MEXICAN LAW OF PUBLIC PRIVATE PARTNERSHIPS

In 2012 the Law of Public Private Partnerships was issued, as well as its regulation, in order to regulate and provide legal and economic certainty to projects of public private partnerships (PPP), that is, long-term contracts between the public and the private sector for the provision of services using infrastructure provided, in whole or in part, by the private sector.

I. REQUIREMENTS OF THE PPP PROJECTS IN ORDER TO BE OBJECT OF A PPP CONTRACT

The public agency interested in developing a PPP project must perform, as a first step, a number of analyzes and studies to identify and verify its reliability and feasibility. These studies and analyzes include the following:

1. The project description and technical viability of the project;
2. The real estate, assets and rights necessary for the project;
3. The authorizations that are required;
4. The legal viability of the project;
5. The environmental impact, preservation and maintenance of ecological balance and, if any, impact on natural or protected areas, human settlements and urban development of the project and its viability in these matters;
6. Social profitability;
7. Estimates of investment and federal and private contributions, in cash and in kind;
8. The economic and financial viability of the project; and
9. The desirability of developing the project through a PPP scheme comparing it with alternative schemes of procurement.

Regarding the economic resources, PPP projects may or may not require the expenditure of federal spending. To require such expenditure, projects must be reviewed and approved by the Interministerial Commission of Public Expenditure, Finance and Privatization, for its inclusion in the bill of Federal Budget of the following year, and, once included, it is subject to approval of the Chamber of Deputies of the Congress.

II. BIDDING PROCESS

PPP projects should be subject to a transparent bidding process, in which projects are awarded on the best terms available regarding price, quality, financing, timing and other relevant circumstances.

Who can participate in the bidding process

In the tenders all persons, individuals or entities, Mexican or foreign, can participate (it is worth mentioning that foreign direct investment in telecommunications is allowed up to 100% in Mexico), provided that they meet the requirements of the call for bids, the bidding terms and conditions and
the applicable provisions to the project. Bidders can participate individually or as a consortium formed by 2 or more persons that file a joint bid. However, to sign the PPP contract, the individual, entity or consortium that wins the bidding process, must incorporate an entity whose object or purpose is, exclusively, to perform the activities necessary to develop the project.

**Observers and social witnesses in the bidding process**

Any person may attend the events of the bidding process, as an observer.

Furthermore, bidding processes must have a social witness, who should be hired by the contracting public agency, whose participation is as follows:

1. He must act in an objective, independent, impartial, honest and ethical manner;
2. He must propose to the public agency the suggestions that promote fairness and transparency in the process;
3. He must participate as an observer in all the proceedings in which the bidders are present, as well as in all other public proceedings in the bidding process;
4. If he notices any alleged irregularity, he must inform the supervisory internal office of the public agency;
5. He must address and respond in a timely and expeditious manner to any request for information that about the bidding process is formulated by the Ministry of Public Administration or by the supervisory internal office of the public agency;
6. He must keep the proper privacy and confidentiality if he has access to information classified as confidential; and
7. He must prepare a final report on the bidding process, which must contain the general information about the bidding process, the chronological description of the relevant facts during the process, if any, the suggestions proposed, and the findings on the adherence to the legal provisions.

**Call for bids**

The call for bids, published in various media (on the website of the organizing public agency, in the Official Journal of the Federation, in CompraNet, in a national newspaper and in a newspaper in the states where the project is to be developed) must contain, among other things:

1. The general description of the project, the services to be provided and, if any, the infrastructure to be built;
2. The dates foreseen for the bidding process, the terms of the provision of the services and of the implementation of the infrastructure, as well as estimate dates of commencement of both; and
3. The locations, dates and times at which interested persons may acquire the bidding terms and conditions.
The bidding terms and conditions must contain at least the following elements:

1. The necessary elements for participants to be able to prepare their bids (such as the features and technical specifications, as well as the minimum standards of performance of the services to be provided, and the features and technical specifications for the construction and execution of the infrastructure).
2. The real estate, assets and rights necessary for the development of the project.
3. The terms in which subcontracting is allowed.
4. The draft contract, with the distribution of risks.
5. The draft authorizations required.
6. The guarantees that participants are to grant;
7. The language or languages, other than Spanish, if applicable, in which bids may be submitted; and
8. The criteria, clear and detailed, for objective evaluation of bids and for the award of the project.

It is worth mentioning that it is prohibited to set requirements that result in limiting the process of free competition.

Questions and clarifications

The bidding processes have one or more stages of consultation and clarification to answer in writing the doubts and questions that the participants submit.

Submission and Opening of Bids

The bids must be submitted in sealed envelopes, which are to be opened in public session.

In each bidding process, participants can submit only one bid, with its technical proposal and its financial proposal. Bids are submitted in final, they are mandatory to the bidder and are not subject to negotiation.

Once the act of submission and opening of bids starts, the bids already submitted cannot be withdrawn or rendered ineffective by the bidders.

Any person who submits a brief declaring, under oath, that has enough powers to do so, may intervene in the act of submission and opening of bids.

Evaluation of bids
In evaluating the bids, the public agency verifies that they meet the requirements set forth in the bidding terms and conditions, and that they contain sufficient elements to develop the project.

Only the criteria foreseen in the bidding terms and conditions can be considered, provided they are clear and detailed and allow an objective evaluation that does not favor any party.

For the evaluation of the bids the method of point-rated criteria, cost-benefit criteria, or any other may be used, provided they are clear, measurable and allow an objective and unbiased comparison of bids; the selected method must be pointed out in the bidding terms and conditions.

**Award Decision**

Once the evaluation of the bids is done, the project is awarded to the bidder who submits the solvent bid, for meeting the legal, technical and economic requirements, according to the criteria foreseen in the bidding terms and conditions and that, therefore, ensures compliance. If it results that two or more bids are solvent for meeting the requirements, the project is awarded to the bid that provides the best economic conditions for the State, as provided in the evaluation criteria foreseen in the bidding terms and conditions. If equal conditions persist, the public agency must choose the project that offers greater use of both human resources of the country and Mexican goods or services.

The public agency must issue a determination that is the basis for the award decision, in which the analysis of the bids is included, the reasons to support them or discard them, the comparison between them, and the elements that make the winning bid the one that offers the best conditions for the State.

**III. PPP CONTRACTS**

**Elements of the PPP contracts**

The PPP contract must contain at least the following, among other things:

1. Rights and obligations of the parties;
2. The features, specifications, technical standards, standards of performance and quality for the execution of the infrastructure and provision of the services;
3. The list of the real estate, assets and rights to be used for the project, as well as the clarification of their ownership after the term of the contract;
4. The financial arrangements for the project, with the considerations in favor of the developer;
5. The risk-sharing arrangements;
6. The terms for the commencement and completion of the infrastructure, for the commencement of the provision of the services, as well as the term of the contract and, if applicable, the rules to extend them;
7. The agreed penalties for breaching the contract; and
8. The procedures for dispute resolution.

The developer is responsible for providing the resources for the execution of the infrastructure and for the provision of services, and the contracting public agency may provide rights, assets, cash or other resources for the execution of the infrastructure and for the provision of services.

**Term**

The terms of the contracts, including its extensions, are the necessary ones for the development of the PPP project, which cannot exceed, jointly, 40 years.

It is worth mentioning that when a PPP project requires permits, concessions or other authorizations that in accordance with the law have a term of 5, 10 or 20 years, for example, the PPP Law allows to it to the term required by the PPP project (up to 40 years).

**Guaranties**

It can be foreseen in the bidding terms and conditions that the developer must provide guaranties. In this case, the cost should not exceed an amount equal to fifteen percent of the value of the infrastructure during its construction, or the equivalent of ten percent of the annual compensation for the services during their provision.

When permitted by the profitability of the project, and as established in the bidding terms and conditions and in the contract, the contracting public agency may require the developer:

1. The refund of the value of real estate, assets and rights used in the project that were provided by the public agency;
2. The reimbursement of amounts for remnants and other items;
3. The payment of fees for supervising and monitoring the execution of the infrastructure or the provision of services; or
4. Other stipulated by the parties.

**Insurance**

The insurance that the developer must purchase and maintain in force must cover, at least, the risks to which users are exposed, the infrastructure and all the assets used for the provision of services, as well as liability.

**IV. EXECUTION OF THE PPP CONTRACT**
Assignment of the developer’s rights to third parties

Developer's rights derived from the PPP contract may be assigned to third parties as a pledge or affected in any way, under the terms and conditions set forth in the PPP contract and prior authorization of the contracting public agency.

Also, in the hypothesis, terms and conditions provided in the PPP contract, the developer can transfer its rights derived from the contract, in whole or in part, prior authorization of the contracting public agency.

Supervision of the contract

The public agency may hire a third party to control and supervise the project.

Extensions

The developer has the right to request an extension of term of the contract, if they are delayed for reasons attributable to the contracting public agency, and to receive the corresponding compensation provided in the contract for damages caused by such delays.

In addition, prior to the expiration of the original term of the contract, the parties may agree extensions and, where appropriate, review the conditions of the contract.

Modification of the contract

During the original term of a PPP project, modifications may be made to it only when they intend to:

1. Improve the features of the infrastructure, which may include additional works;
2. Increase the services or their standards of performance;
3. Address issues related to environmental protection, as well as to the preservation and conservation of natural resources;
4. Set the scope of the project because of supervening causes unforeseen at the preparation and award of the project; or
5. Reset the economic equilibrium of the project.

In order to restore the economic equilibrium of the project, the developer has the right to review the contract when the cost of the project substantially increases or the benefits of the developer substantially decreases, derived from an administrative, legislative or judicial act. For this purpose, it is understood that variations mentioned are substantial as they are durable and jeopardize the financial viability of the project.
**Penalties**

Failure to comply with the contractual obligations of the PPP leads to the penalties agreed in the contract, which may include reductions in the compensations of the developer.

**Completion of PPP contracts**

The contracting public agency may terminate the PPP contract when there are reasons of general interest, or when the need to require goods or services originally contracted is extinguished because of justified causes and it is proved that if the compliance continues it will cause damage or harm to the State.

In case of early termination for reasons not attributable to the developer, it shall be entitled to receive reimbursement of expenses and investments it proves to have made, nonrecoverable, pending amortization. The amount is calculated according to the terms and conditions agreed in the contract. Payment will be made within a period not exceeding 90 working days after the submission of the request and the supporting documentation.

PPP contracts can be terminated for the following reasons:

1. Cancellation, abandonment or delay in performance of the infrastructure;
2. The failure to provide the services, their provision in terms other than agreed, or their suspension for more than seven calendar days without justified cause;
3. If the project requires authorizations for the provision of services, the revocation of such authorizations;
4. Other causes as may be provided in the contract.

Upon termination of contracts, real estate, assets and rights of a public nature, or incorporated to the infrastructure or necessary for the provision of the service, will be transferred pass to the control and management of the contracting public agency. The other property necessary for the provision of the service will be subject to the regime of the public domain of the Federation, under the terms agreed in the contract. The agency will have a purchase option in relation to other property owned by the developer used for the provision of services.

**Disputes - Expert Committee**

In case of technical or economic differences (not legal), the parties of the PPP contract must try to solve them by mutual agreement and in accordance with the principle of good faith.

In the event the parties fail to reach an agreement within the agreed period, they must submit the dispute to a committee of three experts in the field of dispute, appointed one by each party and the third one by the two firstly appointed experts.
The committee issues a resolution that, if adopted unanimously, is binding to the parties. Otherwise, the parties will be entitled to pursue other procedures according with the contract and the Law.

**Disputes - Arbitration Procedure**

The parties of a PPP contract may stipulate an arbitration procedure, in strict compliance, to solve disputes that arise regarding compliance of the PPP contract itself in terms of the provisions of the Commercial Code of Mexico.

The award is binding and final to both parties. If applicable, against the arbitral award only an amparo action can be filed.

**Jurisdiction**

It is competence of the federal courts to handle disputes arising from the interpretation or application of the PPP Law, as well as from the acts issued on the basis of said Law or of provisions derived from it.