



New Law on Public-Private Partnership (PPP) Contracts

No. 27,328

Purposes

- Facilitate new forms of collaboration and association between the public and private sectors.
- Introduce a legal framework to promote and channel both public and private investments, especially in infrastructure projects.

Background – Critical view

- Limitations and rigidity of traditional contracting systems.
- “Exorbitant” powers of the Administration to:
 - Unilaterally modify the contract.
 - Terminate it for public interest reasons.
 - Force the private contractor to continue with performance despite the Government’s non-compliance.
- Power of Administrative authorities to suspend or annul the contract.
- Severe limitation on assignment and subcontracting;
- Bottom line: limited legal certainty for privately financed projects.

The PPP Law

- Legislative process:
 - Submitted to Congress by the Federal Executive Branch in June.
 - Approved with amendments by the Senate in September.
 - Approved and further amended by the House of Deputies in November.
 - Approved by the Senate in November.
 - Published as Law No. 27,328 on November 30th, 2016.
- Provinces and the Autonomous City of Buenos Aires are invited to adhere to its provisions.

Scope of application

- It regulates certain Federal Government contracts.
- Contracts between agencies and companies in the Federal Public Sector (Contracting Party) and the private sector, including companies with government participation (Contractors).
- For infrastructure and services projects, productive investments and applied research or technological innovation.
- Design, building, expansion, improvement, maintenance, equipment and goods' supply, exploitation or operation, and financing activities.
- Alternative contracting regime: it coexists with traditional regimes (public works regime, concession of public works regime and general contracting regime of the Public Administration).

Flexibility of the legal structure

- PPP law provides a framework, while the specific project structure is established by the bidding terms and conditions, and the contract.
- Allocation of risks to the party in a better position to avoid or assume them.
- Possibility of structuring the PPP through publicly traded SPVs and financial trusts.
- Possibility of implementing assignments and subcontracting with prior opinion from the entity controlling the execution of the contract and the Attorney General.
- Possibility of setting up guarantee structures on exploitation rights.

Limitation of Government powers

- Possibility of suspending performance in case of non-compliance by the Government.
- Limited right to unilaterally modify the contract: only related to the project execution, and with a limit (20% of the contract), plus an obligation to compensate.
- Suspension or termination due to illegality of the contract may only be determined by the competent tribunal.
- Full reparation in case of unilateral contract termination for reasons of public interest.
- Payment prior to dispossession and guarantee of “minimum” compensation of unamortized investment (even in case of termination due to the private party’s default).

Financial-economic balance

- The commercial balance must be preserved (economic-financial equation of the contract). Invoking alternation permits the request of an opinion from the Attorney General.
- The term of the contract must be set while taking into consideration the repayment of financing, and a reasonable profit on the investment (maximum: 35 years).
- A minimum income guarantee may be included.
- Monetary updating and price indexation are admitted.
- Payment in foreign currency may be provided.

Public sector contributions

- Money.
- Assignment of funds, assets, rights or credits.
- Rights of use, exploitation or surface rights on public or private assets.
- Guarantees, tax benefits, subsidies or exemptions.
- Open list (any other contribution allowed by the law).

Payment guarantees by the public sector

- Transfer of tax resources, credits, assets, funds or any public income, with the authorization of Congress.
- Creation or use of existing trusts, affecting public income of any kind, with the authorization of Congress.
- Bonds, endorsements or any other guarantee from local or foreign entities.

Selection Process

- Bidding process or Public Contest.
- The bidding terms must favor the selection of domestic companies.
- Private initiatives are admitted.
- A system of competitive dialogue is contemplated.

Promotion of local components

- Establishment of a minimum of 33% of local components on goods and services supplied within the frame of the PPP contracts.
- Application of “Buy Argentine” regime to purchase of goods.
- Exceptionally, these requirements and preferences may be excluded with respect to certain projects.

PPP Unit

- Concentrates all of the PPP contract regulation.
- Provides advisory, technical and operative support to bidding entities.
- Issues its opinion regarding the convenience of using the PPP framework and before the contract is awarded.

Bicameral Committee

- Composed of 7 senators and 7 deputies.
- Controls the projects developed under PPP contracts.
- Controls the fulfillment of legal requirements.
- Copies of all PPP contracts must be submitted to the Committee.
- Confidentiality of information must be ensured.

Dispute resolution

- Possibility of submitting controversies to dispute boards.
- Arbitration in Argentina or abroad is admitted.

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