

Mexico's First Transmission PPP Tender

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The Ministry of Energy (Secretaría de Energía, or SENER) and the Federal Electricity Commission (Comisión Federal de Electricidad, or CFE) have published calls to participate in two bidding procedures for projects related to electricity transmission in Mexico.

The first call corresponds to the Award of the Management and Operation Agreement for the Electric Transmission Infrastructure for the interconnection between the Baja California Electric System and the National Interconnected System (*Adjudicación del Contrato de Gestión y Operación de la Infraestructura de Transmisión Eléctrica para la interconexión entre el Sistema Eléctrico Baja California y el Sistema Interconectado Nacional*), which was published by SENER on February 2, 2018: the SENER-BC Project.

The second call corresponds to Project: 303 TL in Direct Current Ixtepec Capacity-Yautepec Capacity (*Proyecto: 303 LT en Corriente Directa Ixtepec Potencia-Yautepec Potencia*), which was published by CFE on February 13, 2018: the CFE-Yautepec Project.

The SENER-BC Project and the CFE-Yautepec Project are the first to be tendered in Mexico under its new energy constitutional and legal framework, which allows the participation of private entities in the financing, installation, maintenance, management, operation and expansion of infrastructure for the transmission of electricity via a public utility.

The purpose of this memorandum is to address the background and regulatory and contractual aspects of the SENER-BC and CFE-Yautepec Projects.

I. Background: Electric energy transmission as a public utility

Prior to the constitutional energy reform of 2013, all activities within the electricity industry value chain (including transmission), to the extent that they were deemed a public service, were exclusive activities of the Mexican State, and were carried out by CFE. Because CFE was responsible for the provision of the public utility—as well as for the planning and operation of the National Electric System (*Sistema Eléctrico Nacional*)¹ through the National Center for Energy Control (*Centro Nacional de Control de Energía*, or CENACE)²—the construction and modernization of electric energy transmission infrastructure relied entirely on the investment capacity of CFE, thereby constraining the development of such infrastructure.

In December 2013, Articles 25, 27 and 28 of the Mexican Constitution were reformed and added with the purpose of promoting investment and competition within the Mexican electric industry. The implementation of

¹ Article 4th and 7th of the repealed Electricity Utility Law (*Ley del Servicio Público de Energía Eléctrica*).

² Prior to the constitutional and legal reform of 2013 and 2014, CENACE operated the National Electric System as an entity within the structure and dependent of CFE; as of 2014, CENACE became a decentralized public entity under SENER.

this new legal framework³ constitutes a total paradigm shift in the sector. But despite full liberalization and full openness to the participation of private capital in certain areas of the value chain, the law preserves transmission and distribution via public utility as strategic areas to be provided by the Mexican State exclusively, either through SENER or CFE.

Notwithstanding this limitation, the new legal and regulatory framework expressly establishes the possibility that any governmental entity may enter into contracts with private parties⁴ in order for such private parties to carry out, on behalf of the Mexican State, the financing, installation, maintenance, management, operation and expansion of the infrastructure necessary for such public utility.⁵

This shift in constitutional principle, together with the availability of the revised legal and regulatory framework, enable the development of the SENER-BC Project and the CFE-Yautepec Project.

II. Regulated Transmission Rates

The source of payment for both projects will be an increase in the regulated rates paid by Wholesale Electricity Market (WEM) participants for the use of the National Transmission Network, through CENACE.

In accordance with the provisions of the Electricity Industry Law (*Ley de la Industria Eléctrica*, or the LIE), the Energy Regulatory Commission (*Comisión Reguladora de Energía*, or the CRE) is authorized to issue and update the regulated transmission rates (*Tarifas Reguladas de Transmisión*). The purpose of such regulated transmission rates is to foster the efficient development of the industry and competitive markets, reflect best industry practices and to protect the interests of users.⁶

The CRE calculates and adjusts these rates by applying a methodology⁷ requiring that transmission owners (e.g., CFE) and contractors obtain the estimated income necessary to recover their efficient costs of operation, maintenance, financing, depreciation, technical and non-technical losses, applicable taxes and a reasonable profit.⁸

The CRE can modify regulated transmission fees when they do not adhere to the principles established in the LIE as described above.⁹ The procedure to modify regulated transmission rates is set forth in the LIE regulations and has a term of 90 days, during which the CRE decides whether to authorize the rate adjustment.

Regulated transmission rates may also be adjusted to incorporate investments made by SENER and CFE through the tender of contracts,¹⁰ such as the SENER-BC Project and the CFE-Yautepec Project.

³ In addition to the new constitutional framework, the energy reform includes the issuance of new laws and regulations, such as the Electricity Industry Law (*Ley de la Industria Eléctrica*, or LIE), the Electricity Industry Law Regulations (LIE Regulations), the Wholesale Electricity Market Rules (WEM Market Rules) and Guidelines (jointly, the Market Rules), and other guidelines and policies that are complementary to the foregoing.

⁴ Article 27 of the Mexican Constitution.

⁵ Article 30 of the LIE.

⁶ Article 47 of the LIE Regulations.

⁷ As an example, for the calculation of the regulated transmission rates for the period 2016-2018, the CRE used and considered the following methodology and factors: (i) applied the “postal stamp” modality, in which the rate is determined by the amount of energy injected by each generator and extracted by each consumer in the National Transmission Network; (ii) considered as “Total Required Income” the costs incurred by CFE in 2014 for the transmission activity, projected for the years 2016, 2017 and 2018; (iii) applied a reduction to Total Required Income for “adjustment for cost efficiency” of 1% per year; (iv) determined that the Total Required Income would be assigned 70% to consumers and 30% to generators; and (v) applied a different weighting factor depending on whether the generator or consumer is connected to the network at a voltage level of $\geq 220\text{kV}$ or $< 220\text{kV}$. Based on the foregoing, four current transmission regulated rates were obtained.

⁸ Article 140 of LIE.

⁹ Article 47 of LIE.

¹⁰ Thirty-fifth Consideration of the Agreement No. A/045/2015, dated September 7, 2015.

Once these projects are awarded, the CRE will issue an agreement through which these investments are recognized and acknowledged as part of the total required income of the National Transmission Network, which requires WEM participants to pay the charge.

CENACE is responsible for charging the regulated transmission rates to WEM participants, taking into account the amount of energy extracted and injected into the National Transmission Network. Likewise, CENACE is responsible for paying transmission owners (e.g., CFE) and contractors the amounts charged for regulated transmission rates through its invoicing and payment process.

The invoicing and payment process foresees the existence of a Working Capital Fund, which ensures the availability of resources in the event that any WEM participant fails to comply with its payment obligations.¹¹

Should a WEM participant default, CENACE ensures payment by accessing the Working Capital Fund and replenishes such fund by executing the liquid performance guarantees of the relevant WEM participants, among others.

III. Scope of the projects

The SENER-BC Project and the CFE-Yautepec Project are part of the Expansion and Modernization of the National Transmission Network Program (*Programa de Ampliación y Modernización de la Red Nacional de Transmisión*), which aims to reduce congestion costs, encourage efficient expansion of generation and maintain the criteria of quality, reliability, continuity and security of the National Transmission Network.¹²

III.1 SENER-BC Project¹³

The SENER-BC Project comprises the development of the following:

- a. A point-to-point, direct current transmission line operating in a bipolar form with a capacity of 1,500 MW, at a voltage level of ± 500 kV and with a length of 700 km.
- b. Two converter stations with HVDC VSC technology of 1,500 MW, with a direct current transmission voltage of 500 kV, primary AC voltage level of 400 kV and secondary voltage according to the manufacturer's design.

The project will be located in the northern Mexico, and will run from the Cucapah Electric Substation in Mexicali, Baja California to the Seri Electric Substation in Hermosillo, Sonora.

The main objective of this project is to link the National Interconnected System (*Sistema Interconectado Nacional*, or the SIN) with the Baja California Interconnected System (*Sistema Interconectado Baja California*, or the SIBC).

The SIN is the main electrical system in Mexico, and covers a large part of Mexican territory. The SIBC is located in the north of the peninsula of Baja California, which is electrically isolated from the rest of the country. However, the SIBC is interconnected with the electrical system of the western US, so linking it to the SIN expands opportunities for interaction with other electrical systems.

The SENER-BC Project is expected to reduce the price of electricity in Baja California, improve the operation and reliability of the SIBC, and encourage wind and solar generation in the region.¹⁴ The project will require an investment of an estimated US\$1.1 billion.¹⁵

¹¹ Item 17.9.3 of the WEM Market Rules.

¹² Item 5 of the Development Program of the National Electric System 2016-2030 (*Programa de Desarrollo del Sistema Eléctrico Nacional 2016-2030*, or PRODESEN), regarding the Expansion and Modernization of the National Transmission Network Program.

¹³ Item 1.3 of the Informative Prospectus of the Transaction (*Prospecto Informativo de la Transacción*).

¹⁴ Item 5.1 of the PRODESEN.

¹⁵ http://www.proyectosmexico.gob.mx/proyecto_inversion/716-interconexion-del-sistema-electrico-de-baja-california-con-el-sistema-interconectado-nacional/.

III.2 CFE-Yautepec Project¹⁶

The CFE-Yautepec Project comprises the development of the following:

- a. A two-pole direct current transmission line with a voltage of ± 500 kV and a length of 610.5 km.
- b. Five transmission lines in alternating current, with voltage of 400 kV and lengths of 25.3 km, 0.3 km, 131.3 km, 0.0 km and 138.7 km.
- c. Seven electrical substations of various technical specifications.
- d. Two converter stations of 3,600 MW and ± 500 kV.

This project will be located in the States of Mexico, Morelos, Oaxaca and Veracruz, and in Mexico City. Its main objective is to encourage the integration of renewable energy generation (mainly wind and hydroelectric) that has great potential in the southern region of the country, and to facilitate the transfer of this energy to the Valley of Mexico where there is a high demand.¹⁷ The project will require an investment of an estimated US\$1.2 billion.¹⁸

IV. Contractual aspects of the SENER-BC Project

The SENER-BC Project is structured as a DFBOT (design, finance, build, operate and transfer) project.

The basis of this structure is the execution of an electric energy transmission management agreement (the SENER Agreement) between SENER and the winner of the tender, which may be incorporated as a special purpose vehicle (SPV) and act as the contractor under the SENER Agreement.¹⁹

Due to the characteristics of this structure and in accordance with the provisions of the SENER Agreement, the SPV is jointly and severally liable with SENER to carry out the provision of the public electric energy transmission utility before the CRE and CENACE.²⁰

This project design is similar to that of the Independent Power Producers implemented by CFE under the former Electricity Utility Law, in which private entities produce electric energy for exclusive sale to CFE in exchange for consideration.

The winner of the tender is required to establish an irrevocable investment, management and source of payment trust with SENER and the SPV as trustors and trustees. The trust will receive and manage the assets of the SENER-BC Project, as well as the economic resources derived from the SENER Agreement, to serve as a means of repayment of the financing.

a. Contractor's Obligations under the SENER Agreement

The SENER Agreement requires that the SPV do the following:

¹⁶ According to the document "Description of The Complete Project" ("Descripción Del Proyecto Completo") of the Bidding Guidelines.

¹⁷ Item 5.1 of the PRODESEN.

¹⁸ http://www.proyectosmexico.gob.mx/proyecto_inversion/024-linea-de-transmision-de-corriente-directa-yautepec-ixtepec/

¹⁹ Both the Bidding Guidelines and the SENER Agreement anticipate that there may be individual or consortium participants, and that in any case, having been awarded with the SENER Agreement, they may incorporate the SPV, which shall also be the contractor, owner of the permits, developer-owner (in case of entering into works agreements), and debtor (in the financing to be obtained), for the execution of the project.

²⁰ Second Clause of the SENER Agreement. In such regard, although the provision of the public transmission utility remains and would be carried out exclusively by SENER, CRE and/or CENACE have the authority to demand compliance with contractual obligations, operation and performance of the services established therein, directly from the SPV.

- a) Obtain financing for the SENER-BC Project no later than 30 days before the scheduled construction start date, through bank financing, issuance of securities, private equity funds or a combination thereof.
- b) Design the infrastructure of the SENER-BC Project based on the minimum specifications established by SENER in the tender, including the definition of the transmission line's trajectory.
- c) Obtain the rights of way necessary for the development of the SENER-BC Project. This procurement must be carried out in accordance with the new surface occupation provisions set forth in the LIE, which require a special mechanism for the negotiation, execution of agreements and validation of the surface occupation provisions before the jurisdictional authority.²¹

Bankability Note: Failures and delays in obtaining necessary rights of way are some of the most common causes of delay in a transmission line project. Owners and lenders will want to ensure that (i) a detailed land acquisition plan is developed at the outset of the project, (ii) the owner and/or any EPC contractor has the appropriate experience and resources to secure the necessary rights of way and (iii) any relief granted to an EPC contractor for failure to obtain the necessary rights of way is appropriately limited to the corresponding relief granted to the owner under the SENER Agreement.

- d) Obtain all the government authorizations necessary for the development of the SENER-BC Project, including, among others:
 - a. Social impact authorizations issued by SENER including, if applicable, performing a prior, free and informed consultation with affected indigenous communities.²²
 - b. Environmental impact authorization issued by the National Agency for Industrial Safety and Environmental Protection of the Hydrocarbons Sector (*Agencia Nacional de Seguridad Industrial y de Protección al Medio Ambiente del Sector Hidrocarburos*).
 - c. The interconnection procedures to the electric networks with which the interconnections will be made.
 - d. Authorizations arising from crossing rivers, other rights of way and changes in land use, among others.

Bankability Note: Failures and delays in obtaining necessary permits are also common causes of delay. Owners and lenders will want to ensure that owner is proactively working to obtain the same, and that the cost of any social or environmental impact mitigation measures are, to the extent possible, known up-front and included in the project budget and financial model.

- e) Build the SENER-BC Project either directly or through an EPC subcontractor.
- f) Carry out (directly or through a subcontractor) the operation and maintenance of the SENER-BC Project in accordance with the provisions of the SENER Agreement and applicable regulations.
- g) Transfer its trust beneficiary rights in the SENER-BC Project to the trustee at the end of the term of the SENER Agreement, free of all encumbrances.

²¹ This procedure is set forth in Chapter VIII of the LIE. In essence, the developers of transmission and distribution projects are empowered to negotiate in the first instance according to the procedure established therein, with the values and metrics established, and with the participation of the authorities in the matter (Ministry of Agrarian, Territorial and Urban Development [Secretaría de Desarrollo Agrario, Territorial y Urbano], Federal Judge in civil matters or Agrarian Court), each and every rights of use, way, and of occupation with the corresponding owners or beneficiaries. In case of failed negotiations and having exhausted the procedures and resources that the LIE establishes, it will be possible to appeal to the Federal Judge for the latter to instruct the incorporation of a legal easement for the transit of persons, goods, equipment, materials and infrastructure that is required to execute the project.

²² Such prior consultation shall be handled through SENER.

b. Consideration under the SENER Agreement

In the SENER-BC Project, the SPV obtains a “Constant Annual Contractual Payment,” which consists of a fixed annual amount corresponding to the amount offered by the consortium integrating the SPV in the tender and covering all expenses incurred by the SPV in connection with the project.

The Constant Annual Contractual Payment will be denominated in pesos and paid monthly after the commercial operation date (COD) and throughout the commercial operation phase of the project (25 years). The payment is expected to be updated yearly based on the variation of the National Consumers Price Index (*Índice Nacional de Precios al Consumidor*). This monthly amount may be affected by possible reductions, sanctions or penalties applied in accordance with the SENER Agreement.²³

Bankability Note: To the extent the debt or any operating costs are denominated in a currency other than pesos, an appropriate hedging strategy may need to be implemented to ensure coverage of such amounts.

The Constant Annual Contractual Payment is paid by CENACE to the contractor through the trust. The contractor and CENACE enter into an agreement called the Agreement for the Technical and Commercial Operation of the Transmission (*Convenio para la Operación Técnica y Comercial de la Transmisión*), which grants the contractor the right to receive from CENACE the amounts corresponding to the consideration, as explained below.

There is a mechanism to guarantee the availability of liquid resources to make these payments, a trust account called “Liquidity Reserve Account” (*Cuenta de Reserva de Liquidez*) from which resources will be transferred when the “Regulated Income Account” (*Cuenta de Ingreso Regulado*) from which CENACE funds transfers does not have sufficient resources.²⁴

c. Lenders' Rights under the SENER Agreement

In general, under the SENER Agreement, lenders have the right to:

- a) Register and appoint a common representative who receives all notifications under the SENER Agreement. Only registered lenders will be recognized and acknowledged as such.
- b) Receive monthly notifications with respect to the contractor's compliance with its obligations under the SENER Agreement.²⁵
- c) Receive a pledge of the contractor's rights, payments, income, assets, trustee rights and representative actions.
- d) Assume control of the SPV if it does not comply with its financial obligations provided in the financing documents or cure (within 60 days) any serious breach by the contractor provided in the SENER Agreement, in order to prevent early termination.

Bankability Note: Any replacement of the contractor or change of control resulting from an exercise of the share pledge would be subject to the consent of SENER and its confirmation that the new contractor/shareholders comply with the relevant bid criteria and have the requisite capacity to comply with their respective obligations in respect of the project.

- e) Participate in the technical committee of the trust, through two members with voting rights. A representative can also be added for each one of the lenders, also with voting rights.

d. Termination of the SENER Agreement

The SENER Agreement will be in effect for 30 years as of its date of execution; however, it may be terminated early in the following cases:

²³ Clause 26 and item 3.2 of Annex 19 of the SENER Agreement.

²⁴ In terms of Clause 26, Section 7, and Annex 19 of the SENER Agreement. The amounts for such accounts and the incorporation of reserves are to be defined.

²⁵ Clause 25, Section 2.5 and others thereafter, of the SENER Agreement.

- a) Mutual agreement of the parties.
- b) Unilateral decision of SENER due to general interest or justified causes.
- c) Non-compliance by SENER to cover the Constant Annual Contractual Payment, or when a law that prevents the continuation of the SENER Agreement is approved.
- d) For serious breach of the contractor.
- e) Excluded liability event (an extended act of God or force majeure; e.g., 270 days).

The early termination of the SENER Agreement does not imply the payment of any contractual penalty. However, the termination of the SENER Agreement leads to the calculation of a settlement prepared by an expert appointed by the parties, which will contain the amounts to be collected and paid between the parties derived from the early termination.²⁶

Bankability Note: It is not clear that the settlement amount will be sufficient to repay the full amount of the debt in all circumstances; this should be clarified. Also note that in order for SENER to pay any settlement amount, the relevant funds would need to be allotted to SENER at such time in the applicable federal budget.

V. Contractual aspects of the CFE-YAUTEPIC PROJECT

The CFE-Yautepic Project is structured as a BOT (build, operate and transfer) project. In this structure, the contractor will not be directly responsible for the provision of the electric energy transmission public utility, as the contractor is only a provider of services related to this activity. CFE will continue to be responsible for the provision of this public utility and will be the entity that receives payment from CENACE of regulated transmission fees.

This structure also contemplates the incorporation of a transmission system trust in which the contractor that is awarded in the bidding procedure (the CFE Agreement)²⁷ and CFE will participate, as trustor and trustee respectively (the CFE Trust), which will receive and manage the assets of the CFE-Yautepic Project, as well as the economic resources derived from the [Agreement](#) for the Provision of Services regarding the Transmission Public Utility (*Contrato de Prestación de Servicios Relativos a la Prestación del Servicio Público de Transmisión*, or the CFE Agreement) to be executed by CFE.

a. Contractor's Obligations under the CFE Agreement

The CFE Agreement requires that the contractor do the following:

- a) Obtain financing for the CFE-Yautepic Project.
- b) Prepare the bases for the design of the infrastructure, based on the detailed technical specifications from CFE (which include a predetermined path for the transmission line).
- c) Obtain the remaining rights of way. Unlike the SENER-BC Project, in this case CFE already has acquired part of the rights of way necessary for the development of the project; the contractor need only obtain the remainder. The procurement of rights of way shall be carried out in accordance with the new surface occupation provisions set forth in the LIE, which require a special mechanism for the negotiation, execution of agreements and validation of the same before the jurisdictional authority.

Bankability Note: Please see the corresponding note in respect of the SENER-BC Project.

- d) Obtain any necessary government authorizations. Unlike the SENER-BC Project, the obligation to obtain the government authorizations necessary for the development of the project will be shared between the CFE contractor and CFE. The government authorizations required are essentially the same as those for the SENER-BC Project.

²⁶ The methodology for calculating the settlement is set forth in Annex 11 of the SENER Agreement.

²⁷ Unlike the SENER-BC Project, in this case it is not mandatory that the contractor be, or be incorporated as, a special purpose vehicle, in accordance with the Bidding Guidelines.

Bankability Note: Please see the corresponding note in respect of the SENER-BC Project.

- e) Build the CFE-Yautepec Project either directly or through an EPC subcontractor.
- f) Carry out (directly or through subcontractors) the operation and maintenance of the CFE-Yautepec Project in accordance with the provisions of the CFE Agreement and applicable regulations.
- g) Transfer its trust beneficiary rights in any assets of the CFE-Yautepec Project to the trustee no later than the COD of the project, in order to start the operational phase.

b. Consideration under the CFE Agreement

As consideration, the CFE Contractor will receive a monthly fee denominated in pesos consisting of three components: 1) a fixed capacity charge, 2) a fixed operation and maintenance charge, and 3) a fixed modernization charge. This monthly consideration will be paid during the 25-year term of the CFE Agreement.

Bankability Note: Please see the corresponding note in respect of the SENER-BC Project.

The contractor is guaranteed that the payment of its monthly fee is covered by a multi-year budget authorization of CFE. The consideration of the CFE Agreement is charged to the budget of the productive state company subsidiary of CFE (*CFE Transmisión*), and such subsidiary assumes the direct risk of collecting transmission rates from CENACE.²⁸

c. Lenders' Rights under the CFE Agreement

In general, lenders have the following rights under the CFE Agreement:

- a) To remedy a breach by the contractor in order to avoid early termination of the CFE Agreement due to delay in reaching the start date, the COD or any other critical event under the CFE Agreement.²⁹
- b) To assume the rights and obligations of the CFE contractor as a result of an event of default of the CFE contractor as set forth in the CFE Agreement, for which lenders may carry out the relevant actions within 60 days after they are notified of the relevant event of default.³⁰

Bankability Note: Please see the corresponding note in respect of the SENER-BC Project.

d. Termination of the CFE Agreement

The CFE Agreement will be in effect for 25 years as of the commercial operation date. However, the CFE Agreement foresees causes for early termination, including:

- a) Failure to deliver the "Start Certificate" within 180 days after award of the project. The Start Certificate is a document by which the contractor notifies CFE that it has obtained a financial commitment or has a well-founded reason to affirm that it will have the financial resources to build the CFE-Yautepec Project.
- b) Due to sudden variations in the margin (yield on base points of the Mexican Bond) between the date of ruling of the tender and the start date, in more than 200 base points, derived from instability and/or volatility in the markets that serve atypical factors.³¹

²⁸ In terms of I.6 of the CFE Agreement and item 1.1 of the Bidding Guidelines, it is anticipated that the payments to the CFE contractor under the CFE Agreement will come from the budget assigned to CFE Transmisión under the coverage of a multi-year authorization (this allocation of resources comes, in turn, from specific allocations included in the Federal Expenditure Budget—*Presupuesto de Egresos de la Federación*—approved by the Mexican Congress on an annual basis, so that the CFE Contractor does not undertake the risk of charging transmission rates to the WEM participants; *i.e.*, it remains as a risk for CENACE), nor the collection of its consideration under the CFE Agreement is dependent or contingent on CFE Transmisión charging the respective transmission rates to CENACE.

²⁹ Clause 9.2 of the CFE Agreement.

³⁰ Clause 24.2 of the CFE Agreement.

³¹ This exit option has become a trend in contracts with CFE. In summary, it allows the parties to exit the contract without liability (but subject to payment of the termination payment) for causes specifically linked to capital markets

- c) Due to cancellation of the project by CFE before the start date, in which case CFE shall reimburse all expenses and costs incurred by the CFE contractor until the effective date of termination.
- d) When the CFE contractor fails to reach the start date, the COD or any other critical event³² within the dates set forth in the CFE Agreement, and the deadline to remedy the relevant breach or delay is exceeded.
- e) Due to delays in the connection to the National Transmission Network for a term greater than 12 months after the Scheduled Date of Commercial Operation, for reasons attributable to CFE or CENACE.
- f) By any party due to restructuring of the market.
- g) Due to an extended act of God or force majeure (e.g., more than 270 days).
- h) Due to default of the CFE contractor.
- i) Due to the causes set forth in items of the General Provisions regarding Acquisitions, Leases, Services Procurement and Execution of Works of CFE (*Disposiciones Generales en materia de Adquisiciones, Arrendamientos, Contratación de Servicios y Ejecución de Obras de CFE*), namely:
 - a. Act of God or force majeure.
 - b. Resolution of a reconsideration appeal.
 - c. Mutual agreement between the parties.

In the event that the early termination of the CFE Agreement occurs because the contractor did not reach the start date, the COD or any other critical event within the terms set forth in the CFE Agreement, the contractor will be subject to contractual penalties, limited to the total amount of the performance guarantee, without prejudice to any other liabilities in terms of the CFE Agreement.

Bankability Note: Owners and lenders will want to ensure that any liability for delay is appropriately passed-through to the EPC contractor.

As in multiple CFE projects, the CFE Agreement establishes a payment for termination and for the acquisition of the project assets under the CFE Agreement, which CFE will be obligated to pay to the Contractor depending on the circumstances of termination (e.g., before and after the COD, due to an event of default of CFE or the CFE Contractor, or by an act of God or a force majeure). Such payments shall be made in accordance with the formulas and calculation methodology established in Annex 11 of the CFE Agreement.

Bankability Note: It is not clear that the termination payment will be sufficient to repay the full amount of the debt in all circumstances; this should be clarified. Also, note that in order for CFE to pay any termination payment, the relevant funds would need to be allotted to CFE at such time in the applicable budget as the multiannual authorization for the project would not cover such amounts.

(which in turn have an impact on the viability of obtaining financing from reasonable costs), which may be affected by interests or influence of third parties, or reasons of general interest with high media impact (e.g., political reasons, social instability, etc.).

³² Critical events include the payment of real estate rights to CFE, the financial closing date and the scheduling of the preoperative tests of the system. The maximum term to remedy any breach or default under Annex 6 is 120 days as of the date on which the relevant breach or default occurred.

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