



ADJUSTMENTS TO THE NEW CONCESSIONS LAW BILL COULD ENSURE HIGHER QUALITY, AND MORE SUSTAINABLE INFRASTRUCTURE

INTRODUCTION

Improving the regulatory process in the infrastructure sector is a critical step toward increasing private investment in the sector and boosting the quality of projects and the services they offer. The new Concessions Law bill¹ is on the Ministry of the Economy's priority agenda.² A request for its expedited approval was sent to the Senate even before the Chamber of Deputies had finished voting on it.

The new Concessions Law bill recognizes that infrastructure projects have an impact on social and environmental issues and does touch on these issues. However, it does not dialogue with other current bills that aim to modify existing environmental legislation.³

In this technical note, researchers at Climate Policy Initiative / Pontifical Catholic University of Rio de Janeiro (CPI/ PUC-Rio), analyze the legislative process of the new Concessions Law bill from a social and environmental perspective. They recommend items that could be incorporated into the bill to head off potential conflicts currently handled later in the project life cycle — notably during the environmental licensing procedure — and which would foster bidding on more robust, higher quality projects, promoting safer investments, and ensuring social and environmental protections.

This is an especially good opportunity to define at what point a Preliminary Environmental License must be obtained, who must obtain it - the government or the concessionaire, and to require that the Technical, Economic and Environmental Feasibility Studies (EVTEA) be conducted before the bidding process for greenfield projects begins. These issues are key to risk allocation and would particularly help strengthen the pre-bidding phase.

1 PL 7,063/2017. Available at: <https://www2.camara.leg.br/atividade-legislativa/comissoes/comissoes-temporarias/especiais/56a-legislatura/pl-3453-08-parcerias-publico-privadas/documentos/outros-documentos/SubstitutivoAdotado.pdf>. Accessed April 30, 2020.

2 Circular letter Nº 84/2020/ME, received in the Senate March 11, 2020 and appended to Senate bill 3,261/2019.

3 CHIAVARI, Joana; BARROS, Ana Cristina; ANTONACCIO, Luiza; COZENDEY, Gabriel. Technical Note. The Future of Infrastructure in Brazil: An Integrated Vision of Proposed Legislation is Needed to Ensure Progress. Rio de Janeiro: Climate Policy Initiative, 2019.

THE LEGISLATIVE PROCESS OF THE NEW CONCESSIONS LAW BILL

The new Concessions Law bill is not the result of a single proposed amendment. It emerged through discussion in the Temporary Special Committee, which was created in April 2019 for the purpose of studying the bill. It was not based only on the various bills related to concessions and bidding, but largely on public hearings held between August and November of 2019.⁴ Since the beginning it has been related to other bills and topics in the legislature.

Initially, the Special Committee was charged with delivering an opinion on bill PL 3,453/2008, which amends the provisions of the General Bidding Law.⁵ Later, due to the overlapping subject matter, the committee also considered PL 7,063/2017, which proposes amendments to the current Concessions Law. Over the course of the discussion, the chairman realized that PL 3,453/2008 should be considered separately, and that the committee should focus exclusively on PL 7,063/2008 and its annexes. This is how the Special Committee, originally formed to consider proposed modifications to the Bidding Law, changed its focus to the Concessions Law.

It is interesting to note that initially none of these bills made any mention of environmental issues. The bills and their respective annexes made specific proposals for amendments to the laws on bidding and concessions. The Special Committee widened the debate by proposing amendments to the entire legislation rather than to individual provisions.

In this broader debate, environmental issues were brought up at public hearings and by individual deputies, and were partially incorporated into the clean bill approved by the Committee.

ENVIRONMENTAL ISSUES DISCUSSED IN THE DEBATE ON THE NEW CONCESSIONS LAW BILL

Since major infrastructure projects are often operated under concession agreements, and since these projects generate social and environmental impacts that present serious challenges to the implementation of the concession contracts, the new Concessions Law bill might be expected to address these impacts.

The Special Committee's public hearings therefore included a discussion on environmental provisions, with input from a number of specialists. The main topics discussed included a) environmental licensing procedures; b) conducting Technical, Economic and Environmental Feasibility Studies (EVTEA); and c) defining investors' environmental liability; as detailed below.

⁴ Public hearings available at <https://www2.camara.leg.br/atividade-legislativa/comissoes/comissoes-temporarias/especiais/56a-legislatura/pl-3453-08-parcerias-publico-privadas>. Accessed April 30, 2020.

⁵ Law 8,666/1993.

ENVIRONMENTAL LICENSING

The draft put forth by the chairman and approved by the committee in November of 2019 maintains the ambiguity as to who must obtain the Preliminary Environmental License — the government or the concessionaire, giving the government the prerogative to decide this obligation on a case by case basis. At the same time, the draft provides for the possibility of establishing a period prior to a contract’s effective date to obtain licensing and resolve other pending items. The proposal allows the public notice to define how long a contract can wait before obtaining the preliminary environmental license.

The decision as to who is responsible for obtaining a preliminary license is tied to which party assumes the risk for the environmental feasibility of a project. Also tied to this decision is the question of when the preliminary environmental license must be obtained, which in turn determines whether the project structure is complete and ready to be presented in the marketplace. If the government is the one responsible, the license should be obtained before the bidding process begins, and the government should guarantee the future concessionaire that the project is environmentally feasible and ready for bidding, complete with technical definitions and costs associated with licensing and its constraints. If the concessionaire is responsible, the public notice could require that the preliminary environmental license be obtained either before the bidding process begins, as a prerequisite for bidding (as is common in the electrical sector, for example), or after the bidding process.

If the responsibility falls to the concessionaire, on the one hand that party assumes the risk that an authorized environmental agency could refuse its preliminary environmental license — thereby disqualifying it from the bidding process — or that the agency could take longer to decide than the period stipulated in the contract, thereby delaying its compliance. On the other hand, the concessionaire would then be in charge of conducting the Environmental Impact Assessment (EIA), a document that explains how the project will be made feasible. This would give the concessionaire greater decision-making power over a series of questions essential to the project, including what kind of technology will be used, location, and what measures will be in place to mitigate and compensate negative social and environmental impacts.

The draft approved by the committee does not change the current practice, in which the preliminary environmental license is defined case by case. Considering that predictability is crucial for the stability of the business environment and reduces risks, it would be beneficial if there were a general rule establishing when the LP should be obtained by each sector or for specific types of projects. This already happens in the bidding for hydropower plants, where the LP should be obtained before the bidding as per foreseen in specific regulation.

Moreover, transparency is needed regarding how exceptions are decided when projects do not follow the general rule, for example, by making the project’s risk matrix that was used to make the decision available. This the direction that Resolution No.1 from the Investment Partnership Program Counsel (CPPI) is taking for the projects qualified by the Program.⁶

⁶ Resolution Nº 01/2016, CPPI: Article 6th. When the purpose of the agreement requires, the bidding of the projects shall be conditioned, in accordance with applicable law, to the certification of its environmental viability by issuing the Preliminary License - PL or guidelines for environmental licensing. Article 7th. In the preparation of the public call and contract draft, the adoption of risk distribution matrix for the project must be made and should, at the least, take into consideration the identification, evaluation and allocation of risks for the party best able to manage them, with the lowest costs to the process, in a way so as to minimize future extraordinary contractual revisions. Available at: <https://www.ppi.gov.br/legislacao-e-arquivos>. Accessed May 25, 2020.

TECHNICAL, ECONOMIC AND ENVIRONMENTAL FEASIBILITY STUDIES (EVTEA)

Another point that came up in the public hearings was the need for better design of infrastructure projects, through the development of more robust technical projects that would contribute to a concession's success. An effective way to achieve this would be to strengthen the Technical, Economic and Environmental Feasibility Studies (EVTEA). These studies strike a balance between costs and benefits and indicate which project design is most appropriate for a given service. The feasibility study stage also determines the type of interaction with the area in question, and the need for coordination between policy and investments to minimize impacts and maximize benefits, thereby influencing the scope of the project and the role of the government in making it feasible.⁷

At the public hearings a proposal was made that the new legislation include completion of the EVTEA as a condition for opening the bidding process. The committee did not accept this suggestion and the final draft of the bill does not mention the EVTEA.

INVESTOR LIABILITY FOR ENVIRONMENTAL DAMAGE

The draft bill approved by the committee adds to the Judiciary's current understanding by establishing the environmental liability of investors only in cases where a causal link is proven between their conduct and environmental damage.

Currently, courts tend to hold investors liable on the theory of full risk, that is, regardless of proof of a causal link between environmental damage and an action or omission by a financial institution.

Taking into account the notion of indirect pollution and the principle of environmental non-regression, the bill, if approved, could be subject to criticism, and even judicial action, for restricting the prevailing concept of environmental liability enforcement. Given that the concept of "indirect polluter" is considered in the National Environmental Policy Act,⁸ this discussion should be addressed under this context and not in the New Concession Law Bill, which has a different objective.

⁷ Chiavari, Joana et al.

⁸ Federal Law Nº 6,938/81. Article 2nd. The National Environmental Policy Act (...) observes the following principles: IV- polluter, the person or company, governed by public or private law, responsible, directly or indirectly, by activity that causes environmental degradation. Freely translated from: http://www.planalto.gov.br/ccivil_03/LEIS/L6938.htm. Accessed: May 25, 2020.

RECOMMENDATIONS

Since the bill is still going to be debated in the full session of the Chamber of Deputies, and will then return to the Federal Senate, there is still time to make adjustments to its content. CPI's analysis suggest the following modifications would strengthen the bill:

- Determine that sector regulation establishes when a preliminary environmental license should be obtained, and who is responsible for obtaining it, with the purpose of providing more legal certainty and predictability in the allocation of risk.
- Require completion of the EVTEA as a condition for opening s bidding process on greenfield projects. The bill could also establish minimum criteria to be examined in the EVTEA, methods for evaluating and approving the studies, as well as appropriate public notification of the acts.
- Eliminate the provision that limits civil responsibility of the investor, since there is high probability of judicial action, and also because this discussion should be addressed in the Nacional Environmental Policy Act, if it is the case.

Dealing with these issues in the concession phase of an infrastructure project would create an opportunity to head off potential conflicts currently handled later in the project life cycle. This would lead to bidding on higher quality, more sustainable infrastructure projects and promote a more secure investment environment.

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