Open for investment: How Mexico is paving the way for infrastructure investors

The new federal PPP law gives infrastructure investors and contractors a more certain environment, Mexico's government plans to invest US$316 billion in infrastructure projects by 2018.

A step-change for Mexican infrastructure

Mexico enacted its new federal public-private partnership (PPP) law, Ley de Asociaciones Público Privadas (Law on Public-Private Partnerships), in January 2012. The accompanying regulations were published in November 2012.

Most Latin American countries—including Brazil, Chile and Colombia—have a PPP-specific law and an infrastructure program that aims to attract investors' funds.

So if Mexico isn't unique, is it unusual? We think it is. It has three features that will make it an important infrastructure market in the next five years:

- The political will. President Enrique Peña Nieto took office in 2012 and announced a range of reforms aimed at lifting economic growth, including the recently approved opening of the energy sector to private investment.
- A US$316 billion infrastructure budget, including US$48 billion for transport. Peña announced his 2013 – 2018 development plan—and infrastructure spend 35 percent higher than his predecessor's—in July 2012.
- A new federal PPP law. The law reflects best practice from other jurisdictions and is aimed at attracting private investors.

In this briefing we set the context of the new law and summarize the key points. We hope you find it useful.

If you'd prefer an informal briefing—or have some initial questions—just let us know.

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Investors in Mexican infrastructure projects have faced some uncomfortable unknowns. The new federal PPP laws aim to attract foreign investment and give investors and contractors a more certain—and more familiar—environment.

Mexico is gearing up for an infrastructure surge. In May 2013 President Enrique Peña Nieto—elected to a six-year term in December 2012—announced a five-year plan that provides for a spend of US$316 billion on infrastructure by 2018.

The infrastructure spend is part of President Peña's wide-ranging plans that aim to boost economic growth in Mexico. One such plan has already been implemented: The recently approved energy constitutional reform puts an end to the monopoly of state-run electricity and oil companies and opens the energy sector to private investors and partnerships.

President Peña's proposed expenditure for infrastructure is 35 percent greater than that of Felipe Calderón, the previous president. Calderón's five-year plan kick-started infrastructure spending and scheduled more than US$230 billion of infrastructure projects between 2006 and 2012. Mexico has much ground to make up on infrastructure: The World Economic Forum's *Global Competitiveness Report* ranks Mexico's infrastructure 65th out of 144 countries, and fewer than 40 percent of Mexico's roads are paved.

More certainty for investors and contractors

Foreign investors have put money into Mexican infrastructure since the mid-1990s, but there were no specific laws that governed PPPs.

The new federal PPP law was published in January 2012, and the related regulation in November 2012. The current guidelines were enacted in December 2013. The federal PPP law includes several features that will give developers and investors greater certainty (see table on page 6).

Key changes include:

- **A thorough, transparent bidding process.** Requests for proposals will be widely published and contracting authorities have to prepare feasibility studies for prospective PPPs. Bidders can present unsolicited proposals; they can recover reasonable bid costs and will have a financial advantage at a public bid stage.
- **Minimum mandatory terms.** The terms protect investors' and developers' interests and allow flexibility (e.g., clearly defined rights and obligations, risk sharing, liquidation damages on default), but the parties define the detail.
- **Clearer rights for investors.** These include rules on taking security interests in tangible and intangible assets, temporary step-in rights and compensation rights if a contracting authority terminates a contract.
- **Dispute resolution via arbitration.** The right to domestic or international arbitration expressly exists and is consistent with the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Commercial Arbitration. Arbitration awards can be enforced.

The road ahead: Mexico's new infrastructure-investment landscape

Mexico's—and Latin America's—ongoing PPP story

In the 1990s, many Latin American countries turned to public-private partnerships to fund big-ticket infrastructure projects that aimed to improve economic growth. That first wave of PPP projects hit some bumps, as have PPP projects in other regions. But the story of PPPs in Latin America is very much one of iterative development.

Over the last 20-plus years, several Latin American governments have introduced and then refined PPP laws to make them more practical and effective. Chile, widely rated as a PPP success story today, first introduced PPP legislation in 1991, amended it twice in the following years and later suffered an embarrassing corruption scandal in 2002. Colombia used its first PPP in 1993 and, in common with Mexico, introduced a PPP law in 2012. And also in 2012, Brazil made several changes to the PPP laws it introduced in 2004.

Mexico has its own PPP project history. In 1997, the government had to rescue 23 public-private-funded toll roads it had launched in 1989. The program of 52 toll roads was plagued by problems which included errors in traffic-volume estimates, relatively short 15-year concessions and poor project planning. Many toll roads already had financial problems when the Mexican peso crisis hit in 1994, and they were unable to meet their US dollar-denominated debt payments. The government's rescue vehicle was a new entity, Fideicomiso de Apoyo al Rescate de Autopistas Concesionadas (FARAC), that has now re-privatized many of these toll roads on longer 30-year concessions with Mexican peso-denominated debt.

It's worth noting that some features of the new law—contracts can run for up to 40 years or longer in a few specific cases, plus more rigorous project-planning requirements—are remedies to problems faced by the 1990s toll road projects.

A law that addresses investors' concerns

Investors and developers that started PPP-type projects under pre-2012 law faced tricky times. There was no clear federal PPP regime, only piecemeal secondary procedures and decrees. This meant that contractual arrangements had to fill the gaps left by the nonexistent PPP law, with the risk that contract terms would contradict sector regulations. In addition, investors and developers had none of the backstops they had come to expect in other jurisdictions.

Investors had no step-in rights to take control of a developer that defaulted on its obligations, and legal disputes had to be settled in Mexican courts rather than through international arbitration, which is common in other jurisdictions. The lack of a clear legal framework often resulted in project delays, legal uncertainty and unclear allocation of risk.

The new regulations follow PPP practice in major jurisdictions—many of the concepts and approaches will be familiar to those in the infrastructure industry—and are flexible enough to accommodate three distinct types of PPP: "pure" (government pays), "self-sustained" (user pays) and "combined" (see page 13).

It is likely that Mexico will become a significant infrastructure market in the next five years. Any uncertainties around this untested federal PPP framework are balanced by the fact that the framework is well-structured, based on proven models from other jurisdictions, and there is momentum and appetite to ensure the success of this new regime.

"In addition to condensing law provisions that were previously disorganized into a single, cohesive law, this new legal framework unlocks the potential to expand the private sector investment and thus further accelerate the growth of the infrastructure that Mexico needs to increase its global competitiveness."

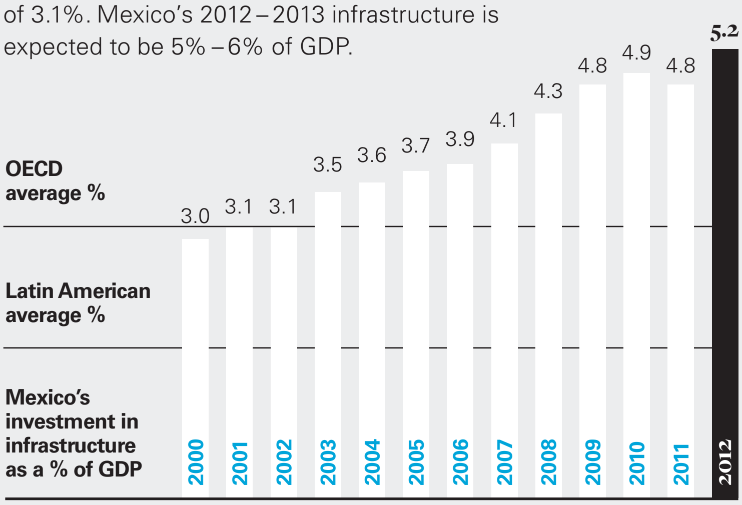
Mexico's Ministry of the Economy

Mexican infrastructure: by the numbers

Mexico's infrastructure spending is ambitious and matched by its readiness to undertake the public-private partnerships required to bring its plans to completion.

Mexico consistently outspends the region

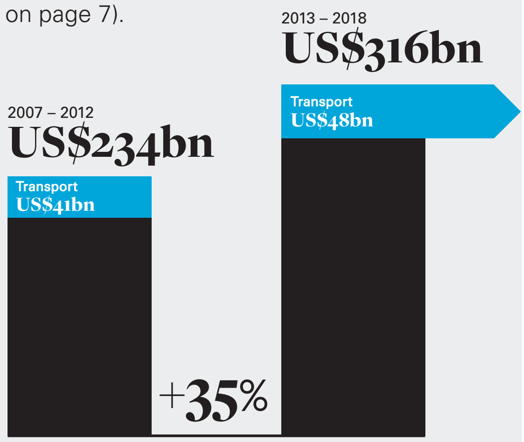
Infrastructure spending is well above the Latin American average of 2% of GDP, and it beats the OECD average of 3.1%. Mexico's 2012 – 2013 infrastructure is expected to be 5% – 6% of GDP.



Source: V Informe de Gobierno

A Mexican infrastructure surge

The total infrastructure US$316 billion spend will go to roads, ports, telecoms, water and energy projects. Transport's share is US$48 billion (see breakdown in table on page 7).



Source: PwC, *Gridlines* Summer 2013

The top five Latin American countries by PPP readiness*

This graphic shows the top five countries according to the Economist Intelligence Unit *Infrascope 2012* PPP-readiness scores—and how Mexico compares to those countries on four other metrics.

*The EIU *Infrascope* report measures government capacity to implement sustainable and efficient infrastructure PPPs in 19 Latin American and Caribbean countries.

PPP-readiness		Change in PPP-readiness		GDP		Infrastructure ranking (of 144)		Competitiveness ranking (of 144)	
Chile	1st	Mexico	+9.8%	Brazil	US$2.49tn	Chile	45	Chile	33
Brazil	2nd	Colombia	+7.6%	Mexico	US$1.154tn	Mexico	68	Brazil	48
Peru	3rd	Peru	+2.2%	Colombia	US$328.4bn	Brazil	70	Mexico	53
Mexico	4th	Brazil	-0.8%	Chile	US$248.4bn	Peru	89	Peru	61
Colombia	5th	Chile	-3.8%	Peru	US$173.5bn	Colombia	93	Colombia	69

Sources:
PPP-readiness score and change in score: Economist Intelligence Unit *Infrascope 2012* report
GDP, infrastructure and competitiveness rankings: World Economic Forum's *Global Competiveness Report* 2012 – 2013

Transportation Infrastructure[1]

On July 15, 2013, the Ministry of Communications and Transports announced the *Infrastructure Investment Program* for the years 2013 – 2018, which sets forth the investment plan by the federal government in five key areas: Roads, Railways, Ports, Airports and Telecommunications. The aggregate estimated investment commitment is approximately MXN1.2 trillion, out of which MXN582 billion shall be dedicated to 210 projects related to transportation infrastructure, and MXN700 billion for telecommunication-related projects.

	Number of projects	Kilometers of road/rail	Amount in pesos (millions)
Road infrastructure			
Highways	34	1,792	101,330
Roads	49	2,734	45.562
Bypasses	33	884	50,354
Road junctions and bridges	22	NA	11,580
Rural road commitments and feeders	9	655	4,229
Roads maintenance program	1	40,710	103,000
Rural paths program	1	12,600	70,200
Total	**149**	**5,410**	**386,255**
Railroads and mass transportation			
Passenger train	3	567	49,155
Mass transportation	6	95	21,124
Bus stations	1	NA	NA
Cargo train railways	8	322	15,668
Railroad signalling	1	NA	2,000
Total	**19**	**956**	**98,098**
Ports			
New ports	3	NA	29,773
Extensions	5	NA	14,994
Specialized terminals	12	NA	17,614
Ferry reduced tariff	1	NA	NA
Total	**21**	**NA**	**62,381**
Airports			
Modernization	19	NA	22,644
Strengthening of connectivity	1	NA	NA
Conclusion of airport in construction	1	NA	200
Total	**21**	**NA**	**35,036[1]**
AGGREGATE	**210**		**581,770**

Source: Infrastructure Investment Program

1 This figure includes investments by airport and railway concessionaires in the amount of MXN 2,192 million and MXN 10,151 million, respectively.

How the new law protects investors' interests

Topic	Under pre-2012 framework	2012 measures that protect investors' interests
General provisions		
Security interests	☐ No legislative provisions. ☐ Agreed among the transaction parties.	☐ Regulations include provisions that allow investors to take a security interest in: – Physical assets – Physical project assets other than public property – Intangible assets which include developer's rights under the PPP contracts, and developer's rights under authorizations granted for the rendering of services – Shares of the project company ☐ No restrictions on refinancing of project debt.
Assignment of PPP contract	☐ No legislative provisions.	☐ Rights of PPP contracts can be fully or partially assigned, and this can be expressly stated in the PPP contract.
Transfer of controlling interest	☐ Usually, contractually restricted in order to retain expertise of original shareholders.	☐ Permitted, but transfer of shares of the project company requires prior approval of the contracting authority. ☐ A transfer intended to create a security for the benefit of lenders will be granted on a "preferential basis."
The bidding process		
Bidding process	☐ Lacked flexibility.	☐ Competitive, efficient and transparent process.
Developer project identification	☐ No clear rules.	☐ Developers are entitled to identify and bid on the opportunity for a PPP project. If accepted, the contracting authority puts the proposed PPP project to tender. ☐ Unsolicited bids get financial advantage of up to 10 percent at public-bid stage. ☐ Developers can recover reasonable initial costs (e.g., cost of feasibility studies) if it is not ultimately awarded the project.
Step-in rights	☐ No legislative provisions.	☐ Lenders have step-in rights and can take temporary control of the project company if it defaults under the terms of the PPP contract.

Topic	Under pre-2012 framework	2012 measures that protect investors' interests
Renegotiating extensions and financials		
Extending the term of the contract	□ No legislative provisions.	□ Extensions are permitted (e.g., to allow the project company to repay debts and achieve profits). □ The maximum term of any PPP contract is 40 years with a few limited exceptions.
Renegotiating fees and costs	□ No legislative provisions.	□ The project company is entitled to request changes to the PPP contract to preserve contract value (e.g., if contracting authority requests a higher specification that increases project costs).
Change of law	□ No legislative provisions.	□ The project company is entitled to request a revision of the PPP contract if there is an anticipated substantial increase in the execution costs of the project or the substantial reduction of the benefits of the project, for reasons due to an administrative, legislative or judicial change that is enacted or issued by a competent authority after the opening of the economic bids at the bidding stage.
Termination and handover of assets		
Termination	□ Inflexible termination events. It was unclear if parties were entitled to agree upon termination events and their consequences. □ The project company's right to terminate was not clearly acknowledged.	□ Parties are entitled to agree to: – Termination events – Consequences of termination – Cure periods, early warnings and lender's temporary step-in to prevent termination. □ The project company has right to arbitration or judicial review if contracting authority terminates.
Termination compensation	□ No clear rules.	□ PPP contract must stipulate how termination-compensation will be calculated (e.g., unrecovered investment, agreed return, outstanding debt).
Handover of assets upon termination	□ No clear rules on what assets would be handed over to contracting authority.	□ Physical infrastructure must be transferred to contracting authority at either no cost, or for compensation agreed upon in the contract. This enables compensation to be structured so that it would amortize unrecovered investment and outstanding debts. □ The contract authority has the option to purchase other project-related assets at a price agreed upon by the parties.

How the new law protects investors' interests

Topic	Under pre-2012 framework	2012 measures that protect investors' interests
Dispute resolution and arbitration		
Review of technical and financial disputes	□ No legislative provisions.	□ Parties can nominate a committee of experts to resolve disputes. □ The contract must stipulate the express powers and authority of the designated experts and the terms of the technical or financial advice. □ Resolutions will be binding if unanimously agreed upon by the committee.
Dispute resolution	□ No legislative provisions. □ Unclear whether arbitration clauses were valid and whether the rescission of a PPP contract by the contracting authority could be submitted to arbitration.	□ The contracting authority is authorized to agree to commercial arbitration under the Commerce Code (follows the principles of the UNCITRAL Model Law on Commercial Arbitration). □ Rescission by contracting authority may be reviewed in arbitration, although revocation of concessions or permits, as well as the validity of administrative acts, may only be reviewed by federal courts of law. □ Neutral country may be selected to host the arbitration. □ Arbitration is assured as Mexico is a signatory of the Convention on the Recognition and Enforcement of Foreign Arbitration Awards of 1958.

Key features of the new PPP framework

This table covers relevant aspects of the new legal framework.

The PPP framework	The bidding process	Operating under a PPP contract

A. The PPP framework

PPP features	Details	Notes
1. Basic features	**Contract term** Between three and 40 years, except if the PPP contract also requires a concession or authorization for the project company to use public property or render the services, which may otherwise require a greater term. **Form of agreement** A PPP can be any type of contract or agreement. **Special-purpose vehicle** The provider must be a special-purpose vehicle incorporated under Mexican law. **Duties of project company and contracting authority** The project company must either build the required infrastructure or add to existing infrastructure. Contracting authority must help the developer get any permits the project requires. If a government body fails to respond within 60 days to a permit request filed by the contracting authority in connection with the commencement of a PPP project, the permit is automatically granted (this excludes all environmental permits). **At the end of a PPP project** Control and ownership of the infrastructure and related assets pass to the contracting authority at the end of the contract, thus increasing the stock of public assets.	□ The project is required to build infrastructure in order to qualify as a PPP, in other words, a "greenfield project." Projects that don't build any infrastructure, in other words a "brownfield project", fall into the public-procurement category and are otherwise subject to relevant federal or state laws.
2. PPP framework is optional	The government agency that awards the contract can elect not to use the PPP framework.	□ Government agencies that don't use the PPP framework are likely to use the existing "concession" model or traditional public procurement schemes such as public works or rendering of services. However, there are strong indications the federal government will primarily elect to utilize the PPP framework.
3. Three types of PPP	**"Pure"** (government pays) Budgeted federal funds are used to pay the project company for: □ Delivering the services to the awarding government agency or to the public. □ To cover its costs (e.g., the cost of funding, operating and maintaining the infrastructure).	□ Main source of revenue for the developer is a stream of payments from the government. □ Must be approved by a permanent government committee that includes the Ministry of Finance and Public Credit, the Ministry of Energy, and the Ministry of Communication and Transports. It is then reviewed and approved by the House of Deputies *(Cámara de Diputados)*. □ If approved, PPP payment obligations will be included as a recurring multiyear line item in the federal government's budget. This mitigates the risk of annual budget changes and/or low appropriation risk.
	"Combined" Funded through a combination of: □ Budgeted federal funds and/or federal grants (this is likely to be via Fonadin, as described adjacent, an infrastructure investment fund under the national development bank Banobras that was created to support private investment in infrastructure projects). □ Private funds.	In addition to the notes set out above in connection with "pure" projects which are also applicable to "combined," note the following: □ Fonadin provides two main sources of financial support to PPP projects provided that such PPPs meet the stated requirements. (1) Grants: funding of preliminary studies as well as subsidies to those PPP projects that are deemed to be in the public interest.

Key features of the new PPP framework

A. The PPP framework

PPP features	Details	Notes
3. Three types of PPP (continued)	**"Combined"** (continued)	(2) Financial Enhancements: risk capital contributions, subordinated debt and payment guarantees (first loss, pari passu, final payment and a mixture thereof), and credit- and political-risk guarantees. □ Fonadin, which stands for National Infrastructure Fund, is a trust incorporated by Banobras (a state-owned development bank), set up to promote the development of infrastructure in Mexico, with particular emphasis on roads, ports, airports, railroads, urban transportation, tourism, environment, weather and integral urban development projects. □ Fonadin's operational rules provide multiple comprehensive requirements that must be met in order for a grant to be awarded. Conversely, the applicable requirements for financing enhancements are more relaxed. Fonadin will provide support up to a certain percentage of the value of the project and will require the private sector and/or the contracting authority to provide the rest. □ Fonadin is expected to funnel MXN 270 billion in the form of grants and financial enhancements over the next five years.
	"Self-sustained" (user pays) Funded entirely through: □ Private funds. □ Revenue generated by the project. □ Non-cash contributions (i.e., permits, authorizations or concessions for the development of the project, or the rendering of services or the execution of works).	□ The main source of revenue for the project company are charges levied on service users (e.g., fees to use a toll road).
4. The parties' funding contributions	Private developers must provide the funds required to partially or totally build and operate the infrastructure either through capital and/or financing measures.	□ Government agencies may contribute assets, rights or funds.
5. Risk allocation	Private developers bear the: □ Operational risk. □ Risks that relate to rendering the service. □ Risks of financing and constructing the infrastructure.	□ However, the federal PPP law provides that the parties to a PPP contract may agree to a different risk-allocation scheme, although it is unlikely that the relevant government agency would assume anything other than the granting of the required permits or the provision of land or the provision of agreed information and documents required in connection with the feasibility of the project. □ PPP contracts allow for a clear allocation of risks; moreover, they mandate a balanced risk-allocation.

B. The bidding process

<table>
<tr><th>PPP features</th><th>Details</th><th>Notes</th></tr>
<tr><td>1. Preparatory stage</td><td>Feasibility and other studies
Contracting authority must evidence the feasibility of the prospective PPP. To this end, the contracting authority is required to carry out an in-depth analysis regarding the following:
□ Description of the project.
□ Real estate, assets and rights necessary for the development of the PPP.
□ Permits and authorizations for the development of the PPP.
□ Technical, legal and financial feasibility of the PPP.
□ Environmental impact, preservation and conservation of ecological balance and, if any, the impact on the natural or protected areas.
□ Social cost of the project.
□ Estimates of investment and contributions in cash and in-kind, both public (federal, state or municipal) and private.
□ That the project meets the viability requirements set out in the regulations.
Contracting authority must also demonstrate that PPP financing has a financial advantage over other forms of financing (as set out in guidelines issued by the Ministry of Finance and Public Credit on December 31, 2013).</td><td>□ The feasibility study must cover technical, legal, social and economic viability. This is an ex ante process to ascertain value for money.
□ PPP is required to stand on its own merits.</td></tr>
<tr><td rowspan="2">2. Request for proposals</td><td>Public
A request for bidders shall be announced, which shall include preliminary information on the project and the minimum requirements to participate in the bidding process.</td><td>□ Published on the Federal Gazette, COMPRANET website, a nationwide newspaper, in a state newspaper where the project will be located and on the Internet page of the contracting authority.</td></tr>
<tr><td>RFP
RFP shall include, among other requirements:
□ Information necessary for bidders to be able to prepare their proposals.
□ A draft of the PPP Contract, with a clear indication of the allocation of risk regime.
□ Detailed criteria for the evaluation of the proposals and the awarding of the project.
□ Causes for disqualification.
□ Times for clarification meetings, filing of proposals, opening of proposals.
□ Drafts of authorizations required to carry out the project.
□ Guaranties required from bidders.
The RFP may be amended by the contracting authority, in which case bidders shall be notified and will have the right to withdraw from the process without penalty.</td><td>□ Conditions set forth in the RFP are not open to negotiation. Note that answers by the contracting authority at clarification meetings are deemed part of the RFP.
□ If so stipulated in the RFP, proposals may be submitted in another language in addition to Spanish. Although this is not common, manuals and brochures that evidence technical experience may be in another language.</td></tr>
</table>

Key features of the new PPP framework

B. The bidding process

PPP features	Details	Notes
2. Request for proposals (continued)	**Clarification meetings** Written question and answer iterations shall be carried out as specified in the RFP.	□ Interaction with bidders during proposal preparation is limited to these question-and-answer sessions for the sake of transparency. This is not only an opportunity for private developers to request clarifications to the RFP but also for them to pose questions or requests aimed at persuading the authority to modify the RFP.
3. How PPPs are evaluated and awarded	**Presentation of proposals** Bidders submit sealed bids in a public bidding process. One single bid shall include the technical proposal and the financial proposal. Bid proposals are handled confidentially.	□ No mandatory pre-qualification step. □ No distinction is made between national and international bids, and hence limitations to foreign participants are left to the specific regulations governing the relevant project sector. □ Bids may not be withdrawn once submitted.
	Evaluation Evaluation mechanisms in the auction include cost-benefit or any other clear and measurable criteria that allow for an objective and impartial comparison of the proposals. One-stage evaluation process, in which bidders present both technical and financial proposals. Technical proposals are evaluated first on a pass-fail basis. Only bidders that pass the technical evaluation proceed to the financial evaluation.	□ Pre-disclosed rating systems and criteria ensure equitable and fair treatment for bidders.
	Basis for award The project is awarded to the bidder that submitted a "solvent" proposal that complies with the legal, technical and financial requirements, pursuant to the criteria set forth in the RFP.	□ The basis for awards are clearly set forth in the RFP. □ If there is a tie, the project could be awarded to the bid that ensures the best financial conditions for the contracting authority. If there is still a tie, then the bid that offers more employment creation in Mexico and the employment of domestic assets or services shall be chosen.
	Award resolution Contracting authority shall publicize the award resolution at the award meeting and electronically, which shall include a detailed analysis of the submitted bids, the reasons for accepting or rejecting them, a comparison between them and the reasons for choosing the preferred bidder.	□ Following best practices as set forth in the UNCITRAL Model Procurement Law.
	Post-award negotiations PPP law does not provide for further dialogue with preferred bidder to finalize the PPP contract.	□ It is essential that investors receive competent legal counsel to prepare responses to the questions and to participate in the clarification meetings. □ Responses from the contracting authority to questions posed in the clarification meetings are deemed part of the RFP and, accordingly, part of the PPP Contract, hence the relevance of competent legal counsel at early stage.

B. The bidding process

PPP features	Details	Notes
4. Awarding without competitive procedure	In certain limited circumstances a bid can be awarded without a bidding process, or by inviting at least three bids. These circumstances can include: □ A project that requires technology or capacity that only one contractor, or a few, could deliver. □ Military or naval projects. □ A project where a company needs to be replaced. □ An urgent need to award the contract in order to avoid heavy losses or costs.	□ To ensure and foster transparency, objectivity and principles of equal access which stem from the federal Constitution, the federal PPP law provides six specific exceptions to the public bidding process in sharp contrast to other state and federal procurement laws. For instance, the Federal Public Works Law provides 16 exceptions (many of which are, to complicate matters, open-ended). □ In our experience, awarding projects without a competitive procedure triggers greater scrutiny by financial institutions as to the integrity of the award process which may adversely impact the "bankability" of the project.
5. Developer project identification	Private developers are entitled to identify and bid on the opportunity for a PPP project (the bid, however, must include the various completed feasibility studies as previously described). The contracting authority then has three months to analyze the bid and decide whether or not to put the proposed PPP project out to tender. If the agency does decide to start a bidding process, developers: □ Can recover "reasonable costs" involved in the bid. □ Will have a scoring advantage of up to 10 percent added to their financial bid when evaluated against others.	□ This demonstrates how the new law follows international best practice—many jurisdictions encourage unsolicited PPP bids in order to make the most of private sector talent. □ Note, however, that any bid by a developer of any such identified PPP project is still required to compete in the public bidding process.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Key features of the new PPP framework

C. Operating under a PPP contract

PPP features	Details	Notes
1. Dedicated project company	**Project company** The entity that signs the PPP contract must be organized as a project company established under Mexican law with its sole purpose being to develop the relevant PPP. **Capitalization** Minimum capitalization requirements and restrictions by law. **Restrictions** Authorization from the contracting authority is required in order to: □ Amend the bylaws of the project company. □ Change the shareholding structure of the project company. □ Assign, transfer or pledge upon the shares of the project company.	□ Facilitates coordination in the execution of the project. □ Corporate purpose limited to development of the project.
2. Minimum terms and conditions	The federal PPP law defines the minimum terms and conditions that shall be included in the PPP contract. Transaction parties are free to modify terms and conditions among themselves, subject to such minimum thresholds in order for the parties to expand as stipulated. They are: □ Parties' rights and obligations. □ Specifications for service performance standards and technical standards that the infrastructure must satisfy. □ A list of real estate, assets and rights that will be contributed to the project, including an indication of which assets will be public property and which will be private property. □ Post-termination ownership regarding such assets (e.g., assets required to be transferred and those the contracting authority shall have the option to purchase). □ Financial details, including the developer's fee. □ Risk-sharing regime. □ Trigger events for rescission and early termination. □ Liquidated damages on default by any of the parties. □ Dispute resolution procedures.	□ PPP contract defines in a single document the scope and purpose of the project, including rights and obligations of the parties and details on the execution of the project and operation of the infrastructure. □ The federal PPP law lists a number of issues that need to be addressed in the PPP contract rather than regulating in detail the contents of the clauses. This approach ensures flexibility and the tailoring of provisions to meet the particular needs for each infrastructure project while ensuring that basic terms and conditions are addressed in keeping with best practices in the industry. □ Terms and conditions of the PPP contract shall not contravene the RFP or the responses by the contracting authority to questions raised at the clarification meetings.
3. Developers' minimum rights and obligations	Private developers have the right to: □ Receive consideration for the development of PPP infrastructure. □ Request extensions to deadlines set out in the contract if they aren't responsible for a delay, and be indemnified by the contracting authority against damages caused by that delay. Private developers' minimum obligations include requirements to: □ Deliver the contracted services and infrastructure works. □ Comply with the contracting authority's instructions (according to the law or the contract). □ Take out relevant insurance to cover the risks set out in the contract.	□ The federal PPP law does not enable the contracting authority to override contractual provisions. This is in line with common law systems. □ The contracting authority is not vested with a right of unilaterally modifying the PPP contract.

Key features of the new PPP framework

C. Operating under a PPP contract

PPP features	Details	Notes
4. Permits and authorizations	The contracting authority is required to assist the private sector in obtaining relevant permits and authorizations for the development of the project.	□ Contrary to a longstanding tradition in public procurement, where government agency silence was deemed a denial, all federal permits (except environmental) will now be deemed granted if the applicable authority fails to respond to any request within 60 days.
5. Temporary step-in rights	A PPP contract can allow a developer's lenders to temporarily take control of a developer if the developer defaults on its obligations to them, prior to authorization from the contracting authority for such step-in.	□ The federal PPP law permits the parties to agree on the terms and conditions for such step-in rights. This is the first time that an express legislative authorization has been granted.
6. Assignment	The project company can assign its rights in the PPP contract if it has the prior approval of the contracting authority provided such assignment right is expressly set forth in the PPP contract. It may further assign any associated permits and licenses with prior approval from the respective contracting authority.	□ This would allow for a complete takeover of the project by the lenders alongside the share pledge mentioned in 7 below. □ The federal PPP law refers to the assignment of rights in general. We believe the best view of such assignment would include both the right to (1) claim proceeds and (2) render the services to the contracting authority or the end-user, as applicable.
7. Security interest	The federal PPP law provides an express legislative authorization for the granting of security interests, which includes: □ Security interest in physical assets. □ Security interest in physical project assets, except public property, with the prior approval of the contracting authority. □ Security interest in intangible assets, including project company's rights under the PPP contracts and project company's rights under authorizations granted for the rendering of services, with the prior approval of the contracting authority. □ Security interest in the shares of the project company, with the prior approval of the contracting authority.	□ Taking security in line with international standards. □ Under the federal PPP law, following the example of common law regimes, it is possible to collateralize the rights of the developer under a PPP contract in order for the trustee to hold security interests for and on behalf of lenders in a syndicated loan without need for formal transfer in the name of new lenders. □ Trust structures may be set up to enable the trustee to hold security on trust for various lenders. □ Agency agreements, the terms of which are free to be negotiated among the relevant transaction parties. □ Upon foreclosure of the rights and assets under the project, secured lenders shall have the exclusive right to the project proceeds after deducting any expenses, tax obligations and any other negotiated payments agreed to rank senior to such payment under the PPP contract.
8. Restoration of financial equilibrium	The project company is entitled to request a revision of the PPP contract upon a substantial increase in the execution costs of the project or the substantial reduction of the benefits of the project, for reasons due to an administrative, legislative or jurisdictional act that is enacted or issued by a competent authority after the opening of the economic bids at the bidding stage.	□ Revision includes contractual terms and conditions, as well as compensation. □ Change of law and other authority-related risks are properly mitigated.

C. Operating under a PPP contract

<table>
<tr><th>PPP features</th><th>Details</th><th>Notes</th></tr>
<tr><td>9. Term extension</td><td>The project company is entitled to request extensions:
□ Upon delays for reasons due to the contracting authority.
□ On a case-by-case basis.</td><td>□ May be a tool for the project company to recover its investment.</td></tr>
<tr><td rowspan="3">10. Termination causes</td><td>Termination events
The contracting authority may terminate the contract upon any of the following statutory events:
□ If the developer cancels or abandons the works, or delays the execution of the works.
□ If the developer fails to provide the contracted services for more than seven days unless such failure is otherwise excused by the agreed-upon contractual terms.
□ If any necessary permits are revoked.
□ Additionally, the contract may be terminated by the respective party, for any other reason agreed to in the PPP contract.</td><td rowspan="3">□ The federal PPP law sets forth three statutory events in which the contracting authority may unilaterally terminate a PPP contract. Any additional event would require to be agreed upon by the developer and the contracting authority.
□ Parties authorized by law to freely agree upon all termination events.</td></tr>
<tr><td>Termination for convenience
Contracting authority may terminate the PPP contract for reasons of public interest.</td></tr>
<tr><td>Developer's compensation for early termination
□ The PPP contract will set out the terms of any compensation:
□ Private developers can only request compensation within 20 business days of termination, provided they did not cause the termination, and any compensation will be paid within 90 business days.</td></tr>
<tr><td>11. Expropriation of third-party property</td><td>The federal PPP law provides for the possibility of designating a project as a public interest project, enabling the expropriation of any items of property necessary to develop such project.</td><td>□ Provides a specific process for the expropriation of private property required to implement these types of projects (e.g., rights-of-way). The federal PPP law provides that, from a civil law perspective, once expropriated, the affected party's rights are limited to challenging the calculation of the compensation and, as the case may be, demand payment of losses and damages by the government. The affected party may resort to a constitutional proceeding to challenge the expropriation by means of an amparo proceeding (which is a constitutional appeal); however, no temporary injunction relief may be granted during such proceeding.</td></tr>
<tr><td>12. Renegotiation</td><td>PPP contracts may not be unilaterally modified by the contracting authority. Renegotiation is permitted in certain circumstances, including to:
□ Improve infrastructure conditions.
□ Increase services or performance levels.
□ Adjust reach of projects for unforeseen events.
□ Restore financial equilibrium of the project.</td><td>□ Restoration of financial equilibrium is an essential tool for investors and lenders.
□ Reassignment of the original allocation of risks is forbidden.</td></tr>
</table>

Key features of the new PPP framework

C. Operating under a PPP contract

PPP features	Details	Notes
13. Termination consequences	**Asset handover** Upon termination of the PPP contract, and in keeping with its terms and conditions, the project company is required to transfer to the contracting authority all project assets. The contracting authority shall have the right, but not the obligation, to purchase from the project company other project-related (usually non-essential assets which contribute to the operation of the project) assets.	□ Transfer at no cost or upon the payment of consideration as stipulated in the PPP contract. □ Opportunity to stipulate in the PPP contract the payment of a consideration that would cover, for instance, unrecovered investment, agreed return and outstanding indebtedness.
14. Dispute resolution	**Technical and financial disputes** These disputes—but not legal disputes—can be resolved by an ad hoc committee of technical experts. The transaction parties nominate the technical experts.	□ Unanimous committee's rulings are binding upon the parties. □ In contrast to other laws, the binding effect does not only stem from the contract but, most notably, from an express provision of the federal PPP law, ensuring that it is recognized by Mexican courts. □ Appropriate expertise is ensured. □ Efficient and simple process.
	Other forms of dispute resolutions Under the principle of freedom of contract, other forms of dispute resolution may be agreed upon.	□ Examples include mediation and high-level negotiations.
	Arbitration Parties can agree to commercial arbitration under the Commerce Code to resolve disputes arising regarding the fulfillment of the PPP contract. Issues dealing with acts of authority and revocation of concessions or permits cannot be submitted to arbitration. Validity of administrative acts cannot be submitted to arbitration.	□ Previously arbitration was only expressly permitted in some cases for government entities (e.g., PEMEX). □ Arbitration rules of the Commerce Code incorporate *UNCITRAL Model Law on Commercial Arbitration*. □ Domestic or international arbitration in a neutral location may be stipulated, provided it is conducted in Spanish. □ Rescission of the PPP contract may be submitted to arbitration. However, it is likely that the contracting authority would characterize such rescission as an administrative act, which is not subject to arbitration. □ This shows that the new PPP regime aims to be investor-friendly: international investors are typically reluctant to invest in projects where all disputes have to be settled under unfamiliar procedural laws. □ Enforcement of awards by Mexican courts follows the *New York Convention and Enforcement of Foreign Arbitration Awards*, to which Mexico is a signatory.

C. Operating under a PPP contract

PPP features	Details	Notes
15. Judicial proceedings	Federal courts shall have jurisdiction over disputes concerning the interpretation or application of the federal PPP law, actions taken based on the federal PPP law and legal provisions arising out of it, *except* if arbitration was agreed to, as well as the validity of any administrative acts.	□ Federal courts are perceived as more reliable and trustworthy than state courts. □ Less prone to corruption and tampering. □ Federal courts are well-regarded for upholding "the rule of law" principle.

Our team

White & Case has an accomplished infrastructure finance team around the world. We offer advice on legal matters related to project structuring and development, financing, government regulation, construction and other issues.

Our unparalleled insight into global and local markets gives our clients a competitive advantage, allowing them to benefit from knowing what only insiders typically know about business customs and conditions in local markets. Please contact us if you would like to discuss any aspects of PPP in Mexico.

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