grant said approval, the OFAPP must approve of, at a minimum, the following aspects:

- a) The description of the rights and obligations of users;
- b) The service levels of the Public Private Partnership project; and,
- c) The rules on user complaints.

Once approved, the service manual shall be published in the institutional website of the OFAPP.

Studies and Records

Art. 89.- The OFAPP shall conduct analyses and studies on matters pertaining to their competence and, at a minimum once a year, on user perceptions regarding the quality of services for projects in the operational phase. Studies conducted by the OFAPP must be published on its institutional

website.

The OFAPP must undertake comparative studies on the various features and factors of the utilization activity of the services, especially regarding their quality and price.

The OFAPP may enter into cooperation agreements with other public institutions or private non-profit entities, for the purpose of gathering information, enhancing the dissemination of the rights of users, and expanding and facilitating pathways for reporting possible breaches of the benefits or violations of user rights.

In addition, the OFAPP shall maintain a representative index of the continuity of service of private participants.

The OFAPP shall draw up a list of private participants, on the basis of the complaints filed by users that are received favorably, the results of the surveys and the aforementioned index of continuity of service. The Regulation shall establish the criteria and guidelines for drawing up this list.

Function of Disseminating the Rights of Users

Art. 90.- The OFAPP and the Consumer Protection Agency shall disseminate the regime of rights of users for each type of Public Private Partnership project within their jurisdiction.

In order fulfill the obligations set out in this article, the OFAPP and the Consumer Protection Agency must publish this information in its institutional website, without detriment to any other dissemination mechanisms that may be set out.

Function of Instructing

Art. 91.- The OFAPP may instruct the contracting State institution and the private participant to take the necessary measures to fully comply with obligations under this legislation and the contract.

TITLE IX ON DISPUTE RESOLUTION SOLE CHAPTER

Dispute Resolution Regime

Art. 92.- EVERY PUBLIC PRIVATE PARTNERSHIP CONTRACT MAY PROVIDE NATIONAL OR INTERNATIONAL MECHANISMS FOR THE RESOLUTION OF DISPUTES ARISING FROM ITS INTERPRETATION, IMPLEMENTATION, OR PERFORMANCE. THESE MECHANISMS MUST INCLUDE, AT A MINIMUM, ONE DIRECT SETTLEMENT STAGE AND ONE STAGE THAT HAS THE PARTICIPATION OF A GROUP OF SPECIALISTS, IN ORDER FOR THE PARTIES TO ATTEND THOSE MEETINGS IN THE SEARCH FOR A PROMPT AND EFFECTIVE SOLUTION TO THE DISPUTE. (1)

The standards contained in Article 93 of this Law, and the following ones of this Chapter, shall also apply when the parties do not agree on a different mechanism in the Public Private Partnership contract.

In any event, the following disputes may not be addressed by mechanisms alternative to ordinary jurisdiction:

- a) Matters on which a final judgment has been ruled;
- b) Labor matters;
- c) EXERCISE OF THE INSPECTION AND SANCTION-IMPOSING ROLE BY THE OFAPP OR SECTORAL REGULATORS; AND, (1)
- d) The exercise of the rights of the contracting State institution, to terminate the contract early, due to abandonment or severe breach of the obligations of the private participant or due to public interest.

Direct Settlement and Group of Specialists

Art. 93.- The contractual parties shall initially seek to resolve their disputes through direct settlement, with either party being able to request it in writing to the other party, once the points in discord have been identified. The date of receipt of this application shall signal the start of the direct settlement.

If from the date of receipt of the request for direct settlement proceed, thirty days elapse without having reached total agreements, the parties shall be forced to appoint one subject-matter specialist each for the subject matter being discussed. Specialists shall have a period of sixty days, counted from the date of the appointment of the last specialist, to propose to the parties ways in which to resolve differences that have not been overcome during the direct settlement stage. The fees of each specialist will be covered by the party that appoints them.

The periods mentioned in the two preceding paragraphs may be extended by mutual agreement, to the extent that the parties require appropriate consultations on the legality and feasibility of the terms of a possible solution.

Start of the Arbitration

Art. 94.- Once the interests of the parties have tried to be reconciled through direct negotiation and through the intervention of the group of specialists, without having reached any agreement with regards to all of the differences, the parties shall then proceed to comprise an Arbitration Panel to hear the unresolved elements.

Nature of the Arbitration

Art. 95.- The Arbitration Panel shall resolve disputes according to law.

Composition of the Arbitration Panel

Art. 96.- The Arbitration Panel shall consist of three professionals in legal sciences; two of them shall be appointed by each of the parties and the third shall be appointed by mutual agreement, and shall act as the chairman of the Arbitration Panel. Once the third arbitrator accepts the appointment, the arbitration shall be deemed to have commenced.

Remuneration

Art. 97.- Regardless of the manner in which the appointment is made, the members of the Arbitration Panel shall be paid by the contracting State institution and by the private participant, in equal parts. The arbitration arrangement expenses shall also be borne in this same manner.

Rules for the Arrangement of the Arbitration

Art. 98.- Within the following ten days subsequent to the acceptance of the appointment of the last arbitrator, the party that promotes the arbitration shall submit its claim to the Arbitration Panel, which once received, shall immediately be forwarded to the defendant, who will have ten days to file its response, its exceptions, or counterclaim, as applicable. Whatever is submitted shall then be forwarded to the complainant so it may respond thereto within a ten-day period. If exceptions are raised against the counterclaim, it shall be forwarded to the other party in the manner and terms of the principal claim.

All documentary evidence that is intended to be used must be added to the claim, response, counterclaim, and exceptions; should said evidence not be available, its contents and its location shall be indicated, and it will be requested that it be incorporated into the process.

If the event that whoever promotes the arbitration proceedings does not submit its claim within the scheduled period, the Arbitration Panel shall deem its functions as finished and shall return the proceedings so that the parties may promote the action before ordinary courts. In case of a lack of response to the claim, there will be no acknowledgment or adjudication of contempt, therefore the process shall proceed.

When the aforementioned periods have elapsed, the arbitrators shall summon the parties to a conciliation hearing. If an agreement is reached, the arbitrators shall terminate the proceedings, and the parties may request the Arbitration Panel that the settlement reached be raised to the status of final arbitration award.

If there is failure to reach a total agreement for the claims, the process will continue by examining the evidence, which, except for those that are documentary in nature, shall be conducted at a hearing convened for this purpose, and it should occur within a maximum period of thirty days counted from the date of the response to the claim or counterclaim.

Once the evidence has been examined, arbitrators will request the parties to submit a written summary of their arguments, which once verified, shall allow the arbitrators to proceed to issue the arbitration award, bearing in mind that

arbitration proceedings may not last more than ninety days after counted from the date of acceptance of the appointment of the last arbitrator.

Evidentiary Rules

Art. 99.- The Arbitration Panel shall have the exclusive power to determine the admissibility, relevance, and value of the evidence. Likewise, it may unofficially decree, whenever it deems it necessary, using evidence of any kind.

Arbitrators must analyze the evidence and assess it according to the rules of fair criticism.

Expert Opinion

Art. 100.- Discrepancies of a technical or financial nature that occur and are part of the dispute subject to the decision of the Arbitration Panel may be submitted to the consideration of one or more experts. The Regulation shall establish the qualification requirements, the formalities for their appointment, and the parameters for the remuneration of experts.

Arbitration Award

Art. 101.- The award shall be stated in writing and shall indicate:

- a) Place and date;
- b) Name, nationality, address and general information of the parties and of the arbitrators;
- c) The matter referred to arbitration and a summary of the arguments and conclusions of the parties;
- d) The assessment of the evidence;
- e) The resolution must be clear, precise, and consistent with the demands and other allegations that may arise during the process, and shall make a decision on all disputed points that have been the subject of debate. When these have been several, a corresponding statement shall be made for each of them, duly separated, maintaining the corresponding logical order; and,
- f) The determination of the costs of the proceedings, if any.

The award may be adopted unanimously or by simple majority vote and will be signed by the arbitrators.

The arbitration award, authenticated by a Notary, shall have the same force and effect as an enforceable sentence passed on *res judicata*, and shall be notified to the parties at the hearing

in which the arbitrators will quote it for purposes of dictation, whether or not the parties attend said hearing. A copy of the award shall be given to each party.

The award shall be subject to clarification, addition, or correction and shall be firm once such proceedings have been concluded, when applicable. Within the following five days subsequent to the notification of the award to the parties, they may request clarification of its operative part, an addition when some point of the dispute has remained unresolved, or corrections for calculation, clerical, or typographical errors, which the arbitrators may carry out unofficially. The Panel must clarify, supplement, or correct the award, if applicable, within a period not exceeding seven days from the receipt of the respective request. The award or any of the decisions referred to in this article cannot be appealed.

Temporary Suspension and Discontinuance of Arbitration

Art. 102.- The parties, by mutual agreement, may at any time before the award is issued, agree the temporary suspension of or withdrawal from the arbitration.

Suspension may also take place in the event of death, resignation, temporary incapacity lasting more than fifteen days, permanent incapacity, or removal of an arbitrator, until the arbitrator has been replaced and the appointed arbitrator has accepted the position. In either case, the period of suspension of the process is not taken into account for purposes of calculating the maximum duration of the arbitration process, and therefore should be discounted in full.

Suspension of Administrative Acts or Works

Art. 103.- During the course of the arbitration proceedings, the parties may request the suspension of the actions of the other party to the Arbitration Panel. Said suspension may not be requested before any other judicial or administrative, ordinary or special, authority.

Said request shall be processed with the prior knowledge of the counterpart, and there must be serious and qualified reasons to decree it, and the following circumstances must take place:

- a) Proving the possible loss or irreparability of the right being claimed if the measure is not adopted; and,
- b) That sufficient surety is given for the damages that may arise and the fines that may be imposed.

Notwithstanding the foregoing, under no circumstance may the Arbitration Panel authorize or order the cessation of the construction of the works or the provision of a public service for more than thirty days, either directly or by suspending the effects of any related action. The Panel may extend the period set forth for another equal period if it is considered that the circumstances that led to the measure still remain and if the public interest is not affected.

**TITLE X
SOLE CHAPTER
MISCELLANEOUS PROVISIONS**

Special Nature of the Law

Art. 104. The provisions of this Law, owing to its specialty, shall prevail over any other general or special character law regulating the same subject matter, notwithstanding the supplementary application of such standards in matters not regulated herein and which are not inconsistent with its provisions. For its repeal or amendment, it must be mentioned in an express manner.

Timeframes

Art. 105.- All timeframes and periods referred to in this Act shall be working days, unless otherwise expressly stated.

NONCOMPLIANCE WITH THE PERIODS SET FORTH IN THIS LAW SHALL BE SANCTIONED WITH A FINE EQUIVALENT TO FOUR CURRENTLY VALID MINIMUM WAGES FROM THE TRADE AND SERVICES SECTOR BY THE PROESA BOARD OF DIRECTORS UNDER THE PROCEDURE SET FORTH IN ART. 87 OF THIS LAW, PRIOR REPORT FROM THE FAPP. SAID FINE WILL BE IMPOSED ON THE OFFICIALS OR EMPLOYEES RESPONSIBLE FOR THE BREACH OF THE LEGAL TIMEFRAME SET OUT.
(1)

PUBLIC REGISTRY OF PUBLIC PRIVATE PARTNERSHIP PROJECTS (1)

Art. 105-A.- CREATE IN PROESA THE PUBLIC REGISTRY OF PUBLIC PRIVATE PARTNERSHIP PROJECTS, IN WHICH ALL PROJECTS PERFORMED UNDER THE CONTRACTUAL MODALITIES SET FORTH IN THIS LAW SHALL BE REGISTERED.

THE REGISTRY SHALL BE PUBLIC IN NATURE AND PROESA MUST ENSURE EXPEDITED AND PERMANENT ACCESS TO ITS INFORMATION VIA ELECTRONIC MEANS THROUGH ITS INSTITUTIONAL WEBSITE, IN LINE WITH THE PROVISIONS OF THE ACCESS TO PUBLIC INFORMATION LAW.

ALL PUBLIC PRIVATE PARTNERSHIP PROJECTS AND THEIR DOCUMENTATION SHALL BE REGISTERED IN THIS REGISTRY, INCLUDING, *INTER ALIA*, THE TENDER GUIDELINES, PREFEASIBILITY STUDIES, FEASIBILITY STUDIES, COST-BENEFIT ANALYSIS, RESOLUTIONS OF THE AWARD, CONTRACTS AND THEIR MODIFICATIONS, SPECIAL PLEDGES SET FORTH UNDER THIS LAW, REJECTED PROJECTS, APPROVED PROJECTS, IMPLEMENTED PROJECTS, PREQUALIFIED BIDDERS FOR EACH TENDER PROCESS AND THOSE PREQUALIFIED FOR EXPERT CONSULTANCIES AND ADVISORY, ARBITRATORS, AND SUPPLIERS. (1)

Regulation of the Implementation

Art. 106.- The Regulation referred to in this Law shall be issued within one hundred and twenty days counted from the effective date of validity thereof.

Validity

Art. 107. This Law shall enter into force eight days after its publication in the Official Journal.

GRANTED IN THE BLUE ROOM OF THE LEGISLATIVE PALACE: San Salvador, on the twenty-third day of the month of May of the year two thousand and thirteen.

OTHON SIGFRIDO REYES MORALES,
CHAIRMAN.

ALBERTO ARMANDO ROMERO RODRIGUEZ,
FIRST VICE-CHAIRMAN.

GUILLERMO ANTONIO GALLEGOS NAVARRETE,
SECOND VICE-CHAIRMAN.

JOSE FRANCISCO MERINO LOPEZ,
THIRD VICE-CHAIRMAN.

FRANCISCO ROBERTO LORENZANA DURAN,
FOURTH VICE-CHAIRMAN.

ROBERTO JOSE d'AUBUISSON MUNGUIA,
FIFTH VICE-CHAIRMAN.

LORENA GUADALUPE PEÑA MENDOZA,
FIRST SECRETARY.

CARMEN ELENA CALDERON DE ESCALON,
SECOND SECRETARY.

SANDRA MARLENE SALGADO GARCIA,
THIRD SECRETARY.

JOSE RAFAEL MACHUCA ZELAYA,
FOURTH SECRETARY.

IRMA LOURDES PALACIOS VASQUEZ,
FIFTH SECRETARY.

MARGARITA ESCOBAR,
SIXTH SECRETARY.

FRANCISCO JOSE ZABLAH SAFIE,
SEVENTH SECRETARY.

REYNALDO ANTONIO LOPEZ CARDOZA,
EIGHTH SECRETARY.

PRESIDENTIAL PALACE: San Salvador, on the fourth day of the month of June of the year two thousand and thirteen.

PUBLISHED,

Carlos Mauricio Funes Cartagena,
President of the Republic.

Juan Ramón Carlos Enrique Cáceres Chávez,
Minister of Finance.

José Armando Flores Alemán,
Minister of the Economy.

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REFORM:

- (1) D.L. No. 666, 25 APRIL 2014
D.O. No. 90, T. 403, 20 MAY 2014.

RELATED PROVISION:

D.L. No. 663, 9 APRIL 2014,
D.O. No. 93, T. 403, 23 MAY 2014.

FN
02/07/14

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14/07/14