

PPPs: the foundations for growth in Uruguay

公私伙伴关系：乌拉圭经济增长的基础

The government of Uruguay is determined to boost investment in infrastructure to ensure sustainable growth. For this purpose, the government has a large number of projects in the pipeline awaiting final details in preparation for bidding processes (i.e. improvement and maintenance of highways, a prison, several port infrastructure projects and facilities in Punta Sayago, Rivera, Rocha's Punta del Este, Piriapolis, Buceo, Punta Carretas, Sauce and Atlantida and the renovation of the Colonia, Salto and Rivera airports) that will most likely be carried out under the scope of the new law on public-private partnership contracts.

乌拉圭政府为确保可持续增长，决定将增加对基础设施的投资。政府有大量的项目在完善招投标过程的最后细节（即改善和维护公路、一所监狱以及位于蓬德萨亚戈、里维拉、Rocha's Punta del Este、Piriapolis、Buceo、Punta Carretas、Sauce 和阿特兰蒂达的基础设施项目以及位于科洛尼亚、萨尔托和里维拉的机场的改造）。此基础设施项目将很有可能按照公私合营项目的新法律规定的范围内进行。

On July 12, 2011 the Uruguayan Congress approved a bill in order to implement a Public-Private Participation (PPP) system. The government and the private sector are confident that the bill will increase the infrastructure that Uruguay currently requires to sustain its economic growth. This new mechanism will allow private enterprises to participate during the early stages of a project affording them the opportunity to make contributions to adjust to their particular needs. We outline some of the bill's main features below.

A PPP contract between the public sector and private enterprises (domestic or foreign) is specifically designed for the implementation and development of public infrastructure projects and related services (PPP projects). Consequently, PPP contracts are those in which the public administration will contract a natural or legal person for the design, construction and operation of infrastructure projects (in addition to financing), for a specific period of time. Bidders of PPP initiatives must provide evidence of economic, financial, technical and professional solvency.

The bill specifies the activities to which the PPP projects shall apply: road works (including rural roads), railways, ports and airports; energy projects (excluding monopolized activities); waste disposal and treatment; social infrastructure such as prisons, health centres, educational centres, public housing, sports centres; and urban projects (improvement, equipment and development works).

Risk allocation and value for money

A key element of any PPP project is the optimal allocation of risk among the parties (both public and private), where each assumes the risks that it can best manage at the lowest possible cost. Moreover, PPP projects will only be permitted if the corresponding public authorities decide that it is the most satisfactory or efficient mechanism to achieve the desired public purpose. Prior to starting the contracting procedure, the contracting authorities must be provided with a report that includes, among other information, a comparative analysis on other contracting alternatives, so as to justify the appropriateness of the PPP. The comparison must be based on technical, legal, economic and financial aspects. In order to use a PPP, the PPP must be the alternative that provides the best value-for-money. In defining the “economic efficiency principle”, the bill states that the concept of value-for-money includes the reduction of costs, risk and feasibility.

The bill also refers to the main principles that PPP contracts must satisfy, which include: transparency and publicity; public interest; economic efficiency; optimal allocation of risk; transfer of assets to the government when required; length (not more than 35 years, including all extensions); fiscal responsibility; control; sustainable growth; and compliance with labor law.

As regards the specific content of PPP contracts, the bill states that the parties must include the following: the purpose of the project; risk-allocation conditions; performance objectives; consideration; causes and procedures to modify the remuneration and maintenance of the contractual financial-economic balance; payment terms; penalties; conditions for amending and terminating the contract; ownership of the works and equipment after termination of the contract; contractor guarantees; mechanisms applicable to the liquidation of the contract, including compensation; the general and specific terms and conditions of the project; and general financial information obligations. The inclusion of the above is without prejudice to the provisions that the parties may decide to include during the negotiations of the PPP contract.

Most of the items described above are regulated specifically in the bill or addressed in this outline.

The relevance of payments and contributions

Payments may be made in multiple forms, although they must be made by the users, the authorities or both. The bill grants compensation and retention rights in favor of the authorities for the implementation of penalties under the PPP contract. The bill also states that the authorities may receive a specified amount of income from the contractor or users.

Article 6 of the bill regulates the contributions that the authorities may make in connection with carrying out the PPP projects (including subsidies and tax exemptions, among others). The authorities may grant minimum revenue guarantees, but they are not permitted to guarantee profits or specific returns.

Contracting Process

The contracting process is divided into the following stages:

Commencement. A contract may be initiated by the authorities ex officio or by a private initiative addressed to the former. Before starting the contracting procedure, the authorities must receive the assessment document referring to the feasibility and convenience of the project. Taking into consideration the individual characteristics of each project, the evaluation will be based on the pre-feasibility, feasibility and impact studies. Those studies will be submitted to the planning and budget office as well as to the Ministry of Economic and Finance for their consideration and subsequent report.

Competitive dialogue. Once reports from those two bodies are obtained, the contracting authorities will initiate a competitive dialogue, which is one of the most innovative aspects of the PPP system and involves a debate between the authorities and the interested entities that fulfil technical and economic solvency requirements. This allows the parties to discuss all the relevant aspects of the PPP contract and define the project's terms and conditions. This phase is essential for the private sector to be able to make modifications or adjustments to the project and is one of the main advantages of the PPP system compared to existing frameworks.

Submission of offers. After the competitive dialogue has finished and the participants have been notified, the authorities will call for the submission of bids. The call can only be addressed to those who participated in the competitive dialogue. However, if only one party participated, other interested entities may be admitted. The call should also state whether the participants of the competitive dialogue will receive any preference or compensation. Upon the completion of the stages and approvals and the creation of the corresponding guarantees, the administration will award the PPP contract and execute the agreements according to the terms and conditions discussed during the competitive dialogue.

A party interested on submitting a private initiative (which must be submitted to the national development corporation, or CND) will have specific rights and preferential status. For example, it will be entitled to the reimbursement of specific costs incurred in connection with feasibility studies in the event of not being awarded the contract. Those costs will be paid by the successful bidder. This benefit will be disclosed in the respective call. The party interested on submitting a private initiative may be entitled to a 10% advantage with respect to the best offer. All information regarding private initiatives is confidential.

The bill authorizes the contractor to create security interests over cash flows generated by the PPP project, as well as to create guarantee trusts, and all other security interests or other form of guarantees over assets and rights (whether in existence at the time or in the future) in favor of creditors other than the authorities, for the execution of the PPP contract. Furthermore, it expressly permits the creation of a security interest over the rights originated under the PPP contract (concession pledge); however, this is limited to obligations assumed with third parties for the financing of the operation or maintenance of the projects, as well as those resulting from a trust created for that purpose.

The new role of the CND - the most relevant change

Lastly, it is important to take into consideration the fact that the CND's role in connection with all PPP projects is probably - in practical terms - the most significant change. The CND will gain new powers related to the promotion, design, advice, selection and implementation of the PPP projects. In particular, the CND will be authorized to create private corporations in order to implement a PPP project and execute PPP contracts directly with the corresponding authorities and subsequently transfer or assign the projects to the private sector through, for example, an auction.

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