



DEVELOPMENT SUPPORT TO PUBLIC-PRIVATE PARTNERSHIPS IN EDUCATIONAL INFRASTRUCTURE IN LATIN AMERICA AND CARIBBEAN

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Multiple forms
and definitions:

- *"Contracts between governments and private companies under which the private sector provides services whose benefits are in line with the objectives of governments and in which the effectiveness of collaboration depends on the existence of a risk transfer sufficient "* (OECD, 2008)
- *"Joint arrangements whereby the private sector provides infrastructure and services that have traditionally been provided by Administrations"* (FMI 2004)
- **"The transfer to the private sector of investment in projects that have traditionally been operated or funded by the public sector"** (Comisión Europea, 2003)

I will focus on ...

- Partnerships between the public and the private sector, where the private sector provides an economically exploitable infrastructure or facility and to serve as a basis for providing a public or public interest service.
- In continental law these partnerships are governed by public law and private law and can also be implemented using mixed formulas.

Forms of Public Private Partnership: Types and Standards

Public law tools

- Public Works Concession
- Public Works Concession with Public Service Management
- Concert Regime
- Institutional PPP
- Public Private Partnership with Competitive Dialogue

Tools of private law

- Concession of Public Domain
- Renting, with or without surface rights
- Leasing, with or without surface rights

Mixed tools of public law and private and patrimonial law

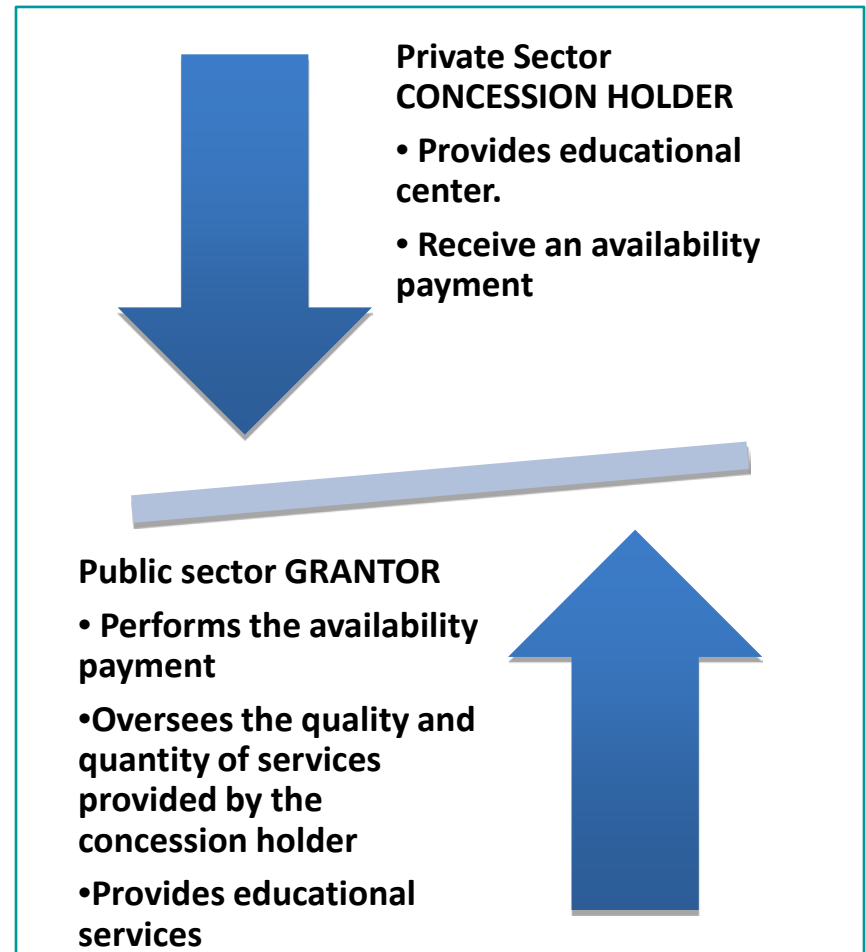
PUBLIC LAW TOOLS

PUBLIC LAW
TOOLS

- Concession of Public Works ("CPW")
- Concession to manage public or general interest services that include, or not, the execution of public works ("CPSM")
- Institutional PPP
- PPP with competitive dialogue
- Regime of concert

Concession of Public Work (CPW)

- ✓ The private sector finances, builds, equips and operates the infrastructure. It can also design it.
- ✓ The public sector is the legal owner of the asset.
- ✓ The public sector makes periodic payments, linked to service quality (availability payment).
- ✓ Education is provided by the education authority.



PUBLIC LAW TOOLS

Concession of Public Work

Financiación y
repago

Capital y
Dividendos

Concesionario

Centro
educativo

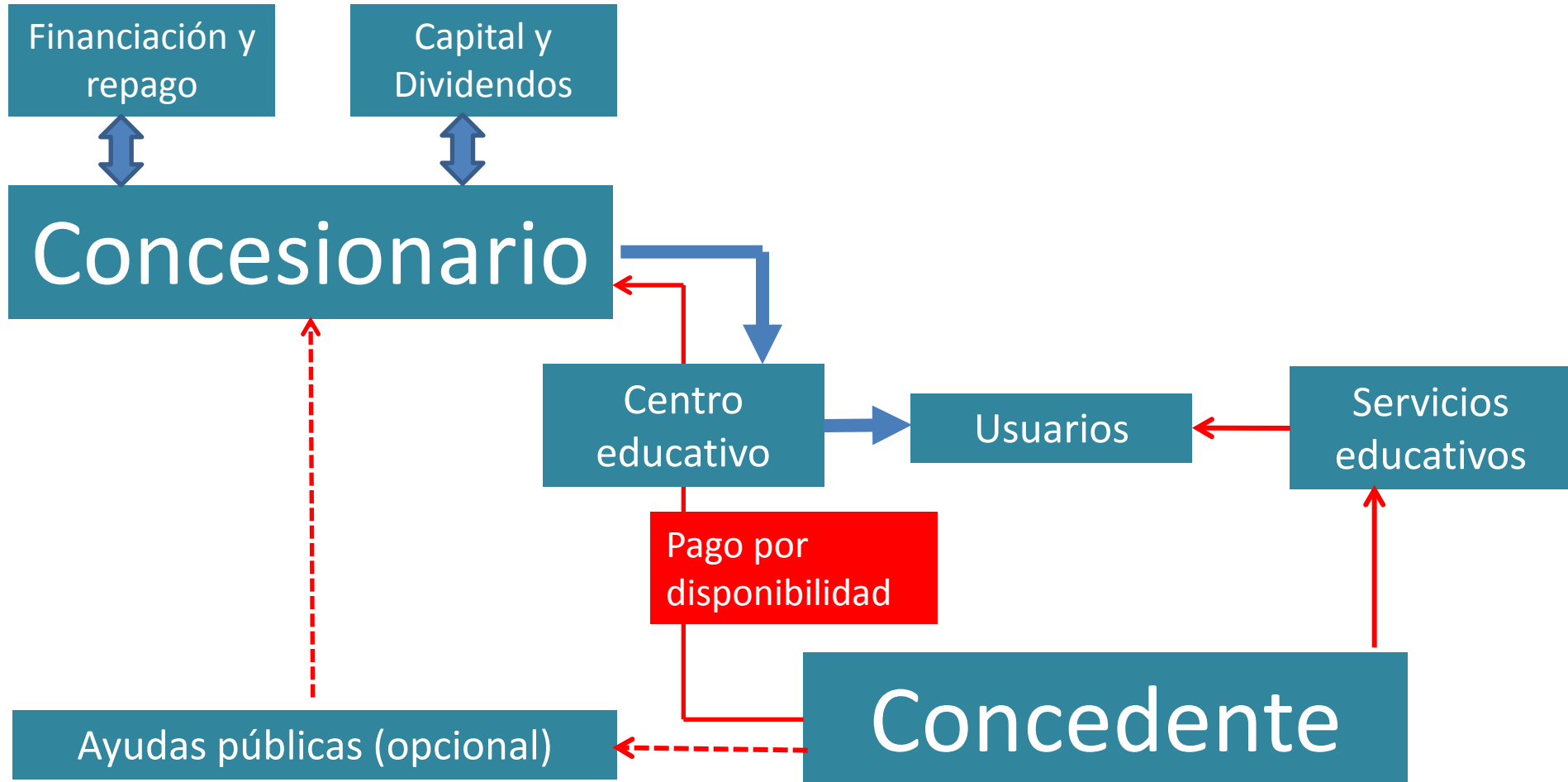
Usuarios

Servicios
educativos

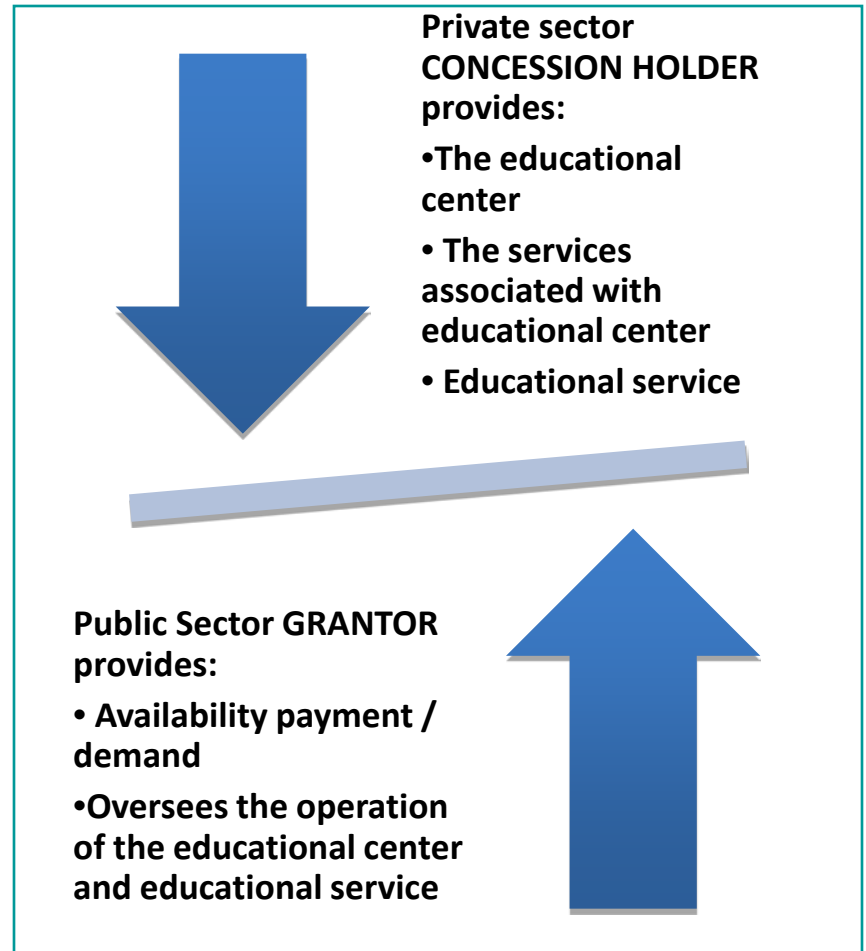
Pago por
disponibilidad

Concedente

Ayudas públicas (opcional)



- ✓ The private sector finances, builds, equips, operates the infrastructure and provides educational services. It can also design the infrastructure.
- ✓ The public sector is the legal owner of the asset.
- ✓ The public sector makes periodic payments, linked to service quality (availability payment) and eventually by demand of places.
- ✓ Also exercise the monitoring and control over educational and non-educational services rendered



PUBLIC LAW TOOLS

Concession of Public Services Management

Financiación y
repago

Capital y
Dividendos

Concesionario

Infraestructura educativa

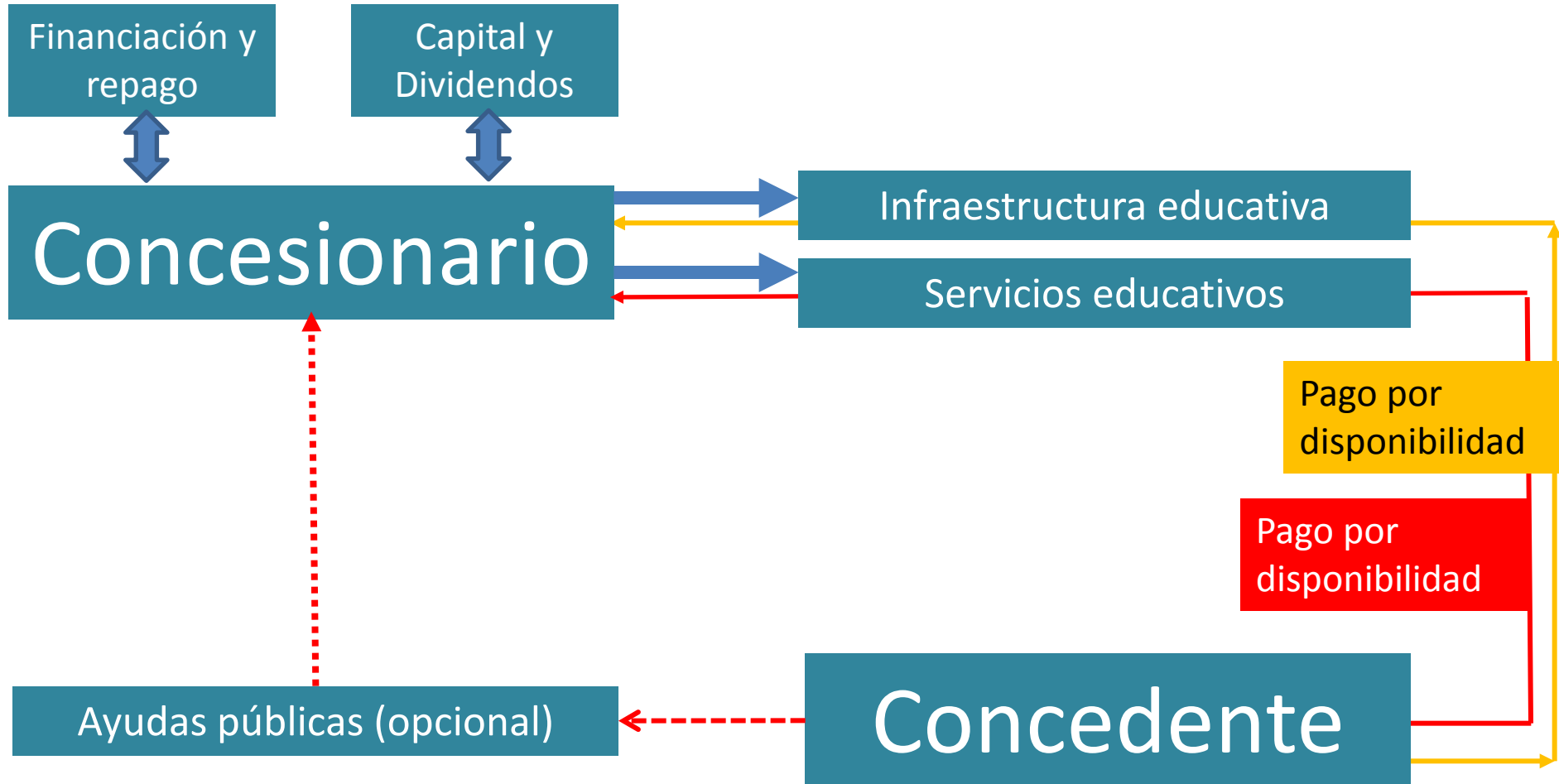
Servicios educativos

Pago por
disponibilidad

Pago por
disponibilidad

Ayudas públicas (opcional)

Concedente



Somme keys of success:

- **Strong regulatory frameworks that allow the private sector to operate efficiently and to public sector exercise the oversight and control of service to ensure their quality.**
- **To have a public Agency with sufficient capacity to place the projects on the market.**
- **Awards process with criteria of transparency, openness and non-discrimination**
- **Establish mechanisms for quality assurance**
- **Establishments of controllable payment formulas, with rewards and penalties**

- ✓ **Public Private Partnerships Act:**
 - The private sector should provide the public sector with an infrastructure for service delivery, either to the public sector (CPW) or the user (CPSM).
 - Long-term contracts.
- ✓ **Value for money is required**
- ✓ **They are possible the non solicited proposals**
- ✓ **They are possible public supports Comisión Intersecretarial de Gasto público, Financiamiento y Desincorporación.**
- ✓ **Necessary authorization of the**
 - National Development Plan.
 - The Education Sector Plan.

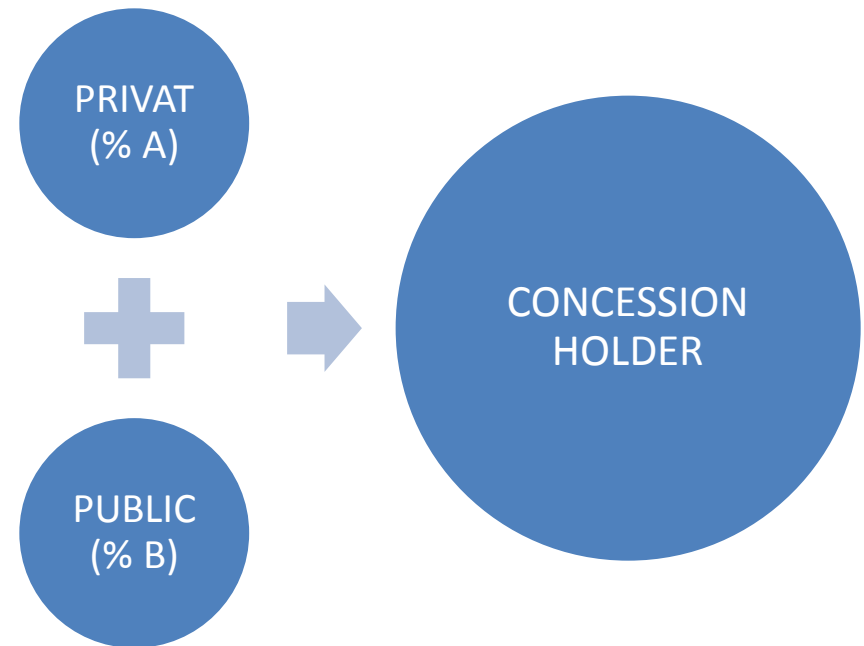
- ✓ **Legislative framework:**
 - Texto Refundido, Coordinado y Sistematizado del DFL MOP N°164 de 1991, Ley de Concesiones de Obra Pública.
 - Reglamento de la Ley
- ✓ **Execution, repair, maintenance or operation of public works in exchange for:**
 - The concession of exploitation,
 - The concession of national property of public use or fiscal property designed to satisfy the services subject of contract
- ✓ **They are possible public supports**
- ✓ **They are possible the non solicited proposals**
- ✓ **Not includes the design risk**
- ✓ **Includes the risk of force majeure, unless other thing be stated in the Contract documents**
- ✓ **Possibility of Agreement with the Ministry of Public Works**

Legislative Framework:

- Ley General de Concesión de Obras Públicas con Servicios Públicos
- Reglamento de la Ley

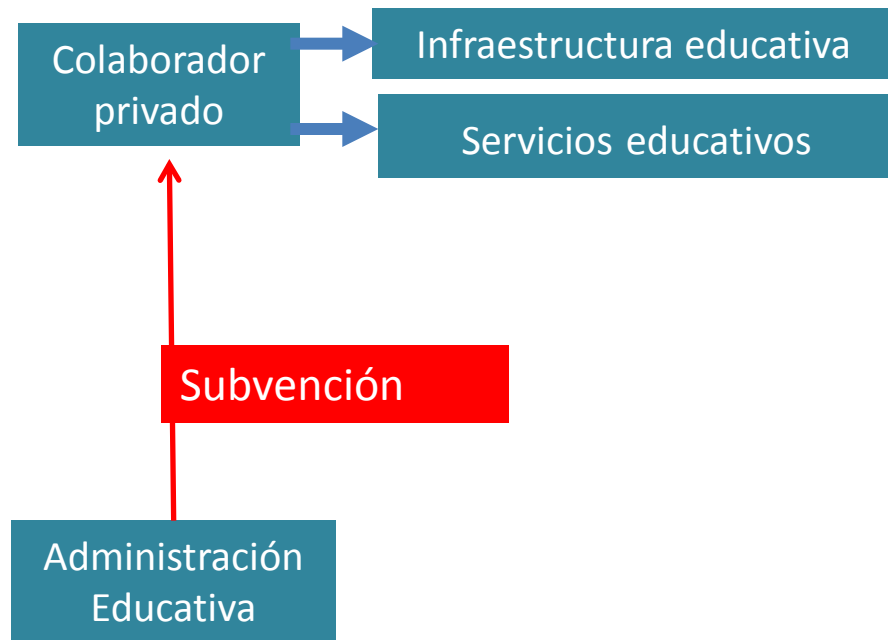
- ✓ Article 2: no telecommunications, electricity and health services.
- ✓ They are possible public supports
- ✓ They are possible the non solicited proposals
- ✓ Possibility of Agreement with the Consejo Nacional de Concesiones.

- This figure allows for CPW and CPSM but with public sector participation in a mixed company with the private partner.
- The selection of the private partner can be done by:
 - Competitive procedure in terms the regulatory dictates.
 - Sale of shares of the public company.



- For particularly complex cases, where the needs are known, but not the means.
- Special contract of residual character.
- Requires value for money analysis.
- It can be structured on other standard contracts.
Competitive dialogue with the candidates who aspire to participate in the contract.
- The contract is tendered with a descriptive document which becomes Terms of References once the dialogue is ended.

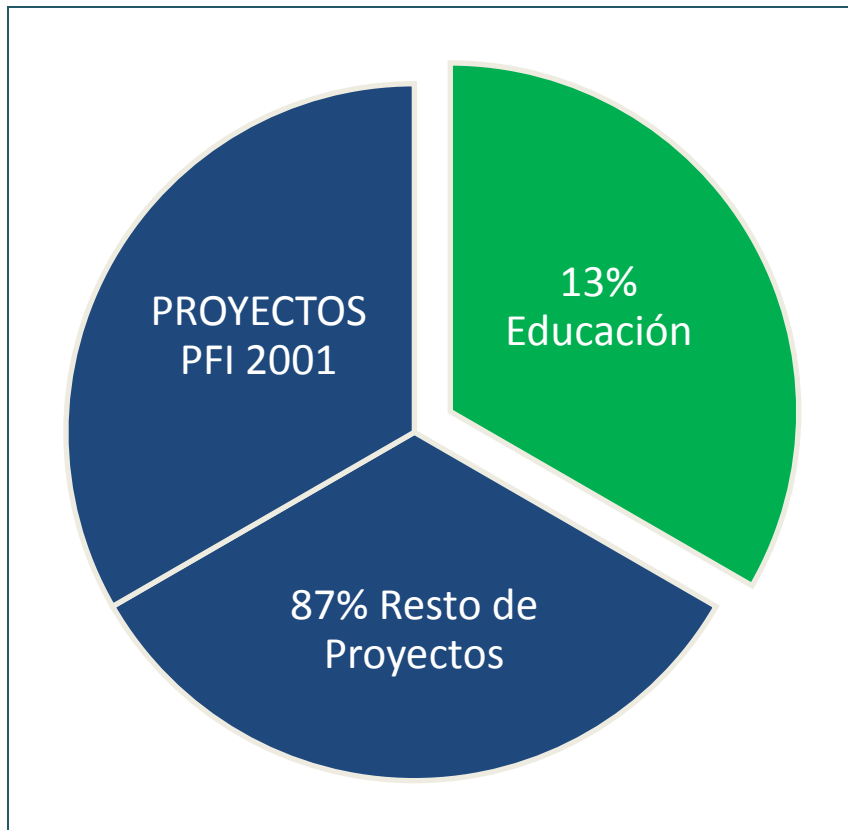
- Through this system, you can use private education facilities to provide public service education.
- The Private receives payment for services from the state and in return agrees to make admission and develop the educational program with the criteria of educational administration.



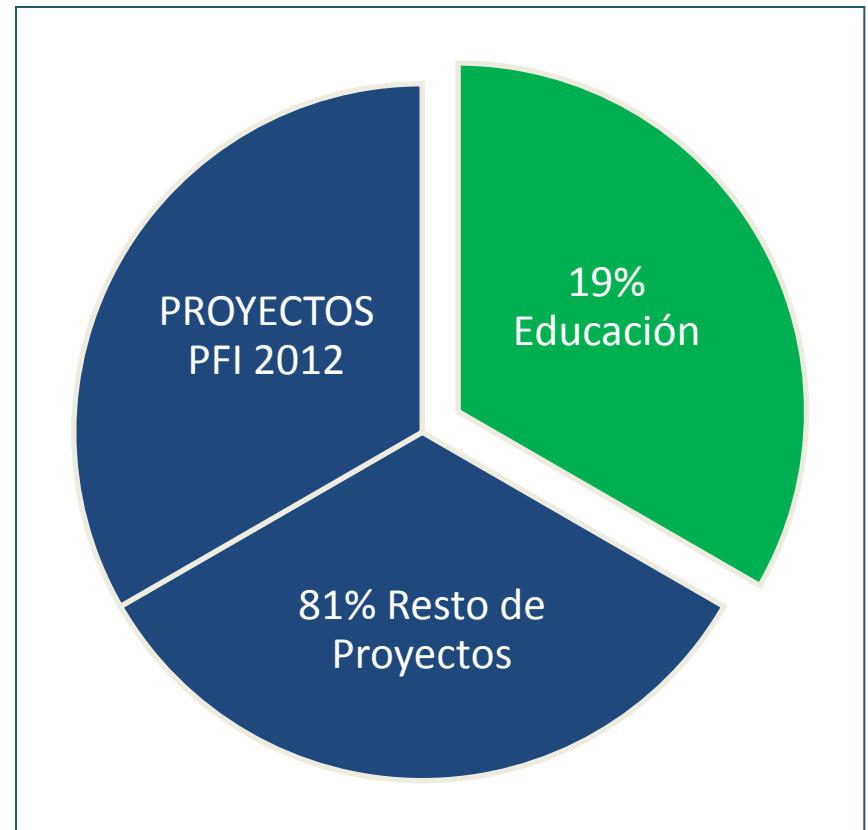
	Chile	México	Costa Rica
CONCIERTO	SI	SI	SI
CPPS INSTITUCIONALES	SI, la Ley no establece prohibición.	SI, la Ley no establece prohibición.	SI, la ley lo determina expresamente.
DIÁLOGO COMPETITIVO	NO	NO	NO

En Reino Unido, el uso de las CPPs para proporcionar infraestructura educativa, en aumento

% Educación PFI en 2001



% Educación PFI en 2012



Objetivos del programa:

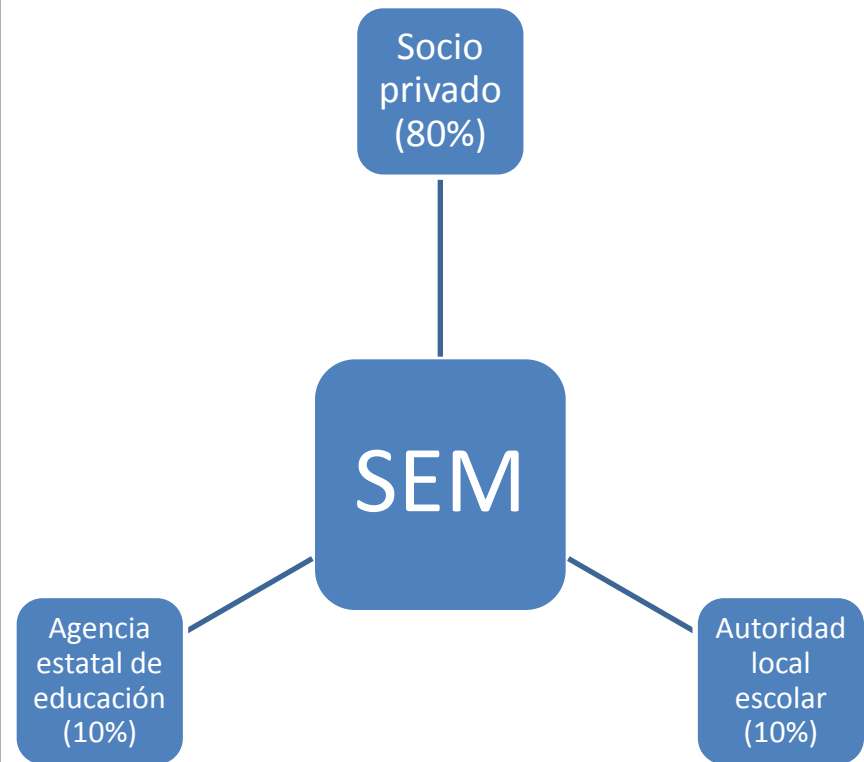
- **Ampliación y mejora de la red de escuelas de secundaria**
- **Servicios a la comunidad: utilización de las infraestructuras escolares fuera del horario escolar.**

Esquema de funcionamiento

✓ **Colaboración Público Privada
Institucional, con:**

- Elección del Socio privado por diálogo competitivo.
- Adquisición de los derechos de los proyectos a desarrollar en diez (10) años.

✓ **Mejor valor por precio (Value for Money).**



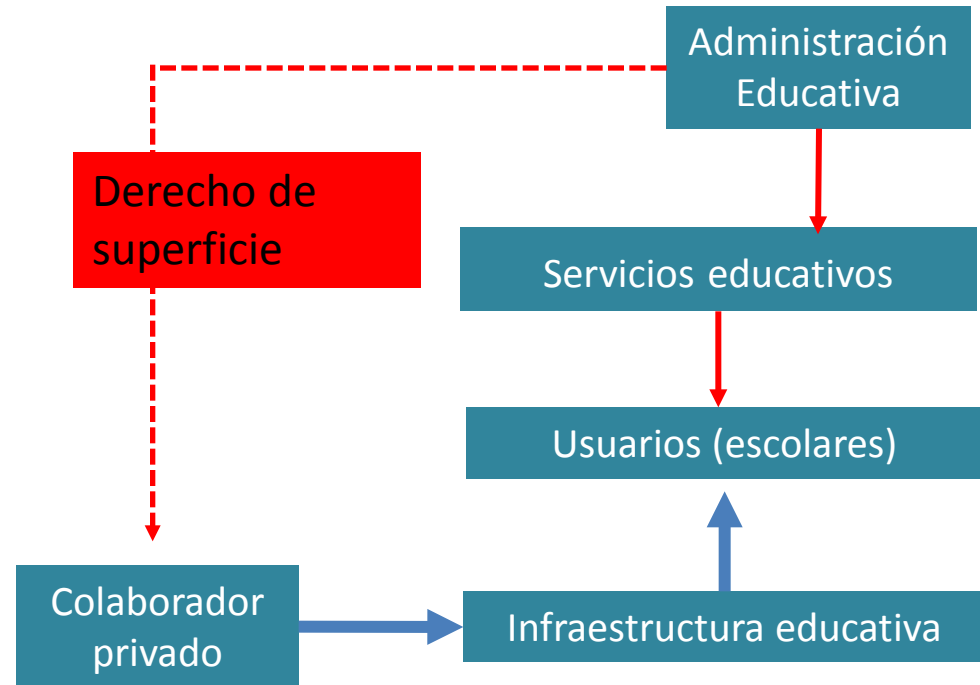
TOOLS OF PRIVATE LAW

**TOOLS OF
PRIVATE LAW**

- **Concession of Public Domain**
- **Renting, with or without surface rights**
- **Leasing, with or without surface rights**

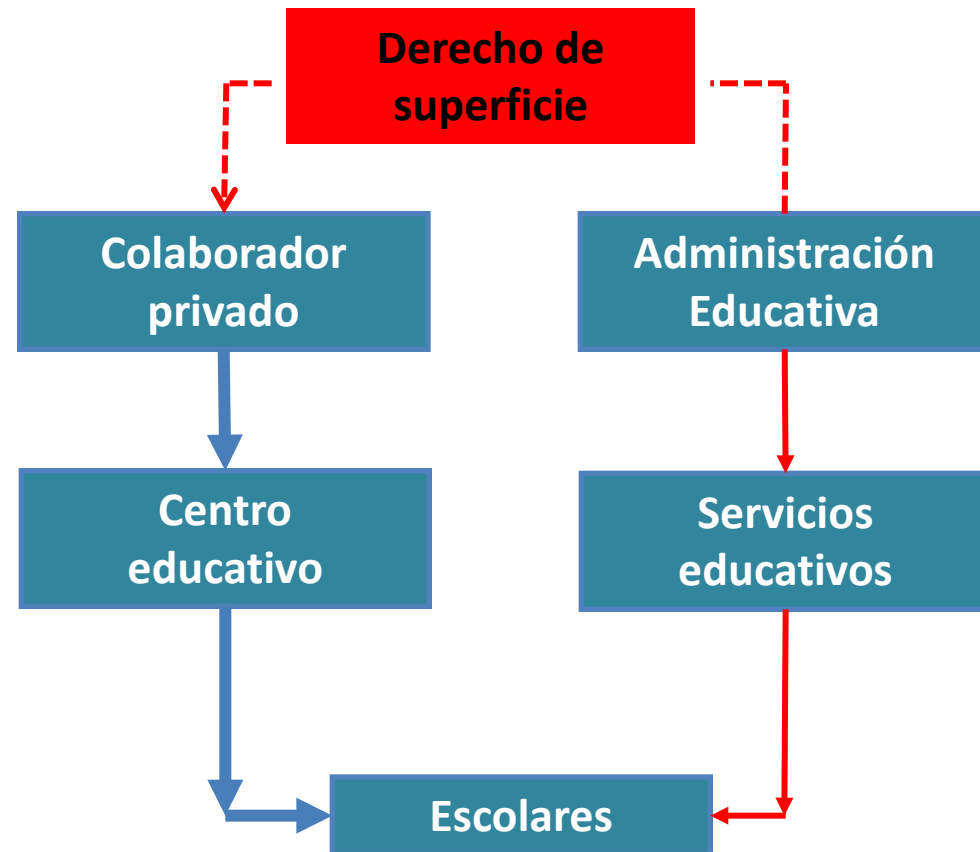
Renting with or without surface rights

- The private finance and build the educational infrastructure, which the Administration will lease for less than that needed for financial payback.
- You can give to the private surface rights, so that the infrastructure is built on land forming part of the assets of the



Leasing, with or without surface rights

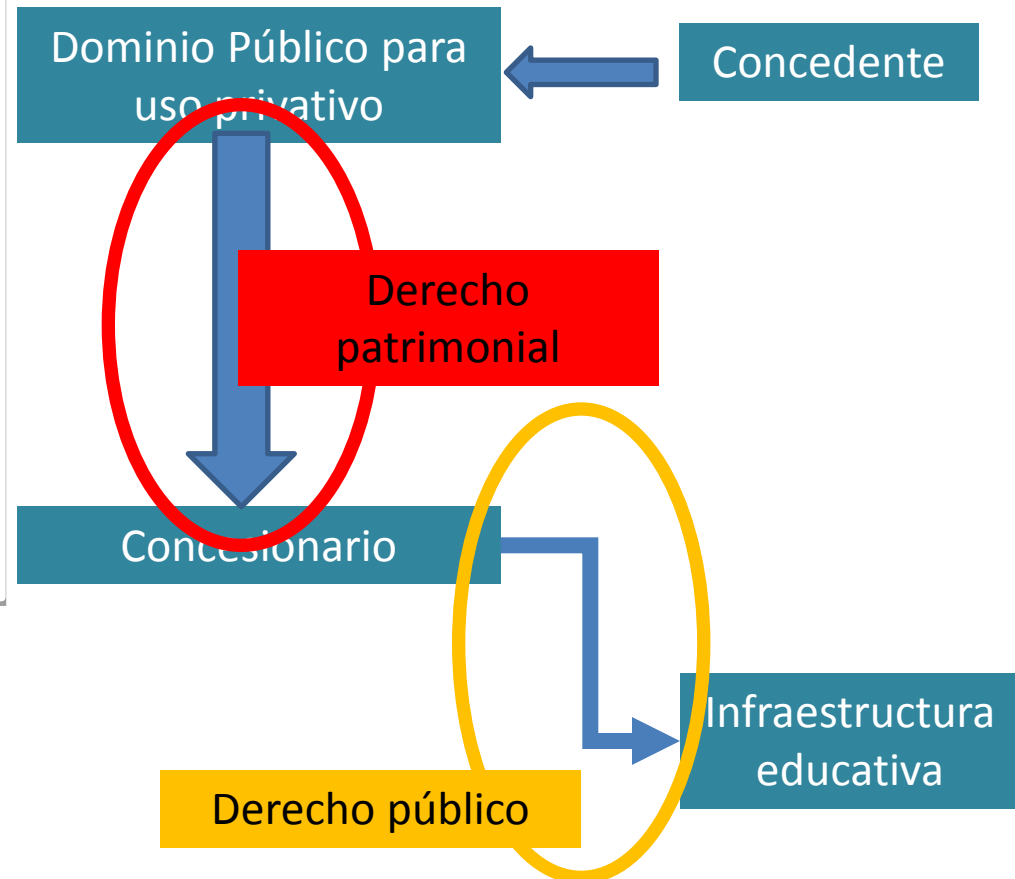
- The private finance and build the educational infrastructure, which will lease the Administration during the period necessary for financial payback.
- You can give to the private surface rights, so that the infrastructure is built on land forming part of the assets of the



MIXED TOOLS OF PUBLIC LAW AND PRIVATE AND PATRIMONIAL LAW

Concession of Public Domain for infrastructure construction

All the above figures may be combined with each other



Obligaciones del concesionario:

- ✓ Construir la infraestructura educativa.
- ✓ Financiarla.

Derechos:

- ✓ En el mismo terreno, derecho de superficie para construcción de apartamentos y arrendamiento de los mismos.



Obligaciones del concesionario:

- ✓ Remodelar la
infraestructura educativa
existente
- ✓ Financiar la remodelación.

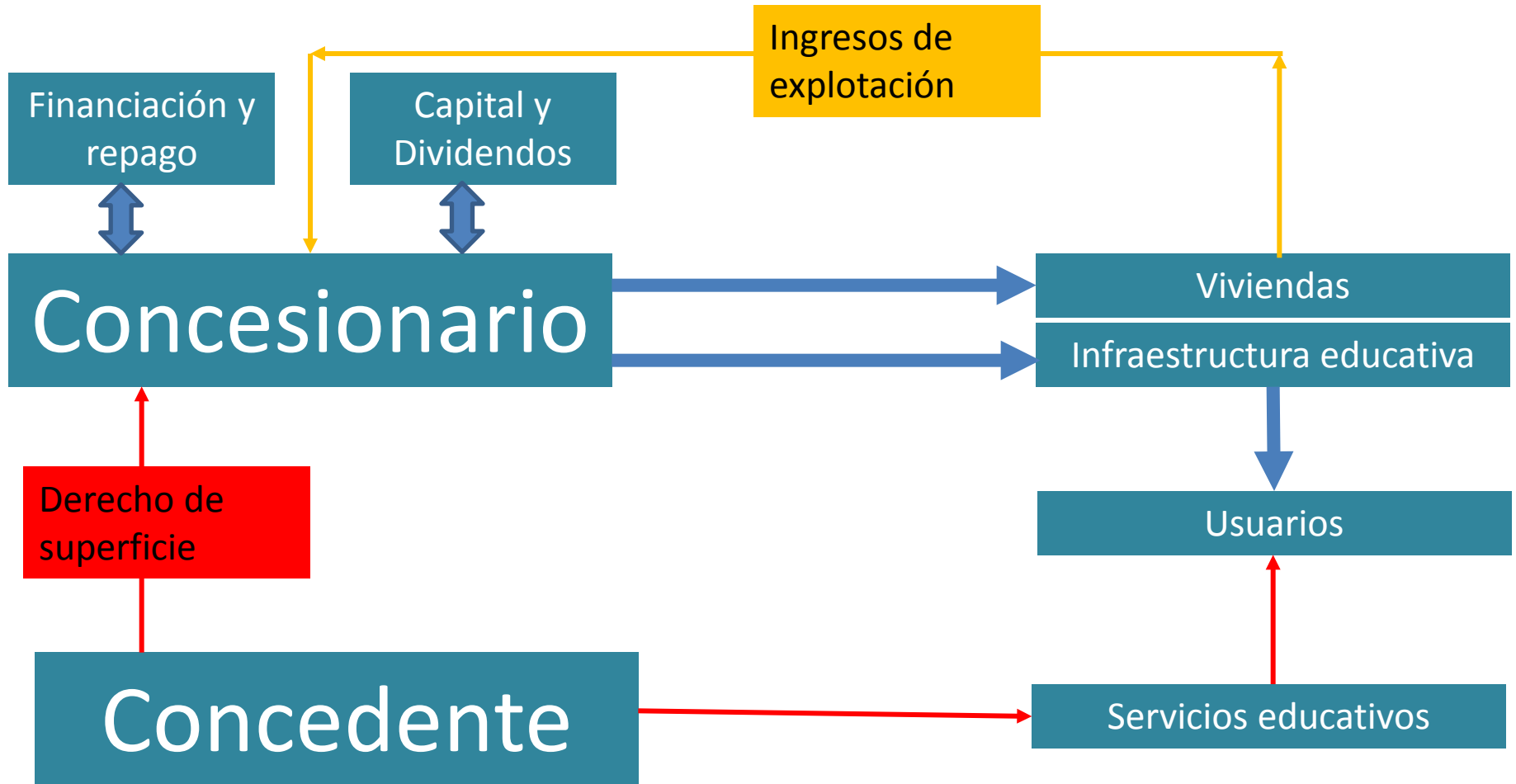
Derechos:

- ✓ Explotación de la
infraestructura fuera del
horario escolar



Herramientas de
DERECHO MIXTO

Experiencias internacionales:
Washington.



No significant factors were found for any of the three countries to prevent, at the regulatory level, the use of PPPs in the provision of education infrastructure, and even in the provision of educational services.

Except for public-private partnership contracts with competitive dialogue, all types and standards are possible in all three countries.

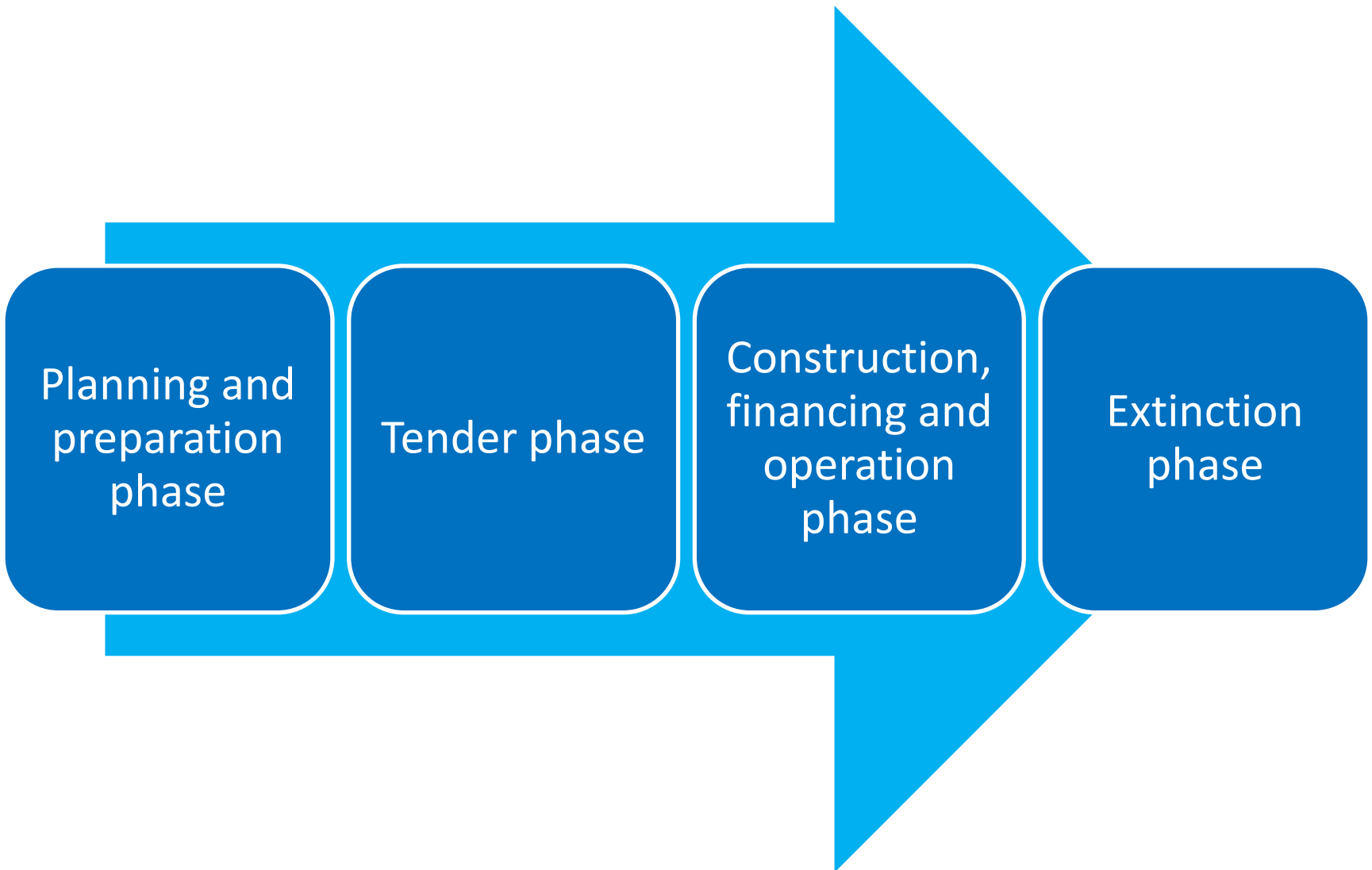
MANUAL OF STANDARDIZED PROCEDURES

Planning and
preparation
phase

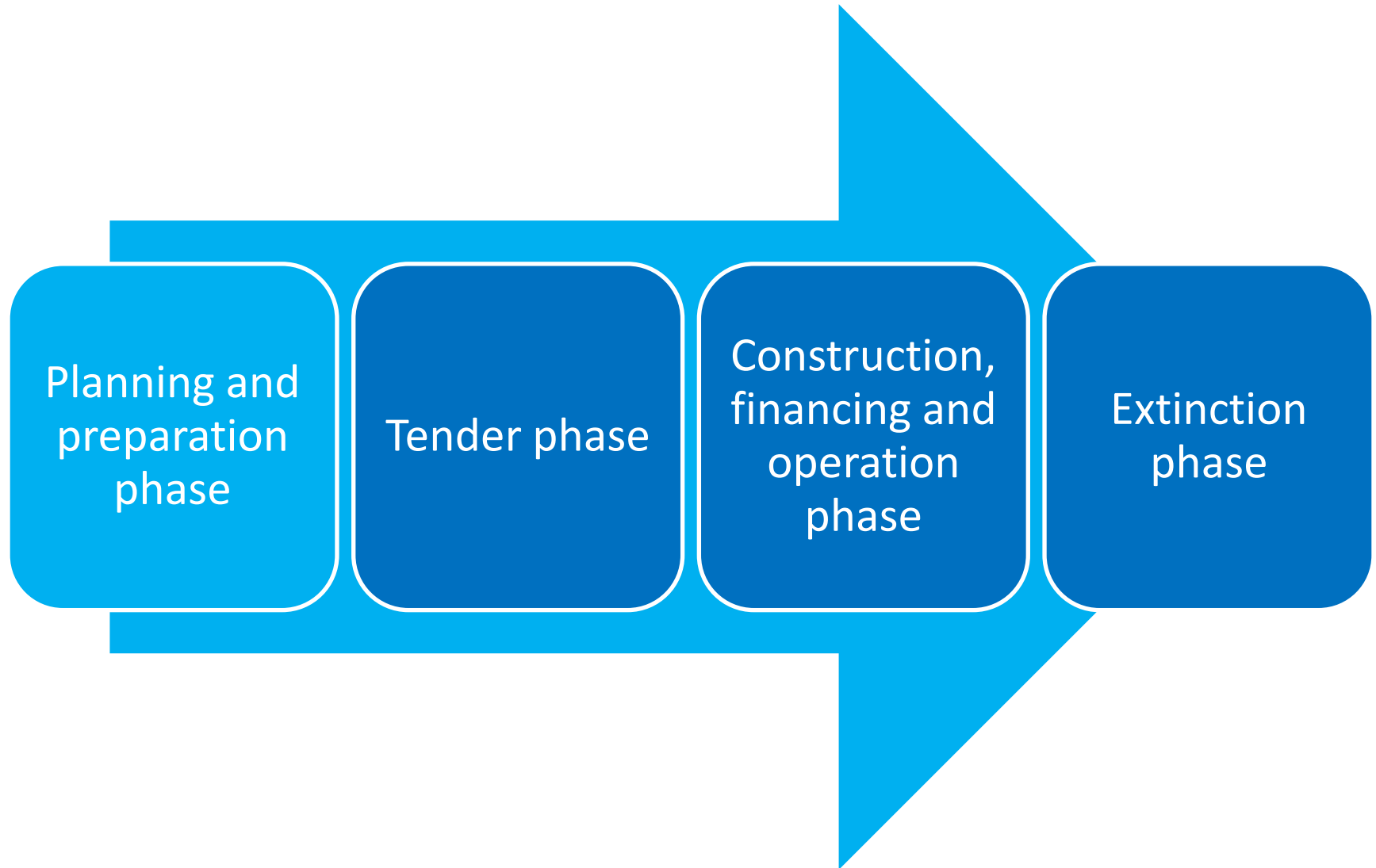
Tender phase

Construction,
financing and
operation
phase

Extinction
phase



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graph LR; A[Planning and preparation phase] --> B[Tender phase]; B --> C[Construction, financing and operation phase]; C --> D[Extinction phase];
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Es esencial para:

- (i) determinar el lanzamiento del proyecto utilizando formas de colaboración público privadas.
- (ii) garantizar el éxito del proyecto.

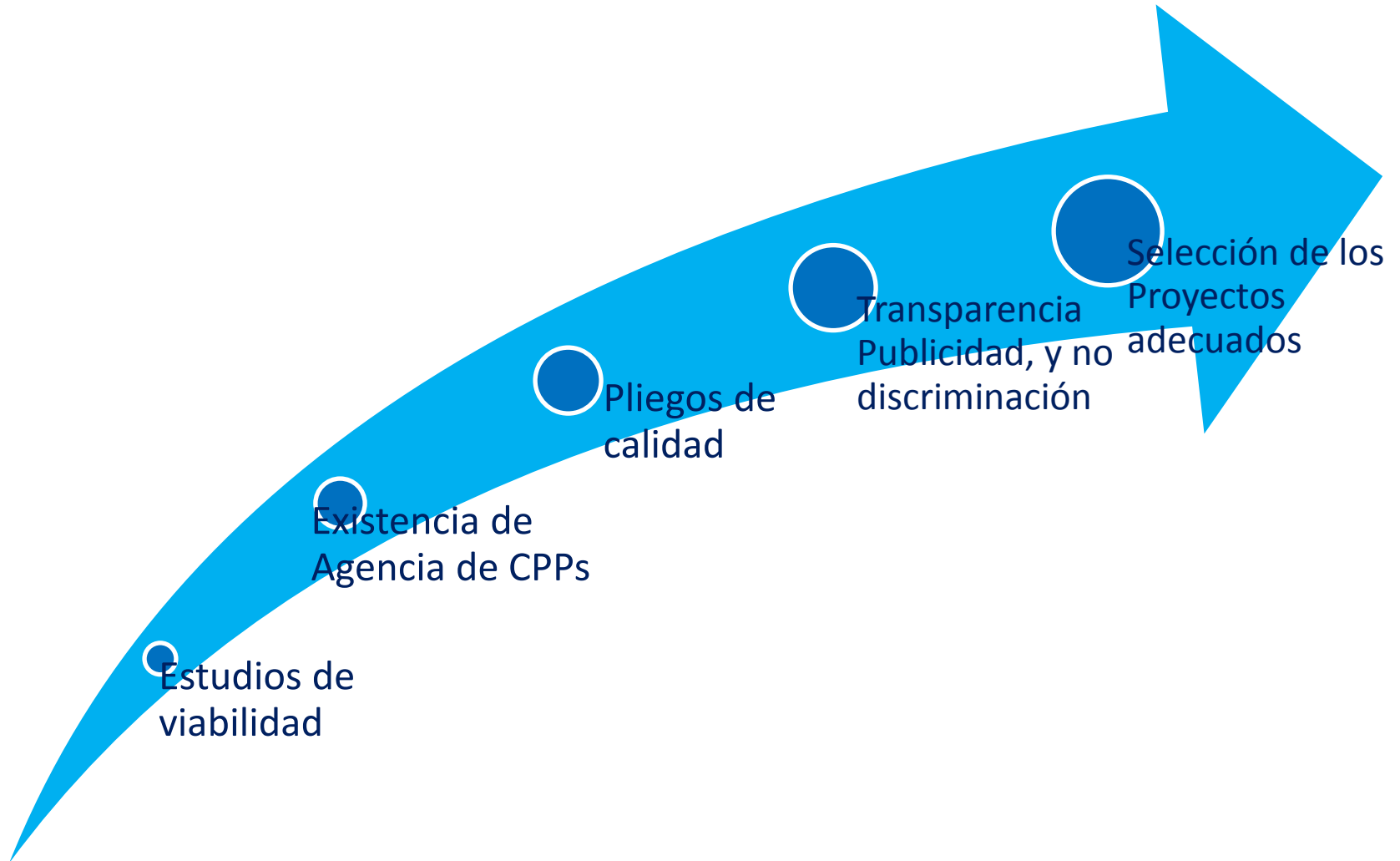
Contenidos mínimos:

- (i) Análisis técnico
- (ii) Análisis medioambiental
- (iii) Estudio de demanda y rentabilidad
- (iv) Análisis de la viabilidad jurídica
- (v) Sometimiento a información pública: coordinación inter-administrativa.

Su correcta ejecución exige una adecuada coordinación entre todas las unidades administrativas participantes.

Dado el nivel de especialización del mismo, es aconsejable contar con una Agencia supra estatal que se responsabilice de su coordinación, ejecución y la toma de decisiones.

Debe determinarse el impacto que la ejecución del proyecto tendrá en las cuentas públicas: capacidad decisoria de la Hacienda Pública.



Procedures manual

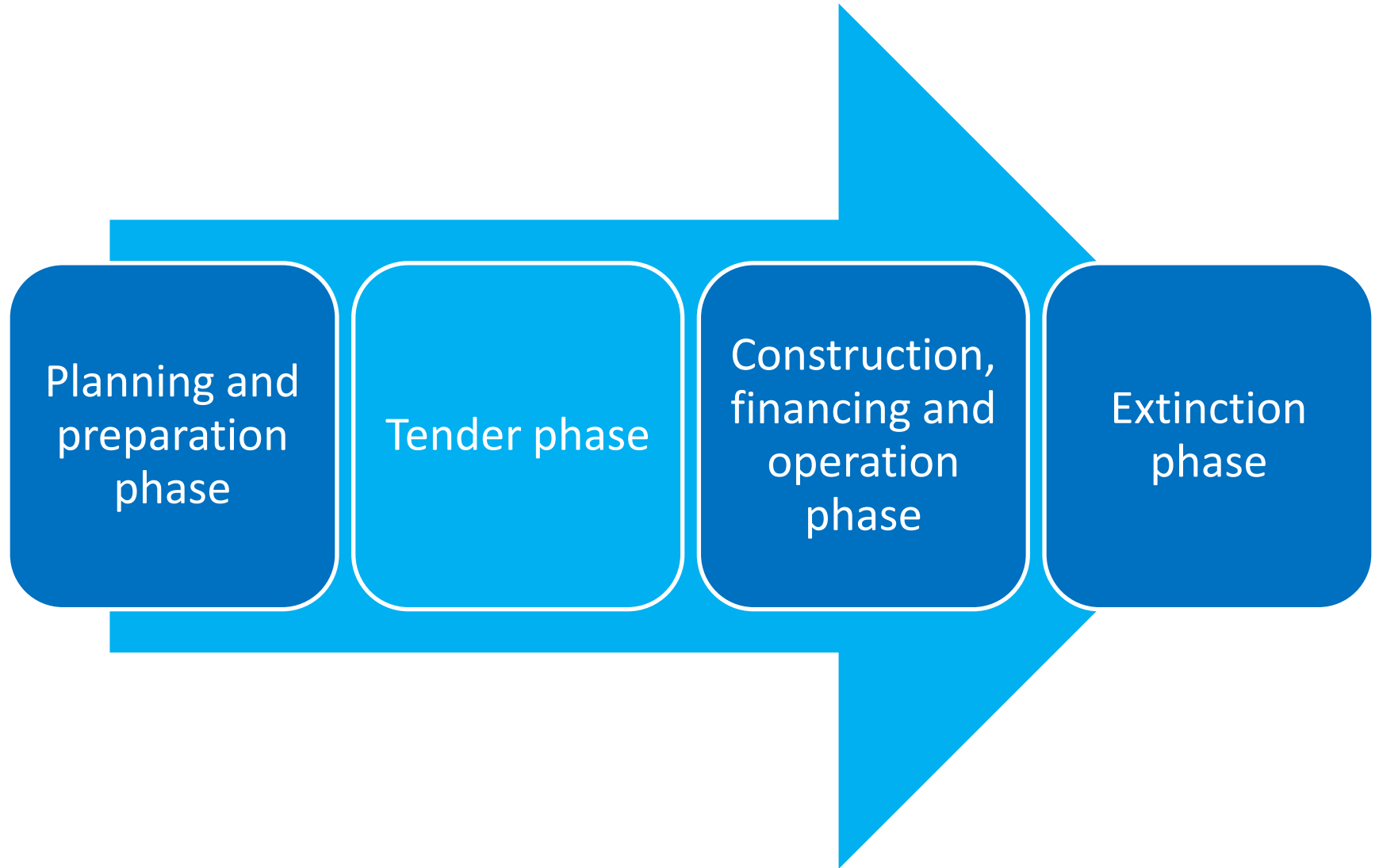
Tender phase

Planning and
preparation
phase

Tender phase

Construction,
financing and
operation
phase

Extinction
phase



Pliegos v. Regulación

- Marcos regulatorios flexibles permiten una mayor adaptación a casos concretos, pero requieren una gran rigurosidad en la redacción de los pliegos para evitar dejar aspectos abiertos.

Sistemas de clasificación por disciplinas

- Contar con catalogaciones estándares que evalúen la experiencia de los licitadores y acrediten la solvencia de estos economizará los costes de evaluación y fomentará la competitividad y calidad de los proyectos.

Agencias de CPPs

- La existencia de una Agencia que cuente con personal formado facilitará la comprensión, la valoración de las ofertas y garantizará la elección del candidato más competitivo.

Los tres pilares: publicidad, transparencia y no discriminación.

- Estos tres principios resultan fundamentales para fomentar la competencia y abaratar el coste.
- El riesgo país queda favorecido por su respeto.

Iniciativa de los particulares

- Facilita la identificación de proyectos rentables
- Permite ahorrar costes de preparación
- Los premios al proponente no deben influir en el sistema de adjudicación

✓ **Strengths:**

- ✓ **Allows challenging procurement processes.**
- ✓ **Forces to draft Feasibility Study.**
- ✓ **The contents of the study are suitable.**
- ✓ **Intervention of economic planning agencies with decision capacity.**

✓ Weaknesses:

Non solicited proposals: prizes undermine the award.

Absence of an PPP Agency. Nevertheless, proper coordination.

Absence of a register of bidders.

✓ **Strengths:**

Forces draft Feasibility Study.

Intervention of economic planning agencies.

**PPPs Agency: Ministry of Public Works.
Sufficient capacity?**

✓ Weaknesses:

Need to define the minimum contents of the Feasibility Study.

Need for improving tender advertising.

Non solicited proposals: prizes undermine the award.

Awards not appealable

Absence of a register of bidders

✓ **Strength:**

Forces draft Feasibility Study.

Existence of non solicited proposals.

PPP Agency: Consejo Nacional de Concesiones. Sufficient capacity?

✓ Weaknesses:

Need to define the minimum contents of the Feasibility Study.

Need for greater control in decision-making: intervention of economic planning agencies.

Lack of uniformity in awards.

Absence of a register of bidders

Procedures manual

Construction, financing and operation phase

Planning and
preparation
phase

Tender phase

Construction,
financing and
operation phase

Extinction
phase

Three different aspects ...

Construction

Financing

Operation

Factum principis

- La afección que la modificación de las normas y leyes de los países puede tener sobre el proyecto, debe estar regulada.
- Reequilibrios sinalagmáticos de los contratos por este motivo están justificados.

Ius variandi

- Facultad de modificar el contrato por parte del ente público responsable del mismo.
- Necesario para preservar los intereses públicos
- Limitación cuantitativa para garantizar la transparencia y fomentar la competitividad. Limite usual: 20%.

Riesgo imprevisible

- Regular situaciones no previstas en los contratos causadas por la materialización de riesgos extraordinarios y no previsibles.

Causas de fuerza mayor

- Los supuestos de fuerza mayor deben estar definidos y las responsabilidades derivadas de los mismos deben estar determinadas.

Ejecución de obras públicas accesorias

- Instalaciones complementarias que pueden ser usadas por sectores de la población más amplios que el destinatario del servicio (e.g. pabellones multiusos).

Cláusula de progreso

- Obligación de adaptar la infraestructura y su equipamiento para mantenerlos actualizados.
- Cobra especial importancia en los equipos informáticos y laboratorios.

Factor institucional

- Analizar el impacto en las cuentas públicas
- Necesidad de coordinar las modificaciones con los órganos de planificación económica.
- Estudiar su impacto en el régimen jurídico.
- Es recomendable la existencia de una Agencia de CPPs.

Riesgo imprevisible

- Regular situaciones no previstas en los contratos causadas por la materialización de riesgos extraordinarios y no previsibles.

Incentivos y Penalidades

- La imposición de determinadas sanciones no tiene por qué fomenta un aumento de la calidad del servicio por estar estas interiorizadas en el modelo económico.
- La concesión de incentivos favorecen la prestación de un servicio de gran calidad. Concesión de años adicionales de explotación.

El secuestro

- Suspensión temporal y acotada de las funciones del colaborador privado
- Garantiza la continuidad del servicio público.

✓ Strengths:

Regulates the “factum principis”.

Allows modification of contracts (“ius variandi”) with appropriate limits to ensure transparency.

The Economic Planning Unit participate in the modification of contracts.

It is possible kidnapping

✓ Weaknesses:

The rebalancing by “factum principis” is only possible in case of substantial disruption that prevents the development of the project.

Lack of regulation of any unforeseeable

Unable to reduce the amount of contract

✓ Strengths:

It is possible the modification of contracts with sufficient guarantees preservation of transparency

Incentives are possible during operation

The Ministry of Public Works works like a PPP Agency.

✓ Weaknesses:

It is needed to regulate the “factum principis”

No modifications are shown to decrease the contract

Absence of the figure of kidnapping

✓ Strengths:

Regulates the “factum principis” and unpredictable risk with economic rebalancing without substantial disruption

Contracts can be modified. Limits are adequate for complying with transparency.

✓ Weaknesses:

Lack of action by the Economic Planning Unit in case of changes of contracts

Decreasing the amount of subject involves compensation for lost profits.

No kidnapping

No allows penalties for poor service.

Procedures manual

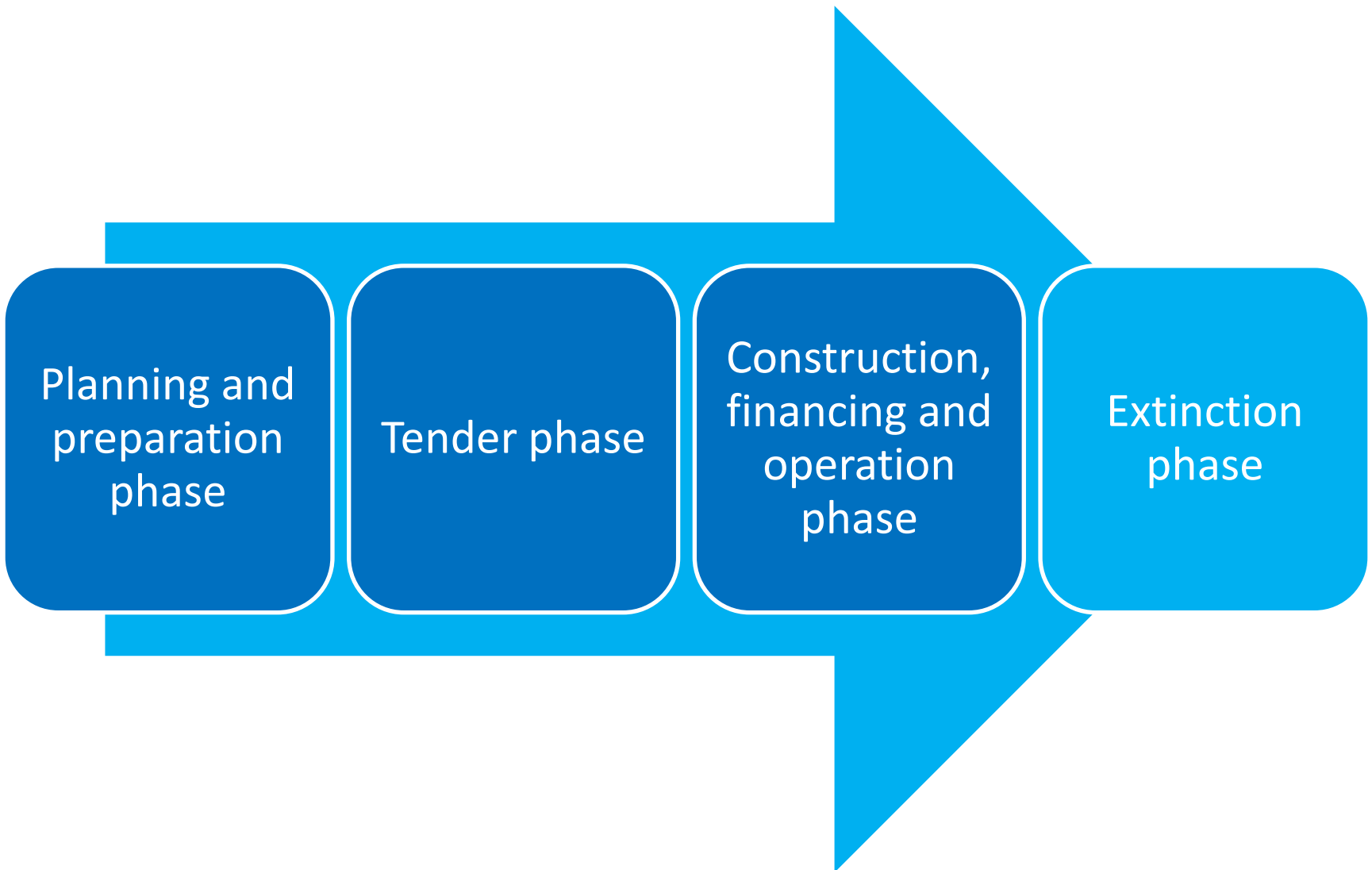
Extinction phase

Planning and
preparation
phase

Tender phase

Construction,
financing and
operation
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graph LR; A[Planning and preparation phase] --> B[Tender phase]; B --> C[Construction, financing and operation phase]; C --> D[Extinction phase];
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Resolución por incumplimiento del sector público contratante

- la aplicación de la excepción del contrato no cumplido, es decir, la facultad del colaborador privado de suspender el ejercicio de sus obligaciones frente a incumplimientos, de determinada magnitud, por parte del colaborador público.
- La resolución del contrato a instancias del colaborador privado en tales circunstancias.

Resolución por causas atribuibles al colaborador privado

- La prestación correcta de los servicios públicos, o de interés general, justifica:
 - Resolución por incumplimiento del colaborador privado
 - Prohibición de contratar en ocasiones futuras

Rescate

- Es la terminación del contrato aún cuando el titular del mismo haga una gestión correcta de éste.
- Es necesario para casos en los que la prestación del servicio pudiera llegar a hacerse innecesaria.
- Necesidad de tasar el derecho del colaborador privado a ser resarcido por daño emergente y lucro cesante.

Mecanismos de resolución de conflictos

- El riesgo país justifica el sometimiento de las disputas a tribunales arbitrales internacionales.
- Los países deben ser firmantes de las Convenciones de Washington y Nueva York para que los laudos arbitrales puedan ser ejecutados.

✓ Strengths:

Ability to resolve conflicts in equity due to the existence of a committee of experts.

Recourse to arbitral tribunals.

The regulatory framework prevents to award private partners with rescinded contracts.

✓ Weaknesses:

No termination for failure of public sector

Rescue is not possible.

✓ Strengths:

Allows termination for default of public sector by terms of reference.

The redemption is permitted in construction phase and can be regulated in operating phase by terms of reference

Possibility to solve technical issues via Technical Panel and via arbitration.

✓ weaknesses:

No viable international arbitration

Kidnapping is only possible under construction.

✓ Strengths:

It allows rescue

Conflict resolution via arbitration

✓ Weaknesses:

No apply the unfulfilled contract except for failure of public sector .

No establishes prohibitions of contracting with private partners with accomplish contracts.

The national and international private players are willing to participate in PPP contracts in the three countries.

All the actors, specially public actors, need a special preparation to participate in this kind of contracts.



GRACIAS

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