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Brazil

Public Procurement

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This country-specific Q&A provides an overview of public procurement laws and regulations applicable in Brazil.

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Brazil: Public Procurement

*"Complex contracts" refers to contracts including: where the needs of the contracting authority cannot be met without adaptation of readily available solutions; contracts involving design or innovative solutions; where prior negotiation is required before a contract can be awarded due to particular circumstances related to the nature, the complexity or the legal or financial make-up of a contract or because of risks attaching to these circumstances; and where technical specifications cannot be determined with sufficient precision with reference to established technical standards, references or specifications.

1. Please summarise briefly any relationship between the public procurement / government contracting laws in your jurisdiction and those of any supra-national body (such as WTO GPA, EU, UNCITRAL).

Pursuant to the Brazilian Federal Constitution, public procurement rules are mandatory to all entities controlled directly or indirectly by the government. In this sense, public agencies of any kind, government funds, public foundations, and government-owned companies in all levels of the federation – federal, state, and local – shall comply with public procurement steps and requirements provided in the applicable legislation to engage in contracts with private parties for the acquisition of goods, works, and services, as well as to proceed with the sale of assets. These procurement rules are provided by three main statues, as indicated below. Apart from eventual form of inspiration, there is no connection between Brazilian official procurement rules and those rules provided by any supra-national body (such as WTO GPA, EU, UNCITRAL).

2. What types of public procurement / government contracts are regulated in your jurisdiction and what procurement regimes apply to these types of procurements? In addition to any central government procurement regime please address the following: regulated utilities procurement regime (e.g. water, gas, electricity, coal, oil, postal services, telecoms, ports, airports), military procurements, non-central government (local, state or prefectures) and any other relevant regime. Please provide the titles of the statutes/regulations that regulate such procurements.

As a rule of thumb, all contracts executed by the government or government-controlled entities must abide by public procurement regulation. Accordingly, the government can only contract engineering works, services, provision of goods, sale its assets or transfer to the private party the right to provide public services after carrying on a competitive public bidding process with the purpose of choosing the most advantageous offer/proposal among those presented by private interested parties.

In Brazil, Law No 14,333/2021 is currently the main legal framework for the procurement of government contracts. This statute provides general principles and rules on public procurement, steps, and requirements for the contract award procedure, as well as guidelines that shall govern the relationship between the government and private contracted parties. Law No 14,333/2021 was enacted in early 2021 and substituted Law No 8,666/1993, the prior public procurement law, that shall only remain in force governing contracts originally executed under its validity. From now on, we are referring to Law No 14,333/2021 as the Brazilian Public Procurement Law (PPL).

Depending on the scope of the public procurement process or who is the government contracting authority, other laws may apply, such as the following:

- Law No 8,987/1995: provides general rules for concessions of the right to provide public services, such as sanitation, energy, toll road, airport infrastructure etc.).
- Law No 10,520/2002: provides rules for an alternative

type of procurement process used for the acquisition of common goods and services that the government is used to contracting out on regular basis.

- Law No 11,079/2004: legal framework applicable for public-private partnerships (PPPs). PPP, as defined in this Law, is a type of public concession in which the government engages with a private party with the purpose of providing public services (sponsored PPP) or the rendering of a service to the government itself (administrative PPP), which shall demand, in any case, high investments and a long-term amortization period. The PPP Law was created with the purpose of attracting a new wave of private investments for projects of high social interest, especially in the infrastructure sector, which, in other conditions, would not be economically feasible for the government.
- Law No 12,462/2011: this law was originally created with the purpose of providing special public procurement rules for works and services related to infrastructure projects for the World Cup FIFA 2014 and the Olympic Games 2016. Afterwards, this law started to be applied for various purposes, such as actions included within the National Growth Acceleration Program (PAC); the National Health System (SUS); prison system; urban mobility; national security; innovation and technology; among others.
- Law No 13,303/2016 and Decree No 8,945/2016: the legal framework for government-owned companies provides specific procurement rules applicable to public companies; mixed-capital companies; and their subsidiaries. This statute allows the government-owned companies to enter strategic partnerships with the private sector with no requirement to launch a prior public bidding process.

3. Are there specified financial thresholds at which public procurement regulation applies in your jurisdiction? Does the financial threshold differ depending on the nature of procurement (i.e. for goods, works or services) and/or the sector (public, utilities, military)? Please provide all relevant current thresholds in your jurisdiction. Please also explain briefly any rules on the valuation of a contract opportunity.

As a rule, all contracts are submitted to the public procurement regulation. There are minimum value thresholds, but they are significant low when compared to those fixed in other jurisdictions. PPL provides that the government is not required to launch a competitive public bidding process for contracting engineering works or services with a total value of up to BRL 100,000 and other service or purchase with a total value of up to BRL 50,000. Conversely, Law No 13,303/2016 provides the same minimum value thresholds applicable to government-owned companies, which are not required to launch a competitive public bidding process for contracting engineering works or services with a total value of up to BRL 100,000 and any other service or purchase with a total value of up to BRL 50,000. These are typical scenarios of waiver of the public procurement regulation, in which the government and government-owned companies can proceed with a direct hiring.

Regarding the estimation of the contract, PPL regulates the government, before the launch of the public procurement, shall conduct an estimation of the contract value. Such estimation is usually performed through one of the following parameters: (a) price list prepared and maintained by public authorities, such as the “SINAPI list” used for construction input prices; (b) market sounding usually conduct with players in the economic segment related to object of the future public procurement; or (c) economic feasibility studies carried out by specialized companies, usually employed in high complex public procurement such as those related to utility concessions.

Important to mention that PPL assigned to the government the prerogative to disclosure or not the budget for the contract. If the government chose to disclose, then the estimated value or budget shall work as a threshold for the proposals, meaning that only those proposal equal or lower than the budget shall be accepted. Differently, the government may choose to reveal the budget or estimated price only after receiving the proposals. In this scenario, the bidder that presented the best proposal shall chose whether meet the government budget or let its proposal being declassified.

The prerogative to hold the budget or the estimated value of the contract is not applicable to the public procurement that use the higher discount criteria. In the higher discount criteria, the estimated global value of the contractual is the main element to guide the elaboration of the proposal by the bidders, since the proposal need to carry a discount on the global value estimated and made public by the government authority.

4. Are procurement procedures below the value of the financial thresholds specified above subject to any regulation in your jurisdiction? If so, please summarise the position.

The contracts executed by the government or state-owned companies without a prior bidding process, like those resulting from direct hiring authorized for non-

achievement of the minimum financial threshold are still subject to public procurement regulation. In this type of situation, PPL and Law No 13,303/2016 only release the public entity from the obligation to start a bidding process to choose the private provider. The other rules related to the execution of the contract remain applicable and must be observed by the private provider.

5. For the procurement of complex contracts*, how are contracts publicised? What publication, journal or other method of publicity is used for these purposes?

For the purpose of launching a procurement process of a complex contract, the government awarding authority must publish in the official gazette a formal notice containing the main features of the public tender process, such as: (a) the scope of the contract; (b) the evaluation criteria; (c) the contract term; (d) the date for proposal submission; and (e) where the tender documents can be found.

The tender notice shall be published in an official gazette (federal, state, or local gazette depending on the level of the awarding authority) and in a newspaper with a wide audience. For complex contracts, the tender notice must provide 60 (sixty) days to bidders presents its proposal.

Law No 13,303/2016 allows government-owned companies to adopt a slightly different and more flexible procedure for certain procurement processes in view of the particularities of the intended contract, whereby the contracting company send a request for proposal (RFP) directly to a limited number of preselected players without prior publication of a formal tender notice. In cases like this, only the result of the tender process and an extract of the contract are published in the official gazette. For complex contracts, the request for proposal must provide 45 (forty and five) days to bidders presents its proposal.

Once the contract is awarded to the winning bidder, the government awarding authority must follow the same publicization procedure. In other words, an excerpt in the format of a summary of the main features of the contract must be published in the official gazette. Publication of the excerpt in the official gazette is a formal condition provided in the PPL for the contract to produce legal effects between the parties and third parties.

6. For the procurement of complex contracts, where there is an initial selection stage before invitation to tender documents are issued, what are typical grounds for the selection of bidders? If there are differences in methodology between different regulated sectors (for example between how a utility might undertake a regulated procurement procedure and how a government department might do so), please summarise those differences.

Brazilian public procurement legislation provides rules for a preliminary selection stage that may take place before the public bidding process. According to the PPL (Article 80), the government may require interested bidders to attest technical capabilities of performing the main parts of the scope of the future bidding process. Pre-qualification consists of a pass-or-fail stage: those who comply with the requirements will be able to participate of the future bidding process. Each pre-qualification tender document shall provide specification of the certificates and other documents to be submitted, as well as objective criteria to be met by the attending players.

Private companies that act as concessionaires of public services are not subject to public procurement regulation, since this set of rules applies only to public entities (central government, the public agencies, and state-owned companies). The private utilities provider is subject to a specific regulation on how the services shall be provided to the users, but these rules do not encompass the obligation to follow public procurement procedures. On the other hand, the government department, its public agencies, and even the state-owned companies are subject to the public procurement regulation, applying to them the statutes mentioned above.

7. Does your jurisdiction mandate that certain bidders are excluded from tendering procedures (e.g. those with convictions for bribery)? If so, what are those grounds of mandatory exclusion? Are there any notable features of how this operates in your jurisdiction e.g. central registers of excluded suppliers? Does your jurisdiction specify discretionary grounds of exclusion? If so, what are those grounds of discretionary exclusion?

The legislation establishes eligibility requirements that shall be met by the interested party. In any scenario, the interested party shall demonstrate that it: (a) is a legal entity duly constituted under Brazilian law or foreign law

in the case of international bidding procedure; (b) has non impediment to contract with the government; (c) has no debt with the Federal, State or Municipal tax authority; and (e) has no debt with its employees.

Both PPL and Law 13,303/2016 confers to the government and state-owned companies respectively the prerogative to apply penalties that restrict for a certain time the right of the private party to participate in the bidding process and engage in a contract with the public administration. Those penalties are applicable in case of significant noncompliance with the contract obligations and generally are applicable as a last resort.

The Judicial Courts can apply a similar restriction, based on Law 8,429/1992 which provides sanctions to improbity acts, a concept that encompasses several misconducts related or not with the execution of public contracts. The Federal Court of Accounts also can apply such restriction based on Law 8,443/1992 which regulates the functions of the court of accounts and establishes the prerogative to penalize private parties that act in a bad manner when engaging with public authorities.

A company penalized with such restriction is prohibited from participating in the bidding process. There are official lists prepared and maintained by public authorities indicating the private players that are prohibited to participate in new public procurement procedures. In practice, the government authorities usually check the official list in the early stage of the bidding process just to make sure that the private party is not bypassing the restriction.

8. Please describe a typical procurement procedure for a complex contract. Please summarise the rules that are applicable in such procedures. Please include a timeline that includes the key stages of the process, including an estimation for the total length of the procedure.

Competitive tender is the most relevant and commonly used tender procedure modality by the government for awarding a complex contract, such as those structured in the form of concession of public services and PPPs. The competitive tender encompasses the following phases:

- preliminary phase, where the awarding authority shall verify that the interested party does not have any impediment to contract with the government, such as a debarment or any conflict of interest;
- qualification phase, where the awarding authority assesses the interested party's financial and technical conditions and capacity; and
- competitive phase, where the proposal submitted by the bidders shall be classified and an auction with the best-classified parties may take place.

The government contracting authority issues an administrative decision after the end of each phase, which can be appealed by all bidders. The contracting authority has the power to postpone the qualification phase to the end of the tender procedure, a scenario where the awarding authority assesses the qualification documents only of the winning bidder.

9. If different from the approach for a complex contract, please describe how a relatively low value contract would be procured. (For these purposes, please assume the contract in question exceeds the relevant threshold for application of the procurement regime by less than 50%)

Assuming that such contracting exceeds the threshold, it would be operated though invitation or auction session.

The Invitation is a type of tender procedure limited to interested parties of a certain sector connected with the scope of the contract, whether pre-registered or not before the government awarding authority, which are chosen and invited, in a minimum number of three.

The Auction Session is the modality of procurement used for the acquisition of common goods and services that the government contracts on a regular basis.

10. What is seen as current best practice in terms of the processes to be adopted over and above ensuring compliance with the relevant regime, taking into account the nature of the procurement concerned?

Transparency is perceived as good practice in other to ensure compliance within the public procurement. The recent corruption scandals have shown that lack of transparency in the bidding process and also in the monitoring of the contract was the main enabler to wrongdoing committed by and between public and private parties. By increase the level of transparency in all stages of the public procurement, the public authority managed to avoid or at least make more difficult the practice of wrongdoing.

11. Please explain any rules which are specifically applicable to the evaluation of bids.

Pursuant to the PPL, the government must pursuit the most advantageous proposal to satisfy the public(s) interest(s) or need(s) connected to the launched public bidding process. The legislation set forth the following evaluation criteria to choose the most advantageous proposal: (a) lowest price; (b) higher discount in the contractual global price indicated by the government (c) best technical expertise; (d) higher purchase offer when the government is selling something; and, for those tenders aiming to transfer to the private sector the provision of public utilities; (e) lowest fee paid by the user; and (f) higher offer for the concession award.

The criteria for choosing the most advantageous proposal can vary in each tender, depending on what is being hired and on the conditions of the selection process. As a rule, the awarding authority tends to use the lowest price criteria to contract common goods and services.

12. Does your jurisdiction have specific rules for the treatment of bids assessed to be "abnormally low" for the purposes of a particular procurement (i.e. a low priced bid, significantly lower than any other bid or a bid whose pricing raises questions of sustainability/viability over the contract term)? If so, is there a definition of what "abnormally low" means and please can you provide a short summary of the specific rules?

Pursuant to Law No. 14,133/2021, bids can be disqualified from a bidding process if their price is deemed to be abnormally low. Such mechanism aims to avoid contractual defaults caused by the private party's inability to supply the contracted goods or services at the offered bidding price. Law No. 14,133/2021 envisages that bids priced lower than 75% of the contracting authority's estimates will be disqualified. However, such thresholds are only applicable to public procurements related to civil works or services and there are no parameters for the disqualification of unsustainable bids in other types of procurements. It is important to note that bidders are entitled to justify the offered price and demonstrate that it will not jeopardize the contract's performance whenever their bid is disqualified for being deemed too low, which may result in its validation by the contracting authority.

13. Please describe any rights that unsuccessful bidders have that enable them to receive the reasons for their score and (where applicable in your jurisdiction) the reasons for the score of the winning bidder. Are regulated procuring bodies required to provide these reasons for their award decision before awarding the contract in question?

Obligation to Disclose Bidder/Tender Evaluation Methodology: The public tender documents must provide the criteria and other elements that would be used by the government contracting authority to select the winner of the contract award procedure. In this sense, any interested party knows from the beginning of the tender procedure what is necessary to take part in the competition and how the offers shall be evaluated.

Obligation to Notify Interested Parties Who Have Not Been Selected: The government contracting authority must select the bidders apt to participate in the contract award procedure according to the requirements and criteria provided for in the tender documents. Any exclusion of participants must be followed with a public decision issued by the government contracting authority with the reasons for the exclusion. In this scenario, the excluded party can request a reconsideration of such a decision to the awarding authority, which may review the decision or confirm it. With the confirmation for the exclusion, the party cannot take part in the contract award procedure anymore and can challenge the administrative decision in Courts.

Obligation to Notify Bidders of a Contract Award Decision: The government contracting authority is not obligated to directly notify any of the interested parties about the contract award decision. All formal communications within the public tender procedure shall be made through publication in the official gazette or through the website page of the awarding authority. In this sense, the party that did not win the tender shall be informed by the official statement made widely available by the awarding authority. The official statement shall encompass the criteria that was used to evaluate the offers and the identification of the winner bidder.

14. What remedies are available to unsuccessful bidders in your jurisdiction? In what circumstances (if any) might an awarded contract be terminated due to a court's determination that procurement irregularity has

occurred?

Any interested party can request to the government awarding authority the reconsideration of any decision issued during the tender procedure. There is no appeal to a higher authority or a different body: the awarding authority is responsible to review its own decision. After the decision on the reconsideration request, the decision is considered final within the administrative level.

However, the interested party may challenge any administrative decision in the Judiciary or before the Court of Accounts. Both Courts have the power to issue injunctions determining the suspension of the whole tender procedure until analysis of the merits of the dispute.

Court of Accounts: In Brazil, the Court of Accounts is the public entity responsible for auditing government tender procedures and contracts arising therefrom. Please note that the Court of Accounts do not monitor and/or conduct audits over the private contractor, but only regarding the execution of a contract entered with a government entity under its jurisdiction. Each government level in Brazil is audited by a Court of Accounts: the Federal Government and all of federal entities shall respond to the Federal Court of Accounts (TCU), while the State and Local Governments – as well as their entities – shall respond to the State Court of Accounts (TCE, in the Brazilian acronym) of the respective State in which they are located. Only the Cities of São Paulo and Rio de Janeiro have a specific Local Court of Accounts (TCM). All the other cities in Brazil shall respond to the corresponding State Court of Accounts of the State where they are located.

The Courts of Accounts are independent government entities responsible for accounting, financial, budgetary, operational and equity control of the corresponding Government. Despite of the denomination, the Courts of Accounts are not part of the Judiciary branch. In fact, they are connected to the Legislative branch of each level of Government and assist the parliamentarians in controlling and evaluating public accounts and contracts from three perspectives:

- legality, which refers to an assessment of an act or contract in view of the applicable legislation;
- legitimacy, which refers to the legal ability to perform the act or contract; and
- economic, which corresponds to an analysis on the public resources spent and the results obtained by the Government.

Judicial Courts: On the other hand, in case of breach of the procurement legislation, the interested party may claim proper remedies in judicial Courts to declare null and void the tender procedure or to cure the breach of the procurement legislation (*e.g.*, declaration of annulment of the interested party wrongful exclusion from the contract award procedure). Remedies available in the Judiciary Branch are comprised (not exhaustively) of the following: writ of mandamus; action for annulment; indemnification; injunctions; and popular action.

The writ of mandamus (*mandado de segurança*) is the typical lawsuit for challenging any administrative act and decision. The plaintiff is required to prove its claim by means of documentary evidence. Pursuant to Law No. 12,016/2009, the writ must be filed within 120 days of the date of the unlawful administrative decision/act.

Claims for annulment and indemnification may be filed by bidders for any purpose. In terms of standing, the applicant needs to prove its participation in the tender procedure and the type of breach incurred by the government awarding authority.

Injunctions can only be obtained in Courts if plaintiffs establish the following three elements:

- a reasonable likelihood of success in the merits of the case (*fumus bonis iuris*); and
- imminent, irreparable harm that will result if injunction is not granted (*periculum in mora*).

The popular action is an appropriate remedy to void administrative acts or contracts causing damages to the public (federal, state, or local) assets. The plaintiff thereby does not defend his own right, but certain collective right associated with a public interest. Any citizen (person who is entitled to vote) may file a popular action to protect, besides the public asset itself, the administrative morality, the environment, and the historical and cultural heritage.

The Judiciary Branch may order either the suspension of the contract award procedure or of the contract itself in case of breach of the PPL. The suspension would last until the government authority remedy the irregularity or otherwise until a final decision, which may determine the termination of the government contract if any irregularity has been identified and not duly remedied by the contracting authority.

15. Are public procurement law challenges common in your jurisdiction? Is there a perception that bidders that make challenges

against public bodies suffer reputational harm / harm to their prospects in future procurement competitions? If so, please provide brief comment. Assuming a full hearing is necessary (but there are no appeals), how much would a typical procurement claim cost: (i) for the defendant and (ii) for the claimant?

Challenges involving public procurement matters are common in Brazil. Pursuant to the Brazilian Federal Constitution, the law shall not exclude any injury or threat to a right from the analysis of Judicial Courts (Article 5, XXXV). In view of such constitutional provision, as well as based on the PPL and related legislation, there are neither reputational harm nor disadvantages in prospective procurement competitions for those who make challenges against government entities, provided they do so in good faith.

Our experience in dealing with public procurement shows that it is more common than not to have bidders trying to challenge the awarding government's decision with the purpose of reverting an unfavorable result. Administrative challenges are usually based on the arguments of (i) government's failure to comply with the public procurement regulation and with the specific rules provided in the tender documents; and/or (ii) an attempt to disqualify competitors by means of identifying flaws in their documentation.

No fees are required from a party in challenging an awarding government's decision. Pursuant to the PPL and Law No 9,784/1999, any bidder has the right to challenge administrative decisions within a public bidding process without the assistance of lawyer (although participation of lawyers at this stage is a common market practice). Conversely, judicial challenge of an awarding government's decision requires a licensed lawyer and the payment of applicable fees to the Court, which may vary depending on the amount in dispute and the state in which the lawsuit will be filed.

16. Typically, assuming a dispute concerns a complex contract, how long would it take for a procurement dispute to be resolved in your jurisdiction (assuming neither party is willing to settle its case). Please summarise the key stages and typical duration for each stage.

In the administrative level, the government authority's decision may be challenged within five working days since its release. Pursuant to the PPL, the government authority has five business days to respond claims/appeals within a public tender procedure.

Brazilian law does not provide for a specific time length for administrative proceedings before Court of Accounts. The length of judicial challenges of a government's decision may vary depending on the complexity of the dispute, the authority responsible for judging the claim, the place of the dispute, among other factors. In the judiciary, the time limits depend on the remedy used by the interested party but it is reasonable to work with an average time limit of five years. After this time limit, even if an irregularity is identified, the judiciary tends to preserve the contract and convict the persons involved in the wrongdoing. The Court of Accounts tends to take a similar approach.

17. What rights/remedies are given to bidders that are based outside your jurisdiction? Are foreign bidders' rights/remedies the same as those afforded to bidders based within your jurisdiction? To what extent are those rights dependent on whether the host state of the bidder is a member of a particular international organisation (i.e. GPA or EU)?

The applicable legislation, rights, and remedies are the same either to Brazilian or overseas-based companies that have subsidiaries in Brazil.

18. Where an overseas-based bidder has a subsidiary in your territory, what are the applicable rules which determine whether a bid from that bidder would be given guaranteed access to bid for the contract? Would such a subsidiary be afforded the same rights and remedies as a nationally owned company bidding in your jurisdiction?

The applicable legislation, rights, and remedies are the same either to Brazilian or overseas-based companies that have subsidiaries in Brazil.

19. In your jurisdiction is there a specialist court or tribunal with responsibility for dealing with public procurement issues? In what circumstances will it have jurisdiction over a public procurement claim?

No. In Brazil we do not have specialized Courts or

tribunals with power to deal with public procurement issues. Disputes regarding public procurement legislation take place in judicial Courts or in arbitration proceedings depending on the dispute resolution clause. Nonetheless, please note that certain state Court systems in Brazil, there are specific sections

20. Are post-award contract amendments/variations to publicly procured, regulated contracts subject to regulation in your jurisdiction? Are changes to the identity of the supplier (for example through the disposal of a business unit to a new owner or a sale of assets in an insolvency situation) permitted in your jurisdiction?

The PPL provides general rules on how government contracts can be modified after being awarded to the contracted party. Amendments are permissible, with proper justification, in the following cases:

- unilaterally, by the contracting government, whenever:
  a. *Qualitative Modification*: the project or its specifications must be qualitatively modified for a better technical adequacy of the scope. In this situation, the contract may be amended up to a maximum of 25% of the adjusted initial amount of the contract, or up to a maximum of 50% in the case of building or equipment refurbishing that require additional works, services or supplies; or
  b. *Quantitative Modification*: the amounts specified in the contract have to be adjusted in view of a quantitative increase or decrease of the scope, within the same percentage limits established above; or
- upon mutual agreement between the parties whenever:
  a. replacement of the performance bond is required;
  b. it is necessary to modify aspects of the works or the service regime, as a result of a technical verification that original contract terms are no longer applicable;
  c. the form of payment must be modified, as a result of supervening circumstances, provided that the initial value is adjusted and maintained; or
  d. rebalance of the economic conditions of the contract is mandatory.

Please note that that for concession and PPP contracts the percentage limits provided in the PPL do not apply. This is because of the complex nature of these types of contracts, whose economic-finance balance depends on the proper risk arrangement between the parties and the corresponding actions to be implemented to mitigate adverse impacts on the contract execution.

Corporate Structure Changes: As a rule of thumb both the PPL and the legal framework governing concessions and PPPs allow modifications in the corporate structure of the contracted party provided that (i) there is a specific provision in this sense in the tender documents and in the contract itself and (ii) the modification at stake does not impact the execution of the contract. Otherwise, the government contracting authority can terminate the contract with due cause. Therefore, depending on the structure for the transaction, if such corporate restructuring may jeopardize the execution of the government contracts because of any impact on the required conditions of the contractor to perform the services (technical, financial, operational, etc), the government contracts may be terminated. It is worth mentioning that the termination is not automatic, as the government client shall demonstrate that the corporate change effectively jeopardized the execution of the agreement with a corresponding loss.

Change of Control: The PPL does not provide specific rule on change of control of the contracted party. On the other hand, the legal framework applicable to concessions and PPPs is clear in stating that the transfer of the concession or of the concessionaire's equity control without prior consent of the granting authority shall imply termination of the concession. Even though prior consent is duly obtained, change of control shall only be allowed if the interested party (i) comply with the requirements of technical capability, financial fitness and tax and legal regularity necessary to the undertaking of the service; and (ii) undertake to comply with all clauses of the contract in force.

21. How common are direct awards for complex contracts (contract awards without any prior publication or competition)? On what grounds might a procuring entity seek to make a direct award? On what grounds might such a decision be challenged?

Even though the general rule applicable to the Government when contracting with third parties is to do so by means of a public bidding process, such rule accepts exceptions. According to the PPL, the Government is allowed to proceed with a direct hiring in two hypotheses:

a. whenever the legislation itself waives the launching of the competitive public bidding (*dispensa de licitação*),

hypotheses exhaustively provided the in PPL (Article 75); and

b. whenever the circumstances allow the conclusion that a competitive bidding proceeding is unfeasible or incompatible with the purpose of the contracting, which could be named as of exemption to the bidding proceeding requirement (*inexigibilidade de licitação*). The characterization of such unfeasibility or incompatibility depends on the verification of the requirements provided in Law (Article 74 of the PPL): technical service; notorious expertise of the contractor and singular nature of the services.

In both scenarios – waiver or unfeasibility of a public bidding process – the Government is allowed to directly hire a third party to acquire goods and services. The direct hiring is a much more flexible process in which the Government is not obliged to observe all steps provided in the PPL.

In this regard, Law No. 13,303/2016 introduced a new legal hypothesis according to which a bidding process is not required. Government owned companies are allowed to pursue a direct hiring for (i) direct commercialization, rendering or execution of products or services by the government owned companies specifically related to their corporate purpose and (ii) in cases in which the choice of a strategic partner is associated with some of its particular characteristics, related with defined and specific business opportunity in scenarios where the impossibility of the competitive process is justifiable.

The strategic partnerships between a government owned company and a private party are the main innovation in Law No. 13,303/2016.

22. Have your public procurement rules been sufficiently flexible and/or been adapted to respond to other events impacting the global supply chain (e.g. the war in the Ukraine)?

Brazilian legislation does not specifically address the issue of events that might impact the global supply chain when it comes to public procurements. However, the applicable legislation provides mechanisms that allow for flexibility in the contract's performance in cases where it is impacted by events considered as Act of God or Force Majeure – such as wars or pandemics. May such events occur, the contract can be reviewed in order to reestablish the balance between supply prices and the private party's compensation.

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