

PUBLIC WORKS CONCESSIONS IN CHILE

a Report prepared by the law firms of

Morales, Noguera, Valdivieso & Besa

Apoquindo 3001, 9th Floor
Santiago, CHILE
Telephone: (562) 334 00 00
Telefax: (562) 334 31 52

Estudio Miquel Ltda.

Apoquindo 3076, 9th Floor
Santiago, CHILE
Telephone: (562) 233 49 40
Telefax: (562) 232 81 98

February, 1997

PUBLIC WORKS CONCESSIONS IN CHILE

1. GENERAL FRAMEWORK:

Since the Chilean colonial period, road tolls have been established for financing public works. Also, the first railways built in Chile in the 1800's were developed thanks to private investors.

Throughout this century, the mechanism of private investment through public concessions for developing public works was abandoned, the State thus remaining as the exclusive decision maker, funding entity, developer and operator of diverse public works. Such conception reached its apex from the 1950s to the 1970s, when imports were expected to be substituted on account of the fruitfulness of the State's activities.

Today's economic trends are towards a reduction in the State's role in the country's economy, predominantly engaging the private sector in such role. Since the 1980s, privatization and private participation policies have predominated in productive economic areas and, most recently, in infrastructure public works. The need to improve the operation and service standards has also proved a matter of the utmost importance, in that connection.

Thus, during the 1970s and 1980s, the largest part of Chile's productive and services State-owned companies were privatized.

As to infrastructure, the privatization of State-owned assets in telephone companies and the privatization of the largest part of State-owned power companies commenced during the 1980s. During the 1990s, a private investment and concession program was structured for ports, roads and airports.

2. PRIVATIZATION SYSTEMS AND PRIVATE PARTICIPATION IN INFRASTRUCTURE:

The above-captioned systems have been made and consolidated in Chile by means of:

2.1. Privatization of sectors or assets:

It has taken place completely in:

- (a) Sea transportation and commercial air transportation;
- (b) Land automotive transportation; and
- (c) Telecommunications.

In these cases, the State has surrendered its monopoly by selling the existing companies. In general, sector and tariff regulations were passed and special agencies were established (Superintendencies) for controlling the relevant operations and safeguarding general interests and those of the public.

In this connection, the privatization of "Correos de Chile" (Chilean Mail) is expected to take place during 1997.

2.2. Public service concessions:

- performed by private entities; or
- (d) Public airports, for the management of its parking lot services, cleansing, commercial establishments, etc.

2.6. Others:

Similar systems are used by private-owned companies for certain investments in works and rendering of services to other private-owned companies. They are utilized in cases where the works and services widely diverge from the exclusive or principal trade of the proposing or awarding company. For example, the construction of a special port for a power plant which had use for a simple bulk loading port. The private entity that built it operates it for rendering specific services, but widened the work with a general cargo dock in order to offer additional capacity for the bidding power plant and other third parties.

3. LEGAL SYSTEMS REGARDING CONCESSIONS IN CHILE:

In general, the legal regime in Chile considers the following types of Concessions:

- (a) Public Use Concessions: Which are permits granted by the authorities for using fiscal goods and goods of public use, towards certain objectives, e.g. beach and coastline concessions. From 1991 to 1995, ten concessions were granted for the construction of new private-owned ports, whether general or bulk load ports, currently operating;
- (b) Public Service Concessions: They refer to a permit given by the administration for developing certain activity, during a specific or indefinite period of time, over a defined operational territory, under natural monopoly or slightly competitive conditions, in which the State regulates the tariff regime and its operative conditions. The assets may be partially or totally State-owned or belong to the operating company which, in this case, is a fully independent economic entity. For example, power services, drinking water, etc;
- (c) Public Works Concessions: They are meant for the construction, conservation and operation of public works; and
- (d) Municipal and State-owned company concessions: Apart from the concessions granted by the State, Chilean legislation also afford Municipalities to grant concessions. Their performance has been somewhat reduced, within their limited scope of competence. Notwithstanding, during the 1990s this trend has been enhanced by virtue of the passing of Law N° 19,425 of 1995 regarding municipal concessions for the underground of land of public use, which amended Law N° 18,695, Organic Law of Municipalities, in order to establish a contractual regime. In 1996, two contracts were perfected for the Santiago area and more than 12 other contracts are expected to be executed during 1997, in various Municipalities. The regulatory framework applicable to such land use refers to urban planning, environmental regulations, obligatory public bidding and creates a special pledge in favor of its financing entities. Likewise, public company concessions have been progressively allowed, such as the case of the Organic Law of the Empresa de Ferrocarriles del Estado, of 1992-1993.

3.1. Juridical and concept analysis of Concessions and Privatizations:

roads and maintenance was increased from US\$ 190 million in 1989 to US\$ 620 million in 1996.

In general, the goals for all of the aforesaid sectors were reached, in a most competitive construction market, with low prices per unit, adequate study of projects and quality control.

3.2.2. Priorization of private investment through a Public Works Concession system:

This shall be addressed throughout the following pages.

4. PUBLIC WORKS CONCESSIONS:

4.1. Legislation:

In 1990, the constitutional framework as well as the Organic Law of the MOP allowed for the participation of private entities in the development, repair or maintenance of public works as per a contract ("Concession Contract") awarded in public bid in exchange for the temporary concession of its exploitation, including land of public use or fiscal property destined for rendering services, for a term which may not exceed 50 years.

Notwithstanding, such framework vested too much authority upon the State which, due to reasons of public interest, was entitled to unilaterally amend such contractual conditions.

Thus, the Government decided to seek legislative amendments, summoning the relevant interested sectors in order to prepare a consensual legal proposal. In parallel, a program of concessible works through bidding processes was being prepared.

From 1991 to 1996, three amending laws have been passed -it would be more appropriate to say "enlarging" laws- of the legal regime of Public Works Concessions. These were Law N° 19,068 of 1991; Law N° 19,252 of 1993; and Law N° 19,460 of 1996. It is to be noted that such laws were unanimously approved in Congress, both regarding the projects of law and the principles informing such projects.

This political consensus is worthy of praise, because the current regulatory framework entails the possibility of charging for the use of a number of goods which were not subject to tariff. From such amendments, two revised texts have been prepared, namely:

- (a) Decree with Force of Law DFL MOP N° 164, enacted on July 22, 1991, and published in the Official Gazette of September 4, 1991; and
- (b) Supreme Decree DS MOP N° 900, enacted on October 31, 1996, and published in the Official Gazette of December 18, 1996; this Decree set the revised and co-ordinated text of the aforementioned Decree With Force of Law DFL MOP N° 164, and which contains the Public Works Concessions Law (hereinafter, the "Public Works Concessions Law").

4.2. Legal framework applicable to Public Works Concessions Contracts:

The bidding processes and Concession Contracts are regulated by the provisions contained in the following legal texts:

- (a) Supreme Decree MOP N° 294 of 1984, which provides for the Organic Law of the MOP;
- (b) Supreme Decree MOP N° 900 of 1996, current revised text of Public Works Concessions Law;

The MOP is the central State organ, which has been endowed with the authority regarding the Public Works Concessions system. However, the essential steps involved in the development of each project, bidding award and Concession Contract must have the concurring signature of the Minister of Finance ("Ministro de Hacienda").

The decision to grant a Public Work Concession must have the prior approval of the President of the Republic, by means of the Supreme Decree granting the same. Likewise, any amendment or termination of such Concession Contract must be subject to the same procedure.

The Comptroller General of the Republic ("Contraloría General de la República"), agency in charge of safeguarding the lawfulness of Government acts, must grant its approval to the Awarding Decree ("Decreto de Adjudicación") and, eventually, participate in other actions of the Government pertaining to the Concession Contract, like the performance of expropriations and other.

In matters subject to the jurisdiction of another or two other Government agencies (e.g. the construction of airports, in which the MOP's Directorate of Airports and the Directorate General of Civil Air Navigation), governmental actions are defined by an agency agreement entered into by the relevant agencies, or in the bidded project itself. But actions related to the Public Works Concessions Law are perfected by the MOP alone.

During the bidding process, the representative of the MOP is the Director General of Public Works ("Director General de Obras Públicas"), who acts together with a staff unit named General Coordinator of Concessions ("Coordinación General de Concesiones").

Through the operative stage of the Concession Contract, whether it corresponds to a construction or exploitation Concession, the connection is made through the relevant MOP Directorate. An Inspector is appointed for each phase, operating as a "unique connection". Such State inspection acts in co-ordination with a Technical Inspectorate ("Inspección Técnica de Obra o de Explotación"), rendering the necessary professional technical assistance.

4.4. Bidding Process and the Concession Contract:

4.4.1. Nationality of the bidders and of the Concessionaire company:

Bids may be called either as national or international bids. Lately, major projects have been called under this last kind.

Nevertheless, this distinction is not relevant owing to Chilean civil law, according to which every company incorporated in Chile is considered Chilean, notwithstanding the fact that one hundred percent of the equity may be contributed by foreign individuals or juridical persons; this is also the case regarding agencies of foreign corporations, duly registered in Chile.

Besides, the awarded bidder shall have to incorporate in Chile a stock corporation which shall be the concessionaire (hereinafter, the "Concessionaire"), as a necessary step in order to perfect the Concession Contract. The non-fulfilment of such requirement is penalized with the cashing of the afore-mentioned Security Bond of Seriousness of Tender.

The purpose of the legislator was to widen the universe of persons coming forth as bidders. Exceptionally, the following persons may not be bidders:

- (a) Those who have been disqualified under law or sentenced or indicted on account of felony, and neither the non-rehabilitated person under bankruptcy nor its representatives. This provision is applicable to companies should a partner, director or manager of such company

It is customary to establish a term of one month elapsing between the last Circular Letter issued and the deliverance of tenders, thus allowing for the "safe" issuance of such tenders.

4.4.3.2. Open tenders or optional Bidding Guidelines:

Certain bidding processes allow for the bidders to make proposals in connection with certain elements of free choice. In fact, in the El Melón Tunnel Concession and in the Concession of the North access to the city of Concepción, bidders were allowed to trace the layout of the works, within a defined area.

4.4.3.3. Formalities of the tender and its delivery:

The Public Works Concessions Law and the Regulations establish vast formal and substantial requirements, especially regarding expiration dates, which must be carefully dealt with. In general, the proceedings are similar to those ruling fiscal contracts.

The delivery and reception of the tenders must be made on a given date, as per the established requirements.

4.5. Factors of the economic regime governing the Concession Contract or Bid:

The Public Works Concessions Law provides for the contents of the Bidding Guidelines, defines the essential elements and structure of the Concession Contract, separating them from those corresponding to the bidders' proposals.

- (a) Level of investment, resulting from the preliminary project or technical project and from the bidder's tender;
- (b) Tariff structure, which is the maximum permitted under the law. Therefore, the Concessionaire shall be allowed to set it or vary it as its cash flow program;
- (c) Concession term which, in general, may not exceed a 50-year term or lesser, as indicated in the Bidding Guidelines in each case;
- (d) State subsidy to the bidder, in cases where the social benefit is not recuperable through the envisaged tariff, thus justifying a State subsidy;
- (e) Payments to be made by the Concessionaire are very restricted, and are only allowed in cases where pre-existing infrastructure has been rendered;
- (f) State-guaranteed earnings. As a rule, the State guarantess between 65% and 70% of the necessary earnings during exploitation of the work;
- (g) Degree of commitment assumed by the bidder during construction, such as Force Majeure or Acts of God. In general, risks are covered by contracted insurances;
- (h) Tariff readjustment formula and subsequent revision. This is applicable in the cases of long-term contracts, in which it is not possible to foresee the changes in circumstances that may affect the project;
- (i) Scoring in the technical assessment, which may only be utilized in privately originated projects in order to break a draw;
- (j) Extraordinary profits. Tender whereby the bidder undertakes to reduce the tariff or term or make payments to the State, whenever the profits deriving from the works exceed a pre-

this mechanism but by other provisions of the Organic Law of the MOP, regulating collections.

4.7.2. Juridical regime and nature of the Concession Contract:

The Concession Contract is constituted by the applicable legislation, the Bidding Guidelines, including the technical project and the answers issued by the MOP through Circular Letters, all of which forms the contract's "tender". Its "acceptance" is made in the awarded tender's terms and conditions, with the variables chosen by the authority, should there be any option.

The Concession Contract is governed by the rules applicable to private arrangements, with the exception of the relevant provisions which are subject to Administrative Law.

As per the latest amendment to Article 21 of the Public Works Concessions Law, this mixed nature of the Concession Contract was defined, for each of the relevant relationships arising thereof, as follows:

- (a) Administrative Law applicable to the Concession: The Concessionaire is subject to Administrative Law in respect to all of those activities incorporated into the Concession Contract governed by such law, as follows:
 - (i) Relationship with the MOP;
 - (ii) Regulations governing construction and exploitation of the work;
 - (iii) Collecting tariffs and their readjustment;
 - (iv) Services to be performed by the State, financial regime of the Concession Contract; and
 - (v) The remaining Administrative regulatory framework governing technical aspects, safety, financial, labor, environment, sanitary, etc.
- (b) Private Law applicable to the Concession: The private nature of the relationship existing between the Concessionaire and third parties is expressly established.

4.7.3. Perfection of the Contract:

The awarded bidder shall have to comply with the requirements that follow, within the term afforded in the Bidding Guidelines, which shall not be less than 60 days:

- (a) Incorporate the Concessionaire company as promised in the tender, as a stock corporation;
- (b) Execute and lodge and record at a Notary's Bureau, the transcript of the Awarding Decree, furnishing copies to MOP services; and
- (c) Furnish the Security Bond for the construction stage.

The Concession Contract is materialized by the execution and lodging and recording made by the awarded bidder, as a signal of acceptance, of the Awarding Decree and its furnishing to MOP's services.

At this point, the Concession Contract is perfected and the legal framework applicable governing the Concession is traced out.

tender; and

- (d) The State may guarantee in the Bidding Guidelines and the Concession Contract, a limited "risk capital" to the Concessionaire, guaranteeing minimum earnings which shall guarantee the payment of the operation and the payment of credits. This takes place by means of a "traffic or minimum earning" guarantee. Nowadays, this practical requirement has become the basis for a new banking operation business.

Counterpart to the foregoing, the Bidding Guidelines may define an extraordinary earnings rate over which the State shall have a participation of the surplus. To this date, some bids have been awarded setting an earnings rate per annum of 15%, over which the State receives a 50% of the surplus.

4.8.2. Equity Capital Requirements:

Pursuant to Article 26 of the Regulations, a minimum amount of the Concessionaire's own equity capital must be paid, and constituting a 20% "of the offered investment" by the awarded bidder. This shall have to be evidenced at the moment of incorporating the Concessionaire company by means of a bank certificate. Nevertheless, the Bidding Guidelines may -and usually do- established a lesser minimum amount. All of this is without prejudice of corporate law requirements regarding the payment of equity capital for incorporation.

4.8.3. Subordinated Debt:

Regularly, bidding processes require an equity capital equivalent to 10% of the investment, and utilizing the concept of subordinated debt for an additional 10% of such investment. This is a sort of "quasi equity capital" which may not be redeemed until the payment of the credits has been completed. Both of these constitute the minimum and effective risk capital of the Concessionaire.

The banking market has a tendency towards requesting a larger percentage of investment, as equity capital and "quasi capital", in excess. This will vary depending on the assessment of each Concession, Concessionaire company, its shareholders, or other additional guarantees that these should care to contribute.

4.8.4. Earnings and their Management:

Earnings may spring from:

- (a) Tariffs;
- (b) Value Added Tax ("Impuesto al Valor Agregado, IVA");
- (c) State Contributions; and
- (d) Other earnings deriving from exploitation, included in the Bidding Guidelines, in the tender, or that should be expressly authorized, e.g. advertisement, service rendering, new access routes and other.

Earnings are managed by the Concessionaire. The Concessionaire may voluntarily constitute a "trustee management", compulsory in other countries.

reducing a Concession's financial cost and tariffs, by means of:

- (a) Removal of "grave default" as an event of termination of the Concession Contract. In such case, a system of compulsory assignment of the Concession Contract was established, by means of an auction mechanism through a new awarding of the rights arising thereof, for the remaining term of the Concession Contract (compulsory assignment and enforceable liquidation of the Concession Contract). A preferential payment is established in favor of the relevant financial institutions; and
- (b) Creation of a Special Public Works Concession Pledge ("Prenda Especial de Concesión de Obra Pública"). This is a specially created collateral, adapted from Chilean Industrial Pledge ("Prenda Industrial").

The purpose of establishing this pledge is to facilitate the creation and enforcement of guarantees based on Concession Contracts, by means of a clear and simple mechanism of creation and an expedite procedure for enforcing them. The creation of the pledge is very important for ensuring an adequate financing for Concessions.

The Special Public Works Concession Pledge may be stipulated among the parties -i.e. Concessionaire and financial institution- over one or more of the following elements:

- (i) The Concession right;
- (ii) The incomes of the company; and
- (iii) Any payment to be made by the State engaged in the Concession Contract.

As to enforcement, the pledge affords its beneficiary an important preference (a special, second class preference over the rights it refers). In the case of Public Works Concessions, the respondent shall always be a stock corporation, in which case the following creditors would be the only ones having preference in the pledge, over its beneficiary: judicial costs, remunerations, pensions and fiscal credit for certain withholding or surcharge taxes.

In order to have a more effective guarantee, Special Public Works Concession Pledge beneficiaries may exercise additional preferred rights:

- (i) Ius Standi before the "Conciliation Committee";
- (ii) Right to "Veto" the early termination of the Concession Contract by mutual agreement between the MOP and the Concessionaire; and
- (iii) Preferred payment in the case of assignment of the Concession on account of "grave default" by the Concessionaire.

4.8.7. Risks and Insurance:

Concession Contracts on long term infrastructure and public use services encompass a number of risks.

Aside from the fact that these services rest on an uncertain market demand, guarantees of minimum traffic are established.

Generally, the sorts of risks associated to works may refer to:

utility" established in the Ministerial regulations and the expropriation law in force. Besides, "all disbursements, costs or expenses that may be derived from the acts or contracts referred to herein, shall be for the account of the Concessionaire. Nevertheless, the State may concur totally or partially to the payment for the expropriations should the Bidding Guidelines establish so.". The Bidding Guidelines regularly establish the payment of a fixed amount by the Concessionaire for expropriations, as per their estimated value. Oftentimes the Concessionaire must also disburse a certain percentage in excess of such value.

- (i) If any cause of delay were attributable to the State, e.g. procrastination in the expropriations, the term of the Concession Contract must be extended for a lapse equal to the period of delay, without prejudice to other applicable "compensations" (Article 22, N°4); and
- (ii) A special provision regulates easements, indicating that their creation is of the exclusive responsibility of the Concessionaire.

In general, the very same principles pertaining to any public works contract entered into with the State are applicable herein, especially as regards to traffic, waters, mining and other material which may appear during the works.

This stage concludes with the provisional and final acceptance of the works.

4.9.2. Legal regime during exploitation stage:

The legal regime governing the exploitation phase is contained in Article 23 of the Public Works Concessions Law. We may highlight the following aspects of such provision:

- (a) The Concessionaire shall keep the works, its accessories and the level of services, under normal using conditions;
- (b) The continuance of the rendering of services obliges the Concessionaire to provide the same on a regular basis and to suppress any inconveniences or dangers that the users may face, unless such measures alter the normal development of the services, are due to safety reasons or are associated to urgent repair. The obligation of service is solely excused in the case of those who infringe the norms on use of the works;
- (c) The services shall have to be rendered uninterruptedly, except for exceptional events such as Acts of God or Force Majeure. Both Concession Contract and Regulations provisions define the levels of service and the way in which the parties shall concur in order to repair the damages caused by Acts of God or Force Majeure;
- (d) The Concessionaire shall see to the absolute compliance with the Regulations regarding use and up-keeping of the works;
- (e) The MOP keeps a fiscal inspection during the exploitation stage and is accorded direct access to the Concessionaire's data; and
- (f) The penalty for infringements is, as a rule, the imposition of fines. Solely "grave defaults" may cause the termination of the Concession Contract, as defined under Article 57 of the Regulations.

4.10. Bankruptcy of the Concessionaire:

- (b) Compulsory assignment: This assignment was established by the latest and most important amendment, whereby the former termination event of "grave default" was thus amended. Once this event is met, the MOP shall intervene the Concessionaire company with management powers, but after the Concessionaire exercises its right to file a complaint either before the Conciliation Committee or in Court.
- Once the "grave default" pronouncement has been passed, the MOP will be entitled to intervene the Concessionaire and put an end to the Concession Contract in force.
- In such case, within 180 days, the MOP shall publicly bid or auction the Concession Contract to the highest bidder, without establishing minimum bids. Over such payment the creditors will receive payments to their credits. The remainder, if any, shall be given to the Concessionaire.

4.13. Events of termination of the Concession Contract:

The events of termination of a Concession Contract are only a few, namely:

- (a) Expiration of the term of the Concession: This term is set in the Bidding Guidelines and in the Awarding Decree and may not exceed 50 years;
- (b) Mutual agreement between the State and the Concessionaire: In view of preserving third-parties' rights, the MOP shall only agree to such termination with the concurring will of the creditors of Special Public Works Concessions Pledges created on their behalf;
- (c) "Grave default" of the Concessionaire: As indicated above, this is not an event of necessary termination but rather, a compulsory assignment of the Concession; and
- (d) Those stipulated in the Concession Contract: This clause has not been established in the Bidding Guidelines so far. It may take the form of a "purchase" by the MOP whenever certain conditions are met, as per the particulars of each work.

4.14. Conciliation Committee and mechanism:

Law N° 19,068 established a Conciliation Committee ("Comisión Conciliadora"), for general purposes and with special jurisdiction for entertaining the termination of a Concession Contract due to "grave default".

Amendments to the law have turned this Conciliation Committee into an arbitration panel in cases where conciliation arrangements have to be agreed within 30 days, if the Concessionaire should so request. The Concessionaire may also choose to file a complaint before the Court of Appeals of Santiago.

The Conciliation Committee is composed of three professionals with academic degree as per the following appointment: one member is appointed by the MOP; one member is appointed by the Concessionaire and a third presiding member shall be appointed by mutual agreement and, if the parties should fail to agree, by the President of the Court of Appeals of Santiago. Such Court sets out the procedure.

Generally speaking, conciliation is sought for controversies regarding the interpretation or performance of the Concession Contract, arising between the MOP and the Concessionaire and which have been submitted to it.

The Conciliation Committee shall also have jurisdiction in connection with any other claim

- (h) When a public work commenced by private initiative is bidden, the scoring of the bidder may not be considered for assessing the technical offer, except for breaking ties deriving from the financial offer.

4.16.2. Proceedings and stages:

The proceedings for the approval of an idea passes through the following stages, which compliance entails certain acquired rights arising in favor of the proposing entity:

- (a) "Presentation" Stage: Those ideas which are not entertained by the MOP, personally or through private initiative, may be proposed for its development under this mechanism and provided that its study is not reserved exclusively to the State. Thus, projects interfering in other projects or Concessions under study should not be admitted, the latter being of either public or private initiative.

The minimum obligatory contents of the "Presentation" form are established in Article 4 of the Regulations. The technical and economic basic contents are established in order to specify the work and define whether fiscal interest would exist for the formulation of a more elaborate pre-project.

This "Presentation" shall be delivered at the Reception Office ("Oficina de Partes") of the DGOP, which shall register its time and date of submission. Within one month, the MOP shall communicate whether it arises fiscal interest or not. During this period, the relevant State agencies must make a pronouncement in this connection.

If the MOP's pronouncement is favorable, then "Proposal" stage commences. But such acceptance does not imply the approval of the project, but solely the fiscal interest in getting thoroughly acquainted with it, without further liability being assumed by the State.

If the MOP's answer should be negative, the idea may be submitted again, but the MOP shall not be subject to time periods, in such case;

- (b) "Proposal" stage: Articles 4 to 10 of the Regulations make reference to the "Proposal", its time length, contents of the studies, and requirements and rights of the "proposing entity".

In short, the proposing entity is given a 90-day term, extensible one time for an additional 90-day term, for presenting technical, environmental, economic and special studies which should be requested, as per the nature of the project.

In the case of complex proposals -at the first submission-, a two-year term may be requested for the development of studies throughout stages and the MOP's decisions regarding public interest.

The untimely delivery of the Proposal causes the proposing entity to be considered to have desisted from the project. In that case, the MOP will be entitled to undertake it as its own.

If this should not be the case, the idea is open for another "Presentation".

The non-complying "proposing entity" is not precluded from initiating a new proceeding, but the MOP is likely to reject its new "Presentation".

Proposition studies consist of the following three elements:

- (i) Administrative requirements;
- (ii) Description of the Concession, characteristics of the service and private and social assessment, identifying costs and incomes of the Concessionaire; and

- proposing entity, so that it may participate in the bid and apply for the prize that should correspond as per the assessment of the Proposal, during a three-year term; and
- (iii) The non-appearance of the proposing entity to the the bidding process, having been given notice through letter remitted by certified mail, shall mean its waiver of all of its rights as initiator.

5. TAX REGIME:

Tax regulations applicable to Concessions have been established as a matter of law instead of being subject to the Chilean IRS's interpretation, as was the case prior to the amendment of 1996.

5.1. Purpose of the Regulations:

- (a) To assimilate Concession Contracts to other activities as regard to their applicable tax regulations:
 - (i) The work to be built shall be the property of the State;
 - (ii) The work is paid through the income flows (tariff or other);
 - (iii) Incomes are accrued at the starting of operation of the Concession Contract, but shall be received by the Concessionaire through a number of years;
- (b) The recognition of the independence of the "public work Concessionaire" activity: The necessity for the Concessionaire to "directly " build a part of the work in order to have access to a V.A.T. refund has ended. The Concessionaire is not longer assimilated to a construction company. Now the Concessionaire company will be able to freely choose to build or sub-contract the work, with the right to a refund of the V.A.T.;
- (c) The partial refund -by stages- of V.A.T.: The current regulations allow for the periodical V.A.T. refund payment, with invoices for partial advances, which decrease the financial cost for the Concessionaire;
- (d) Tax shall be paid after the income is received by the Concessionaire: Theoretically, the "investment of the Concessionaire" is its asset. However, a Public Works Concession is always a matter of fiscal property. Therefore, in the Balance Sheet, the "asset" of the Concessionaire shall always be the "price of the work". At the beginning of the operation of the Concession, its price is accrued instantaneously, generating the obligation to make the tax payment. This occurs a the result of the application of general tax regulations which order the tax payment "when it accrues or is paid, whichever occurs first". Notwithstanding, in these cases, the payment shall be made throughout many years and, in most cases, throughout more than one decade. By virtue of tax ex aequo et bono, new provisions establish that the tax shall be calculated and shall be paid only after payment has taken place;
- (e) V.A.T. is not applicable to toll payers. However, the Concessionaire may recuperate its V.A.T. payments (purchase of materials o consumables for construction, reparation and other). On that account, a legal fiction is established according to which a percentage of incomes (specified in the Bidding Guidelines) shall be subject to V.A.T. in order to calculate over such amounts the reimbursement of effective payments of V.A.T. made by the Concessionaire company. On the other hand, construction stage V.A.T. is reimbursed by the MOP, as "proprietor" of the works,

- (g) Today, several national holdings form the Concessionaire companies. Various foreign companies participate in Concessionaire or pre-qualified national consortia. Among the Concessionaires associated with national companies, we may highlight three Spanish companies (3 Concessions), one United States company and one Mexican company (2 Concessions). On the other hand, another Spanish company was the sole awardee, without association whatsoever;
- (h) The sector constitutes a national and foreign investment alternative, which has proven quite attractive due to its mechanics but also owing to Chilean national stability and economic growth; and
- (i) Towards the end of 1998, an additional US\$ 1.8 billion are expected to be invested in these Concession Contracts.

ADDITIONAL INFORMATION: We suggest your review of our additional reports "Investing in Chile" and "Infrastructure Investment Areas in Chile", which are available at your request.

If you have any questions or would like additional information regarding these matters, please contact **Juan Enrique Miquel**, Esq. at Estudio Miquel Ltda. (562) 233 49 40 or **Eugenio Besa**, Esq. at Morales, Noguera, Valdivieso & Besa (562) 334 00 00.

This Report has been prepared as an information to clients and friends. Please recognize that the information is general in nature and does not constitute legal advice. The lawyers listed above would be happy to discuss in greater detail the information contained in this Report and its application to your specific situation.

Exhibit N° 2

PUBLIC WORKS IN CONCESSION ACCORDING TO THE ORIGIN OF THE IDEA

From the 13 bid works:

- (a) 8 corresponding to the MOP Program, and
- (b) 5 to private initiative:
 - (i) Camino del Ripio
 - (ii) Road Access to AMB Santiago Airport.
 - (iii) Airport terminal of Puerto Montt.
 - (iv) Airport terminal of Iquique, and
 - (v) Highway Santiago - Colina - Los Andes.

Except for the last mentioned project, with an investment that will surpass US\$ 140 million, the other private initiative works are of low investment, almost marginal in the system.

Exhibit N° 4

AIRPORT TERMINAL PROGRAM

Recently announced, with:

- (a) 4 works to be bidded in 1997; and
- (b) possible extension of the 2 Concessions in current construction: Iquique and Puerto Montt.

It will include:

- (i) passenger terminals;
- (ii) parking lounge;
- (iii) installation; and
- (iv) its administration.
- (v) In some, cargo terminals may be added.

These are:

- (i) Calama;
- (ii) La Serena;
- (iii) Concepción; and
- (iv) the enlargement of AMB Santiago Airport (the most relevant).

The investment is estimated in US\$ 150 million, including the cargo terminal of Santiago and installations in some Regions.

These projects are from private origin, except for the Santiago Airport.