

Public Procurement of infrastructure projects and energy projects

**Organising Commissions: International Business Law and
Environmental/Energy Law**

Prague, 2014 – Working Session 7

National Report of Brazil

Ricardo Pagliari Levy

Pinheiro Neto Advogados
Rua Hungria 1100
01455-906 São Paulo, SP
Brazil
+5511 3247-8477
rlevy@pn.com.br

General Reporters:

Per-Ola Bergqvist, Foyen Advokatfirma
Box 7229, 103 89 STOCKHOLM, SWEDEN
Tel: +46 733 22 84 34, e-mail: per-ola.bergqvist@foyen.se

and

Jan Rolinski. WKB Wierciński, Kwieciński, Baehr Sp. k.
ul. Polna 11
00-633 Warszawa



INTERNATIONAL ASSOCIATION
OF YOUNG LAWYERS

office: +48 22 201 00 00
direct: +48 22 201 00 14
mobile: +48 508 01 94 98
fax: +48 22 201 00 99
mail: jan.rolinski@wkb.com.pl
www.wkb.com.pl

Public Procurement of infrastructure projects and energy projects

1. What is the legal framework on public procurement in your country governing public purchases of energy projects and large-scale infrastructure projects? Are the relevant rules to be found in a broad public procurement package or are they found in separate legislation? Are there relevant thresholds obliging to apply public procurement rules to such projects? Are there any exemptions from the application of the public procurement rules provided for in the legislation for such projects?

Large-scale infrastructure projects (in general):

Government procurement has been regulated by Brazilian law since at least 1862. Currently, the obligation of the Public Administration to open bid proceedings for all contracting is provided for in Article 37, item XXI of the Federal Constitution, which sets forth that *“with the exception of the cases specified in law, public works, services, purchases and disposals shall be contracted by means of public bid proceedings that ensure equal conditions to all bidders, with clauses that establish payment obligations, maintaining the effective conditions of the bid, as set forth in law. Public bid proceedings shall establish only the technical and economic qualifications indispensable to secure performance of the obligations.”*

Article 22, item XXVII of the Federal Constitution determined that the Federal Government would be exclusively responsible for defining the general rules and procedures to be followed in public bidding processes and for issuing specific instructions regarding their implementation.

At an infraconstitutional level, public bid proceedings have been successively regulated by a number of laws throughout the years. The main statute currently governing government procurement is Federal Law No. 8,666 of June 21, 1993, as amended (“Law 8,666”).

Other relevant federal statutes include: (i) Law No. 10,520/2002 (Reverse Auction Law); (ii) Law No. 8,789/1995 (Concessions Law); (iii) Law No. 11,079/2004 (PPPs Law); (iv) Law No. 12,462/2011 (Law of the Differentiated Procurement Regime – RDC).

States and municipalities may supplement federal laws, provided that the supplementary law does not violate the main principles and basic provisions of Law 8,666. Practically speaking, however, the vast majority of bids in Brazil is regulated only by Law 8,666 and other applicable federal legislation.

In general, the bidding procedures used by the Public Administration are open to all interested parties who, in order to participate, must submit to conditions defined beforehand in the tender notification. The Public Administration receives the bids and chooses that considered most appropriate, almost always on the basis of price. In Brazil, bidding procedures are governed by a vast variety of principles, among which one should highlight the principles of free competition, equality among competitors, publicity, strict observance of the terms of the tender notification, objective judgment and compulsory awarding. However, the greatest of all principles is the supremacy of the public interest, which interacts with all of the other principles involved.

According to Article 2 of Law 8,666, *“the works, services (including advertising), purchases, disposals, concessions, permissions and leases involving the Public Administration and third parties shall necessarily be preceded by bidding procedures, unless otherwise expressly prescribed by this Law”*.

The general rule is that the Public Administration is required to carry out bidding procedures in order to contract with third parties. However, Law 8,666 sets forth two cases in which it will not be necessary or feasible for the Public Administration to carry out a bidding procedure: (i) waiver of tender; and (ii) unfeasibility of tender.

Thresholds for application of the rules are very low, at R\$ 8,000 (approx. USD 3,000) for the “Direct Public Administration”, ie. governmental bodies, and R\$ 16,000 (approx. USD 6,000) for the “Indirect Public Administration”, ie. public companies and mixed capital corporations.

Energy: The legal framework for public purchases of energy projects is based on federal laws and regulations and the applicable rules are found in separate legislation coming from different public authorities (mainly from National Congress, Executive Branch, National Electricity Regulatory Agency, Electricity Trading Chamber, National Council on Energy Policy and National Electric System Operator). The public procurement rules set forth in Law 8,666 are applicable to the purchase of energy projects as a general law, which means that the specific energy rules will prevail over general procurement rules.

2. Is this legal framework based on international agreements and commitments, like the EU Directives?

No. As a matter of fact, Brazil is not even a signatory to the Government Procurement Agreement (GPA) of the World Trade Organisation.

3. If based on international agreements and commitments, have your county added any specific procedures and tools to the national legislation directed to the procurement of energy projects and large-scale infrastructure projects?

Not applicable.

4. Which, if any, is the procurement procedure envisaged in the legal framework for the procurement of energy projects and large-scale infrastructure projects? What is the most commonly used procurement procedure within the legal framework for the procurement of energy projects and large-scale infrastructure projects? Are conditions for use of various procurement methods clearly established

Large-scale infrastructure projects (in general): In virtually all large-scale projects, open competitive procurement is adopted. Other methods of procurement, such as competitive negotiation, can only be used in cases where procurement can be waived, such as projects related to national security.

Projects which are partially or wholly funded by multilateral bodies such as the IBDR or the BID can be (and usually are) procured with the adoption of the procurement rules of the respective entity, provided that the main principles of Brazilian public procurement are followed. Still, open competitive procurements are likewise invariably adopted by such multilateral entities in large-scale procurements, albeit with the particularities of their own respective rules.

Energy: The procurement procedure used for energy projects is the reverse auction, in which the winning bidder is the one that offers the lowest price for selling electricity produced by the power plants participating or the lowest revenue for exploring the transmission line.

5. What are the award criteria (in public procurement procedures) most commonly used for energy and large-scale infrastructure projects? Are the Lowest price or

the most economically advantageous tender most common? Are circumstances related to quality, time and output evaluated?

The award criterion applied in almost all cases is the lowest price. Brazilian law is very restrictive to the adoption of other award criteria.

6. Do the public procurement rules regulate relations between the investor, the contractors and subcontractors?

Yes, to a certain extent. Contractors are fully liable vis-à-vis the Government for any acts committed by their subcontractors. Investors are given some protections under the Law of Concessions and the Law of PPPs, such as step in rights and the right to receive concession payments directly from the Concession Authority.

7. Are there works concession procedures used for the procurement of energy projects and large-scale infrastructure projects? And if so, are there one or several specific procurement procedures envisaged for this in your national legislation?

Yes. They are granted by means of open competitive procurement proceedings.

8. According to your experience, how often do foreign bidders participate in award procedures related to energy projects and large-scale infrastructure projects in your country?

Large-scale infrastructure projects (in general): In infrastructure projects (except defence procurement), there are no restrictions to foreign capital. However, under Brazilian law the Public Administration may choose to open procurement proceedings only to companies formed under Brazilian law

(regardless of the capital being Brazilian or foreign). Law also allows for discrimination against goods produced or services rendered out of Brazil (again, as a geographical criterion, and not in relation to foreign capital).

In practice, foreign bidders often participate in award procedures related to large-scale infrastructure projects in Brazil. Frequently, they elect to participate in consortia with Brazilian companies, even though this is not an actual legal requirement.

Energy: For energy projects, no restrictions are imposed for foreigners to participate in the bid procedures, and thus their participation is very frequent in the energy reverse auctions.

9. Are the model contracts for the construction works commonly used (at national as well as international level, like the FIDIC Books)? If so, which are the most commonly used model contracts for the procurement of energy projects and large-scale infrastructure projects? Are the model contracts specifically designed for public procurement?

No. Model contracts for the construction works are not used for the public procurement itself (or for the administrative contract resultant therefrom), but rather for the winning bidder to subcontract the construction work to be done within the project.

10. Please briefly describe the how do the model contracts regulate the contractual liability of the contractor Are models of liability similar to those applied in case of Turn-Key Contracts, design-build contracts or build contracts (where the design is provided by the procuring entity) commonly used?

Not applicable.

11. To what extent are external lawyers engaged to draft, or otherwise involved, contract notices and/or contract documents in the case of procurement of energy projects and large-scale infrastructure projects?

Some procuring entities hire external lawyers for drafting the tender documents in more complex projects.

On the other hand, the call for private projects is becoming more and more common. In this procedure, companies or consortia of companies hire consultants and lawyers to make all feasibility studies and design and to prepare all draft tender documents and to deliver them to the procuring entity. In case the project is accepted by the procuring entity and is put for tender, the winning bidders reimburses the companies or consortia for the cost of the studies and preparation of the documents (in case the companies or consortia themselves did not win the bid).

12. Is it, in your country, common to appeal against award decisions related to procurement of energy projects and large-scale infrastructure projects? What is the authority relevant to recognize the appeal (common court, arbitration court, other)?

Large-scale infrastructure projects (in general): Appeals are very common, both in the qualification phase and in the proposals phase. There is often litigation. Appeals can be made administratively, ie. to the procuring entity itself through higher levels of authority, and to the Judicial Courts.

Energy: Within the energy projects, it is more often to appeal in order to assure the participation in the bid rather than against award decisions after the auction has finished. The competent authority to recognize the appeal could be either the

public official in charge of the bid (if the appeal is addressed to the administrative bodies) or the regular court.

13. From your experience – what would you indicate as the most problematic issue while awarding public procurement for such projects and on the other hand what would you call the biggest achievement/improvement made of the legislation implemented during last years for such projects.

Large-scale infrastructure projects (in general): One of the most problematic issues over the last couple of decades has been litigation delaying the procedure. Part of the problem has been minimised by changes in law which allowed inversion of phases, ie. having the proposal phase taking place before qualification (eligibility).

Energy: The most problematic issue when awarding energy projects is the environmental issue, since several of the new projects are located in environmentally sensitive areas, especially in the North and Amazon regions. There is often delay in obtaining the permits. One big achievement made in the 2013 wind power auction to overcome this problem was to only allow in the bid power plants near to existing transmission substations, in order to mitigate the risk of delay of the transmission line that would connect the power plant to the grid and enable it to deliver its production.

14. What are the most commonly used/provided by the public procurement laws instruments for securing of the performance of the contracts?

The most common instrument is the performance bond that contractors must provide when executing the contract.

Performance bonds in administrative contracts are legally limited to ten percent of the total value of the contract. However, in large-scale projects, it is common that the contractor is contractually required to top up the bond shortly after it is collected, each time it is collected, if at all, thus circumventing the legal limitation, in practice..

Performance bonds can be presented in cash, as a bank guarantee or as insurance bond.

15. Is it possible to sign the contract for the procurement of energy projects and large-scale infrastructure projects in other than national language?

No, the use of national language (ie. Portuguese) is mandatory.

16. Is there a legal or regulatory requirement for public disclosure of the information related to the award procedure?

Yes. All information is public, except under very exceptional circumstances, eg. where national security or a trade secret might be in question.