

GOVERNMENT DECREE NO. 13/2016

of 21 September 2016

REGULATES THE PROCESS OF OPENING ESCROW BANK ACCOUNTS AND THE CONCLUSION OF ESCROW DEPOSIT CONTRACTS IN THE CONTEXT OF THE IMPLEMENTATION OF THE PUBLIC-PRIVATE PARTNERSHIP FOR THE PORT OF TIBAR

In accordance with the guidance determined by the Strategic Development Plan and the Strategic Plan of the Ministry of Finance and according to the Government Program, the concession contract for the design, construction, financing, operation and maintenance of the Port of Tíbar was signed through a Public Private Partnership between the Democratic Republic of Timor-Leste and a private partner.

Under this contract, the Government is responsible for the payment of the grant for partial financing of the capital expenditure required for the construction of the Port of Tíbar (Viabilization Fund or VGF), corresponding to the Government's participation in the project, in accordance with the multi-annual disbursement program established in the concession contract. For this purpose, the concession contract foresees the opening, by the State, of bank accounts of an escrow nature and the execution of an escrow deposit contract with a banking entity of international reputation, which will act as agent and move the respective account, in accordance with the contract to be signed between the banking entity and the Timorese State, to which the concessionaire will be party as beneficiary.

As this is an innovative legal instrument in Timor-Leste and it is up to the Government to regulate the terms and conditions of escrow deposits, within the scope of public-private partnerships, it is therefore necessary to establish the necessary rules and conditions for the opening of escrow accounts and escrow deposit contracts, in order to comply with the obligations resulting from the concession contract for the Public Private Partnership of the Port of Tíbar.

Thus, the Government decrees, under no. 8 of article 7 of Law no. 1/2016, of 14 January, as amended by Law no. 11/2016, of 10 August (General State Budget for 2016) and under article 15 of Law no. 13/2009, of 21 October (Budget and Financial Management), to apply as regulation, the following:

Article 1

Object and scope

This law establishes the necessary rules for the opening of escrow bank accounts and the execution of escrow contracts, for the execution of the payment of subsidy for partial financing of the capital expenses necessary for the construction of the Port of Tíbar (VGF), corresponding to the State's participation in the project, under the terms and for the purposes of the concession contract for the Public Private Partnership of the Port of Tíbar.

Article 2

Escrow Account and Escrow Contract

1. For the purposes of this legal diploma, escrow accounts shall mean bank accounts officially opened in the name of the Democratic Republic of East Timor, with a banking entity located in the national territory or abroad, for the benefit of the concessionaire, for the purpose of payment of the subsidy for partial financing of the capital expenses necessary for the construction of the Port of Tíbar (VGF), corresponding to the State's participation in the project, under the terms and for the purposes of the concession contract for the Public Private Partnership of the Port of Tíbar.
2. Escrow bank accounts may have associated current deposit bank accounts in order to facilitate the payment of fees and receipt of interest associated with the deposit of amounts in the depository bank entity.

3. The escrow account is moved in accordance with the escrow deposit contract to be entered into with the escrow agent, to which the concessionaire will also be a party, as beneficiary.
4. The escrow deposit agreement is the agreement whereby the depositor entrusts the custody of certain movable assets to the depositary, who undertakes, in accordance with the agreed irrevocable instructions, to return the assets to the depositor or hand them over to a third beneficiary.
5. The escrow agent is the depositary, which may be a bank or other entity, and undertakes to store, return and deliver the movable property in accordance with the terms established and communicated by means of an escrow deposit contract, and results in the deposit being linked to the vicissitudes of the underlying contract.
6. The Government designates the bank entity with which it opens the escrow account and associated bank accounts, as well as the entity acting as escrow agent, and which moves the escrow account, in accordance with the rules set out in this document and in the escrow contract.
7. The escrow contract shall reflect the principles set forth in this statute and in the concession contract entered into with the concessionaire for the Public Private Partnership of the Port of Tibar.

Article 3

Authorization to open escrow account and conclude escrow contract

It is the responsibility of the member of the Government responsible for the area of finance to directly consult the banking entities, to negotiate and conclude the escrow deposit contract and to authorize the opening of the escrow account, under the terms of paragraph 1 of Article 15 of Law No. 13/2009 of 28 September, and of this law and the concession contract of the Port of Tibar.

Article 4

Selection of the banking entity and the escrow agent

1. The process of selecting the bank entity to hold the escrow account and associated bank accounts and the entity acting as escrow agent shall be the responsibility of the member of the Government responsible for the area of finance and shall be subject to the conditions set out in this Article.
2. The Public Private Partnerships and Loans Unit of the Ministry of Finance shall carry out direct consultation with at least three banking entities of international reputation, which provide banking services of an escrow nature, in national territory or abroad.
3. For the purposes of the previous paragraph, electronic means of communication, telephone contacts and other means of communication may be used, as well as meetings with the entities consulted, and they must present their best final proposals in writing, preferably by electronic mail, within the period established by the Public Private Partnerships and Loans Unit of the Ministry of Finance for that purpose.
4. Within the scope of direct consultation with the banking entities, the Public Private Partnership Unit is authorized to negotiate the terms and conditions of the proposals presented, in order to ensure that they comply with the law and the requirements stipulated in the concession contract for Public Private Partnership for the Port of Tibar.
5. For the purposes of this document, banking entities with an international reputation are those with a minimum rating of AA-, in accordance with Standard and Poors or Aa3, in accordance with Moody's rating or another rating accepted by the Government, under the terms of the applicable legislation.
6. The entities consulted are selected on the basis of the credit rating, fees and commissions charged, interest rate offered, consistency with the conditions stipulated in the concession contract of the Public Private Partnership of the Port of Tibar and other services and advantages provided.

7. After analyzing the proposals, the Public Private Partnerships and Loans Unit of the Ministry of Finance prepares a technical evaluation report, identifying the entities consulted, describing the characteristics of the proposals and identifying the best proposal to which the escrow contract should be awarded in order to open the escrow account.
8. On the basis of the report referred to in the previous paragraph, the member of the Government responsible for finance selects the entity submitting the best tender and authorizes negotiation of the particular terms and conditions of the escrow contract and the opening of the escrow account.

Article 5

Content of the Escrow Agreement

1. The escrow contract establishes, within the private autonomy of the parties, the terms and conditions for the opening of the escrow account and its operation, including the irrevocable instructions as to the disbursement of the FVC, in accordance with the terms and conditions established in the Public Private Partnership concession contract for the Port of Tibar.
2. The escrow contract is based on and dependent upon the Public Private Partnership concession contract for the Port of Tibar.
3. The functions of the depositary and escrow agent are remunerated and exercised on a professional basis.
4. All fees, costs and expenses of any nature related to the escrow account or payable to the escrow agent shall be borne by the State without being deducted from the FVC.

Article 6

VGF deposit, interest and proceeds from escrow account

1. Upon conclusion of the escrow contract, the Directorate General of the Treasury of the Ministry of Finance shall immediately and fully transfer the total amount of the FVC to the escrow account.
2. All interest and proceeds from the escrow deposit and generated during the term of the escrow contract are the property of the Democratic Republic of Timor-Leste.

Article 7

Entry into force

This decree of the Government shall enter into force on the day following its publication.

Approved by the Council of Ministers on September 13, 2016.

Be it published.

The Prime Minister,

Rui Maria de Araújo

The Minister of Finance,

Santina José Rodrigues Ferreira Viegas Cardoso