



PPPS AND CONCESSION AGREEMENTS A GUIDE FOR COMPANIES INTERESTED IN SETTING

Co-Organizato



Organizato

UP A CONSORTIUM



PPPS AND CONCESSIONS

GUIDE FOR ORGANIZATION OF COMPANIES IN CONSORTIA

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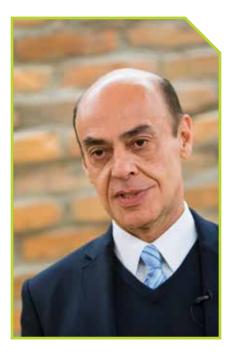
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SUPPORTING THE DEBATE

The progress of partnerships between the Public Administration and the private sector that is fundamentally achieved through Concession and Public-Private Partnership (PPP) projects, takes place for two factors: The significant decrease in the PublicAdministratio ability to invest and the need to reduce the State's size, focusing on better planning and management.

Such progress requires a real cultural shift of public and private players as for social infrastructure and logistics works, until recently governed by the General Bid and Public Contract Act.

It is importante for contractors to undertand that their role is now to lead the execution of a partnership contract, to enjoy more room on management and also to take more responsibility for the outcomes.

This new role, for small and mid-sized companies above all, can be better performed through the combination of abilities between partners and by sharing and mitigating risks. These are usually larger works, with contracts longer than 20 years.

Such "grouping" of partners translated into Consortia, with well-defined rules and procedures since its creation.

This work aims to support, in a practical, realistic way, these companies to organize themselves in consortia.

This is another step that the Brazilian Construction Industry Chamber (CBIC – Câmara Brasileira da Indústria da Construção) and National Industrial Learning Service (Senai – Serviço Nacional de Aprendizagem Industrial) make to ensure a safe, effective development of Concession and PPP programs and to strengthen the Brazilian economy.





I. INTRODUCTION

I.1. WHAT DOES DOING BUSINESS IN CONCESSIONS AND PPPS MEAN?

- 1.1. Concession Agreements, including Public-Private Partnerships (PPPs), are a special method of public hiring and budgeting services, works, and utilities¹.
- 2. This is the public field that is more accessible and friendly to the entrepreneurship that marks the private sector, as it is through this specific hiring method that the Hired Party performs a leading role in executing the contract, has more room to manage the means necessary and, as a consequence, takes more responsibility for the results.
- 3. Even for PPPs, where the Private Partner receives counter payment from a Public Entity, such compensation is tied to the project's performance and the Private Partner is in charge of getting resources whether by its own capital or from third parties, to operate while the public counter payment is not done and to the periods of time when the sum of investments and expenses is higher than the public counter payment value, which often happens in the Concession's first years.
- 4. In addition to such responsibility of deploying financial resources to execute the contract in larger or smaller proportion as the model is an Ordinary, Sponsoredor Administrative Concession, gradually doing business in any Concession modality implies the assumption of certain risks that are higher than in traditional public work contracts, governed by Law 8.666/93.

¹ For further detail on the concept and differences for work contracts, grants and PPPs in both sponsored and administrative modalities, refer to the *Grant and Public-Private Partnership Guide*, developed under request of the *Brazilian Construction Industry Chamber (Câmara Brasileira da Indústria da Construção, CBIC)* by the law firm Escritório *Vernalha Guimarães & Pereira Advogados*.

- 5. Hence it is said that the execution of a concession's object is performed by the *Concessoinarie's sole responsibility*.
- 6. However, this original concept of Concessoin as a legal institution does not mean that *all* business risks shall be *fully* and *solely assumed by the concessionaire*, as the very same Public Services Concessions Act (Law 8.987/95), in its initial articles (paragraphs II and III, art. 2) determines that executing concessions governed by such law are done under the *concessionaire's* sole *responsibility* and assigns some of the risks to the Conceding Power (The State Authority), such as, for instance, tax-related risks and the change of the Contract by one party only (as per items 3 and 4 of article 9).
- 7. But it is certain that some risks are enlarged in Concessions and PPPs, such as engineering-related risks, which encompass the draft of projects (design), the execution of works and services (build), and finally delivery (operate for future handover of the infrastructure or public equipment to the Conceding Power in operational conditions (transfer)².
- 8. But if by one hand it is certain that, within Concessions and PPPs, some risks are taken in larger proportion than in traditional public work contracts, by another hand it is also certain that other risks are eliminated, mitigated or shared in Concessions and PPPs.
- 9. The risk of default, for instance, is always lower in this hiring method. For Ordinary Concessions, in which compensation is charged directly from the user, the risk of default is dramatically reduced and pulverized as more people in this case, users will pay a smaller fee than a fee that would be paid by the Public Administration; and for PPPs, although compensation is fully or partially borne by the Public Administration, the concessionaire can make use of the typical PPPs warranty special regime in case of default instead of waiting for debt securities ordered by court that result from acknowledging the public debt upon a long legal dispute.
- 10. Thus, it is certain that the concessionaire is exposed in larger degree to some risks than Hired Parties through Law 8.666/93, however this is offset as other aspects of concessions eliminate some risks and its contract framework is built as so to make contracts clearer, more objective, foreseeable and, thus, easier to put a price on, let alone to share such risks

according to the rationale that each risk shall be assigned to the party that can deal best with the risk taking place, i.e., to the party that is able to take measures that may prevent, mitigate and, if these are not possible, bear with the consequences of the risk taking place.

11. This is, at the end of the day, the role of a well-drafted risk matrix - another element of the typical legal structure of this public hiring model.

12. More than this, for companies at the entry level in this segment, doing business in concessions and PPP means taking unknown risks.

13. For this reason, the *Brazilian Construction Industry Chamber (Câmara Brasileira da Indústria da Construção, CBIC)* initiative to promote a series of debates, studies and guides, such as this one, shall be praised, as these materials provide valuable information on how to enter this market so that, as said by CBIC Chairman José Carlos Martins, this public-private sector can open new horizons for the construction sector and thus, support Brazil's development.



I.2. WHY DOES THE PARTICIPATION OF MID-SIZED COMPANIES IN SUCH VENTURES DESERVE TO BE OBJECT OF A SPECIFIC GUIDE?

- 14. As the title of this guide says, the goal here is to provide information on the main attention points to be considered by *mid-sized companies* that are interested in doing business in concessions and PPPs so they can be ready for such.
- 15. Thus, it seems important to us to deal with the aforementioned question in the Introduction, whether to clarify some aspects or to anticipate real bottlenecks for mid-sized companies to join this segment.
- 16. In fact, Grants and PPPs are *large, long-term, complex scope deals, in an* environment that usually is the home of big companies, which alone would be reason for developing a guide focused on mid-sized companies willing to know and join this market.
- 17. As it was said before, for companies at the *entry level* doing business in concessions and PPPs mean not only taking up the typical risks of this hiring model, that are summarized above³, but also taking risks unknown so far, so that a guide aimed for these companies is justified by the need to expand knowledge on the field they are about to enter.
- 18. The question left to be answered is if concessions and PPP feature improper aspects for mid-sized companies and/or if bidding processes, that necessarily precede the signature of concession and PPP agreements, usually present barriers for entry to mid-sized companies.
- 19. As for the *size of the deal*, article 2th, §4th, I, of Law 11.079/04 forbids celebration of PPPs under 20 million BRL. Although Law 8.987/95 does not establish a minimum threshold for Ordinary Concession, the value of such contracts is virtually never below the mandatory minimum value for celebrating PPPs.
- 20. It is worth mentioning that while there is no mandatory general rule, the contract value is usually calculated by projecting the income to be

³ For a further detailed explanation on the risks that typically comprise the Grant and PPP risk matrix, refer the aforementioned Guide on Grants and Public-Private Partnerships, also developed by CBIC.

earned by the concessionaire, which, in its turn, should contemplate the compensation of investments (*capex*), expenses (*opex*), and ROI.

- 21. It would be proper to say, thus, that the size of this type of business could be an actual barrier for entry to mid-sized companies interested in joining this market independently.
- 22. But this is a barrier that can be overcome if mid-sized companies are willing to set up a "consortium" ⁴ or, precisely, to join a pool of companies organized to join the bidding process and later, constitute the Specific Purpose Entity (SPE) that will act as concessionaire throughout the execution of the concession agreement.
- 23. As this is a measure able to overcome eventual barriers for entry of mid-sized companies in concessions and PPPs, this Guide features in Chapter III more detailed information about the participation of companies in pools or "consortia".
- 24. As for *Contract term*, financing public infrastructure, equipment, or service by fees charged directly from users is not a policy related to short-term contracts, so that Ordinary Concessions never have contract terms below 5 years as a minimum, as clearly determined by article 2, paragraph 4, II of the PPP Act.
- 25. In fact, it is not uncommon that the length of Concessions and PPPs is 5 times more than the minimum legal term of 5 years, and the maximum term allowed by the law is 35 years (as per article 5, I of the law above).
- 26. In our view, the long term of such contracts does not seem to be alone a barrier for entry to mid-sized companies interested in doing business in Concessions and PPPs, as the contract term should match the period of time calculated to fully amortize investments made.
- 27. It is so that the long term of such contracts actually is an indication that the first years of the Concession will bring in losses, which is something that must be considered by companies willing to enter this segment, as losses will also be brought upon the companies by potential lenders, as they will demand more guarantees from the concessioanire's stakeholders during this period.

⁴ As we will explain later, in order for companies to be allowed to enter a Grant or a PPP as a pool, a consortium is not required.

- 28. On what concerns to the *scope of the contract,* article 2, paragraph 4, III of the PPP Act forbids celebrating a PPP whose object is solely the execution of a public work or providing and installing equipment or providing workforce.
- 29. Such prohibition unveils two other aspects of PPPs and Ordinary Concessions: **the emphasis in service delivery**, which is the only scope that can be a stand-alone object of a PPP or, more commonly, that adds to the scope diverse activities including the execution of works with distinct aspects, its further operation, equipment deployment, service delivery to users and so on.
- 30. The diversity of activities comprising the scope of a Concessions or PPP also is not seen as a barrier for entry to mid-sized companies to prevent doing business in this segment. Actually, such scope diversity is rarely met by a single company whatever size it may have, so that both the bidding process that always allows the participation of companies in a "consortium" and the contract execution are adapted to such reality.
- 31. In addition to opening the doors for the participation of companies grouped in a consortium, which allows for building the technical qualification from each member, it is common that bidders can meet technical capacity requirements by means of experienced professionals they can connect to by a type of pre-contract as per terms detailed in Chapter III of this Guide.
- 32. As for the execution of contract, the Law provides concessionaires with wide freedom for outsourcing, which is allowed not only for the so-called *medium activities* but for *activities inherent* to the concession as well (as per article 25, paragraph 1⁵ of Law 8.987/95, that is also applicable to PPPs), although it must be told that there are questions on how far such freedom can go by Labour Courts.
- 33. For this reason, it is not uncommon that concessionaires employ less than 499 staffers and even less than 100 staffers, albeit this less frequent however, of course the number of employees in a concessionaire varies as per the size and the nature of the Concession, as well as the corporate strategy adopted by the shareholders.
- 34. Thus, according to criteria adopted by the Ministry of Labour and Social Security in the Yearly Information Book (Relação Anual de Infor-

^{5 &}quot;Article 25. The Concessionaire is responsible for executing the granted service and is in charge of all losses incurred by the Conceding Power, to users or to third parties, and the oversight applied by the relevant entity does not exempt or mitigate such responsibility.

Paragraph 1: Without limitation to the responsibility mentioned in this article, the Concessionaire may hire from third parties the development of inherent, ancillary or supplemental activities to the service grantes, as well as the implementation of associated projects."

mações – RAIS)⁶ for classifying companies in terms of size, Concessionaires are largely mid-sized companies, so that the concessionaire's size, from the size of workforce standpoint, does not become a challenge for mid-sized companies to do business in this segment, as both concessionaire and mid-sized companies are at the same level.

- 35. In fact, the Concessionaire does not execute directly the wide range of activities that comprises the concession agreement contract scope, operating more like a manager of contracts it signs off for the execution of several scopes in the concession agreement, while it is the sole responsible for the concession's proper development and for injecting resources as stipulated in such agreements.
- 36. Thus, it is possible to say that more financial capacity is demanded from the concessionaire than technical capacity, which echoes through the whole hiring process and is usually the largest bottleneck for mid-sized companies to participate in this segment.
- 37. Although the participation of companies as a "consortium" may solve eventual issues related to meeting financial requirements for the participation in the bidding process, according to the methods described in Chapter III of this Guide, the future concessionaire shareholders' financial capacity will be strongly tested from the very beginning of the concession agreement.
- 38. In addition to meeting financial commitments as described on Chapter IV of this Guide, so they do not have to input only their own capital (*equity*) for the big investments that shall be made in the beginning of the concession, the SPE main stockholders shall obtain first a **bridge loan and then long-term loans.**
- 39. Here, perhaps, lies the major attention point for mid-sized companies interested in doing business in concessions and PPPs, as in order to get required financing, these companies shall submit guarantees of payment for loans taken.
- 40. This guarantee submission system exists largely because, in order to get financing in Brazil, project financing frameworks are rarely used, through which its approval depends solely on resources generated by the concession or PPP project, named as *project finance non-recourse*.

⁶ According to the Ministry of Labour and Social Security's RAIS, mid-sized companies are those employing between 100 to 499 people. However, there are other criteria for assessing a company size, such as gross revenue or yearly revenue or total of assets recorded in a year, which will be mentioned to later.

- 41. Within the stricter scope of a *project finance non-recourse*, a positive analysis of project's conditions, along with the receivables from the project itself given as a guarantee in case of default by the borrowers, is enough for financing institutions to feel protected and grant financing.
- 42. It happens that in Brazil, financing approval is highly concentrated in few financial institutions but most of all on the Social and Economic Development National Bank (Banco Nacional de Desenvolvimento Econômico e Social, BNDES), which assesses not only the own project's conditions, but also the capacity of payment from the companies asking for financing.
- 43. Thus, in the current credit restriction scenario, in addition to guarantees bound to the project, such as binding or grant of receivables and fiduciary lien of the SPE shares, and the commitment to financial obligations, such as the creation of a reserve account, which characterize the model called *project finance limited recourse*, it has been also demanded guarantees from the companies' shareholders, from which results the so-called *project finance full recourse*.
- 44. And so that as smaller is the company and less professional its governance structure is, more restricted the analysis of an eventual financing request will be, which can be a barrier for mid-sized companies to do business in the structured project segment, as they may not have or be willing to perform all investment with their own capital.
- 45. It should be noted that for purposes of fitting into the BNDES's Operational Policy for financing, criteria and threshold of ranking of company sizes are different from those applied to hiring in which the size of investment allows for execution without loans, as in general is the case of contracts resulting from auctions and bids governed by Law 8.666/93.
- 46. As an example, while the minimum threshold for a company to be considered as mid-sized and then being excluded from tax and bureaucratic benefits and from preferential treatment in bids for micro companies and small size companies is a revenue of 3,6 million BRL (as inferred from article 3, II, of Supplemental Law 123/2006), the minimum threshold for a company to be considered as mid-size and then eligible for

BNDES financing is a gross operational income above 16 million BRL and equal to or below 90 million BRL (as per BNDES Instructions 11/2010 and 34/2011).

- 47. We will return to the topic of consequences of the size of a company for obtaining financing at the Chapter IV of this Guide, but it is still worth to mention in the Introduction that despite all difficulties related to the submission of corporate guarantees for obtaining financing, such challenge is not exclusive to mid-sized companies.
- 48. In current market climate, financial institutions are making similar demands to larger companies, and a smaller company has some advantages, such as higher percentage of financing in relation to cash flow and a specific fund that may support the structure of the loan.
- 49. There are of course huge challenges for any company intenting to do business in concessions and PPPs, which, as both are new, can be even higher for mid-sized companies willing to enter this market.
- 50. But the challenge usually sharpens the animal spirits that are the flagship of this special mode of hiring. This Guide is intended especially to companies willing to embrace this challenge, giving them some support so they can be organized and get ready to face them!

1.3. HOW SHALL THESE COMPANIES BE ORGANIZED TO DO BUSINESS IN CONCESSIONS AND PPPS

- 51. As already mentioned, concessions and PPPs are a specific method of public hiring. Peculiarities encompass not only the contract execution but also the procedures preceding its celebration.
- 52. For this reason, this Guide is structured so to cover the whole peculiar hiring process of concessions and PPPs.
- 53. In this regard, Chapter II covers the potential participation of companies interested in the future concession or PPP modeling phase, even before the

bid, which is not allowed for contracts governed by Law 8.666/93, where the basic project author is prevented to join the future bidding process (as per article 9, II).

- 54. Chapter III covers the bidding process, including aspects related to the participation of companies in "consortia" as, for reasons already commented in this Introduction, creating such pools of companies may allow for mid-sized companies to enter the Concession and PPP market.
- 55. Chapter IV discusses the challenges found in the contract phase, from meeting requirements preceding the celebration of the Concession Agreement to relevant questions related to its execution, so that, as said before, companies can be prepared to face such challenges.
- 56. Finally, Chapter V presents an Executive Summary with all information and comments contained in this Guide.







II. PARTICIPATION OF STAKEHOLDERS IN MODELLING A FUTURE CONCESSION OR PPP

- 57. One quirk related to the hiring process of Concessions and PPPs is that companies willing to do business in this segment can join the modeling of a Concession or PPP through two instruments that do not exclude each other: The *Procedure for Expression of Interest (Procedimentos de Manifestação de Interesse, PMI) and Public Consultation*, with respectively higher and smaller influence levels by the stakeholders in the business modeling.
- 58. Whereas PMIS may take place or not before the bidding of a Concession or PPP, Public Consultations are mandatory both for Ordinary Concessions⁷ and PPPs⁸.
- 59. Please see below the main characteristics for both instruments, some relevant and practical aspects, and their advantages and disadvantages, so that companies willing to do business in Concessions and PPPs are able to assess if they shall join PMIs or Public Consultations or not, and if yes, how they can get prepared.

⁷ This is because Ordinary Grants are subject to article 39 of Law 8.666/93, which determines public consultations before large bidding processes take place.

⁸ As per article 10, VI, of Law 11.079/04.

II.1. PROCEDURE FOR EXPRESSION OF INTEREST (PROCEDIMENTO DE MANIFESTAÇÃO DE INTERESSE, PMI)

II.1.1. Procedure's main aspects

- 60. PMIs⁹ are procedures that may be started by the Conceding Power or by a company proposing a project of public interest that might be executed under a Concession or a PPP.
- 61. In practice, PMIs are carried out when: i) a given company foresees a business opportunity that may take place by means of a Concession or PPP and then submits it to the Conceding Power; ii) the Conceding Power is not sure whether a given business or its model is attractive to the market and so wants to hear from potential stakeholders; or iii) the Conceding Power is not willing, whether by lack of time, resources or any other reason, to launch a bidding process to hire a company for executing *studies*, *research*, *surveys and projects* required to launch a bidding process for a Concession or a PPP.
- 62. In the first assumption, we would have a PMI launched by a vested company whereas in all other assumptions, the PMI would be launched by the Conceding Power.
- 63. If the project lacks data even for launching a PMI, the Conceding Power may open a *preliminary procedure* to extract the definition of basic aspects for the venture, according to article 13 of Provisional Measure #727 dated of 05/12/2016, which created the Program for Partnership in Investment Program (*Programa de Parcerias de Investimentos*, PPI). In this case, stakeholders can join by offering subsidies irrespective of authorization, thus without rights for reimbursement but also not being prevented to join the respective PMI, if it comes to traction.
- 64. The first action for PMIs launched by a Conceding Power is the posting of an invitation or public notice where participation requirements are

determined for interested companies, as well as the basic characteristics of the project that may be the object of a Concession or a PPP.

- 65. As for PMIs launched by interested companies, the procedure starts with the request for acknowledging the public interest of a given project, for which it is required that the company submits the project's own basic characteristics, in addition to the company's qualification for developing the corresponding studies and projects.
- 66. Once the Concession or PPP project's public interest is acknowledged, the procedure evolves the same way as for PMIs launched by a Conceding Power to comply with principles of isonomy and publicity, and thus an invitation shall be posted so that other interested parties¹⁰ that meet the requirements may submit studies, surveys, research and projects within the scope of the PMI.
- 67. Although PMIs are also competitive public procedures, they are also less formal than bids, so that handling the procedure and eligibility requirements for interested parties are less rigid.
- 68. It is not customary to demand, for instance, strict statements of financial capacity or technical certifications issued by relevant professional entities. Equally, having experience in executing works and services has been accepted as a demonstration of technical qualification of experience for carrying out the corresponding Engineering studies and projects.
- 69. Companies that meet requirements laid out in the PMI public invitation are authorized to develop studies, surveys and projects that comprise its object, in which have been called Study Authorization Procedure (Procedimento de Autorização de Estudos, PAE) by the Provisional Measure that created the PPI.
- 70. Allowing a quite logical practice that appeared previously in some decrees regulating PMIs, the new Provisional Measure determines that the authorization for developing studies will be only exclusively granted if the PMIst name used to designate persons that participate of this procedure expressly waive the possibility of joining the future venture (as per article 14, paragraph 1), which will not encourage companies to join

¹⁰ In our view, the publication of a public invitation for other interested parties to join the PMI is required, yet not determined by the regulation of the public entity promoting the procedure, in order to prevent that controlling entities may declare void the PMI and even the future bidding process, due to the principles applicable to the Public Administration.

PMI due to this restriction aimed to consulting firms, thus scaring companies directly interested in the Concession and PPP market.

71. This legal provision also causes that for companies interested in joining the future venture and that have already joined the PMI, **such authorization will be granted without exclusivity** - also provision part of some previous decrees issued to regulate this procedure.

72. The remaining steps of this procedure and their aspects are described in the Guide on *Concessions and Public-Private Partnerships*, developed by CBIC. For the purposed of this Guide, it suffices to mention only three other aspects: i) the detailing level of such studies, projects, surveys, and research that arises from PMIs; ii) the potential reimbursement of corresponding expenses; and iii) pros and cons of the participation in PMIs of interested companies in doing business in Concessions and PPPs.

II.1.2. Level of detail for studies, projects, surveys and research to be submitted through PMIs

73. PMIs are based on two legal instruments contained in laws applicable both to Ordinary Concessions and PPPs: article 21 of Law 8.987/95¹¹ and article 31 of Law 9.074/95⁹⁵. The aforementioned Provisional Measure # 727/16 was also passed recently, instituting the PPI and also a series of rules on these procedures, confirming certain practices and assigning them some designations: acts developed within PMI scope, described above, are now referred to together as *integrated framework*¹³.

74. In addition to legal instruments aforementioned, the procedure is usually governed by decrees issued by each Brazilian state, which allows for some variation in procedures whether it is related to the Federal Adminis-

^{11 &}quot;Art. 21. Os estudos, investigações, levantamentos, projetos, obras e despesas ou investimentos já efetuados, vinculados à concessão, de utilidade para a licitação, realizados pelo poder concedente ou com a sua autorização, estarão à disposição dos interessados, devendo o vencedor da licitação ressarcir os dispêndios correspondentes, especificados no edital."

^{12 &}quot;Art. 31. Nas licitações para concessão e permissão de serviços públicos ou uso de bem público, os autores ou responsáveis economicamente pelo projeto básico ou executivo podem participar, direta ou indiretamente, da licitação ou da execução de obras ou serviços."

^{13 &}quot;Art. 14. Para a estruturação integrada de empreendimentos integrantes do PPI, a administração pública titular poderá: (...) §2º. Considera-se estruturação integrada o conjunto articulado e completo de atividades e serviços técnicos, incluindo estudos, projetos de engenharia, arquitetura e outros, levantamentos, investigações, assessorias, inclusive de relações públicas, consultorias e pareceres técnicos, econômico-financeiros e jurídicos, para viabilizar a liberação, a licitação e a contratação do empreendimento, segundo as melhores práticas e com transparência, podendo esses serviços incluir a revisão, aperfeiçoamento ou complementação de subsídios obtidos em trabalhos paralelos ou anteriores."

tration, as per Decree 8.428/2015, or States or Cities with whom the Concession or PPP will be celebrated.

75. In a way, the purpose of PMIs is given by article 21 of Law 8.987/95: to authorize companies to perform studies, surveys, research and projects to support the bidding process for a Concession or PPP.

76. As mentioned before, and differently from determined by article 7, paragraph 2, I¹⁴ of Law 8.666/93, the Concession Act, also applicable to PPP, does not require a basic project for launching bids preceding such contracts, which is a consequence of the fact that the burden of elaborating required projects for execution of the contract lies with the concessionaire.

77. Thus, while it is desirable that bids are preceded by detailed, current studies, the Grant Act only determines that documents submitted to the bid allow for full description of the bid's object, as per article 18, XV, of Law 8.987/95¹⁵.

78. Of course, albeit there is no express clause in the Concession Law, it is not possible to launch a bidding process to sign off this specifical hiring method without prior analysis of its technical and economic feasibility.

79. The PPP Act is a bit more assertive in this regard, demanding justification for opting for this hiring method, which necessarily demands a business feasibility analysis as well as the evidence that this model brings more advantages than the service's direct execution by the Public Administration (as per article 10 of Law 11.079/04), which is often called as *value for money analysis*.

80. The PPP Law is also clear on the level of details for Engineering studies, submitted as **preliminary draft** and also determines that the value of investment and expenses forecast in such studies shall comply with official tables and methodologies (as per article 10, VII, paragraph 4 of Law 11.079/04).

81. Although every public invitation specified other studies that shall be submitted and their respective level of details, it is usually requested

¹⁴ "Article 7 - Bids for executing works and delivering services will comply with this article, particularly in the following order: (...) paragraph 2: Works and services can only be bid when:

I - There is a basic project approved by the relevant entity and available for examination by parties interested in join the bidding process."

¹⁵ "Article 18. The bid's notice will be elaborated by the Conceding Power, given, when applicable, the criteria and general rules from the legislation on bids and contracts, and will specifically contain:

^(...) XV - In cases of granting public services, preceded by the execution of a public work, data related to the work, among which the elements of the basic project that allow for its full description, as well as guarantees required for this specific portion of the contract, suited to each case and limited to the value of the work."

submission of the following documents: i) Engineering preliminary drafts for main works; ii) study on demand for the service and/or work and/or equipment that are object of the Concession or PPP; iii) Concession or PPP technical-economic feasibility, that must forecast investments (*capex*), expenses (*opex*) and income earned by the concessionaire, whether arising from public payments or fees, including eventual ancillary income; iv) environmental studies, surveying main liabilities and permission guidelines; v) estimation of expenses on dispossession and rights on land; and vi) studies on the legal model to be adopted.

II.1.3. Potential reimbursement of PMI-related expenses

- 82. As established in article 21 of Law 8.987/95, companies authorized to develop studies, research, surveys and projects will have expenses reimbursed at the execution by the bid winner.
- 83. In practice, this means that **such studies are developed on interest-ed parties own risk**, because the material submitted may not be selected to support a future bid or because the bid may not take place or yet, the bid is not attractive to other companies.
- 84. For this reason, it is common that invitation notices clearly allow that companies may withdraw from presenting studies and projects that are the object of a PMI. Such withdrawing is only forfeited if there is a clause in this regard in the invitation's notice and it is understood that such forfeiting is applicable just in the case of permission given in exclusivity.
- 85. In the terms of the legal clause aforementioned, only companies authorized by the Conceding Power to develop such studies, research, surveys and projects can have their corresponding expenses reimbursed, which results also from the Provisional Measure that created PPL
- 86. For such, it is required that the applicable tax documentation is submitted, which implies in some expenses being not reimbursed, such as those incurred with the interested company workforce.

- 87. At the beginning, the Conceding Power would reserve the right to leverage content from the material submitted by several PMIsts, a practice that happily today is not in use as studies submitted by each PMIst are interconnected, so that technically it is not possible to leverage demand studies from one party, projects from another and legal model from a third party.
- 88. Anyway, only expenses corresponding to studies, surveys and projects that are effectively leveraged by the Conceding Power can be reimbursed, so that the value to be returned may not match what was spent in the PMI.
- 89. Furthermore, **some invitation's notices predetermines a price cap for reimbursing expenses**, such as all PMIs launched by the Federal Administration, as per article 4, paragraph 5, II of Decree # 8.428/2015¹⁶.
- 90. Although paragraph 4 of article 14 of Provisional Measure 727/16¹⁷ opens room for the invitation notice to establish, as part of the reimbursement due to the PMIst a *reward for the risks taken and for the result of studies*, it is believed that this type of forecast shall be more commonly appear in PMIs aimed to consulting firms as it implies a waiver on the participation in the future venture.
- 91. In being so, the participation of companies interested in doing business in Concessions and PPPs through PMIs is not a profitable activity per se, which brings us to the next topic, that covers the pros and cons in taking part of this procedure.

II.1.4. PMI's pros and cons for companies interested in doing business in Concessions ans PPPs

92. As can be understood from the considerations related to reimbursement of expenses inherent to the participation of companies in PMIs, carrying out studies, research, surveys and projects that are the object of these proce-

^{16 &}quot;Article 4 As a minimum, the public invitation's notice must contain:

 $^{(...)\} paragraph\ 5\ Maximum\ nominal\ value\ for\ eventual\ reimbur sement\ of\ projects,\ surveys,\ research\ or\ studies:$

^(...) II - will not be higher than, in total, 2.5 percent of the total value previously estimated by Public Administration for investment required to the deployment of the venture or expenses required for the operation and maintenance of venture during the contract term, whatever is higher."

^{17 &}quot;Article 14. For the integrated framework of ventures comprising the PPI, the Public Administration can:

^(...) paragraph 4. The invitation notice may forecast that in addition to reimbursement of expenses, a reward is included for the risks taken and by the result of studies."

dures is not a profitable activity per se, which brings us to cover in this section of the pros and cons of taking part of this kind of procedure.

II.1.4.1. Pros

- 93. Ass we have mentioned above, in the section where we covered PMI's Basic Aspects that PMIs are carried out when: i) a given company foresees a business opportunity that may take place by means of a Concession or PPP and then submits it to the Conceding Power; ii) the Conceding Power is not sure whether a given business or its model is attractive to the market and so wants to hear from potential stakeholders; or iii) the Conceding Power is not willing, whether by lack of time, resources or any other reason, to launch a bidding process to hire a company for executing *studies, research, surveys and projects* required to launch a bidding process for a Concession or a PPP.
- 94. This way, the participation of a company interested in doing business in a given Concession or PPP project through its corresponding PMI may be necessary for (1) *making the business feasible*, as without it the project will not progress.
- 95. Another advantage as clear as the first one above is that by taking part of a PMI, (2) the company participates directly and at a certain degree of its modelling.
- 96. Although it is a technical material and discussions with the Conceding Power are common, in order to align public and private interests related to Concessions and PPPs, and the decision on at what degree, if any, the studies if deemed fit to support a bid will be used lies with the Conceding Power, the resulting modeling will hardly go against the PMIst main interests.
- 97. Another quite evident advantage is that the participation on a PMI implies the (3) execution of studies with a moderate level of detail on the bid's object, which must be performed by any company willing to do solid business in Concessions and PPP.
- 98. The fact that such studies will be made available not only to competing bidders but also to any interested party, as they are public documents, leads to the idea that it would be more beneficial to conduct

them privately. It is, in fact, a drawback of participating in a PMI, although, of course, whoever studies a given business learns more about it than it is obliged to divulge.

II.1.4.2. Cons

99. The first drawback to be pointed is the (1) *risks that PMI-related costs are not reimbursed, fully or partially*, as studies, surveys and projects carried out in association with the PMI may not be used, partially or in full, and this bid - which is the main goal of companies interested in doing business in Concessions and PPPs, may never take place.

100. Secondly, different from the scope of bids governed by Law 8.666/93, whose article 9 paragraph I forbids the direct or indirect participation of the author of the basic project in the bid for executing for what it was designed for, article 21 of Law 9.074/95, which is one of the legal basis used for carrying out PMIs, expressly authorizes the author of the economic responsible entity for elaborating the basic project to take part in the bid.

101. However, (2) some public invitation notices for PMIs deny the participation of companies interested in the future bid. In such case, there is an evident drawback as the interest of companies lie in the main business and not in performing the corresponding studies, which is the field of consulting firms.

102. Another drawback is that (3) studies, surveys and projects performed for a PMI will be made available to competing bidders and to any other interested part, so that the company interested in doing business in the corresponding Concession or PPP may rather perform them privately and thus remain as the sole party to know their results.

II.2. PUBLIC CONSULTATION

103. Public Consultations are procedures according to which interested parties give their input to a Concession or PPP project before the launch of the corresponding bid.

104. Inputs submitted within the scope of a Public Consultation shall be considered and mandatorily responded by the Conceding Power, which is not subject to accept them, though.

105. An act that is part of this procedure is a live public session to which any interested party may be present, which is the so-called Public Hearing.

106. In such Public Hearing, inputs can be submitted in writing or orally, which are not always responded to by the Conceding Power representatives at the session - they may reserve the right to respond them later, even because such Public Hearings are the place of political claims and heated speeches.

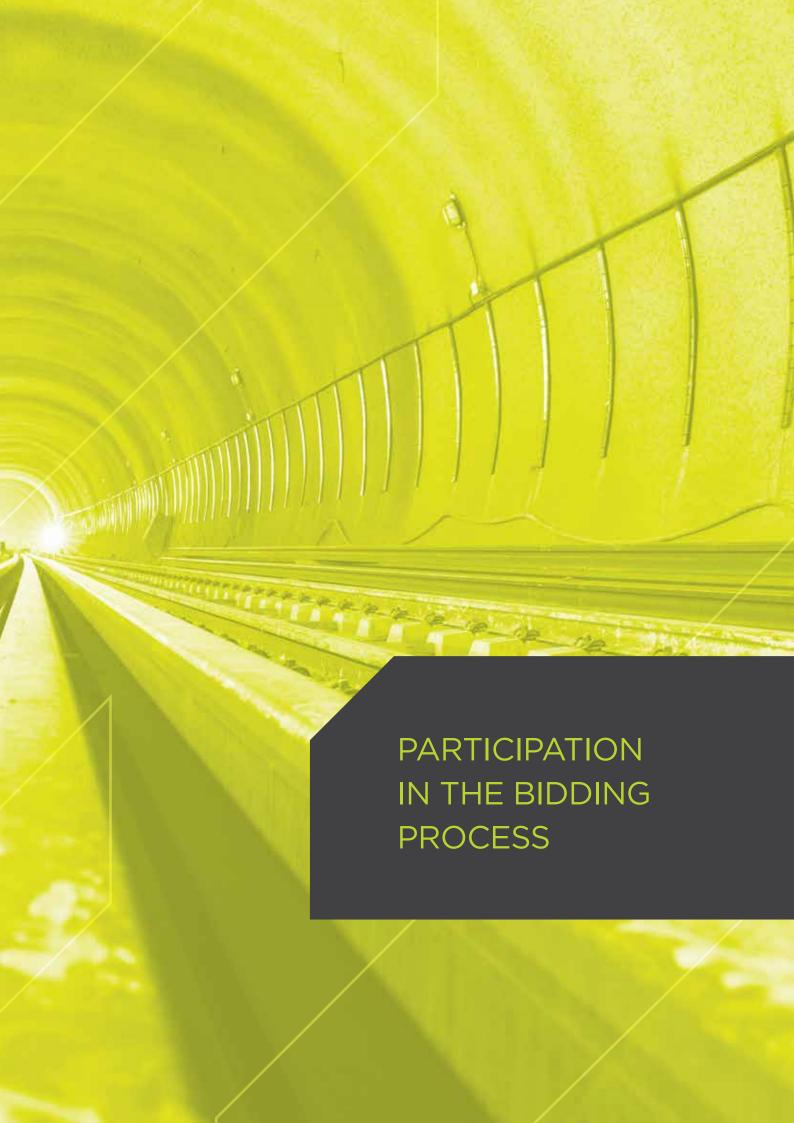
107. Thus, Public Hearings are an act that is part of the Public Consultation, which aims to collect suggestions of interested parties that are presented in Public Hearings or at any other time, since it is within the timeframe of submitting inputs as determined by the Public Consultation Notice.

108. As for PPPs, the minimum term for receiving suggestions is of 30 days and responses shall be given in at least 7 (seven) days before the date scheduled for posting the bid's notice, as per article 10, VI, of Law 11.079/04. In the case of Ordinary Concessions, there is no timeframe determined for receiving inputs, only the date for hosting a Public Hearing, that must be 15 business days prior at least, as per article 39 of Law 8.666/93.

109. Usually, inputs can be submitted electronically, which is the best channel to present technical, better informed suggestions.

- 110. Paragraph VI of article 10 of Law 11.079/2004 determines that Public Consultation shall be hosted previously to PPP bids, which also clarifies its content, i.e., both bid's notice and contract drafts shall be made available so that interested parties may give their inputs in relation to them. In addition to such drafts, the justification for hiring the PPP shall be presented and it is commonly presented along the corresponding technical-financial feasibility studies.
- 111. As one can see from the minimum mandatory content of Public Consultation performed within a PPP, the project that is its object is already well mature, so that the influence margin upon them is quite small.
- 112. As for Ordinary Grants, Law 8.987/95 does not specify contents that shall be submitted to Public Consultation and does not even mandates its hosting, which is caused, however, by article 39 of Law 8.666/93, which determined at least that a Public Hearing is mandatory in large businesses such as Ordinary Concessions.
- 113. In this case, as there is no minimum mandatory content, sometimes only the general aspects of the bid and the future contract are present, which despite not fulfilling Public Consultation goals, opens room for accepting better informed inputs.





III. PARTICIPATION IN THE BIDDING PROCESS

114. Bids that precede Concession and PPPs contracts also have some peculiarities on: i) judgment criteria that may be adopted; ii) the bidding procedures; and iii) the homologation requirements.

115. In addition to approach such quirks of the bidding procedure previous to this singular hiring model, this Chapter will emphasize the participation of companies grouped in "consortia" because, as seen in the Introduction to this Guide, this is a measure that may be adopted by companies interested in doing business in Concessions and PPPs and to make their entry in this segment feasible.

III.1. PECULIARITIES OF THE BIDDING PROCESS THAT PRECEDES GRANTS AND PPPS

III.1.1. Peculiarities of the bidding process decision criteria

116. Similarly, to what takes place in other bids governed by Law 8.666/93, best price is the preferential criterion for determining the winner of a bid, so that the adoption of the **best technique** criterion shall be properly justified (as per article 46 of Law 8.666/1993), by the demonstration that the required technique for the future contract is quite complex and singular to be adopted as a judging criterion.

- 117. Although the best price criterion is used, own Concession and PPPs characteristics cause some variations to this criterion, which may be *lowest fee* to be borne by the user, for Ordinary and Sponsored Concessions, or the *lowest counter payment* to be paid by the Conceding Power, in the case of Sponsored and Administrative Concessions.
- 118. Furthermore, another variation of the best price criterion applicable to Concessions is the **best offer or higher burden** to be borne by the Conceding Power, when the Conceding Power decides that the Concessions shall have as a counter payment a burden, a given encumbrance or, most commonly, a payment in cash to be made by the concessionaire.
- 119. In such cases, it is common that the concessionaire must pay for two types of encumbrances, although there is no obligation that both encumbrances are cumulative, as usually they are: the **fixed encumbrance**, which normally corresponds to a predetermined value to be paid to the Conceding Power within the timeframe established in the bid's notice, or the so-called variable encumbrance, which value changes according to the concessionaire's revenue, with a fixed percentage to be transferred to the Conceding Power.
- 120. Evidently that the value of encumbrances to be paid by the concessionaire reflects directly in the attractiveness of the business, even because such value is not financeable so that the bid winner shall be prepared to bear the cost as forecast in the bid's notice with capital of its own.
- 121. For this reason, in less favorable economic climates, it is not required the payment of such encumbrance from the Conceding Power or, at least, the value of the Concession's fixed encumbrance is paid in installments across the Concession instead of being paid upfront, in the spot at the time of contract signature, as happened in Brazil's first Concessions.
- 122. As such encumbrance affects business attractiveness and consequently the fee to be paid for by users, the payment of Concession's encumbrance is usually justified in the so-called "brown field" projects, i.e., when the future concessionaire receives by signing the contract the in-

frastructure already ready to be explored by charging a fee and previously funded by resources originated directly from the Public Administration.

III.1.2. Peculiarities of the bidding procedure

- 123. One of the peculiarities of the bidding procedure that precedes Concessions and PPPs is the level of detail of projects made available to bidders.
- 124. As already mentioned in Chapter II of this Guide, the Concession Law through an instrument also applicable to PPPs, only requires that the basic project has content enough to describe the bid's object. The Concession Law does not require, thus, the basic project per se, according to the level of detail as determined by article 6, IX, of Law 8.666/93, and the PPP Law is more affirmative by referencing a preliminary draft as per article 10, paragraph 4.
- 125. Another relevant peculiarity is the sequence of phases in the bidding procedure, as the order of homologation and judgment phases is commonly inverted in bids preceding Concessions and PPPs, the socalled phase reversal.
- 126. If such phase reversal takes place, economic proposals are examined first and then homologation and qualification documents only from the company whose proposal was ranked first.
- 127. Documents from the second-ranked proposal will only be opened if the first-ranked company's homologation papers do not meet requirements determined in the bid's notice and so forth.
- 128. The findings of the proposal and homologation documents assessment are released at the same time and refer only to the best ranked, so that potential legal actions are now targeting a single company and still, the defeated competitors are not encouraged to proceed.
- 129. Such aspects of phase reversal, as determined by articles 18-A and 13 of Laws 8.987/95 and 11.079/04, respectively, have resulted in time savers

- bidding processes that usually took more than one year have been completed in less than 6 months so that phase reversal has been applied to the majority of bids that precede Concessions and PPPs.
- 130. Another peculiarity of the bidding process that precedes Concessions and PPPs is the possibility that their respective notices establish a phase where competitors can bid orally, as per article 12 of the PPP Law.
- 131. In this case, the PPP Law says that the bid's notice may or may not limit the pool of competitors that may bid orally to those whose proposals are 20% higher, maximum, than the value of the best written proposal. Such measure seems mandatory to us, as the nature of the bid object and the complexity of precification in Concessions and PPPs seem not fit to the intensity of oral auctions.
- 132. Another differential seen in bids that precede Concessions and PPPs, with implications to the execution of the future contract, is the demand for bidders to present only homologation and qualification documents and the price proposal **but not submitting the execution methodology and, more importantly, no business plan.**
- 133. The impact of this measure to the future execution of the concessiona agreement is that there will not be parameters related to bidders' original estimations, which means that all **eventual contract economic-financial adjustments will be performed based in market projections valid at the time of the event that caused the adjustment**, according to a methodology called marginal cash flow.
- 134. It is worth mentioning that in the bids where companies do not submit a business plan explaining the assumptions used for the price offer, it is required the presentation of a declaration issued by a first-class top-rate financial institution, informing that they have reviewed the bidder's plan and they can affirm it is feasible and sound, and this document can also be required even when the business plan is submitted.
- 135. Furthermore, another peculiarity of this procedure previous to concessions and PPPs is that **before the submission of documents**

and proposals, the proposal guarantee (bid bond) is examined.

We'll analyse legal aspects of bid bond later in this Guide.

III.1.3. Peculiarities of the bidder participation requirements

136. The first peculiarity to be mentioned about participation requirements is that **bids preceding Concessions and PPPs are usually attractive to foreign companies.**

137. In this regard, it is not required from foreign companies to submit a decree authorizing them to operate in Brazil, as determined by article 28, V, of Law 8.666/93, because, if a foreign company wins the bid, the resulting SPE which will be the compaby operating in the country if a foreign company wins the bid - and a SPE is a stand-alone company.

138. Based on article 32, paragraph 4 of the same Law, foreign companies can submit solely the documents requested in the Brazilian bid's notice that are equivalent to those in their own country, and a statement issued by the embassy or even by the company itself, affirming that a given document has no similar in their country, is suffice to exempt them from this demand.

139. Requirements evidencing legal¹⁸, tax and labour¹⁹ compliance for Concession and PPP bids are the same for bids governed by Law 8.666/93, so for this reason this Guide will not explain them.

140. As for technical qualification, the company can meet requirements as established in the notice by submitting technical reports similarly to bids governed by Law 8.666/93, but participation requirements are adapted to recognize that i) the contract object will not be executed by the bidder itself, but by a company to be founded by the bidder if it wins the bid, and ii) as said before, concessionaires have a great space for outsourcing.

¹⁸ Demands related to the bidder's legal compliance require the submission of documents proving that the company is properly constituted and its representatives are legitimate and empowered. In some cases, it is also required that the company shows that it is regular with the entity promoting the bid.

¹⁹ It is required the submission of certificates and/or statements proving that the company is compliant with Federal, State, and City Tax; Social Security; Unemployment Fund (Fundo de Garantia por Tempo de Serviço, FGTS); and the Labour courts.

141. For this reason, it is not customary to demand - as would be possibly argued against in courts - that bidding companies are enrolled in the Agronomy and Engineering Council (Conselho de Engenharia e Agronomia, CREA) as such requirement shall be complied with by the future SPE.

142. Equally, some notices admit that the bidder technical qualification is proved only from the standpoint of the professionals who will have a role in executing the future contract (professional-technical capacity), and it is not required the bidding company proves experience in executing the object in bid (bidder's technical-operational capacity).

143. In this case, the experience of professionals indicated by the bidding companies can be demonstrated through certification from works completed when working for other companies, being exempted to prove they are connected with the company or pool of companies bidding at the time of the bid - a commitment stating they will perform the work in case of victory is enough.

144. The **flexibilization of technical requirements for bidding companies** is welcomed for controlling entities, as it expands competition and is compatible with the fact that these companies will have a controlling stake but will not necessarily be executing the concession's object, which lies under the future SPE responsibility and is allowed to hire other companies and professionals with *expertise* related to the diverse scopes that comprise the object of a Concession or PPP.

145. On the other hand, the complexity and envelope of a Concession or PPP object usually result in demonstrating experience not only in work execution, but also in the *operation of the object being bid* and in *administrative-financial management* regarding a contract similar to the one which will be celebrated.

146. The financial capacity of bidders is usually measured by requiring that they present a given minimum threshold for Net Assets or Capital Stock, limited to 10% of the contract value, along with certain financial indexes, such as General Liquidity Index and/or Current and Debt ratio. ²⁰

147. It is worth mentioning that while there is no mandatory general rule, the contract value is usually calculated by projecting the income to be

²⁰ Compliance to these requirements is similar to bids governed by Law 8.666/93, i.e., by submitting last balance sheets and financial statements as specified by the law, which mostly corresponds to balance sheets closed by December 31 before the date of submitting bids, and other documents are not accepted (as per article 31, I, of Law 8.666/93).

earned by the concessionaire, which, in its turn, should contemplate the compensation of investments (*capex*), expenses (*opex*), and ROI.

148. It is certain that thresholds demanded will vary according to the bid's object size and innovation level, as well as the specific industry and the federative entity and government agency promoting the bid.

149. Yet, just of a rough estimate of the demand level in practice in Concessions and PPPs, it is usually required that the Net Asset or Stock Capital levels are around 2% to 5% of the contract value, while Current Liquidity and General Liquidity levels should be equal or higher than 1.0 to 1.5; and the General Debt Index shall be between 0.5 and 1.0.

150. In addition to comply with the aforementioned participation requirements, there is the **demand that bidding companies submit a certificate of financial capacity in which they enter into a** *contribution of capital commitment* as the SPE minimum capital stock in case they win the bid, which, in some recent bids, have even replaced the demand for minimum Net Asset or Capital Stock and compliance with financial indexes.

- 151. Another participation requirement related to bidders' financial capacity is the submission of a proposal guarantee (*bid bond*), which, according to article 31, III, of Law 8.666/93, shall be limited to 1% of the contract value and can be presented as a collateral, cash or public debt bonds or, still, as it is more common, **bank warranty or a guarantee security.**
- 152. Some bid's notices still require that bidders present a statement from the financial institution that will grant a bridge loan to bidders if they win the bid or that bidders prove they have leveraged financing at similar levels to those which will be required to execute the bid's object.
- 153. Finally, it is worth mentioning that it is possible that a *letter from a financial institution or an insurance company committing to issue the contract guarantee* is required *(performance bond)*, if the bidder wins the bid.
- 154. As a result, it should be noted that in order to meet all these financial participation requirements, **bidders shall have good communication channels and relationships with the insurance and financial markets**, which is the reason why it is so common to hire consultants from these industries.

155. In the case of a consortium, such channel can be opened by only one company member while all companies in the pool can bear the costs, in general not cheap, that must be incurred to meet all demands.

III.2. PARTICIPATION OF COMPANIES IN CONSORTIUMS

- 156. We have covered, in the Introduction to this Guide, albeit briefly, all risks that a company interested in doing business in Concessions and PPP will be exposed to.
- 157. It is obvious that a proper preparation by these companies goes through the knowledge and understanding of such risks and assessing how manageable these will be, in the sense of evaluating if they are able or not to adopt measures that may prevent these risks to happen or at least, mitigate their effects.
- 158. Given the complexity of the object in a Concession or PPP, such preparation covers several knowledge areas, studies, surveys, research and projects.
- 159. This means that a proper preparation, precification and other acts necessary to elaborate the proposal for the bid as a consortium is expensive and may yield no results. It is still possible, and quite often seen, that the company is willing to participate in more than one bid, which increases such cost.
- 160. So that the perspective of sharing these costs with other companies is in itself an incentive to companies group in consortiums, not to mention the sharing of technical and market knowledge.
- 161. Creating a consortium is the sum of efforts that works from the business prospection phase and taking part in bids until the pinnacle of executing the contracts resulting from winning bids, sharing both costs and profits.
- 162. *Corporate synergy* is the expression that in our view describes best the type of amalgamation that must be generated between companies

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deciding to create a *consortium* to do business together, including Concessions and PPPs.

163. This, as already mentioned in the Introduction to this Guide, pooling companies in a *consortium* aims to increase competitiveness of companies comprising it.

164. In addition to combine efforts for preparing proposals to be submitted in the bid, companies that may not be able to meet alone the requirements of a public hiring by their own have the possibility to participate as a group with supplemental companies.

165. By participating as a *consortium*, companies can add up their technical qualification and meet financial qualification requirements according to their percentage of ownership of the consortium, as detailed below.

III.2.1. Consortium formalities, leadership and joint liability

166. Actually, although the expression *consortium* is still in use, companies participating as a pool of bids that precede Grants and PPPs will never constitute a consortium per se, whether during the bid process or later, even if they win the bid.

167. In fact, bid's notices do not demand that the company pool is formally registered as a consortium, so that they will not have to comply with article 279 of Law 6.404/72²¹ and there is not even the need for companies to submit a *Public Commitment of Constitution of a Consortium* as requested in some bids governed by Law 8.666/93.

^{21 &}quot;Article 279. The consortium will be constituted by a contract approved by the relevant society entity to authorize the alienation of long-term assets, as follows:

I - the designation of consortium, if any;

II - the venture that is the consortium object;

III - duration, address, and jurisdiction;

IV - the definition of obligations and the responsibility of each entity in consortium and the specific deliveries; V - rules on receivables and sharing of profits/losses;

VI - rules on the consortium management, accounting, representity of entities in the consortium and administration fees if any;

VII - rules on deliberation of common issues with the number of votes assigned to each consortium member; VIII - contribution of each consortium member for common expenses if any.

Sole paragraph. The consortium contract and changes will be filed in the jurisdiction's Trade Association and such filing certificate shall be posted."

- 168. Based on article 20 of Law 8.987/95, it suffices that the companies submit a *Commitment to Constitute the future SPE*, the concessionaire, about which we will discuss in Chapter IV of this Guide.
- 169. This Commitment is a relatively simple document containing pretty basic information about how the company pool is comprised, such as percentage of interest of each company, obligations taken, how decisions will be made, consortium's duration and its name.
- 170. The companies shall also indicate which one is the *consortium's leader*, which will be in charge during the bid for the communication with the Conceding Power; this company is not required to have majority of interest over the other members, as it may have equal or less interest than the other members, as well as being part of a consortium where decisions are made independently of the interest of each member.
- 171. This way, although the expression lead company is not used, this company would not necessarily take internal control of the consortium, but will be its representative with powers to enter in legal action and sign documents in behalf of other consortium members.
- 172. If the consortium is formed by local and international companies, paragraph 1 of article 33 of Law 8.666/93 stipulates that the leadership must be taken by a Brazilian company. As such demand is absent from the Concession and PPP Law, it is understood, although it not a consensus either, that such demand is mandatory only if there is a clause clearly stating it in the bid's notice, which is not a rule.
- 173. As such *Commitment to Constitute a SPE* among consortium members will be examined not only by the entity promoting the bid, but also by competing bidders, it is customary to submit only information clearly requested in the bid's notice and by the Law.
- 174. The same applies to the *drafts of the future SPE bylaws* and the respective *shareholder agreement*, when its submission is requested in the bid phase.
- 175. For this reason, it is common that the companies sign a *Memoran-dum of Understanding* (MoU), which is an internal document detailing

how the consortium will operate before, during and after the bid in case the consortium wins.

176. Depending on the relationship between the pooled companies, they can anticipate discussions related to future requests by lenders by agreeing on the main conditions of a future *Engineering, Procurement and Construction contract*.

177. In EPC contracts, "Epecists" are hired by the concessionaire to draft projects, execute works and deliver and manage all engineering services related to the Concession, by providing a predetermined budget and a previously specified deadline, which is known as turn-key-lump-sum.

178. A point that must be highlighted on the impacts related to the participation of companies in a consortium is that it is applicable the so-called **joint liability**²² as per article 33, V²³ of Law 8.666/93, although, as it was said before, such companies do not formally constitute a consortium.

179. Here, "joint" means that each company in the pool is liable for acts that any other company make during the bid. In other words, if any company in the group causes damages to the entity hosting the bid or to any bidder, all other companies in the group or even one of them individually, chosen by the damage party, are forced to repair it, even if they have no participation in the event that caused such damage.

180. Of course, the company or companies in this situation may demand the reimbursement of what they paid from the company that caused the damage, but this is an issue that is to be solved between the companies comprising the pool, and the lack of guilty of any of them is not an allegation to exclude the joint liability that is mandatorily vested upon consortium members.

²² According to article 246 of the Civil Code, there is joint liability "when, in the same obligation, there is more than one creditor or debtor, each of them with rights, or liable, to the whole debt."

^{23 &}quot;Article 33. When the participation of companies in a consortium is allowed in the bid process, the following rules shall be complied:

^(...) V - Joint liability of members for acts made in consortium, both in the bid phase and in the contract execution phase."

181. However, *joint responsibility* will end with the constitution of the SPE, which is an autonomous company not related to the companies which have created it, and the SPE will be responsible for the concession agreement.

III.2.2. What must be considered to define each company's percentage interest in the consortium

182. The definition of percentage of interest of the companies comprising the consortium is a result basically of **the needs related to the fulfillment of the bid's participation requirements.**

183. It is also common that bid's notices demand that the percentage of interest of each company in the consortium is maintained in the future concessionaire, an aspect that shall be considered when determining the percentage of interest of each company in the consortium.

184. In the case of the participation of companies in a consortium, both demands related to legal homologation and the tax and labour compliance shall necessarily be met, alone and in full, by all consortium members.

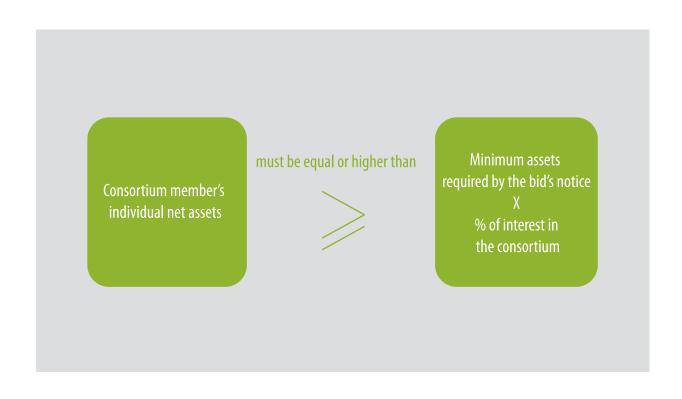
185. All technical capacity demands can be met by the consortium, adding up different expertise of members irrespective of their percentage of interest in the consortium. It is not requested that all members met independently all technical qualifications in the bid's notice, as far as one of the members do so.

186. In the case of a consortium participating of a bid for building and operating a highway, for instance, it is possible that one member proves it is qualified for executing Special Works, such as bridges and tunnels (*Obras de Arte Especiais*, OAEs), as another member proves it is experienced in paving or in executing capacity extension works, adding up all experiences from all consortium members.

187. However, in cases where the bid's notice demand evidence of minimum quantitative, it will be possible to enforce all certifications for complying with a single requirement if the bid's notice clearly allows to do so.

188. It is important to highlight that for consortiums participating of the bid, the Bid Law allows that Capital Stock or Minimum Net Assets levels demanded from individual bidders is added up to 30%.

189. Differently from what happens as for technical qualification, adding up economic-financial qualification of all companies for calculating the Minimum Net Assets and Financial Indexes will be proportional to the interest of companies in the consortium.



190. Specifically, for consortiums, the Federal Accounting Court ruling²⁴ on the **methodology of minimum net asset calculation** determines that each member shall prove to own minimum net assets equal or above the **amount resulting of its interest in the consortium multiplied by the total Minimum Net Asset as forecast by the bid's notice,** as shown in the figure below:

- 191. Thus, let's take as an example a consortium formed by two companies ("A" and "B") that are willing to participate in a bid whose notice demands bidders to submit Net Assets of 1,000 BRL as a minimum.
- 192. Assume that company "A" owns: i) 60% of interest in the consortium, and ii) Net Assets of 100 BRL, whereas company "B" owns: i) 40% of interest in the consortium, and ii) Net Assets of 2,000 BRL.
- 193. In this scenario, the consortium would not be homologated as Net Assets of company A (100 BRL) are below the minimum required by the Bid's Notice at the ratio of its interest (600 BRL).
- 194. This way, in the aforementioned example, the fact that company "B" owns more Net Assets than the minimum required by the Bid's Notice does not imply in the consortium's habilitation, as each consortium member must comply with minimum Net Assets in the ratio of its interest in the consortium.
- 195. However, there is another train of thought that, albeit lesser, is sometimes adopted, reason for which it deserves to be commented as it is less beneficial to consortiums and as such, shall be argued against in the phases of public consultation and/or clarification to the notice.
- 196. According to this secondary argument on the calculation methodology of Net Assets, the whole available net asset of a consortium member shall not be considered, as per the other understanding, but

only the percentage of the consortium member shall be calculated by the ratio of its interest in the consortium.

197. By this rationale, if the bidder's interest is of, say, 20%, in order to comply with the economic-financial qualification requirement, only the amount corresponding to 20% of the value that the bidder offer as net asset or capital stock shall be considered.

198. For illustrating this understanding, let's again take as an example a consortium formed by two companies ("A" and "B") that are willing to participate in a bid whose notice demands bidders to submit Net Assets of 1,000 BRL as a minimum.

199. Let's assume that the first company owns 800 BRL in net assets and an interest stake of 60% in the consortium. The second company owns 400 BRL in net assets and interest of 40%. According to the second understanding, the consortium would not meet homologation requirements as the company "A" would input 480 BRL (60% of 800 BRL) and company "B" would input 160 BRL (40% of 400 BRL), thus not reaching the minimum required of 1,000 BRL.

200. One can see that the second understanding is more restrictive and prevents, in a way, consortiums to join bid processes as, in practice, this methodology demands that all consortium members comply with minimum Net Asset requirements, reason for which there would be no use for consortiums to participate in bids.

201. As for Financial Indexes, the Federal Accounting Court does not allow for simply adding up indexes from each company²⁵. In reality, it is admitted that quantitative/figures comprising the calculation of Financial Indexes to be added up, in the ratio of each company's interest in the consortium.

202. When quantitative are added up, then the financial index of the members of the consortium can be calculated - an amount that will be different from the simple sum of indexes from each member.

203. In order to better explain the FAC understanding, let's take as example the Current Liquidity Index, which is calculated by dividing the Current Assets by the Current Liabilities of a company.



204. In the case of companies participating of a bid through a consortium, in order to check compliance to the minimum Current Liquidity Index requirement of a bid's notice, Current Assets of each member are added up in proportion to each member interest and then divide the resulting amount by the sum of all Current Liabilities, also in the same proportion, to end up with the Current Liquidity Index of the consortium, as best shown in the figure below:

205. Another important aspect that encourages companies to enter bids in consortiums is that usually it is accepted that the proposal's guarantee (bid bond) is submitted by only one member for the benefit of the whole consortium, which is also valid for the eventual commitment that in case of win, the companies will submit a contract guarantee (performance bond).

206. This usually makes easy for mid-sized companies to join bids, as it suffices that one of them to take all required commitments for submitting the proposal guarantee and the commitment that the future SPE will submit a contract guarantee to financial institutions or insurers, establishing thus a series of commitments among companies to share the expenses incurred.





IV. CONCESSION AGREEMENTS SIGNATURE

207. In this Chapter, we present information and comments on the conditions before signing the Concession Agreement and aspects of its execution that may help understanding on the peculiar regime of this specific method of hiring and, thus, the preparation of companies interested in doing business in Concessions and PPPs.

208. Such content is structured in the following topics: 1) conditions preceding the contract celebration; 2) administrative and financial engineering; 3) physical engineering; 4) regulation; and 5) interaction with several stakeholders.

IV.1. CONDITIONS PRECEDING CONTRACT SIGNATURE

209. The bidder, company or consortium that is ranked first and got their homologation and qualification documents approved, among others documents required by the bid's notice and mentioned on Chapter III of this Guide, is declared as winner of the bid.

210. If such victory is confirmed after the phase of legal actions in the bidding process, the procedure is homologated and the contract's object adjudicated, inviting the winner to sign the concession agreement within the timeframe determined by the bid's notice.

211. According to the phase reversal system usually adopted in the bidding procedure, eventual legal actions will be focused in a single bidder - the one declared as winner - and become faster: from making winner's

documentation available for interested parties, placement of legal action, invitations for the winner to counterargument legal actions and the judgment by a court, 40 days are usually spent.

- 212. Homologation, the act through which the bid procedure is considered regular, and adjudication, the act through which rights to hire the bid winner are assigned, , are usually performed together and posted in a single publication, along with court rulings on legal actions and the invitation for the winner to sign the concession agreement , adding 5 days more to the 40 days of the legal action phase.
- 213. Finally, the bid's notice usually establishes a 30-day term, extendable for additional 30 days for a justified reason, for the bidder to fulfill preceding conditions below and then is able to sign the agreement.
- 214. Failure on fulfilling these conditions and not signing the contract triggers the execution of the *proposal guarantee* (bid bond), as well as and eventual fines determined by the bid's notice.
- 215. Thus, between the first announcement of a winner and the signature of the contract, there is some 75 days or two months and a half, which is a very tight period for fulfilling the conditions described below.
- 216. For this reason, while the bidder that was declared as winner cannot consider such result as definitive, it is common and recommended to start working on the necessary measures for signing the Concession as soon a bidder is declared as winner, despite having to keep the victory by fighting legal actions in the bidding process.

IV.1.1. Forming a Specific Purpose Entity (SPE)

- 217. One of the first conditions to be met preceding the signature of the concession agreement is the constitution of a Specific Purpose Entity (SPE), as required by article 9 of Law of PPPs and granted by article 20 of Concession Law.
- 218. Although the Concession Law only allows for the winner to constitute a company and not a *consortium* before signing the contract, cases where such requirement is absent from bid's notice are quite rare both for Ordinary Concession and PPPs.
- 219. Beyond legal and bid's notice requirements, constituting a SPE is also a demand from lenders as having a company autonomous from its controllers, with taxpayer's number, accounting and assets of its own, segregated from the companies that founded the SPE, prevents confusion on liabilities and other risks and related to other activities pursued by its shareholders, easing its accounting and asset controls.
- 220. These are the very same reasons that lead the Conceding Power to determine in bid's notices that constituting a SPE to manage the Concession's object is mandatory even if the law does not say so: **risk and asset segregation and efficient control.**
- 221. The SPE is nothing more than a company created for a single purpose: in this case, implement and manage the concession agreement's object. For this reason, the SPE has no shelf life other than the concession agreement term, including its eventual extensions.
- 222. From a partnership standpoint, the SPE is a company like any other and may take any form admitted by Law while it is quite common **that** bid's notice determine it should be a stock corporation (in Brazil, "sociedade anônima").
- 223. In this case, SPEs are governed by Law 6.404/76, in all matters concerning partnerships, which determines a series of **transparency measures for financial statements and governance rules** that are welcomed by the Conceding Power due to reasons above.

- 224. The SPE will be considered as constituted when its bypass is filed at the Trade Association of its jurisdiction, i.e., in addition to the bylaws, also its name, taxpayer's number and office address, as well as the constitution drafts with the election of the Board.
- 225. At the discretion of the SPE controlling companies, the Shareholder Agreement, mandatory for SPEs controlled by different companies with relevant interest, which is usually valid for companies that won a bid in a consortium, can be celebrated later as it is not a required document for constituting a SPE.
- 226. It is worth mentioning that once the Shareholder Agreement is signed it shall be made available at the concessionaire's headquarters as per article 118 of law 6.404/76.
- 227. Once the SPE is constituted, a **bank account** must be immediately opened as it will receive the initial financial inputs and other payments that are mentioned below.
- 228. Considering the short time for all these arrangements, it is common and acceptable that bidders use **a non-operational company that already is a stock corporation and constitute the SPE upon this existing partnership foundation.**
- 229. Such practice shall not be put in place in States where Trade Associations are fast, but whenever necessary, it has been accepted by the Conceding Power since the SPE controllers prove that the company being used has never started operation, by presenting corresponding conformity certificates.
- 230. In some recent bids promoted by the Federal Administration, such as concessions of airports, it was determined that the entity related to the Conceding Power, in this case INFRAERO (the state-owned company that manages airports in Brazil) would also be a shareholder in SPEs (in that case with a mandatory 49% stake).
- 231. In effect, the PPP Law forbids that public administration entities may have a controlling stake in a SPE, which is allowed by the Concession Law.
- 232. In this case, the winner of the bid firstly must constitute another SPE, controlled only by the private shareholders and then such SPE will become

a shareholder of the concessionaire SPE, together with the public administration entity named in the bid's notice.

- 233. In this case, the bid's notice shall also determine drafts from the future shareholder agreement for the Concessionaire SPE with guidelines to discipline the relationship between private shareholders and the public administration entity.
- 234. As mentioned before, the SPE is only closed when the concessionaire agreement expires, and in the case of bankruptcy.
- 235. However, Concession and PPP Laws admit SPE's control transfer once it is previously authorized by the Conceding Power, if other conditions determined by law and notices are met.
- 236. On this regard, it is common that the bid's notice determines a period in which control transfer and sometimes any change to the SPE partnership are blocked until a given work is completed and/or some period of time is lapsed.
- 237. Irrespective of setting a period of time during which any control change is prevented, the bidders shall care that companies determining for its technical and financial qualification that led to the win in the bid can only be replaced by companies with similar qualification, as per articles 27, paragraph 1, I, of Law 8.987/95 and 55, XIII, of Law 8.666/93.
- 238. It seems to us, though, that the peculiar Concession and PPP regime and the qualification of the concessionaire itself across the contract execution would allow for less literal interpretation of such legal device.

IV.1.2. Capital requirements and initial payments

239. Some bids previous to Concessions and PPPs are called *auctions as they are part of a privatization program* as it happens in the Federal Administration (Law 9.491/97) and the State of São Paulo (Law 9.631/96).

240. Before we proceed to the analysis of such fact with forecast payments on the conditions before signing the concession agreement, it is worth making a couple of notes so that the language used do not lead to confusion of concepts caused by words conveying more than one meaning.

241. The first one is that **the name of auction is given to bids comprising a decentralization** program, even if the procedure does not have an oral bidding phase, which may take place in bids for Concessions and PPPs as mentioned on Chapter III of this Guide.

242. The second note is that laws governing decentralization processes, called before as *privatization* determine that *decentralization* comprises two different realities: both the sales of public goods (shares, real estate and so on) for the private sector and the concession that is vested upon an asset and/or public service.

243. These are legal and political different situations as in the first case, a public asset is sold whereas in the second, nothing is sold; instead, **only the object of the concession agreement is transferred to the private sector**, and eventual enhancements made by the concessionaire will be later incorporated to the Public Asset.

244. Despite different, laws call both the sale of assets and the concessions of *descentralization* events, which were before called before privatization *because* in both cases something that was public is handed over to the private sector, although in the first case, an asset is transferred and in the second case, an encumbrance is transferred through a compensation.

245. So well. Overall in the Federal Administration it is common that auctions contemplating or not oral bids are hosted by the São Paulo Stock Exchange (BOVESPA), which also performs the custodianship of documents submitted by bidders. Thus, one of the first payments to be made by the winner bidder are **BOVESPA fees**.

246. In order to provide a glimpse about figures, the amount charged in the last highway auction was approximately 560,000.00 BRL.

247. Other initial payment due to another peculiarity of the bid procedure for Concessions and PPP is the eventual **reimbursement of studied performed within the scope of a PMI.**

- 248. As described in Chapter II of this Guide, article 21 of Grant Law, also applicable to PPPs, authorizes that the winner directly makes the reimbursement of expenses arising from performing such studies, projects, research and surveys leveraged by the Conceding Power to promote the bid.
- 249. In order to provide a glimpse about figures, the amount reimbursed in the last highway auction was approximately 4.2 million BRL.
- 250. Another peculiarity of the Concession and PPP bidding procedure that may result in payment to be made as a condition to sign the concession agreement is the **Concession encumbrance** whether it has been adopted or not as selection criterion for the bid.
- 251. Even if the bid adopts different selection criteria, the Conceding Power can define in the bid's notice that the concession's award has a cost, hence the term *concession encumbrance*, that may be encumbrance of performing some activities without compensation or charging fees, or, more commonly, any payment at all.
- 252. As mentioned in Chapter III of this Guide, the Grant encumbrance can be variable and/or fixed and the bid's notice may determine the payment of the fixed encumbrance in installments or upfront, on the spot as a condition to sign the concession agreement.
- 253. In this case, this is the highest initial payment as it can not be financed due to be paid on a short notice and to the fact that it is not an investment in infrastructure or public equipment.
- 254. It is important to see that the payment of the concession encumbrance, when applicable, **must be made by the concessionaire**, which is positive for its controllers and becomes one more reason for which a bank account must be opened for the SPE immediately after its constitution.
- 255. The same is not applicable to BOVESPA fees and to the reimbursement of studies, surveys, projects and research carried out by the concessionaire or under its authorization and that have been leveraged in the bid. Such payments are not generally considered by the Conceding Power as due by the concessionaire but by the bidding companies.

256. Despite the payments above mentioned, the most significate amount spent on fulfilling conditions before signing the concession agreement is related to the required capital inputs for constituting the concessionaire.

257. Although this figure varies according to the entity promoting the bid, the figure of investment required in the beginning of the concession and the level of risk taken on the value to be paid, it ranges, as a rough estimate, from **around 1% to 5% of the contract value.**

258. As already said, while it is not mandatory, the contract value is usually calculated by projecting the income to be earned by the concessionaire, which, in its turn, should contemplate the compensation of investments (*capex*), expenses (*opex*), and ROI.

IV.1.3 Other previous conditions usually required

259. In addition to the conditions above specified, bid's notice can determine other conditions to be met before the signature of the concession agreement, which is usual.

260. A condition usually requested is that the SPE - note that **it is the SPE itself, not its controllers anymore - presents a contract execution guarantee** (*performance bond*), and it is common that bid's notices specify that it is issued by a first class and top-rate financial institution or insurer or that present a given minimum Net Asset level or, still, that prove they already have guaranteed a similar contract.

261. Similarly, to what is applicable to the proposal guarantee (bid bond), the maximum guarantee value is limited to 1% of the contract value (as per article 31, III, of Law 8.666/93), and it can be presented under as a collateral, cash or public debt bonds or, even more common, as a bank guarantee or an insurance bond.

262. Another condition also common on bid's notice is that **SPE hires before signing the concession agreement** - again the SPE and not its con-

trollers anymore - **other insurance policies defined in the respective bid's notice** as insurance by engineering risks, civil liabilities and so on.

263. Due to the short term, it is common that companies get the advice of insurers since the bidding phase, not only to support the hiring of the proposal guarantee and the issuance of a letter with a commitment to provide contract's guarantee, but also to estimate prices and to get ready to comply with the so-called concession insurance plan.

IV.2. ADMINISTRATIVE/FINANCIAL ENGINEERING: OBTAINING FINANCING AND OTHER OPERATIONS IN CAPITAL MARKETS

264. It can be seen by the agility and volume of the conditions that shall be met even before the SPE becomes the concessionaire - which happens effectively when the respective concession agreement is signed - that **the management of a concession demands not only physical engineering but also a great deal of administrative and financial engineering.**

265. Such aspect of Concessions and PPP has been highlighted in this Guide and it is, of course, an operation to which companies interested in doing business in this market shall be prepared to, as it is more intense and complex operation than seen in the Administrative and Finance departments of companies executing contracts governed by Law 8.666/93.

266. The management of a Concession and PPP demands some sophistication in the administrative field, considering also the contract and the company management, and in the financial management all over its execution and also at its end. Thus, the company board and staff shall be properly structured to face this challenge.

267. Soon after the conditions before the contract are met and the contract is signed, the next important step is obtaining **the bridge-loans, usually necessary until long-term financing are approved.**

268. As mentioned in the Introduction of this Guide, the leverage capacity, i.e., of mobilizing resources through long-term financing, is a large attention point for mid-sized companies interested in doing business in Concessions and PPPs.

269. As said before, **financing available in the Brazilian market are rarely structured under the** *project finance non-recourse* model, in which guarantees related to the project itself, such as the fiduciary grant of its receivables and/or the fiduciary lien of shares in behalf of the financing institution are enough to make feasible the financing what seems to be a good project in terms of bankability and exposure to risk.

270. In addition to the assessment related to the project conditions, **the financing entity** - **in Brazil**, **basically BNDES** - **also assesses the capacity of shareholders of borrowing from companies to pay back the loan granted to the SPE, if it cannot pay it.**

271. And as highlighted before, as smaller is the company and less professional its governance structure is, more restricted the analysis of an eventual financing request will be, which can be a barrier for midsized companies to do business in the structured project segment, as they may not have or be willing to perform all investment with their own capital.

272. It is worth to mention in more detail that according to the Operational Policies currently in practice by BNDES, the conditions below, in addition to other that may be identified in the project's specific risk analysis to approve loans:

- (i) The borrower must be a stock corporation with the specific purpose to deploy the financed project;
- (ii) Expected cash flows from the project shall be sufficient to pay all loans:
- (iii) The Debt Service Coverage Index (*Índice de Cobertura do Serviço de Dívida,* ICSD) projected for every year in the project

operational phase must be 1.3 as a minimum; the ICSD may be 1.2 as a minimum since the project yields ROI of 8% per year in real terms as a minimum;

- (iv) Shareholders own capital must be 20% as a minimum of the project total investment, excluding in this calculation eventual partnership by BNDESPAR, and at BNDES discretion, the project cash flow generation might be considered as a portion of the shareholder's own capital;
- (v) Contracts of the operation shall forbid the grant of client's mutual to shareholders and still determine conditions and restrictions to all other payments made by the client to its shareholders under any title.
- 273. The risk analysis will be based in the following factors:
 - (i) The SPE shareholder's risk, according to the project dependency and financing in relation to these;
 - (ii) The risk of implementation of the project and their respective mitigators;
 - (iii) SPE leverage level;
 - (iv) Sufficiency, foreseeability and stability of project's cash flow;
 - (v) The project's operational risk and their respective mitigators;
 - (vi) The value, liquidity and security of guarantees offered by the SPE.
- 274. The demand for guarantees from SPE shareholders (the so-called *corporate or surety guarantees*) will be higher or lower whether the project is still in its implementation phase also called *pre-operational* and hence more exposed to risk, or it is in operational phase, generating revenue.
- 275. One of the measures that can be adopted within the SPE to mitigate demands of guarantees from its shareholders is celebrating an EPC contract, as mentioned on Chapter III of this Guide, through which the contractor and/or equipment provider (the so-called "Epecist") is obliged to

complete the project within a predetermined budget in a previously specified timeframe and as per technical specifications, to ensure the project's efficient operation and performance in a *turn-key/lump-sum* regime.

276. Another instrument being demanded to mitigate requests of surety bonds is *ESA* - *Equity Support Agreement*. ESA is a capital input commitment made by the SPE shareholders that places the SPE itself as direct beneficiary and within this context in discussion, lenders are indirect beneficiaries of the capitalization.

277. Capital inputs determined by the ESA will be made if the SPE does not satisfy the obligation to amortize loan installments or even to meet eventual cash flow needs to make some investments possible, as the shareholder has committed to subscribe new shares in a potential capital increase.

278. Another guarantee that may be demanded by the lender, overall in the project's pre-operational phase, is that the lender be the beneficiary of an insurance bond against risks related to the project's implementation.

279. However, within the current credit restrictions in the marketplace, it is not rare that in addition to the instruments mentioned above, it is also demanded the so-called *surety guarantees*, such as SPE shareholders *guarantees and letters of comfort* and even real guarantees, such as those upon real estate that comprise its assets, as well as project guarantees, such as fiduciary grant of SPE receivables and shares.

280. It is also common to require capital inputs in advance from the SPE shareholders as a previous condition to approve financing.

281. Despite the bleak landscape described above, and while the company shareholders size determines whether lenders will seek for more guarantees before lending, instruments such as ESA, shareholders guarantees and letters of comfort have been also demanded from larger companies, reason for which the capacity to deliver such guarantees becomes a huge challenge for any company interested in doing business in Grants and PPPs.

282. It is worth mentioning that through SPE shareholder guarantees or letters of comfort, mid-sized companies (those companies with gross year

operational revenue up to 90 million BRL) can access the **BNDES FGI,** which is the bank's guarantee fund to supplement guarantees, but limited to the maximum value of 10 million.

283. Consider also that **percentage of financing investment-related cash flow is of 40%** for small- and mid-sized companies - larger companies are limited to 15% (as per item 6.1.12.1 of Instruction # 34/2011).

284. Finally, in order to expand control, transparency and adoption of corporative governance standards by the concessionaire, **some bid's notices determine the obligation of SPE IPO after a period of time not much longer than 1 year.**

285. It is not required, however, that the SPE trades its shares in the stock market - this is usually adopted by the controlling *holdings*. **The demand for the IPO** can be met, as usually is, by issuing debentures, which has become an additional financing method for investments in Concessions and PPPs.

IV.3. PHYSICAL ENGINEERING: EXECUTION OF CONCESSION'S OBJECT UNDER TURN-KEY REGIME AND LUMP SUM

286. As mentioned in the Introduction to this Guide, Concessions and PPPs are defined by aggregating within its scope activities of different types, which results in the concessionaire having to work as manager of contracts signed for executing the Concession's object but remaining sole responsible for its proper development and by inputting resources required for such.

287. For this reason, it was highlighted above that the management of a Concessions demands not only physical engineering but also a great deal of administrative and financing engineering.

288. However, Grants and PPPs always involve the traditional Engineering not only for service delivery, which is their primary goal, but also to encompass project elaboration (*design*), work execution (*build*), operation (*operate*) and the future delivery to the Conceding Power of the public infrastructure or equipment, both fully operational (*transfer*)²⁶.

- 289. Such contract typology, known in English by the acronym *DB-FOT*, is a full contracting, *turn-key*, executed under a global price regime, *lump-sum*.
- 290. It is also quite common to add to the concessionaire's duties the adoption of a series of measures related to expropriation required for executing the concession's object, as well as obtaining environmental permits.
- 291. On what concerns to expropriations, the concessionaire is usually responsible for all data required for the Conceding Power to issue the corresponding Public Utility Decrees, after which the Conceding Power shall start court procedures for expropriations, obtain and realize ownership issuances or negotiate with real estate owners to expropriate their properties.
- 292. The cost of indemnifications arising from expropriations is also borne by the concessionaire but sometimes not in full, as some concession agreements determine a threshold for these payments that, when exceeded, forces the contract to be adjusted for the benefit of the concessionaire.
- 293. Mostly when the payment of indemnifications for **expropriations** is fully borne by the concessionaire without the threshold above mentioned, **companies interested in doing business in Concessions and PPPs shall prepare meticulous studies to calculate properly the amount to be spent.**
- 294. The responsibility for environmental permits, such as main permits, authorizations for deforestation and eventual exemption permits for both is generally attributed to the concessionaire, although some contracts also foresee sharing this duty with the Conceding Power and/or limiting its costs to a threshold and/or sharing risks related to impact mitigating

measures to Indian reserves, former slaves' communities and the eventual discovery of archaeological sites.

295. Anyway, the assessment of the environmental liability assigned by the contract to the concessionaire and the analysis of conditions to obtain environmental permits is also critical for companies interested in doing business in Concessions and PPP to precify properly risks inherent to environmental permits.

296. It shall be mentioned, finally, that the concession agreement, like the EPC contract normally celebrated with companies hired by the concessionaire to directly execute a relevant portion of the concession's, is executed under a global price regime, also known as *lump-sum*.

297. This leads to taking some Engineering risks, such as design risk, including the variation of quantities and price of raw materials within a certain level of normality.

298. Such fact comes with **consequences related to the considered economic-financial balance of the contract**, strongly linked to the its risk matrix and that is performed based in calculation methodologies that do not adopt as parameters the bidders' projections, but market standards valid at the time of unbalance, which are used for the composition of a marginal cash flow, based upon which the adjustment is carried out.

299. It is out of bounds of this Guide to go deeper into a topic so complex, but our goal is to draw attention to relevant points to allow for a proper understanding of the business tied to a Concession or PPP, so that companies willing to do business may be prepared to assess them properly.

IV.4. SUBMISSION TO TYPICAL CONCESSION REGULATION

300. As already mentioned in this Guide, it is a peculiarity of Concessions and PPP to emphasize service delivery, which is the sole activity that may be alone a PPP object.

301. Albeit such services that are the object of a Concession or PPP not always are public services, it is quite common that they are so.

302. The delivery of public services under the Concession regime is clearly referred to on article 175 of the Constitution, which highlights the "special aspect of its contract" and mentions that a specific Law will govern its oversight, user rights, fee policies and the obligation of keeping a proper service level.

303. Thus, this is an activity subject to intense regulation due to its political relevance and legal treatment not only as for the Law, but also by a series of infralegal rules issued by the Conceding Power.

304. Upon *decentralization* of public service delivery, whether by selling state-owned companies developing such activities or by handing delivery over to private sector, the regulation activity has intensified, which ended up in the creation of specialized regulation entities of the public administration equipped with administrative autonomy to regulate concession agreements with less political influence.

305. However, mainly for cities, it is still common that the oversight is performed by entities that are members of the central administration, thus more susceptible to political interference that is always present, in higher or lower levels, on the oversighting performed on public service concession contracts.

306. Anyway, no matter the level of **political influence or autonomy** of regulatory bodies, , the concessionaire will be always subjected to strong oversight of the concession agreement as a whole, but not only that.

307. Even on what concerns to oversight, the focus on a concession is different from the one placed on contracts exclusively governed by Law 8.666/93, as **its main object will be the results, not the means, employed to reach them.**

308. To this end, concession agreements determine quality or performance indicators and parameters to be met, as well as investment

triggers activated according to the effective demand for the infrastructure, instead of investing in dates determined by inflexible schedules.

309. Once such parameter is reached or a trigger is activated, the concessionaire shall deploy all means, material and human resources to implement the expected action without claiming compensation of eventual excess of price estimations drafted by the time of submission of its proposal in the bidding process, except in exceptional cases.

310. An increasingly popular instrument in concession agreements are the so-called **adjustment discounts**, that are applied in case of lack of execution of any investment, even by no fault from the concessionaire - if the concessionaire is found guilty, fines apply.

311. Although the oversight method changes according to the industry being regulated, as well as legal and contract provisions applicable, it is also common that across the concession agreements term the regulating entity issues a series of rules and new guidelines about the contract's object, the so-called *service regulating provisions*.

312. Such normatization applied upon the concession agreements is justified by the need for regular updates and adjustments for a delivery aimed to a large group of people and for a long period, and are based in the principles of proper delivery, topicality and changes of public service.

313. Material changes of price that this normatization may cause shall be the object of an economic-financial adjustment for the concession agreements, but here we want to highlight that the **concessionaire** is subjected to regular changes due to the special character of its contract.

314. Another point worth of mention is that the social relevance of public services imposes a **duty of continuity** for delivery against the concessionaire.

315. Inversely to what happens within contracts exclusively governed by Law 8.666/93, whose article 78, XV, allows the Hired Party to suspend the fulfilling of its obligations if the Public Administration delays counter payments longer than 90 days, **the concessionaire can only interrupt service delivery if authorized by a legal court** as determined by the sole paragraph of article 39 of Law 8.987/95 - an instrument also applicable to PPP (as per article 3, caput, and paragraph 1 of Law 11.079/04).

316. Thus, this is an oversighting environment much more dynamic than the one applied on contracts solely governed by Law 8.666/93, requiring proper preparation of companies willing to do business in Concessions and PPPs, who will deal much with such oversighting.

IV.5. LIVING WITH DIVERSE STAKEHOLDERS: DETERMINING LEGAL RELATIONSHIPS WITH THIRD PARTIES DUE TO THE CONCESSION

317. Concessions are **an outsourcing model** of an activity originally public, hence the mention to decentralization even when no assets are disposed of.

318. By means of a Concession, **not only a public duty is outsourced but also some prerogatives that are required for the concessionaire to develop the activity that is the object of the concession and get paid,**

such as the rights for using public assets, charging users with fees, if that is the case, and communicate directly to them for delivering the service.

- 319. This way, by celebrating a concession agreement, the SPE takes a legal position that implies a series of legal relationships going further than the contract-based relationship with the Conceding Power.
- 320. In addition to the aforementioned intense, long-term relationship with the Conceding Power²⁷ and lenders, the Concessionaire will establish direct legal relationships with users of public services, under which these users will be charged with the fulfilling of given obligations but also the concessionaire will be charged by any improper service delivery, even if unfairly.
- 321. In addition to the relationship with users, there are always other stakeholders, such as public agents that may interfere somehow in the public service delivery, such as police forces, other public entities with supplemental competencies and so on, entities able to issue environmental permits in their diverse fields of operation, controlling entities, such as Accounting Courts, Controllers and the State Prosecution, among others.
- 322. That's why it is said that while contracts governed solely by Law 8.666/93 generate bilateral legal relationships, concessions imply in **polygonal legal relationships**, for which companies willing to do business in this sector must get ready for.
- 323. There is a reason for the fact that concessionaires always set up an Institutional department through which relationships with several *stake-holders* in this special method of hiring are formed.

²⁷ This umbrella covers not only the direct representatives of the political person, such as the Presidency of the Republic, State and City governments, their ministries and secretariats, but also agents performing the daily oversight of contracts, as Regulation Entities and Oversight Departments.







V. EXECUTIVE SUMMARY

324. It is hoped that the information and comments in this Guide can support the preparation of companies interested in doing business in Concessions and PPPs.

325. In previous chapters, we have tried to objectively provide a handson exposure of the main practices and attention points related to this public-private operation model, also providing explanations and some detailing when relevant.

326. Although we recommend reading the previous chapters in full, we also present below an Executive Summary referencing Chapter and Item, where it is possible to find explanations and detailing of ideas summarized in the topics below.

GENERAL CONSIDERATIONS ON RISKS TAKEN IN CONCESSIONS AND PPPS (I.1.)

327. In addition to such responsibility of deploying financial resources to execute the contract - in larger or smaller proportion as the model is an Ordinary , Sponsored or an Administrative Grant - doing business in any concession modality implies to take certain risks that are higher than in public work contracts, governed by Law 8.666/93.

328. But if by one hand it is certain that, within Concessions and PPPs, some risks are taken in larger proportion than in public work contracts, by another hand it is also certain that other risks are eliminated, mitigated or shared in Concessions and PPPs.

329. More than that, for companies at the *entry* level in this segment, doing business in Concessions and PPPs means to take risks unknown so far, reason for which initiatives like this one launched by CBIC to debate and share information are critical for leveraging this private-public operation field can open new horizons for the construction industry and then support Brazil's development.

BARRIERS FOR MID-SIZED COMPANIES TO DO BUSINESS IN GRANTS AND PPPS (I.2)

- 330. The size of investments required for this type of business could be a barrier for entry to mid-sized companies interested in join this market independently. However, this is a barrier that can be overcome if these companies join a *consortium*.
- 331. Although long term contracts are alone a barrier for mid-sized companies willing to do business in Concessions and PPPs, this is an indication that the first years of the Concession will bring in losses, which is something that must be considered by companies willing to enter this segment, as losses will also be brought upon the companies by potential lenders, as they will demand more guarantees from the concessionaire stakeholders during this period.
- 332. The diversity of activities comprising the scope of a Concession or PPP also is not seen as a barrier for entry to mid-sized companies to prevent doing business in this segment. Actually, such scope diversity is rarely met by a single company whatever size it may have, so that both the bidding process that always allows the participation of companies in a *consortium* and the contract execution are adapted to such reality.
- 333. According to criteria adopted by the Ministry of Labour and Social Security in the Yearly Information Book (Relação Anual de Informações RAIS)²⁸ for classifying companies in terms of size, concessionaires are

²⁸ According to the Ministry of Labour and Social Security's RAIS, mid-sized companies are those employing between 100 to 499 people. However, there are other criteria for assessing a company size, such as gross revenue or yearly revenue or total of assets recorded in a year, which will be mentioned to later.

largely mid-sized companies, so that the concessionaire's size, from a size of workforce standpoint, does not become a challenge for mid-sized companies to do business in this segment, as both concessionaire and mid-sized companies are at the same level.

334. More financial capacity is demanded from the concessionaire than technical capacity, which echoes through the whole hiring process and is usually the largest bottleneck for mid-sized companies to participate in this segment. The participation of companies in a *consortium* may solve eventual issues related to satisfying financial requirements for participating in the bidding process, as well as to allow for sharing costs with the preparation of proposals and, most of all, the investments required by the future Concession.

335. Actually, the main issue for mid-sized companies interested in doing business in Concessions and PPPs is related to financing, which depend on payment guarantees.

336. This is because to get financing in Brazil, project financing frameworks are rarely used, through which its approval depends solely on resources generated by the Concession or PPP project.

337. In Brazil, financing approval is highly concentrated in few financial institutions but most of all on the Social and Economic Development National Bank (*Banco Nacional de Desenvolvimento Econômico e Social, BNDES*), which assesses not only the own project's conditions, but also the capacity of payment from the companies asking for financing.

338. That's why as smaller is the company and less professional its governance structure is, more restrictive the analysis of an eventual financing request will be, which can be a barrier for mid-sized companies to do business in the structured project segment, as they may not have or be willing to perform all investment with their own capital.

MECHANISMS THROUGH WHICH COMPANIES CAN INFLUENCE THE BUSINESS MODELING (II)

339. The purpose of PMIs is given by article 21 of Law 8.987/95: to authorize companies to perform *studies, surveys, research and projects* to support the bidding process for a Concession or PPP.

340. Although PMIs are also competitive public procedures, they are also less formal than bids, so that handling the procedure and eligibility requirements for interested parties are less rigid.

341. The participation of companies interested in doing business in Concessions and PPPs on PMIs is not a profitable activity per se, which brings us to the next topic, that covers the pros and cons in taking part of this procedure.

342. The benefits of a company willing to do business with a given Concession or PPP project participating in the corresponding PMI are below: (1) the participation may be required to make the business possible, as the failure to do would imply in the business cancelation; (2) by joining a PMI, the company directly influences its modelling, in a way; and (3) the participation in a PMI implies in carrying out studies with some depth on the bid's object, which shall be performed by any company willing to do business in Concessions and PPPs in an informed basis.

343. The first drawback is (1) the risk that the costs from the PMI are not reimbursed, fully or partially, as studies, surveys and projects for the PMI may not be used, in full or partially and the bid, which is the main target of companies willing to do business in Concessions and PPP, may never take place; (2) some public invitations for PMI forbid the participation of companies interested in the future bid; (3) studies, surveys and projects carried out within a PMI will be made available to competing bidders and to any other stakeholders, so that the company interested in doing business in the corresponding Concession or PPP may prefer to produce such materials privately in order to keep their results to itself.

344. As one can see from the minimum mandatory content of Public Consultation performed within a PPP, the project that is its object is already well mature, so that the influence margin upon them is quite small. For Ordinary Concessions, as there is no minimum mandatory content, sometimes only the general aspects of the bid and the future contract are presented, which despite not fulfilling Public Consultation goals, opens room for accepting better informed inputs.

PECULIARITIES OF BIDS PRECEDING CONCESSIONS AND PPPS (III.1)

345. The adoption of judgment criteria for the bid that are different from those determined by Law 8,666, such as lowest fee to be paid by the user, for Ordinary and Sponsored Concession, or the *lowest counter payment* to be made by the Conceding Power, for Sponsored and Administrative Concessions or, for encumbered grants, *highest bid or larger encumbrance*.

346. Bids preceding Concession and PPPs are also attractive to foreign companies.

347. As for technical qualification, the company can meet requirements as established in the notice by submitting technical reports similarly to bids governed by Law 8.666/93, but participation requirements are adapted to recognize that i) the contract object will not be executed by the bidder itself, but by a company to be founded by the bidder if it wins the bid, and ii) as said before, concessionaires have a great space for outsourcing.

348. The financial capacity of bidders is usually measured by requiring that they present a given minimum threshold for Net Assets or Capital Stock, limited to 10% of the contract value, along with certain financial indexes, such as General Liquidity Index and/or Current and Debt ratio.

349. In addition to compliance with these thresholds and indexes, the documents below can also be requested: (a) statement of financial capacity in

which bidders enter into a capital payment commitment of a given value as the SPE minimum capital stock if they win the bid; (b) statement of a financial institution that will lend the bridge loan to bidding companies if they win the bid or documents attesting that bidders have already gotten the required financing for the bid purposes; (c) proposal guarantee (bid bond); and (d) a letter from a financial institution or insurer committing to issue contract's guarantee (performance bond) if the bidder wins the bid.

350. To comply with all these financial participation requirements, bidders shall have good relationship and communication channels with insurers and banks, reason for which it is common to hire advisors in these fields. If a consortium is involved, such channels may be provided by a single company member, and all members can jointly share the costs, usually not cheap, required to adopt all these measures.

PARTICIPATION OF COMPANIES IN CONSORTIA (III.2)

- 351. Proper preparation, precification and other acts necessary for companies willing to do business in this sector to elaborate the proposal for the bid is expensive and may yield no results. It is still possible, and quite often seen, that the company is willing to participate in more than one bid, which increases such cost.
- 352. Creating a *consortium* is the sum of efforts that works from the business prospection phase and taking part in bids to the pinnacle of executing the contracts resulting from winning bids, sharing both costs and profits.
- 353. In addition to combine efforts for preparing proposals to be submitted in the bid, companies that may not be able to meet alone the requirements of a public hiring have the possibility to participate as a group with supplemental companies.

354. By participating as a *consortium*, companies can add up their technical qualification and meet financial qualification requirements according to their percentage of ownership of the consortium.

355. Bid's notices do not demand that the company pool is formally registered as a consortium, so that they will not have to comply with article 279 of Law 6.404/72 and there is not even the need for companies to submit a *Public Commitment of Constitution of a Consortium* as requested in some bids governed by Law 8.666/93.

356. Based on article 20 of Law 8.987/95, it suffices that the companies submit a *Commitment to Constitute the future SPE*. As such Commitment to Constitute a SPE among consortium members will be examined not only by the entity promoting the bid, but also by competing bidders, it is customary to submit only information clearly requested in the bid's notice and by the Law. For this reason, it is common that the companies sign a *Memorandum of Understanding (MoU)*, which is an internal document detailing how the consortium will operate before, during and after the bid in case the consortium wins. Yet, depending on the relationship between the pooled companies, they can anticipate discussions related to future requests by lenders by agreeing on the main conditions of a future *Engineering, Procurement and Construction contract*.

357. A relevant point on creating consortiums is that company members will have *joint responsibility*. Here, "joint" means that each company in the pool is liable for acts that any other company make during the bid. In other words, if any company in the group causes damages to the entity hosting the bid or to any bidder, all other companies in the group or even one of them individually, chosen by the damaged party, are forced to repair it, even if they have no participation in the event that caused such damage.

358. However, joint *responsibility* will cease with the constitution of the SPE, which is an autonomous company not related to the companies which have created it, and the SPE will be responsible for the concession agreement.

359. The definition of percentage of interest of the companies comprising the consortium is a result basically of the needs related to the fulfillment of the bid's participation requirements. It is also common that notices demand that the percentage of interest of consortium members are kept in the future concessionaire, which must be complied.

360. All technical capacity demands can be met by the consortium, adding up different *expertise* of members irrespective of their percentage of interest in the consortium.

361. Differently from what happens as for technical qualification, adding up economic-financial qualification of all companies for calculating the Minimum Net Assets and Financial Indexes will be proportional to the interest of companies in the consortium.

362. It is also worth to highlight that the Bid Law allows that the required figures of Stock Capital or Minimum Net Assets demanded from individual bidders is elevated by up to 30% for consortiums and that there are two methodologies for calculating Minimum Net Assets for consortiums - one of those not beneficial to consortiums.

363. It is admitted that quantitative/figures comprising the calculation of Financial Indexes to be added up, in the ratio of each company's interest in the consortium.

364. It is usually accepted that the proposal's guarantee (bid bond) is submitted by only one member for the benefit of the whole consortium, which is also valid for the eventual commitment that in case of win, the companies will submit a contract guarantee (performance bond).

CONDITIONS PRECEDING THE CONCESSION AGREEMENT SIGNATURE (IV.1)

365. Between the announcement of a winner and the signature of the contract, there is some 75 days or a two months and a half, which is a very tight period for fulfilling the conditions described below.

366. One of the first conditions to be met preceding the signature of the concession agreement is the constitution of a Specific Purpose Entity (SPE). The SPE is nothing more than a company created for a single purpose: in this case, implement and manage the concession agreement object. Although it can take any form admitted by Law, it is common that the bid's

notices demand the constitution of a Stock Corporation (Sociedade por Ações in Brazilian Law).

367. Beyond legal and bid's notice requirements in this regard, constituting a SPE is also a demand from lenders as having a company autonomous from its controllers, with taxpayer's number, accounting and assets of its own, segregated from the companies that founded the SPE, prevents confusion on liabilities and other risks and related to other activities pursued by its shareholders, easing its accounting and asset controls.

368. Before signing the concession agreements, the following payments shall be made: (a) BOVESPA fees if the auction was hosted by this entity; (b) eventual reimbursement of the cost for studies performed within a PMI; (c) payment in installments or on the spot of the grant's encumbrance when applicable; and (d) inputs for payment the concessionaire's initial social capital.

369. Payments for items (a) and (b) above shall be made by the companies that won the bid whereas payments for items (c) and (d) shall be made by the SPE, so a bank account for the SPE shall be opened immediately upon its constitution.

370. In addition to the SPE constitution and initial payments and capital inputs above mentioned, it is usually required also as a preceding condition to sign the concession agreement that the SPE submits a contract execution guarantee (*performance bond*) and hire other insurance policies determined in the respective bid's notice, among other demands in such notices.

CONCESSIONAIRE ADMINISTRATIVE AND FINANCIAL MANAGEMENT/ GETTING FINANCING AND OPERATION (IV. 2)

371. The management of a Concession or PPP demands some sophistication in the administrative field, considering also the contract and the company management, and in the financial management all over its execution and also at its end. Thus, the company board and staff shall be properly structured to face this challenge.

- 372. Upon celebrating the concession agreement, the first challenge to be faced is obtaining bridge loans, usually necessary until long-term loans are approved.
- 373. The capacity to leverage, i.e., of mobilizing resources through long-term financing, is a large attention point for mid-sized companies interested in doing business in Concessions and PPPs. This is because financing available in the Brazilian market are rarely structured as *project finance non-recourse*, so that the lender in Brazil, it is basically the BNDES also reviews the capacity of paying the loan for shareholders of the companies that control the SPE, in the case the SPE fails to do so.
- 374. The demand for guarantees from SPE shareholders (the so-called *corporate or surety guarantees*) will be higher or lower whether the project is still in its implementation phase *also called* pre-operational and hence more exposed to risk, or it is in operational phase, generating revenue.
- 375. Celebrating an EPC contract by the SPE is a measure that may mitigate the demand for guarantees from its shareholders. *Another instrument being demanded to mitigate requests of surety bonds is* ESA Equity Support Agreement. Another possibility is to hire a surety bond against the risks related to the project implementation, placing the lender as a beneficiary.
- 376. However, within the current credit restrictions in the marketplace, it is not rare that in addition to the instruments mentioned above, it is also demanded the so-called surety guarantees, such as SPE shareholders guarantees and letters of comfort and even real guarantees, such as those upon real estate that comprise its assets, as well as project guarantees, such as fiduciary grant of SPE receivables and shares. It is also common to require capital inputs in advance from the SPE shareholders as a previous condition to approve financing.
- 377. Such demands have been made to larger companies, reason for which the ability to deliver such guarantees represents a huge challenge for any company interested in doing business in Concessions and PPPs.
- 378. Mid-sized companies can also use the BNDES FGI, which is the bank's guarantee fund serving as supplemental guarantee instrument, and the percentage of financing of cash flow associated to the invest-

ment, up to 40%, is higher than what is offered for large companies, that is up to 15%.

379. In order to expand control, transparency and adoption of corporative governance standards by the concessionaire, some bid's notices determine the obligation of SPE IPO after a period of time not much longer than 1 year. The demand for the IPO can be met, as usually is, by issuing debentures, which has become an additional financing method for investments in Concessions and PPPs.

ENGINEERING FOR THE GRANT'S OBJECT (IV.3)

380. The concession agreement corresponds to a contract typology known by its acronym DBFOT: a broad contract of full hiring, *turn-key* encompassing not only design, build, equipment deployment but also the operation and transfer to Conceding Power at the end of the Grant period, that is executed under a global price regime, *lump-sum*.

381. The concessionaire ends up more like a manager of contracts it signs for executing the concession agreement, and it is the sole responsible for its proper development and by inputting required resources.

382. It is also quite common to add to the concessionaire's duties the adoption of a series of measures related to expropriation required for executing the concession's object, as well as obtaining environmental permits, reason for which it is important to conduct detailed studies on the costs required to obtain such permits.

OTHER RELEVANT ASPECTS OF THE GRANT REGIME (IV. 4 AND IV.5)

383. Due to its political relevance and legal treatment, the activity performed by concessionaires is subject to intense regulation not only as for the Law, but also by a series of infralegal rules issued by the Conceding Power.

384. Such normatization applied upon the concession agreement is justified by the need for regular updates and adjustments for a delivery aimed to a large group of people and for a long period, and are based in the principles of proper delivery, topicality and changes of public service.

385. The oversight upon concession agreements has a different nature than the oversight employed in public works contracts: its main object is goals and not the means used employed to reach them. For this end, concession agreements determine indicators and parameters of quality or performance to be met, as well as investment triggers and rebalance discounts applicable in the case of investments being not executed, even if not by concessionaire's fault.

386. Another point worth of mention is that the social relevance of public services imposes a duty of continuity for delivery against the concessionaire. Inversely to what happens within contracts exclusively governed by Law 8.666/93, whose article 78, XV, allows the Hired Part to suspend the fulfilling of its obligations if the Public Administration delays counter payments longer than 90 days, the concessionaire can only interrupt service delivery if authorized by a legal court as determined by the sole paragraph of article 39 of Law 8.987/95 - an instrument also applicable to PPP (as per article 3, caput, and paragraph 1 of Law 11.079/04).

387. By celebrating a concession agreement, the SPE takes a legal position implying in a series of legal relationships beyond the contract-based relationship the Conceding Power, as well as with the *stakeholders* as follows: users, financial institutions, public agents that may somehow interfere in the delivery of the public service, relevant entities to issue environmental permits in their diverse fields of action, controlling entities, such as accounting courts, controllers and the State Prosecution, among others. As this means that while contracts governed solely by Law 8.666/93 generate bilateral legal relationships, Concessions imply in polygonal legal relationships.





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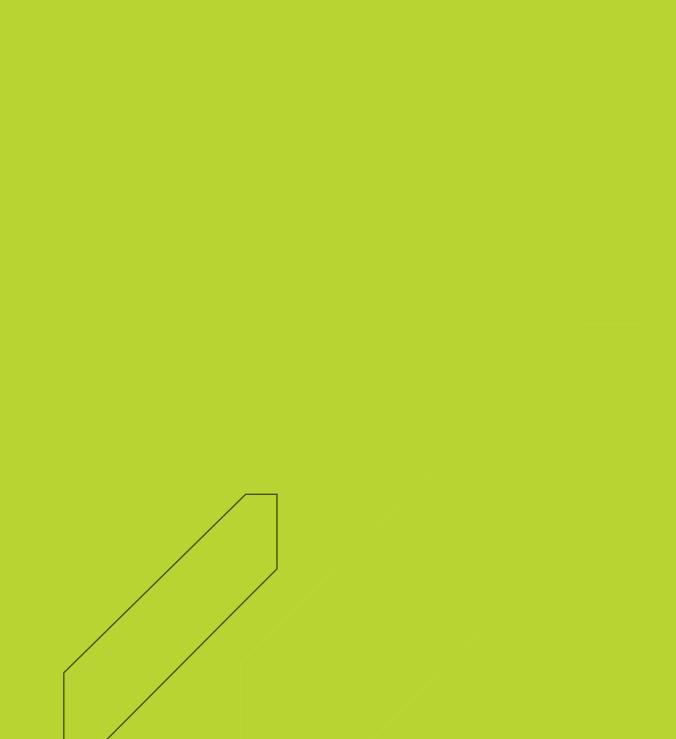
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