

## **The new Mexican Public Private Partnerships Law**

### **新出台墨西哥《公私合营项目法》**

**A new Public Private Partnerships Law has recently been passed which aims to encourage the development of infrastructure projects and private investment in Mexico. As a way of attracting foreign investment, the new legal framework gets rid of limitations on the nationality of bidders. In addition, the law welcomes private parties to suggest infrastructure projects and then freely participate in the subsequent bidding processes.**

墨西哥通过了一新《公私合营项目法》，来鼓励基础建设项目的发展以及私人投资。为了吸引外来投资，新的法律框架解除了对于投标人国籍方面的局限。此外，该法鼓励私人企业对于基础建设进行提案，接着自由参加投标程序。

On 16 January 2012, President Calderón published in the Federal Official Gazette (“DOF”) the Public Private Partnerships Act (“PPP Act”) and amended several provisions of the Law of Acquisitions, Leases, and Services for the Public Sector (“Law of Acquisitions”), the Public Works and Related Services Law (“Law of Public Works”), the Expropriation Law, and the General Law of National Assets (“National Assets Law”).

The PPP Act (along with the amendments made to the above- mentioned laws) consolidates a market practice that was carried out in practice without a clear legal framework as, prior to the PPP Act, projects involving the construction of infrastructure and the provision of services between the Public Administration and the private sector were regulated by the Law of Acquisitions, the Law of Public Works, and the Federal Budget and the Fiscal Responsibility Law, among others.

In general terms, the PPP Act aims to provide the Federal Public Administration and the private sector with a new framework for the development of long-term infrastructure projects with a high social impact, in which the infrastructure is provided, in whole or in part, by the private sector.

The following is a summary of the most significant aspects of the PPP Act.

#### **Scope of application**

PPP projects must be executed by companies incorporated with the exclusive corporate purpose of executing the respective project, on the understanding that these projects may be awarded to an individual or a company (both

individually, or through a consortium), whether national or foreign, which in turn must create the special purpose company or trust for the development of the project with the corporate statutory limitations established in the bid documents for each project within the scope of the applicable project or public bid.

The PPP framework is optional and may be used in activities in which the specific legislation permits the free participation of the private sector through permits, authorizations, or concessions. This framework may not be used in activities related to the exploration, exploitation, refining, transportation, storage, or distribution of oil, gas and its derivatives.

The PPP Act does not exclude public bids, but rather, is an additional set of legal provisions which apply to the acquisition requirements applicable to each project and sector. Likewise, the PPP Act does not preclude the obligation to attain all necessary authorizations, permits or concessions that may be required for the project at hand.

#### **Unsolicited proposals**

It is important to note that the PPP Act establishes a new legal concept. Those interested in developing a new project under the PPP framework are now entitled to propose the project to the Contracting Entity.

Under no circumstances may an unsolicited proposal be awarded through a direct award; this must always be through a public, competitive bidding process.

#### **Awarding of the projects**

As a general rule, PPP projects are awarded to whoever presents the best proposal in technical and financial terms in the corresponding public bid.

In order to incentivize participation in public bids, the PPP Act establishes no limitations on the nationality of the bidders. Still, the specific sectorial laws that govern the project may establish if the restrictions applicable to foreigners will be enforceable.

Once the evaluation of the proposals has been carried out, the project will be awarded to the bidder presenting the soundest proposal from a legal, technical and financing standpoint, according to the requirements set out in the bid documents.

By way of exception, PPP projects may be awarded through a bidding process in which at least three parties are invited or by direct award (which is invalid in the case of unsolicited proposals).

#### **Acquisition and expropriation of assets necessary for the development of the project**

The responsibility for obtaining the property, assets and necessary rights for the execution of PPP projects may lie with the Contracting Entity, the private party, or both, as stipulated in the relevant agreement.

## **PPP contracts**

The following are some significant aspects of PPP contracts under the PPP Act:

- a) Unlike the concessions in which the private party obtains the benefits directly from the final user, PPP contracts establish that the Contracting Entity must pay the developer periodic consideration for the execution of the project;
- b) The developer's rights derived from the PPP contracts may be transferred or granted as collateral with the prior authorization of the Contracting Entity. It is anticipated that upon foreclosure the holders of collateral or encumbrances, on the authorization of the Contracting Entity, may themselves engage a supervisor for the execution of the works or provision of the services;
- c) The term of the contracts, including extensions, must not exceed 40 years (unless the law applicable to the governmental authorizations required under the project establish a longer initial period). The developer may request the extension of the term of the contract and indemnification payments when its performance is delayed for causes attributable to the Contracting Entity;
- d) On prior authorization of the Contracting Entity, the developer is entitled to subcontract the execution of works or the provision of services. However, the developer will bear sole liability to the Contracting Entity;
- e) The infrastructure works may include facilities for the execution of complementary or commercial activities other than the principal service, i.e., the construction of commercial premises that may be leased in addition to the main project.

### **Step-in rights in the project**

In accordance with the PPP Act, the Contracting Entity is allowed to intervene at any stage of the development of the project when it considers that the developer is in default for causes attributable to such party and which are jeopardizing the project's development.

### **Amendment of PPP contracts**

The PPP Act establishes limited provisions under which the amendment of the contracts is permitted. In general terms, the contracts may only be amended in the following circumstances: (i) to improve the characteristics of the infrastructure, which may include additional works, (ii) to increase the services or their level of execution, (iii) to attend to certain aspects regarding the protection of the environment, (iv) to adjust the scope of the projects due to unforeseeable causes at the time the project was awarded; and (v) to restore the financial equilibrium of the project.

### **Early termination of PPP contracts**

In addition to the termination causes established under PPP contracts, the PPP Act sets out the following causes: (i) cancellation, abandonment or delay in the execution of the works, (ii) lack of provision of the contracted

services, provision of the services in terms other than those agreed or the suspension of the services for more than 7 days; and (iii) the revocation of the authorizations required for the execution of the project.

The PPP Act therefore differs from the previous regime established in the Law of Acquisitions; as the PPP Act does not permit the Contracting Entity to unilaterally terminate the PPP contract for reasons of public interest or due to the lack of necessity of the service, therefore effectively mitigating the risk for the developer of the early termination of the agreement for causes unrelated to its performance.

### **Dispute resolution**

Under the PPP Act, the differences between parties of technical or financial nature will initially be settled by mutual consent. If the dispute persists, an expert committee of three members will be appointed in which each party will appoint one expert and the experts will then choose a third one.

In the event of disputes related to PPP contracts, the parties may agree to arbitral proceedings.

For further information please contact:

#### **In Mexico City**

**Galicia Abogados**  
Manuel Galicia Romero

Torre del Bosque  
Blvd. Manuel Ávila Camacho No. 24, 7º Piso,  
Col. Lomas de Chapultepec  
C.P. 11000 México D.F., México  
**Tel:** +52 55 5540 9204  
**E-mail:** mgalicia@galicia.com.mx  
www.galicia.com.mx

#### **In Beijing**

**Uría Menéndez**  
Juan Martín Perrotto

2909 China World Office 2  
No. 1 Jianguomenwai Avenue  
Beijing 100004, PRC  
**Tel:** +86 (10) 5965 0701  
**E-mail:** jmp@uria.com  
www.uria.com

The information contained in this article is of a general nature and does not constitute legal advice.