

January 18, 2012

Public-Private Partnerships Law

On January 16, 2012, the Decree that enacted the Public-Private Partnerships Law (the Law) was promulgated in the Mexican Official Gazette.

The purpose of the Law is to regulate partnerships between public and private sector entities for the provision of services to the public sector or end user using total or partial private sector infrastructure.

Such partnerships have the aim of increasing social welfare and levels of investment in the country, as well as developing investment projects, applied research and/or technological innovation.

The aforementioned projects should be (i) fully justified; (ii) specify the social benefits they pursue, and (iii) demonstrate their financial advantage compared to other forms of financing.

In the case of technological innovation projects, entities and agencies shall choose, under equal conditions, the development of projects with higher education institutions and public scientific-technological research centers in Mexico.

A technological research and development fund shall be set up to promote public-private partnerships.

For the effects of public-private partnerships, the Public Sector Procurement, Leases and Services Law and the Public Works and Related Services Law, their regulations and other related provisions shall not apply.



The Law has the following supplementary ordinances: (i) The Commercial Code; (ii) The Federal Civil Code; and (iii) The Federal Administrative Procedure Law.

Public-private partnerships are optional and only require that the specific legislation applicable to the activity to be performed sets forth the free participation of the private sector or by means of the granting of concessions, authorizations or permits.

Public-private partnerships shall not proceed in the case of those fundamental productive activities set forth in Articles 3 and 4 of the Law Regulating Article 27 of the Political Constitution of the United Mexican States in the Area of Petroleum and in those cases in which the relevant provisions indicate that the private sector may not participate.

Public-private partnerships shall be notified in CompraNet.

The requirements for project development by means of a public-private partnership are as follows:

- a) The execution of a long-term contract.
- b) The granting of one or several permits, concessions or authorizations for the use and exploitation of government-owned property, the rendering of services or both.
- c) For technological innovation and development projects, the prior approval of the Scientific and Technological Consultative Forum shall be required.

Any interested party may submit its project development proposal to the respective entity; a feasibility study should be attached to such proposal.

Government entities and agencies shall give priority to those projects to be developed by means of public-private partnerships when assessing and processing environmental compliance, human settlements, urban development, construction, land use and other applicable aspects.



The respective government entity should evaluate the proposal submitted thereto in a term of three months, which may be extended for another three months.

If it concludes that the project proposal is admissible, the respective government entity shall hold a tender in order to award the project under the best conditions in terms of price, quality, financing, timeliness and other pertinent circumstances.

In this case, the respective government entity shall give the promoter of the project a certificate for the reimbursement of the expenses incurred in the formalization of the proposal if the promoter is unsuccessful in the tender or does not participate therein. Such reimbursement shall be charged to the successful bidder of the tender.

Mexican or foreign individuals or corporations may participate in the tenders; in the case of individuals, if successful, they must incorporate a company, the purpose of which must be specific, i.e., the execution of the project.

Two or more persons may submit a joint proposal, as a consortium and if successful, they must incorporate a company, the purpose of which must be the execution of the project.

Once the respective entity has determined that a project is viable, it shall call a tender; the call for bids shall contain the information required to identify the project, with all the information of interest for the participants.

Such information shall include the ratio of inclusion of domestic products, procuring to include the greatest possible amount of domestically-manufactured goods.

None of the conditions contained in the call for bids shall be subject to negotiation.



The guaranties to be granted by the participants, if applicable, should not exceed 10% of the estimated value of the investments to be made.

During the tender, there shall be one or more consulting and clarifications stages.

The term for the submittal of proposals may not be less than 20 business days counted from the publication of the call for bids.

The award shall be made in favor of whoever has submitted a solvent proposal; in the case that there are more than one solvent proposals, it shall be awarded to the proposal that ensures the best economic conditions for the State.

Once the decision of the tender has been made, the public private partnership contract should be formalized in the term established in the terms of reference of the tender.

If the contract is not executed for causes imputable to the successful bidder, the guarantees granted in accordance with the terms of reference of the tender shall be enforced and the contract shall be awarded to whoever obtained second place in the bidding.

If the contract is not executed by decision of the tendering entity, it should pay the successful bidder the unrecoverable expenses incurred thereby.

The government entity interested in the execution of a project may, under its own responsibility, award the respective project without subjecting the process to tender, by invitation of at least three persons or by direct award, in those cases established in the Act.

In the case that in order to execute the respective project it is necessary to acquire real estate, property and rights, the responsibility for such acquisition may correspond to the tendering entity, the successful bidder or both.



The acquisition may be carried out by means of expropriation (in the case of public interest) or negotiation with the owners of the respective property.

The successful bidder shall be responsible for contributing the resources for the execution of the work and rendering of the services; for its part, in the terms established in the terms of reference of the tender, the contracting entity or agency may contribute resources for the execution of the work and provision of the services, in property, rights, money or in any other form.

The term of public-private partnership contracts may not exceed forty years, including extensions.

The rights of the developer, derived from the public-private partnership contract, may be given in guaranty in favor of third parties or attached following prior authorization of the government tendering entity. In addition, the shares representing the capital stock of the successful bidder may be given in guaranty or transmitted with the prior authorization of the contracting entity.

The successful bidder may assign all or part of the rights of the contract, in the terms established therein.

The execution of the project shall correspond to the successful bidder, including the provision of the services with the performance level stipulated in the contract and, if applicable, the construction, equipping, maintenance, conservation and repair of the necessary infrastructure.

The risks of operation, rendering of services and, if applicable, the construction of the infrastructure and financing of the project, shall be assumed by the successful bidder.

The tendering entity may intervene in the execution of the project when, in its opinion, the successful bidder fails to perform its obligations and places the project at risk. The intervention of the entity may not exceed the term determined thereby, which in turn may not exceed 3 years.



The successful bidder may solicit the suspension of the intervention after demonstrating that the causes that lead to such nonperformance have been rectified.

Should the causes that gave rise to the nonperformance continue to exist once the term of the intervention has concluded, the entity may rescind the contract.

In the event the project cost increases significantly as a consequence of an administrative, legislative or jurisdictional act, the successful bidder shall be entitled to a contractual review.

The contract may be rescinded under the following grounds:

- i) The cancellation, abandonment or delay in the execution of the project.
- ii) The failure to provide the contracted services or the provision thereof in terms different to those established in the contract or the suspension thereof for more than 7 continuous calendar days, without justified cause.
- iii) In the event the authorization for the rendering of the services required to execute the project is revoked, if applicable.

The supervision of the project preparation, commencement and awarding process is the responsibility of the Civil Service Ministry; the supervision of the execution of the project shall correspond exclusively to the tendering entity.

The violation of the Law by civil servants shall be sanctioned in accordance with the Federal Law on Administrative Liabilities of Civil Servants.

If the successful bidder fails to perform, the contractual penalties established in the public private partnership contract shall be applied,



irrespective of the fact that the Civil Service Ministry may disqualify the successful bidder if it incurs in any of the grounds for disqualification established in the Law.

In the case that a dispute of a technical or financial nature arises, the parties shall attempt to solve it by mutual agreement and based on good faith, and if an agreement cannot be reached, a committee of experts shall be designated; each party shall name one expert and they in turn shall name the third.

If the opinion issued by the committee is unanimous, it shall be binding for the parties; otherwise, their right to appear before the competent instances shall remain intact.

The contract may stipulate the conciliation procedure to be carried out before the Civil Service Ministry in accordance with the procedure established in the Public Sector Procurement, Leases and Services Act or the Public Works and Related Services Law, accordingly.

Furthermore, the parties to a public-private partnership contract may agree on a strictly legal (no equity) arbitral proceeding in order to resolve their disputes derived from the performance of the contract, in the terms of the fourth title of the fifth book of the Commercial Code, provided Mexican Law is applicable thereto, and the proceeding is carried out in Spanish. The arbitral award shall be final and binding on the parties, and only Amparo proceedings shall be admissible, if applicable.

The revocation of concessions and authorizations in general, and acts of authority, may not be subject to arbitration; and the solution of disputes related to the validity of any administrative act (government action) may only be settled by the federal courts.

With regards to the interpretation and application of the Law, the federal courts shall have jurisdiction to judge those disputes derived thereof and of those acts performed in accordance with the Law, and the successful



bidder should grant a guaranty that covers the fines, damages and losses that may be caused.

The Law became effective on January 17, 2012; the Regulations should be issued in a term of 12 months as of the effective date of the Law.

The preparation and commencement of projects is subject to the issuance of the corresponding guidelines by the Ministry of the Treasury and Public Finance and shall be governed by the Law.

