

(H. B. 533)

(No. 173-2013)

(Approved December 27, 2013)

AN ACT

To repeal subsections (a) and (b) and redesignate subsections (c) and (d) as (a) and (b) of paragraph ii of subsection (b) of Section 9 of Act No. 29-2009, known as the “Public-Private Partnership Act,” in order to eliminate the provisions that empower the Public-Private Partnership Authority to waive the holding of competitive bidding to negotiate public-private partnership contracts; reassert the right of citizens to gain access to public information related to transactions conducted by virtue of the statute; and make technical corrections.

STATEMENT OF MOTIVES

Act No. 29-2009, known as the “Public-Private Partnership Act,” created the Puerto Rico Public-Private Partnership Authority (hereinafter, “the Authority”) and established processes and parameters to enable government entities to execute contracts with private entities in order to establish the type of public-private partnership conceptualized under said Act.

However, when the Bill that created this Act was under consideration, different sectors raised their objections to several provisions thereof because they believed that such provisions: failed to guarantee People’s access to information relating to the terms and conditions agreed upon by the Government and the participating private entity, failed to establish controls to prohibit any unreasonable rate raises, and allowed the execution of large contracts without holding a bidding process, among other significant aspects of the statute.

Certainly, Act No. 29, *supra*, should undergo a thorough analysis to provide the Government of the Commonwealth of Puerto Rico with the necessary conditions to ensure that the intended public-private partnership truly represents a viable alternative for creating jobs and developing new infrastructure on the Island, that otherwise would be impossible to develop. There is a need to rethink the statute to establish greater controls that guarantee that the formation of said partnership would actually benefit the Island.

Furthermore, one of the measures that require immediate attention is the need to eliminate from the Act any language that provides for the award of large contracts, without holding a bidding process.

Concerning this issue, Section 9 of Act No. 29-2009 establishes the process whereby a proponent with whom the Government entity shall enter into a Public-Private Partnership contract shall be selected and whereby the Authority is allowed to waive the holding of a bidding process when: conducting such process is deemed burdensome, unreasonable, or impractical, or when the project to be carried out under the partnership contract has a duration that does not exceed one (1) year or the estimated initial investment value does not exceed five million dollars (\$5,000,000).

Any process that involves the execution of Partnership contracts by government entities is undeniably complex and entails investing time to meet countless government requirements. However, it is unreasonable to adopt lenient measures with respect to the management of public funds solely in the interest of expediting said process.

Regarding this issue, it is necessary to point out that Section 9 of Article VI of the Constitution of the Commonwealth of Puerto Rico expressly states that “public property and funds shall only be disposed of for public purposes.” Therefore, our Government is responsible for overseeing the proper use and

management of public funds. Also, the aforementioned constitutional mandate imposed on the state the responsibility of ensuring that said use of public funds be forever linked to the general wellbeing of every citizen. Consequently, many processes have been established to govern the disposition of public funds to exalt sound public administration, as part of the efforts to meet said task.

In interpreting the Constitution, the Supreme Court of Puerto Rico has expressed, repeatedly, that a sound government administration is a virtue of democracy. And as part of this sound administrative policy and to protect the interests and moneys of the public that the government represents, government purchase procedures must be conducted with efficiency, honesty, and correctness. It has also pointed out that the objective of statutory provisions that regulate and govern the performance of works and the acquisition of goods and services for the State, its agencies and instrumentalities, and municipalities, is to protect the interests and financial resources of the People against squandering, prevarication, favoritism, and risks of noncompliance. *Colón v. Municipio de Arecibo*, 170 D.P.R. 718 (2007); *Mar-Mol Co. Inc. v. Adm. Servicios Generales*, 126 D.P.R. 864, 871 (1990); *Cancel v. Mun. de San Juan*, 101 D.P.R. 296, 300 (1973).

Consequently, a bidding process is one of the most suitable mechanisms to ensure that a contract awarded by the Government, its instrumentalities, and officials is executed to benefit public interest. For such purpose, formal bidding processes or request for proposals (RFP) exist. Bidding processes are extremely important and hold the highest public interest. *Oliveras, Inc. v. Universal Insurance Co.*, 141 D.P.R. 900 (1996).

Within the Public-Private Partnership context, the public interest in ensuring a sound government administration becomes more relevant as it is related to a type of agreement intended to “providing a service for citizens, as well as building or operating a facility or project that is held in high priority by the Government.”

Statement of Motives of Act No. 29-2009. Note that Public-Private Partnership Contracts are related to service rendering or to high-priority facilities or projects; therefore, said contracts have a generalized and substantial impact on the community.

Given the impact that awarding public-private partnership contracts pursuant to the parameters set forth in Act No. 29-2009, *supra*, has on the Treasury and on consumers, this Legislative Assembly deems it indispensable to amend said Act to limit the instances in which the Authority is allowed to waive any type of bidding.

Lastly, this Legislative Assembly recognizes that access to information is a fundamental and necessary right of every individual in order to truly oversee public efforts. The capacity of the People to know about the government's decision-making processes and to review the documents that support every decision shall not be lacerated, hindered, or limited unjustifiably. Therefore, Act No. 29-2009 is hereby amended to clarify that its content shall not be interpreted as to impair the fundamental right of citizens to access such public documents or information.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF PUERTO RICO:

Section 1.- Subparagraphs (a) and (b) are hereby repealed and subparagraphs (c) and (d) are hereby redesignated as subparagraphs (a) and (b) of paragraph (ii) of subsection (b) of Section 9 of Act No. 29-2009, and the last subsection of Section 9 is hereby redesignated as subsection (j), incorrectly designated as subsection (f), to read as follows:

“Section 9.- Procedure for the Selection of Proponents and Award of Partnerships

(a) Applicable Requirements and Conditions for those who wish to be Considered Proponents. Any proponent who wishes to be contracted for a partnership must meet the following requirements and conditions, in addition to

such requirements as provided in the request for qualification or in the request for proposals designed for such partnership, which may by no means impair fair competition and the public interest, to wit:

(i) ...

(ii) ...

(iii) ...

(iv) ...

(b) Procedure for Selection and Award.

(i) ...

(ii) Without this being construed as a limitation to the provisions in subsection (b)(i) above, the Authority may negotiate Partnership Contracts without abiding by the procedures for requests for proposals in the following cases: (A) when there is only one source capable of providing the service required, such as services that require the use of intellectual property, trade secrets, or other licenses or rights which only certain persons own or hold exclusively; and (B) when a call to any pre-qualification procedure or any request for proposals conducted pursuant to the provisions of Section 6 (b)(i) has been issued and there has been no participation or response, or the proposals submitted have failed substantially to meet the evaluation requirements provided for in the request for proposals, and if, in the judgment of the Authority, issuing a new request for qualification and for proposals would cause such a delay that it would render the possibility of selecting a proponent and signing a partnership contract within the time frame required, highly unlikely. In the cases mentioned in subparagraphs (A) and (B) of this Section, before executing a partnership contract, notice must be given to the Joint Committee on Public-Private Partnerships of the Legislative Assembly, created in this Act, for the appropriate action.

(iii) ...

- (c) ...
- (d) ...
- (e) ...
- (f) ...
- (g) ...
- (h) ...
- (i) ...

(j) **Publicity.-** The Authority shall at least grant public access as provided hereinbelow to the following documents: the study on desirability and convenience in connection with a Partnership; the documents generated by the Authority to request qualifications and to request proposals in connection with a partnership; and the report prepared for the Partnership Committee, by publishing the same on their webpage and in a newspaper of general circulation, as per the rules established in this chapter or in the regulation of the Authority, as well as any other document or report as set forth in this Act. The Authority may publish as provided above any other document that, in its full discretion, it may deem pertinent. The foregoing shall not be interpreted as to impair the rights of citizens to access public information and the Authority shall make such information available for public review. However, the Authority may not publish or disclose information deemed to be confidential under the provisions of Section 9(i) of this Act or any such information whose publication or disclosure could affect the proponent selection process.”

Section 2.-This Act shall take effect immediately after its approval.

CERTIFICATION

I hereby certify to the Secretary of State that the following **Act No. 173-2013 (H. B. 533)** of the **2nd Regular Session** of the **17th Legislative Assembly of Puerto Rico**:

AN ACT to repeal subsections (a) and (b) and redesignate subsections (c) and (d) as (a) and (b) of paragraph ii of subsection (b) of Section 9 of Act No. 29-2009, known as the "Public-Private Partnership Act," in order to eliminate the provisions that empower the Public-Private Partnership Authority to waive the holding of competitive bidding to negotiate public-private partnership contracts; reassert the right of citizens to gain access to public information related to transactions conducted by virtue of the statute; and make technical corrections.

has been translated from Spanish to English and that the English version is correct.

In San Juan, Puerto Rico, on this 30th day of January, 2017.

Roger J. Iglesias-Sepúlveda
Director