An Overview of the Brazilian PPP Legal Framework: Guiding Steps for Selecting and Contracting PPP Projects

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 ABSTRACT

Brazil faces shortages of public resources for investments and increased demand for invest­ments in transportation, energy, education, health, sanitation and security, activities that are essential to sustainable development. In this scenario, the country has had to look to the pro­ductive sector to create mechanisms to invest and provide the services that are demanded by society.

Interest in financing infrastructure through concessions under a public-private partnership (PPP) has grown during the last several years as an adequate approach to tackle infrastructure deficit and promote sustainability in the road sector.

However, when different models are analyzed around several countries and regions, successful stories are not always found. In order to build a successful story several steps are needed, including: political commitment and clear policy, competent public administration, a legislative framework to enable PPP, availability of both public and private capital, and willingness to invest by the private sector.

Consequently, a legal framework for implementing Public-Private Partnerships (PPP) was es­tablished by the country, which supports a form of concession in which the public sector be­comes a partner of private firms in the management of infrastructure and delivery of services. A review of how a PPP project can be prepared and implemented in Brazil under such legal framework is presented, and guiding steps are provided for selecting a PPP project and hiring a concessionaire by the Federal Government.

The paper presents the critical concepts and steps in the process, pointing out the main responsibilities of the public and private actors. It then highlights: (a) the institutional and proce­dural aspects of PPP, including the diverse interests of the contracting authority, the private partner, and the end-users of the services; (b) the activities that should be retained by the public sector; (c) the role of fiscal responsi­bility; (d) the importance of disclosure of information and transparency; (e) the risks involved and the consequences of risk sharing; and (f) the im­portance of legal de­tails in the contracting documents.

The paper shows that the Brazilian PPP framework provides for a balanced partnership that is advantageous to both the public and private contracting parties. While the government has an opportunity to accelerate the completion of new investments required to promote the coun­try’s economic and social development, the private partners, domestic or international, have an opportunity to generate long-lasting cash flows with relatively low risks in view of the finan­cial sup­port and guarantees from the public partner.

**KEYWORDS:** ICPPP, Dalian, conference, Brazil, infrastructure, PPP, project, investments.

# INTRODUCTION

In August 2012, Brazilian president Dilma Rousseff assured, at the launch of the "Investment Program in Logistics of Highways and Railways," that Brazil ultimately will have an infrastructure commensurate with its size. She stated on that occasion that the government recognizes partnerships with the private sector (public private partnerships – PPP, and concessions) as essential to growth acceleration, and that such partnerships enable the country to provide public goods and services more efficiently.

In fact, pressed by the upcoming two major sporting events in 2014 (World Cup) and 2016 (Olympic Games), the investments in infrastructure occupy a privileged space in discussions about the development of the country. In the next four years, the Federal Government intends to invest about $500 billion in infrastructure.

The level of investments in Brazil remains relatively low. While China invests over 40% of its GDP, such investments in Brazil are only about 19% of its GDP; it is estimated that Brazil would need to invest at least 24% of GDP to achieve the a growth rate of 5% per year. The model of increased consumption and indebtedness of Brazilians has been exhausted and growth has to come from investments, local and foreign.

A significant example of the Brazilian effort in this direction is the modernization and expansion of the road and railway networks for which the Brazilian Government expects to invest about $65 billion, as well as an investment of $20 billion in ports. Such program will accelerate the concession award process and increase the opportunities for foreign investment in Brazil.

To attain these goals, the Brazilian Government is improving its PPP regulatory model and expanding the incentives offered to the private partner. The Brazilian Congress approved, in December 2012, Law 12.766, to enhance the feasibility of, and promote private sector investments in infrastructure. The government has recognized that public resources are not enough, and that the use of PPPs for implementation and management of infrastructure and public services will be essential to ensure better quality public services and lower social costs.

This paper aims to review how a PPP project can be prepared and implemented in Brazil, pointing out the PPP legal framework and its recent changes,the institutional and pro­cedural aspects and the main responsibilities of the public and private actors in the process. It describes the main phases involved (e.g., Technical, Le­gal, Fiscal), providing guiding steps for selecting a PPP project and hiring a concessionaire by the Federal Government. It serves as a guide to potential part­ners and other actors interested in participating in competitive selection of con­cessionaires in Brazil. Such concessions generate long-lasting cash flows with relatively low risks, in view of the guarantees provided.

#  THE PPP LEGAL FRAMEWORK

The Brazilian PPP Law 11.079/04, including the changes introduced by Law 12.766/2012, establishes general rules for competitive bidding and con­tracting the private partner at both the national and sub-national levels. The PPP law comple­ments the concession laws (Laws 8.987/95 and 9.074/95) and the procurement law (Law 8.666/93). The PPP law also established an organizational structure in the federal government to oversee the Brazilian PPP program.

Among its features, the PPP law allows government entities to assume long-term com­mit­ments, including the payment of subsidies to service providers, with the overall ob­jective of increasing efficiency. The PPP legal framework contains provi­sions that prevent the administrator to adopt projects without proper prioritization stu­dies and to assume future financial commitments for which there would be no assured source of financing. The law also requires public hearings to be held, and economic and financial assessments to be carried out for each proposed PPP project.

Rocha and Horta (2010, p.30) define the Brazilian PPP model as special concession arrange­ments through which the Administration delegates to a private partner the provi­sion of a ser­vice, with or without prior construction works, and remuneration paid by the users and the state, or only by the state.

Based on the federal law, Brazilian states and municipalities can enact their own PPP laws. As an example, the states of Minas Gerais and São Paulo implement their PPP projects according to PPP state laws, which have been enacted in harmony with the fed­eral PPP law. Henceforth, the federal PPP law will be referred to as PPP law.

# BASIC PPP PRINCIPLES

According to article 4 of the PPP law, the following principles must be observed at all stages of the process to select the private partner:

1. Efficiency in delivering services and using public funds;
2. Respecting the interests and rights of recipients of services and private entities re­sponsi­ble for service delivery;
3. Retaining in the public sector the regulatory functions, the exercise of police power, and other strictly state tasks;
4. Fiscal responsibility in the contracting and implementation of partnerships;
5. Transparency of procedures and decisions;
6. Objective sharing of risks between the parties; and
7. Financial sustainability and socioeconomic benefits of partnership projects.

The PPP project preparation steps discussed in the paper follow the above prin­ciples, so as to guide interested parties in the implementation of PPP projects under the Brazilian legal framework.

# SPONSORED AND ADMINISTRATIVE CONCESSIONS

The Brazilian PPP legal framework defines PPP as a concession contract that may take one of two forms: (a) “sponsored” concession; or (b) “administrative” concession.

In a sponsored concession, the private partner revenues come from (a) fees charged to the users, and (b) financial subsidies paid by the contracting public entity as the services are deliv­ered (Provisional Measure No. 575/2012 gives more flexibility, allowing subsidies to be provided prior to the beginning of service delivery).

In the case of administrative concessions, the contracting state entity pays fully for the services provided; there are no user fees.

If a project is shown to be financially viable without any public funding, instead of falling under the PPP law, it should be managed as a “common” concession, to be bid and implemented under the country’s concession laws and other related norms.

# BASIC PPP CONCEPTS

The Brazilian PPP law provides several useful definitions, such as:

1. **The Public Partner** - may include government agencies, special funds, mu­nicipalities, public foundations, public companies, joint stock compa­nies and other entities controlled di­rectly or indirectly by the Union.
2. **The Private Partner** – should be a Special Purpose Company (or SPE, us­ing the Brazilian acronym), to be established by the successful bidder. The SPE is usually a consortium of entre­preneurs and investors who will fund and manage the PPP project.
3. **Types of PPP** – PPPs may include typical public services, such as roads and other transport infrastructure, transportation services, sanitation, health, and education. Services to be pro­vided to the public administration can also be contracted as a PPP. However, some activities cannot be delegated to the private partner, such as regulatory functions and the exercise of police power.

The PPP law states that PPPs cannot be used with the single objective of sup­plying labor, the supply and installation of equipment, or to carry out public works. It also specifies that no PPP contract can be worth less than R$20 million (about US$10 million) or last less than five years.

The financing of PPP projects by state enterprises is limited to 70 percent of the total resources required, a limit that can increase to 80 percent if the project is located in areas with low hu­man development index (HDI) in the North, Northeast or Midwest regions of the country. A specific legislative authorization is required for a sponsored concession to receive public sup­port above 70 percent of its total cost.

The ability to generate revenues is a key factor in the choice of the form of concession. Com­mon concessions apply to self-sustaining projects, while PPP projects (i.e., spon­sored or ad­ministrative concessions) are those that require public financial support.

# PPP INSTITUTIONAL ARRANGEMENTS

In Brazil, at the federal level, several agencies are responsible for different aspects of the PPP program, as discussed below.

The **Ministry of Planning, Budget and Management** assesses, models, and monitors poten­tial PPP projects, which have been identified as priorities by the Partnership Steering Committee (Comitê Gestor de Parcerias - CGP).

The **Ministry of Finance** is responsible for appraising any proposed PPP project and mak­ing sure that the program is within the maximum allowable allocation for PPP projects. Such limit is set as 3 percent of the net current revenues, as defined in Articles 195 and 239 of the Con­stitution. The limit applies to all levels of government. The National Trea­sury Secretariat (STN), after receiving information about the project, verifies that the pro­posed spending is within the spending limits established by the Fiscal Responsibility Law.

The **PPP Steering Committee** (CGP), established by presidential decree (Decree No. 5385/05, modified by Decree No. 6.037/07), works under the coordination of the Ministry of Planning, Budget and Management (MPOG), and is also composed of representatives from the Minis­try of Finance and the Presidency. Its responsibilities include to:

• Approve the Projects and PPP contracts.

• Authorize the opening of the bidding process.

• Define the priority services to be provided under PPP arrangements.

• Define the criteria for analyzing the appropriateness and timing of the contract.

• Set up the procedures for contract award.

• Authorize the launching of the bidding and approve the bidding documents.

• Approve the PPP plan, and monitor and evaluate its implementation.

• Review the contract monitoring reports.

• Develop standard bidding documents and sample PPP contracts.

•Authorize the use of the resources of the PPP Guarantee Fund (FGP) to guaran­tee the gov­ernment financial obligations.

The **Technical Committee of Public-Private Partnerships** (CTP) is coordinated by the Chief Eco­nomic Advisor of the Ministry of Planning, Budget and Management, and also includes mem­bers from the Ministry of Finance and the Presidency of the Repub­lic. CTP can request studies, surveys or investigations to support a proposed PPP project, which has already been estab­lished as a priority.

The **Special Purpose Company** (SPE), to be established by the successful bidder, will be exclu­sively responsible to implement and manage the object of the partnership (e.g., a motorway or an airport). This feature facilitates the control and supervision by the Gov­ernment, as the SPE cannot have any other responsibility. The SPE may be incorporated in the form of a publicly traded corporation, with the majority of its voting capital in the private sector. The PPP law forbids the government to be its majority partner. In any case, the government participation in the SPE requires legislative authorization.

The **PPP Guarantee Fund** (FGP) was established by the government to guarantee the payment of financial public obligations under PPP projects awarded by federal agen­cies. It has its own assets, consisting of fixed and variable income securities and varia­ble. The FGP capital is entirely public, subscribed by eligible shareholders (i.e., the Union and public companies and foundations). The legal limit for the FGP capital is R$6 billion (about US$3.8 billion), which is also the overall limit for the provision of guarantees by the Union. The CGP is managed by the Bank of Brazil. In order to reduce the cost of raising finance, the FGP can also provide counter-guaran­tees to insurance companies, financial institutions and international organizations, which ultimately will assure payment of the public sector obligations to the private partner.

The **Government Auditor General** (TCU) monitors the bidding process and contract awarding, as well as the implementation of PPP projects. The public partner is required to send to TCU relevant documentation during all stages of implementation of the PPP program.

# RECENT CHANGES IN PPP LAW

The Federal Government promoted some important changes in the PPP law, incorporating new concepts based on successful international experience to increase the efficiency of PPP in Brazil:

* Allowing private partners to receive public funds during the construction of the PPP facility (e.g., road, railway). The Federal Government, States and Municipalities will be able to transfer resources to private partners to build or acquire goods, proportionally to the steps completed, which will reduce the need for borrowing by the private partner.
* The payment of federal taxes (e.g., income tax, Social Contribution on Net Income - CSSL) by the private partner will be made as the subsidies received are effectively applied. Now, taxes are due as the subsidies are received. The goal is to lower the cost of implementing PPPs.
* The maximum commitment, in terms of net current revenues (Receita Corrente Líquida - RCL) was increased from 3% to 5%.
* The time for the private partner to request funding from the Partnership Guarantee Fund (Fundo Garantidor de Par­ceria - PGP), to compensate for possible default of the public partner to honor its financial commitments, will be shortened. The purpose of such change is to secure the continuity in the revenue flow to the private partner.

# THE PPP BIDDING PROCESS

The Brazilian PPP law provides for two distinct phases in the bidding process:

* **Inter­nal phase** (or planning)
* **External phase** (or bidding)

## The Internal or Planning Phase

Initially, a **Preliminary Proposal** (PP)shouldbe prepared by a public entity, such as an agency of the federal government, special funds, municipalities, public foundations, public companies, or joint stock companies. Such entity is referred to as the Concerned Public Entity (Organização Interessada no Projeto - OIP).

The PP is then submitted to CGP by the ministry or regulatory agency responsible for the sector. The PP should indicate the type of PPP to be adopted and basic information, such as project description, expected demand and economic and so­cial benefits, as well as the projected cash flow during construction and operation of the project.

The CGP first checks whether the project has been included in the Multiyear Plan (Plano Plurianual - PPA), which summarizes the government's strategy for the economic and social devel­opment of the country. Next, it reviews the impact of the proposed project implementa­tion for government and society in general, as well as the availability of public re­sources to implement the project. In setting priorities, the CGP takes into account that projects with lower requirements for public financial support will allow a higher num­ber of projects to be implemented.

The CGP then includes the projects deemed as priorities in the PPP Federal Plan (Plano de Parcerias Público-Privadas - PLP) and authorizes the responsible entity to carry out detailed studies for the project. Decree No. 5977 of December 1, 2006, regulates the presentation of project studies and design.

The public entity responsible for the proposed project, usually with the assistance of private consultants, will carry out more detailed studies, including:

1. **Technical studies**: detailed project identification, preliminary design and feasibil­ity studies to support the implementation of the project as a PPP.
2. **Fiscal studies**: the impact on the budget and financial provisions, including com­pliance with the law on fiscal responsibility.
3. **Legal studies**: preparation of draft bidding documents and PPP contract, particu­larly describing the services to be provided, the required quality or performance parameters, applicable technologies, contractual terms (not less than 5 years, not more than 35 years), and the share of risks between the partners.

The technical, fiscal and legal studies to be carried out are summarized in Figure 1.

**FIGURE 1 Summary of Technical, Fiscal and Legal Studies for a PPP Project**

(Adapted from Ribeiro and Prado, 2007 p.52).

Once the studies have been completed, the entity responsible for the proposed project submits a Technical Proposal to the CGP, requesting authorization to launch the bidding process.

## The External Phase or Bidding

The external phase includes public consultation, the invitation to bid, the receipt of ten­ders, and the contract:

1. Public consultation: a notice containing general project information (e.g., de­scription, the term of the contract and its estimated value) is published in the official press, major newspapers, and electronic media inviting com­ments to be submitted by a specified deadline. Public hearings may also be conducted.
2. Invitation to bid: taking into account the results of the public consultation, the bidding documents are reviewed and finalized, and a formal invitation to bid is published.
3. Receipt of tenders: tenders are received in a public session and the success­ful bidder is selected according to the criteria in the bidding documents.
4. Contract: the winning bidder establishes a SPE and the PPP contract is signed between the responsible entity and the SPE.

A summary of the steps in both the internal and external phases is given in Figure 2.

**FIGURE 2 The Process of Planning and Contracting PPP Projects in Brazil**

(Source: Motta and Queiroz 2012)

More detailed guiding steps for selecting a PPP project and hiring the concessionaire in Brazil have been presented by Motta and Queiroz (2012).

# RISK SHARING

The types of concession discussed earlier (i.e., sponsored, administrative, and common concessions) imply different risk sharing between the public and the private partners. There is no unlimited risk bearing by the private partner. Private firms will be cautious about accepting major risks beyond their control, such as exchange-rate risks, the risk of existing assets, and some demand risks. For example, a common concession would not be appropriate where the private partner would not accept demand risks.

The placing of a risk (for example, design, construction, performance, demand, operation, and force-majeure risks) on a concessionaire within the terms of a concession agreement does not release the state and its agencies from the impact of events. In most jurisdictions, the state has public-service obligations to the inhabitants of the state and in most jurisdictions this includes, to as high a level as reasonably practicable, the safe and secure use of roads or other transport infrastructure and may as a consequence result in an adverse economic effect, where important transport links cease to be available or are constrained. The concessionaire will take into account, when making its proposal, the cost associated with the risks it is expected to bear.

If a risk is transferred to the private sector that it cannot control (for example, inflation being higher than forecast), the private sector will either take a very conservative scenario (such as assuming a very high inflation rate) or simply not accept the risk (and therefore will not make any proposal, reducing competition).

# DISCLOSURE OF INFORMATION AND TRANSPARENCY

PPP and concession contracts in Brazil, as in many other countries, include required standards for construction, operation, maintenance, and tariff collection. For monitoring the quality of the facility during the life of the concession, several performance indicators of condition are used. For example, in the particular case of roads, indicators of condition include roughness, skid resistance, luminescence of pavement markings, and the presence and condition of signs, lighting, and other safety features. Performance on these indicators that falls outside the boundaries of acceptability may lead to penalties for the concessionaire. Enforcing such standards helps the government and the users to reap maximum benefits of road concessions, as stated by Queiroz and Kerali (2010).

Full disclosure of concession agreements, an indication of good governance, helps ensure that the users know what to expect from the facility under concession, thus increasing transparency in the role of the regulator. Nevertheless, not all concession contracts are open to public scrutiny in several countries. A typical excuse is a claimed need for confidentiality. While not currently included in the Brazilian PPP Law, it appears appropriate that in future revisions a clause be added on the full disclosure of contract documents, which would increase accountability of both the concessionaire and the regulator.

It appears that full disclosure of concession agreements is foreseen by Brazilian Law 12.527, of November 18, 2011, which regulates the citizens’ constitutional right of access to public information. Such law aims at greater popular participation and social control of government actions, which can contribute to improvements of the public administration, as indicated by the Brazilian Ministry of Transport (2012).

Any future revision of the PPP Law should also establish clear mechanisms for renegotiation and amendments (as a way to minimize potential contract distress and cancellation). The renegotiation of projects is not an unusual occurrence (Harris 2003). In fact, about half of all concessions become subject to re-negotiation, often due to unrealistic cost and revenue assumptions (Amos 2004). While not all renegotiations are undesirable, opportunistic renegotiation should be discouraged in both existing and future concessions. The appropriate behavior for governments is to uphold the contractual obligations resulting from the competitive bidding process, and not to concede for opportunistic requests to renegotiate. Improving concession design and establishing credible regulations can lower the incidence of renegotiations (Guasch 2004).

# CONCLUSIONS

This paper reviewed how a PPP project can be prepared and implemented in Brazil, pointing out the main responsibilities of the public and private actors in the process. It described the main phases (e.g., Technical, Le­gal, Fiscal), providing guiding steps for selecting a PPP project and hiring a concessionaire by the Federal Government. This is expected to serve as a general guidance for domestic and international investors interested in participating in competitive selection of concessionaires in Brazil.

A description was given of what is called PPP in Brazil, including the recent changes in the PPP Law. The main phases and studies required for government approval and the bidding process to be carried out were discussed.

In order to make PPP projects more attractive to private investors, the Brazilian PPP law pro­vides the Contracting Entity with several options to extend guarantees to the private partner, including those given by the PPP Guarantee Fund, guarantees linked to revenues, and guaran­tees provided by international financial institutions.

A main advantage of stimulating private investments through PPP agreements is the possibility to explore all the flexibility and managerial competence of the private sector in order to accele­rate the implementation in Brazil, even with the limited budget available, of priority projects in critical areas such as infrastructure, education, and health.

In summary, the Brazilian PPP framework provides for a balanced partnership that is advanta­geous to both contracting parties. While the government has an opportunity to accelerate the completion of new investments required to promote the country’s economic and social devel­opment, the private partners, domestic or international, have an opportunity to generate long lasting cash flows with relatively low risks in view of the financial support and guarantees from the public partner.

Guiding steps were provided to potential part­ners and other actors interested in participating in competitive selection of con­cessionaires in Brazil.

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