



GOVERNMENT OF PUERTO RICO

Department of the Treasury


August 2, 2022

ADMINISTRATIVE DETERMINATION NO. 22-05 (“AD 22-05”)

ATTENTION: ENTITIES ENTERING INTO CONCESSION PARTNERSHIP CONTRACTS WITH A PARTNERING GOVERNMENT ENTITY UNDER ACT 29-2009, AS AMENDED

SUBJECT: CERTAIN RULES AND TAX CONSIDERATIONS APPLICABLE TO A CONTRACTOR ENTERING INTO A CONCESSION PARTNERSHIP CONTRACT WITH A PARTNERING GOVERNMENT ENTITY

I. Statement of Motives

 Act 29-2009, as amended, known as the Public Private Partnership Act (“Act 29”) sets forth the public policy regarding Public-Private Partnerships in Puerto Rico (“APP” for its Spanish acronym) and creates the legal framework for the establishment of such partnerships. Pursuant to the provisions of Act 29, any Partnering Government Entity is authorized to establish an APP and execute a Partnership Contract in connection with one or more Functions, Services or Facilities, as such terms are defined under Act 29. Act 29 provides various forms of arrangements that can constitute a “Partnership Contract.”

The purpose of this Administrative Determination is to set forth certain rules and tax considerations applicable to a private contracting entity entering into a Concession Partnership Contract (as defined below) or a long-term Lease under Act 29 after the date of this Administrative Determination. For the taxation rules applicable to an operation and maintenance partnership contract under Act 29 or Act 120-2018, as amended, refer to [Administrative Determination No. 20-06](#).

II. Definitions

In accordance to Section 2 of Act 29, the following terms will have the meanings set forth in Act 29 as follows:

1. **Authority** - The Public-Private Partnership Authority.
2. **Contractor** - The Person who executes a Partnership Contract with a Partnering Government Entity or the successor thereof.
3. **Facility** – Any property, capital work or facility of public use, whether real or



personal, whether existing or to be developed in the future, including, but not limited to, aqueduct and sewer systems, including all plants, reservoirs, and systems to store, supply, treat, and distribute water, systems to treat, collect, and eliminate rainwater and sewer water, improvements financed under the provisions of the Federal Clean Water Act and the Federal Safe Drinking Water Act, or any other similar or related Federal legislation or regulation; systems to collect, transport, manage, and eliminate nonhazardous and hazardous solid waste; systems to recover resources; systems to produce, transmit or distribute electric power; freeways, highways, pedestrian walkways, parking facilities; airports, convention centers, bridges, sea or air ports, tunnels; transportation systems, including mass transportation systems; communications systems, including telephones, information and technology systems; industrial facilities; public housing; correctional institutions; and any kind of facilities used as tourist, healthcare or agricultural-industrial infrastructure or any other similar facilities.

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4. **Function** - Any present or future responsibility or operation of a Government Entity, expressly delegated to the same by means of either its enabling act or any pertinent special laws that is closely related to Priority Projects, as established in Section 3 of Act 29.
 5. **Partnering Government Entity** - The Government Entity directly concerned with the kinds of Functions, Services or Facilities that shall be under the Partnership Contract, and which is or shall be a party to the Partnership Contract.
 6. **Partnership Contract** - The contract executed by the Contractor and the Partnering Government Entity to establish an APP, which may include, but shall not be limited to, a contract to delegate a Function, administer or render one or more Services, or conduct the design, building, financing, maintenance, or operation of one or more Facilities that are themselves, or are closely related to, Priority Projects, as established in Section 3 of Act 29. A Partnership Contract may be, without it being understood as a limitation, any modality of the following kinds of contract: design / build, design / build / operate, design / build / finance / operate, design / build / transfer / operate, design / build / operate / transfer, turnkey contract, long-term lease contract, surface right contract, administrative concession contract, joint venture contract, long term administration and operation contract, and any other kind of contract that separates or combines the design, building, financing, operation or maintenance phases of the Priority Projects, as established in Section 3 of Act 29.
 7. **Service** - Any service rendered or to be rendered by a Government Entity directed to safeguarding the interests or meeting the needs of citizens under the provisions of either its enabling act or other special laws, which are in themselves, or are closely related to, Priority Projects, as established in Section 3 of Act 29.

In addition, the following terms will have the meanings set forth herein for purposes of this Administrative Determination:

8. **Concession Partnership Contract** – An administrative concession contract, pursuant to which a private party performs a public Function, provides a Service, or uses a Facility and retains any profits derived from such Function, Service or Facility. As part of the Concession Partnership Contract, the Contractor can design, construct, finance, maintain or operate the existing Facilities or build new Facilities.
9. **Lump-Sum Upfront Payment** – The payment made by the Contractor to the Partnering Government Entity at closing in exchange for the rights granted to the Contractor under the Concession Contract.
10. **Partnering Contractor Fees** – The fees or charges that are imposed, collected and retained by the Partnering Government Entity prior to entering into the Concession Partnership Contract and subsequently thereto imposed, collected and retained by the Contractor from the third-party customers or users of the Function, Service or Facility that under the Concession Partnership Contract legally belong to the Contractor (rather than to the Partnering Government Entity).
11. **Termination Payment** – The payment made by a Partnering Government Entity to a Contractor in connection with the termination of a Concession Partnership Contract. To be considered a Termination Payment, it must be expressly included in the Concession Partnership Contract.

III. Statutory Basis

Pursuant to Section 12 of Act 29, participants in an APP are entitled to certain tax benefits in accordance to the agreements set forth on the Partnership Contract. Among the tax benefits that the Contractor of an APP is entitled to enjoy are the following:

- **Property tax exemption** – real and personal property that: constitute the Facility, or property used exclusively in or for the facility or for the Services or Functions that belongs to the Partnering Government Entity, and is made available to the Contractor or that is acquired, built or owned by the Partnership Government Entity and is made available to the Contractor. The property tax exemption percentage shall be established by the Authority.
- **Municipal license fees, excise taxes and other municipal taxes** - Contractors and municipal governments may establish exemption for the payment of municipal taxes. Municipal governments are authorized to establish the terms and amount of the tax exemptions on said municipal taxes.




- Income taxes – the net income from the operations covered by a Partnership Contract shall be calculated in accordance with the Puerto Rico Internal Revenue Code of 2011, as amended (the "PR Code"), but the income tax rate will be a flat income tax rate of twenty percent (20%) in lieu of any other income tax imposed by the Code including but not limited to alternative minimum tax. Distributions made out of the earnings and profits covered by the Partnership Contract will be exempt from income taxes.

However, a Contractor under a Partnership Contract may not receive tax benefits provided for under the Economic Incentives Act for the Development of Puerto Rico, Act No. 73 of May 28, 2008, for the activity covered under such Contract.

Act 29 is silent with respect to the responsibilities of a Contractor in connection with the payment of sales and use taxes, excise taxes and the responsibilities of the Contractor as an employer and withholding Agent.

IV. Determination

A. Treatment of Lump-Sum Upfront Payment

 In general, Section 1033.07(a)(1)(D) of the PR Code provides that intangible property (other than goodwill) acquired by purchase or developed in taxable years commencing after December 31, 2009, may be amortized by use of the straight-line method over a period of 15 years or the useful life of such intangible property, whichever is lower. Accordingly, the portion of the Lump-Sum Upfront Payment allocable to the Concession Partnership Contract shall be amortizable by the Contractor as an intangible over 15 years, and the portion of the Lump Sum Upfront Payment allocable to the acquisition of personal property, if any, shall be depreciable over the applicable life of such property. All improvements made by the Contractor shall be depreciable over their applicable lives for these purposes.

B. Treatment of Termination Payments Made to, and Other Income Derived by, the Contractor

Article 12(a) of Act 29 provides that the Contractors of a Concession Partnership Contract are subject to a twenty (20) percent fixed income tax rate on the net income derived from the operations set forth in the Concession Partnership Contract, computed in accordance with the PR Code. Article 12(a) of Act 29 further provides that the twenty (20) percent fixed income tax rate applies in lieu of any other income tax, if any, imposed under the PR Code or any other law including, but not limited to, the alternative minimum tax and the tax on the deemed dividend amount imposed under the PR Code. In addition, Article 12(a) of Act 29 provides that the owners of the Contractor will not be subject to the payment of income taxes on dividend distributions of the net income derived from the operations covered under a Concession Partnership Contract.

Based on the above, for Puerto Rico income tax purposes, the net income derived by a Contractor under the Concession Partnership Contract, which includes amounts received with respect to any Termination Payments made thereunder, will be considered to be derived from the operations provided in the Concession Partnership Contract and, accordingly, to the extent that all or a portion of it is considered ordinary income will be treated as net income derived from the operations covered by the Concession Partnership Contract subject to the twenty (20) percent fixed income tax rate provided under Article 12(a) of Act 29. Furthermore, a Termination Payment will not be subject to the alternative minimum tax imposed under Section 1022.03 of the PR Code, or to the ten (10) percent deemed dividend tax imposed under Section 1062.13 of the PR Code. Moreover, the owners of the Contractor will not be subject to the payment of income taxes on dividend distributions of the net income derived from the operations covered under the Concession Partnership Contract.

C. Treatment of the Partnering Contractor Fees

The Partnering Contractor Fees will be considered gross income or revenues derived from the Concession Partnership Contract, subject (on a net basis) to the twenty (20) percent fixed income tax rate provided under Article 12(a) of Act 29. Notwithstanding the above, any part of the Partnering Contractor Fees imposed and collected by the Contractor but that are subsequently transferred to the Partnering Government Entity (under a revenue sharing agreement or similar provision contained in the Concession Partnership Contract) will not be considered gross income or revenues of the Contractor, and the Contractor will not be subject to Puerto Rico income taxes with respect to such fees.

D. Applicability of Sales and Use Taxes to Partnering Contractor Fees

The Partnering Contract Fees are subject to the provisions of the Concession Partnership Contract that provides consent rights or oversight over such fees or charges to the Partnering Government Entity, despite the fact that the referenced fees will be imposed, collected and retained by the Contractor, with such fees becoming the property of the Contractor. These charges imposed by the Partnering Government Entity and collected from third party customers or users prior to the execution of the Concession Partnership Contract are not currently subject to the payment of the SUT. For example, pursuant to Section 4010.01(I)(2) of the PR Code, the amount paid to admit a person or vehicle into the collective transportation systems established by the Government of Puerto Rico, such as the Metropolitan Bus Authority, the Ports Authority and the Transportation and Public Works Department, or by an operator or subcontractor, including persons certified by the Government of Puerto Rico, its agencies or instrumentalities to render those services, are not subject to the payment of the SUT. Similarly, the charges or fees paid by customers of a utility service (such as electricity from the Puerto Rico Electric Power Authority or water from the Puerto Rico Aqueduct and Sewer Authority) are not subject to the payment of the SUT, in accordance with Section 4010.01(gg)(2) of the PR Code.



Based on the above, considering that under the Concession Partnership Contract the Partnering Government Entity retains control and oversight of the referenced fees at all times, such fees should not be subject to the payment of the SUT. Accordingly, the Partnering Contractor Fees imposed, collected and retained by the Contractor will not be subject to the payment of the SUT. However, for the avoidance of doubt, this treatment shall not be applicable to any future fees or charges that may be imposed by the Contractor that prior to the execution of the Concession Partnership Contract were not imposed by the Partnering Government Entity.

E. Government Agent for purposes of Sales and Use Taxes

Section 4030.08(a) of the PR Code provides that every "taxable item" acquired for official use by the agencies and instrumentalities of the Government of the United States of America and the Government of Puerto Rico are exempt from the payment of the SUT. The term "Government of Puerto Rico" is defined for these purposes as the departments, agencies, administrations, bureaus, boards, commissions, offices, public corporations, public instrumentalities and the municipalities of the Government of Puerto Rico, including the Legislative Branch and the Judicial Branch, as well as those persons operating or acting on behalf or in the name thereof, as provided in Section 4010.01(p) of the PR Code.

Moreover, Article 4030.08-1(a)(2) of the Regulations under the PR Code provides that the term "Government of Puerto Rico" (and the Government of the United States of America) includes those persons that operate or act on their behalf, requiring that such persons request and obtain a certificate to those effects from the Secretary of the Treasury (the "Secretary"). The referenced certificate issued by the Secretary will generally be effective for a two (2) year period. Article 4030.08-1(a)(2) of the Regulations under the PR Code and [Circular Letter of Internal Revenue No. 19-13](#) ("CC RI 19-13") further provide that the person requesting the referenced certificate to act on behalf of the Government must provide to the Secretary evidence to the effect that the entity was created exclusively to act in an official capacity as an agent of the Government. In addition, the person must provide a certification issued by the governmental entity in the name of which the person is acting in which such authority is acknowledged, as well as a list of the taxable items to be acquired on the governmental entity's behalf.

Consistent with the above, the Contractor may request, and the Secretary may issue the certificate referenced in Article 4030.08-1(a)(2) of the Regulations under the PR Code and [CC RI 19-13](#) demonstrating that the Contractor is operating or acting on behalf of or in the name of the Partnering Government Entity, which shall be effective for the same term of duration of the Concession Partnership Contract (rather than for a two (2) year period). The Partnering Government Entity will also certify to the Secretary the items that qualify as Covered Items.



F. Applicability of Excise Taxes

Subtitle C of the PR Code provides for the imposition of excise taxes on certain products, such as fuel and motor vehicles (the "Excise Tax"). The acquisition of products by a Contractor that enters into a Concession Partnership Contract with a Partnering Government Entity will be subject to the payment of the Excise Tax, since the tax exemption generally applicable to the Government of Puerto Rico will not be extended to the Contractor.

G. Applicability of Act 48-2013

Article 1 of Act 48-2013 imposes a special contribution equivalent to one and a half (1.5) percent of the total amount of every professional service, consulting, marketing, public relationships, communications, training or orientation, and lobbying contract executed by an agency, dependency or instrumentality of the Government of Puerto Rico, public corporations, as well as by the Legislative Branch and the Judicial Branch (the "Special Tax"). The Special Tax must be withheld by the Puerto Rico Treasury Department or by the corresponding governmental entity at the time of making payments for services rendered under the contract. [Administrative Determination No. 13-14](#) issued on August 28, 2013 contains a list of certain services which are subject to the payment of the Special Tax, as well as a list of other services which are not subject to the Special Tax.

For purposes of Act 48-2013 the term "professional or advisory services" has the meaning established on Act 23-2004, as amended. At the same time, Act 237-2004 defines the term "professional or advisory services" as those whose main performance consists of the product of intellectual, creative or artistic work, or in the management of highly technical or specialized skills. Moreover, Article 2 of said act established that the procurement of professional or advisory services shall be exceptionally improved and used only when the governmental entity does not count or cannot use its internal resources for the task at hand, or when the "expertise" in skills or experience is necessary for the achievement of the purposes for which such services are being procured.

In the case of a Concession Partnership Contract, the Contractor is not performing a professional or advisory service of certain expertise, but rather, the Contractor is basically performing the acts and duties that the Partnering Government Entity is bound to perform. Pursuant to the Concession Partnership Contract, the Partnering Government Entity delegates the functions, services and responsibilities with respect to the provision of a Service or use of a Facility to the Contractor. Therefore, the Contractor "substitutes" the Partnering Government Entity on the performance of the duties that by law the Partnering Government Entity must do.

Since the services to be performed by the Contractor in a Concession Partnership Contract do not constitute "professional or advisory services" as such term is defined in Act 237-2004, then it is hereby determined that a Contractor that enters into a Concession Partnership



Contract with a Partnering Government Entity will not be subject to the Special Tax, should there be any amounts payable by the Partnering Government Entity to the Contractor.

H. Contributions to a Government Retirement Plan

Under Article 10(g) of Act 29, certain government employees that are hired by a Contractor that enters into a Concession Partnership Contract with a Partnering Government Entity may continue to make contributions to the corresponding Government Retirement Plan, and the Contractor may make the corresponding employer contributions to the referenced plan. For taxable years beginning after December 31, 2018, Section 1033.15(a)(6) of the PR Code provides that the contributions made by employees to Government Retirement Plans will be considered as a reduction from wages subject to taxation in accordance with the provisions of Section 1081.01 of the PR Code.

When an employer makes contributions for the benefit of a participant in a retirement plan to an employees' trust or annuity contract which forms part of the retirement plan enjoying tax exemption according to Section 1081.01(a) of the PR Code ("Tax Qualified Plan"), the participant does not have to include said contributions in gross income at the time of the contribution. Similarly, contributions by a participant to a Tax Qualified Plan are made on a pre-tax basis and, accordingly, are excluded from the employee's current income.

Based on the above, it is determined herein that the contributions made by the employees to the corresponding Government Retirement Plan, which are withheld from the employees' wages, will be made on a pre-tax basis and, accordingly, will not be considered taxable income to the employees at the time of the contribution. Said contribution shall be reported on the employee's Withholding Statement (Form 499-R/W-2PR) in the year the contribution to the plan is withheld to the employee. Similarly, any contributions to a Government Retirement Plan made by the Contractor entering into a Concession Partnership Contract with a Partnering Government Entity on behalf of such employees will not be considered taxable income to the employees at the time of such contribution.

I. Private Rulings and other Requests

This Administrative Determination is intended to address certain Puerto Rico tax considerations that might be of general application to a Contractor entering into a Concession Partnership Contract under Act 29 with a Partnering Government Entity. Contractors entering into a Concession Partnership Contract which, due to the specific factual background, require a determination from the Secretary regarding certain tax considerations not specifically addressed in this Administrative Determination Letter should request the issuance of a private ruling from the Secretary.

In filing the ruling petition with the Secretary, the Contractor should follow the requirements established in [Circular Letter of Tax Policy No. 16-09](#) ("CL 16-09"). The petition must be addressed to the Assistant Secretary for the Internal Revenue Area, and may be filed with



the Puerto Rico Treasury Department (the "Department") by any of the following two (2) methods:

In Person: Department of the Treasury, Ruling Request under Act 29-2009, Office 620, Intendente Ramírez Building located at 10 Paseo Covadonga, Old San Juan, Puerto Rico 00901

By Mail: Department of the Treasury, Ruling Request under Act 29-2009, Office 620, P.O. Box 9024140, San Juan, P.R. 00902-4140

The Contractor shall be subject to a service charge established under Article 6(a)(17)(vii) of Regulation 9115 of October 8, 2019, better known as "Regulation for the Imposition of Service Charges for Requests Submitted to the Treasury Department." In addition, the petition must include copy of the Concession Partnership Contract executed between the Contractor and the Partnering Government Entity.

The ruling petition, together with the information requested above, must be included in digital format in any external memory device. The Department reserves its authority to request additional information and/or documentation from the Contractor as part of the valuation of the ruling petition.

V. Effectiveness

The provisions of this Administrative Determination are effective immediately.

For additional information regarding the provisions of this Administrative Determination, taxpayers can contact the Department by sending a web message through their SURI account.

Cordially,



Angel L. Pantoja-Rodríguez
Deputy Secretary

