

# URGENT NEED FOR THE REGULATION OF THE LAW ON PUBLIC PRIVATE PARTNERSHIPS (PPP) OF PANAMA

BY PUBLIO CORTÉS



Last year Panama passed Law 93 of 2019 (PPP Law) which regulates Public Private Partnerships (PPP). It was an important step for our country to catch up with this instrument to offer solutions for the implementation of public works and services, while energizing the economy and generating jobs. It is an extensive and well-balanced law.

Perhaps the only important question is that it leaves out relevant areas such as water, education and health services, for fear that the population would think that the use of the mechanism implied "disguised privatization", when, if correctly applied, the PPP regime should not diminish public presence, benefits and control.

I think that in this sense the Lawmakers have been somewhat contradictory, in that if the PPP regime is good for infrastructure works of the Ministry of Public Works, on roads, bridges, etc., it should also be good for, for example, infrastructure works such as aqueducts or the efficient and quality construction of schools and hospitals. Conversely, if it was a bad regime for developing aqueducts, then it would also be a bad regime for roads.

At the end, as everything in the Public Administration, efficiency is not assured beforehand and depends on the technical design of the contracting and the handling of the contract, as well as on the level of transparency and neutrality applied, to avoid possible deviations from the sound objective of quality service in favor of the general interest.

In any case, Panama's PPP Law is an important step forward. However, for the regime to be truly implemented, it is **essential** that adequate regulations be issued as soon as possible, because this law has many aspects that need to be clarified, and it also includes many issues where the legal instrument itself refers to what the regulations state, and said and such regulation, to date, **does not exist**. This means that it is not yet a clearly defined instrument for attracting investment.

On January 16, 2020, the newspaper LA ESTRELLA DE PANAMA, published a news item in which the National Secretary of the PPPs said that *"in the first quarter of this year we hope to have the regulations of Law 93 in place"*. In that same news item, it is reported that the Government of Panama has plans to develop 17 projects under the PPP regime and that the first four would be the San Miguelito Metro-Cable, the Panama West Coastal Highway, the Colon Atlantic Corridor and the David, Chiriquí North Corridor.

Once the COVID-19 crisis was underway, the Panamanian newspaper LA PRENSA published on May 7, 2020, an interview with the "Counselor Minister for the

Promotion of Private Investment", where said public official expressed that *"the Government's finance team is reevaluating the budget and that in the execution of investments the figure of the **public private partnership (PPP)** will have to gain prominence"*. And further on he adds: *"Before the crisis began, the Government had identified an investment portfolio through this mechanism of some \$2,000 million. In the new post-pandemic scenario, the portfolio of projects to be executed under this modality is expected to amount to \$10,000 million."*

I agree with the two public officials above. Precisely because of this, it seems to us that, now, when the month of October ends, the country should have the Executive Decree that regulates the PPP Law in force.

LA ESTRELLA DE PANAMÁ

Economía //

### Implementación de ley de APP estaría lista en el primer trimestre del año

Las autoridades se encuentran trabajando en la implementación de la normativa, que busca reactivar la economía panameña y atraer más inversión al país.

EXPERIENCIAS DE LAS ASOCIACIONES PÚBLICAS PRIVADAS EN LATINOAMÉRICA CHILE, COLOMBIA Y PERÚ.

La Cámara de Comercio de Panamá y la Cámara Panameña Chilena de Comercio realizaron este jueves un foro sobre la experiencia de las APPs en otros países con expertos internacionales. Raúl A. Bernal | La Estrella de Panamá

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Noticias Relacionadas

Contra sanción ley que formaliza el

El Secretario Nacional de la Asociación Público-Privada (APP), Saleh Asvat, dijo este jueves que esperan que en el primer trimestre de este año ya tengan lista la reglamentación de la Ley 93, que crea este régimen, el cual busca incluir al sector privado en inversiones de interés social que ejecuta el gobierno panameño.

"Queremos en el 2020, con la institucionalidad y la reglamentación que estamos desarrollando, colocarlos como uno de los mejores países" para hacer APP en Latinoamérica, puntualizó Asvat a periodistas dentro del marco de celebración del Foro "Experiencias de las Asociaciones Públicos-Privadas en Latinoamérica, Chile, Colombia y Perú" en la sede de la Cámara de Comercio, Industrias y Agricultura de Panamá (Cria).

## Why is the PPP Law Regulation necessary?

To illustrate the urgent need for the regulation in reference, we present below, by way of example, 10 important items that deserve to be clarified in the PPP Law, as follows:

(1) The PPP Law provides for the right of creditors of the PPP contractor to replace such contractor if the contractor commits an uncorrected breach under the PPP contract. That right is subject to the provisions of the contracts between the creditors and the PPP Contractor, but is also subject to the provisions of the PPP Law and the Regulations of the PPP Law. In relation to this right, we have that -when the creditors do not exercise it- it could be moved to the stage of "serious breach", situation in which the public contracting entity may terminate the contract and execute guarantees and/or appoint an auditor, all in application of the PPP Law and the Regulations. As the Regulations have not been issued, there is a need to know what it will say on this matter, to fully understand the legal framework.

(2) Our PPP Law regulates the so-called "*fixed liabilities*" and "*contingent liabilities*" of public entities to the PPP Contractor. The former is fixed commitments to pay for investments and the provision of services, and the latter are stipulated assurances that can potentially generate payment obligations when certain specific risk events occur. Well, the PPP Law establishes that the Ministry of Economy and Finance and the National

Secretariat of PPPs must adhere to the Regulations to monitor and control that the contracting public entities comply with the rules on calculation parameters for the design of firm and contingent commitments and the accounting rules for the valuation and updated control of such commitments. This is a very important issue to decide whether to invest or not, however, it depends on the Regulation that does not exist now.

(3) Related to the previous issue, there is another rule of the PPP Law, which states that "The regulation will establish the terms and conditions that must be complied with by the contracting public entities to assume firm or contingent liabilities within the framework of this Law". That is, both at the stage of determining which firm or contingent commitments a public entity may acquire, and at the stage of monitoring whether such entities comply with the parameters of such commitments, we depend on the Regulations.

(4) The terms of the PPP Contracts are established in the tender documents, but it shall be for a maximum of 30 years, renewable for 10 additional years. The APP Law indicates that the term will begin to be in force from the countersigning of the Contract by the Comptroller's Office, "in accordance with the regulations of this Law". In other words, the Regulations also have something to do with how the term begins to be counted.

(5) The PPP Law has a minimum amount established for projects: they cannot be

for less than 15 million dollars. The only exception is in the case of projects where the contracting entities are Municipalities. In this respect, the PPP Law says: "*This exception will be implemented by **means of regulations...***" Without Regulations no PPP projects can be made for Municipalities when these are for amounts of less than 15 million dollars.

(6) According to the PPP Law, it is established that all the resources of each project must be managed through a Trust for a specific purpose in the Republic of Panama, being the Fiduciary required to hold accounts in banks with general license in Panama or international banks supervised in their countries in a manner equivalent to the Panamanian supervision and with investment grade rating. If this is not complied with, the PPP Contract is lost. In that case, the bidding entity may notify the next bidder in score, to declare whether it wants to replace the original contractor. The PPP Law states that this notification and replacement process must be carried out "*in accordance with the procedure defined **in the regulations** for this purpose*".

(7) The PPP Law allows the contracting entity, after consultations and authorizations, to modify the contract for reasons of public interest, duly justified, by means of an addendum to the PPP Contract. If there are additional costs due to this, the contracting entity must financially compensate the PPP Contractor. The Law states that: "*The methodology of such modifications shall be established **in the regulations***".

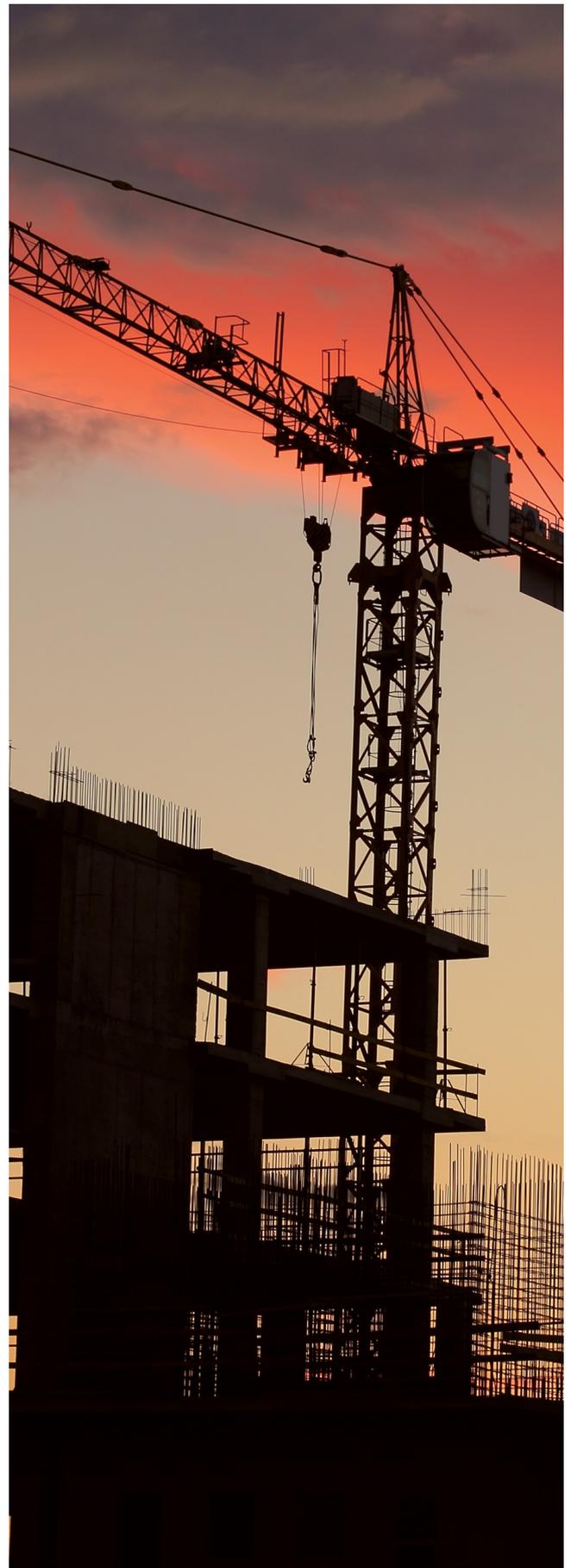
(8) Regarding extensions to the PPP contract, requested by the contractor, these can only be requested before the completion of  $\frac{3}{4}$  parts of the contract duration. On "time renewals", the PPP Law says, must be evaluated by the contracting entity, in coordination with the National PPP Secretariat, "*as established in this Law **and its regulations***". Again, the Regulations have the floor.

(9) The PPP Law also has some rules that do not refer to the regulation, but that have some level of possible inaccuracy that would merit clarification through Regulations.



For example, on the matter of expropriations. One rule mentions the obligation of the PPP Contractor to warn "*in due time*" when the project involves the need to expropriate private property, so that the entity can initiate the expropriation procedure in accordance with the Judicial Code. However, it later establishes that the contracting entity is responsible for making a technical diagnosis of the legal status of the property to identify the interference and costs of expropriation. It would probably be beneficial if the Regulations specified that, if the contractor did not notify the contracting entity, in due time, for example, about the interference of a property that could be expropriated, there would be no major consequence, because in any case the entity was also obliged to make the diagnosis.

(10) The PPP Law provides that the contracting entity, upon authorization and in cases of serious breach, may appoint an auditor to ensure compliance with the PPP contract. The profile, experience and fees of the auditor must be established **in the Regulations**. At the end of the audit, the contracting entity must submit a report. The minimum content of this report will be established in the Regulation.



## **Final Comments**

As well as the 10 items already explained, there are many other elements that need to be clarified in a PPP Law regulation. If all those aspects are not fully clarified, it will be more difficult for an investor to become interested.

Moreover, the simple enactment of the regulation is not enough since the market must be given the opportunity to make a detailed study of the entire legal framework and business prospects. Likewise, the technical and administrative capacity of the State to propose reasonable projects must be studied, which are tendered with transparency and neutrality, and a balanced administration and supervision of the contracts must be visualized. All these studies take time, especially in the current economic situation.

We hope that the Government of Panama will resume the subject and promulgate the regulations of the PPP Law, as soon as possible. The economic recovery makes this step more than imminent.

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