Colombia's PPPs: a step forward to modernize its infrastructure

哥伦比亚的公私合营项目： 迈向基础设施现代化的重要步伐

Despite Colombia's economic growth and global positioning as a destination for foreign direct investment from all corners of the world, its infrastructure, especially transportation, remains a work in progress. Due to a new law that will encourage and facilitate private finance initiatives for public infrastructure projects, the situation is expected to change soon.

尽管哥伦比亚有不俗的经济增长表现，以及作为全球外国直接目的地国的全球定位，但其基础设施，尤其是交通基础设施，仍有待改进。由于出台了鼓励和促进私人资本投资于公共基础设施项目的新法律，因此预计情况将迅速改变。

Despite Colombia's economic growth and global positioning as a destination for foreign direct investment from all corners of the world, its infrastructure, particularly with regard to transportation, remains a work in progress. The Economist[1] wrote that in Colombia, "moving goods from inland cities to a port can be more expensive than shipping them from the port to a market halfway around the world". However, this is expected to change due to the tremendous interest in investing in Colombian infrastructure and a new Law which was recently enacted (the "PPP Law") which is expected to encourage and facilitate private finance initiatives for public infrastructure projects.

Due to a markedly improved security situation, combined with significant regulatory reforms easing investment requirements, Colombia has become the fourth largest recipient of foreign investment in Latin America, after Brazil, Mexico and Chile[2]. In 2011, direct foreign investment reached an all-time record level of USD 15 billion, which represents an increase of 58.5% compared to 2010.

Nevertheless, while investment in all industry sectors (particularly commodities) is experiencing a boom, infrastructure currently lags behind, and the country's roads, airports and ports are unable to meet the needs of industry and commerce to transport the increasing flow of goods and services. The pressure on the transportation infrastructure has been exacerbated by unusually heavy rainy seasons over the past two years that have damaged large portions of Colombia's highway and transportation systems. The combination of strong economic growth and damaged infrastructure has highlighted the inadequacy of the system and placed the issue at the forefront of the government's list of priorities for the coming years.

1 http://www.economist.com/node/21529036

2 Foreign direct Investment in Latin America and the Caribbean 2011, ECLAC (Economic Commission for Latin America and the Caribbean).

To address the country's shortcomings in infrastructure, on 10 January 2012, following a fast track legislative procedure, Colombia enacted a new law on Public Private Partnerships which is expected to greatly incentivize the development of new infrastructure projects in Colombia and attract new foreign companies to invest in this sector. The PPP Law creates new opportunities to build and operate public infrastructure projects, provides additional comfort to lenders and substantially improves upon the country's previous private finance initiatives regime.

The main objective of the PPP Law is to utilize private capital for the provision of public goods and related services. Under the previous legal framework applicable to public-private initiatives, their use was strictly limited to certain public works projects and did not encompass projects related to public housing, courthouses, schools and prisons. The new PPP Law significantly broadens the types of projects deemed permissible to include a variety of construction and infrastructure projects and the operation thereof.

In addition, under the new regime payments to contractors will only be made once projects become operational, and payment will further depend on meeting certain service levels and quality standards. In essence, contractors will not be paid for work performed until the project is completed in accordance with the original project plan.

Generally, the PPP Law provides for a maximum term of 30 years for public private initiative projects. However, with the prior approval of CONPES (the National Council for Economic and Social Policy) this maximum term may be extended.

The new PPP Law also includes elements which are typically encountered in traditional project financing arrangements. For example, the new law requires that the project's resources be administered through a trust, to which all assets and liabilities of the project must be transferred. This requirement provides greater assurance to lenders with respect to outstanding payments and the enforceability of any security interests. Prior to the introduction of the new PPP Law, even though it was not a legal requirement, it was common to administer project resources through a trust, particularly for the administration of resources for large concession contracts. Furthermore, the new PPP Law expressly confers step-in rights on project lenders in the event of default under the loan agreement. Finally, the new PPP Law requires that PPP contracts include early termination provisions, which serves as additional security for the lenders.

Another important change introduced by the new PPP Law is the use of a special procedure for contractor proposals for new projects, and the awarding of contracts in connection with such private initiative projects. With respect to private initiative projects proposed by private contractors, the previous legal framework suffered from several shortcomings, including the previously referenced limitation on the types of private-public initiatives permitted. Additionally, it did not allow any favourable treatment or advantages to be given to the contractor proposing the project in the public bidding procedure following the private initiative. We expect the new PPP Law to incentivize experienced foreign companies to propose novel structures for a wide variety of projects for the development of Colombia's infrastructure.

The new law establishes two different bidding procedures, depending on whether the private initiative project requires any public resources. For projects that do not require such resources, once accepted by the government, there will be a period of between one and six months during which the project is publicly advertised to allow interested parties to express their interest. If there is no other potential bidder, the government will generally award the contract to the original proponent, subject to certain minimum requirements being met. If other parties express an interest in bidding for the project, they must post the required bonds, at which point the government will open a simplified tendering process in which the original proponent of the project has the right to match a subsequent better offer submitted by a third party.

Private initiative projects requiring government funding (with a maximum of 20% of the project cost) will be awarded through an ordinary tender process in which the original proponent will receive additional bonus points (ranging from 3% to 10%) from the National Infrastructure Agency for its submitted bid.

Regardless of whether a private initiative project requires any government funding, the private initiative project must comply with certain technical, socio-environmental, financial, and legal requirements. For any private initiative project, the proposing contractor must pay any expenses incurred in connection with the structuring process. However, if the proposing contractor does not succeed in winning the project bid, the winning contractor must reimburse the expenses incurred to structure the proposed project.

There is no doubt that the new law on private initiatives for Public Private Partnerships will significantly increase the interest of international investors in the country and that it represents an excellent opportunity for developing infrastructure projects in Colombia. However, in order to efficiently compete against local companies and other foreign companies already established in the country, it is important to understand the Colombian legal, tax and accounting environment. When structuring a private initiative project or preparing an offer during a public request for proposals, a thorough understanding of these local aspects has made the difference between a winning and a losing bid.

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