THE GOVERNMENT PROCUREMENT REVIEW

Seventh Edition

Editors
Jonathan Davey and Amy Gatenby

THE LAWREVIEWS

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SEVENTH EDITION

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PREFACE

It is our pleasure to introduce the seventh edition of *The Government Procurement Review*.

Our geographic coverage this year remains impressive, covering 17 jurisdictions, including the European Union, and the continued political and economic significance of government procurement remains clear. Government contracts, which are of considerable value and importance, often account for 10 to 20 per cent of gross domestic product in any given state, and government spending is often high profile, with the capacity to shape the future lives of local residents.

It is frankly depressing to have to refer in the future tense to Brexit for the third successive edition. However, it remains the case that the United Kingdom continues to recognise the importance of procurement law both during and beyond any ratified transitional period. Her Majesty's Government has pronounced itself committed to the need for continued regulation of procurement, and has secured approval from the World Trade Organisation for the United Kingdom to become party to the Agreement on Government Procurement (GPA) in its own right, rather than through the European Union, once Brexit happens.

In the UK and EU we are starting to see increasing use of the national legislation emerging from the Concessions Directive and there is also a growing body of case law on the Hamburg exception.

UK practitioners are coming to terms with the Court of Appeal's landmark decision in the *Faraday* case, which has called into question the use of what had become reasonably widely utilised approaches to avoid the application of the procurement rules where a developer initially had a right (rather than an obligation) to carry out works. That case will continue to have wide-ranging implications for real estate development affected by procurement law.

Looking further afield, it is clear that law and policy on government contracting continue to be shaped by political developments at national and international level:

a with GPA parties giving formal approval in October, Australia joined the (revised) GPA on 5 May 2019;

b new international agreements on government procurement have emerged in the US, Mexico, Canada Trade Agreement (USMCA), executed in December to replace NAFTA, and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which entered into force between Canada, Australia, Mexico, Japan, New Zealand and Singapore in December;

c US sanctions against Venezuela constrain US financing for Venezuelan public bodies and the state-owned Petroleos de Venezuela, with the future outlook for government purchasing and procurement policy very much dependent on the outcome of the current political situation; and

d Brazil, under a liberal political agenda, has launched a programme of privatisation involving the sale of public assets and the award of contracts for the management of public services across a range of economic sectors.

When reading chapters regarding European Union Member States, it is worth remembering that the underlying rules are set at EU level. Readers may find it helpful to refer to both the European Union chapter and the relevant national chapter, to gain a fuller understanding of the relevant issues. So far as possible, the authors have sought to avoid duplication between the EU chapter and national chapters.

Finally, we wish to take this opportunity to acknowledge the tremendous efforts of the many contributors to this seventh edition as well as the tireless work of the publishers in ensuring that a quality product is brought to your bookshelves in a timely fashion. We hope you will agree that it is even better than the sixth edition and we trust you will find it to be a valued resource.

Jonathan Davey and Amy Gatenby
Addleshaw Goddard LLP
London
May 2019

Chapter 5

BRAZIL

Mauro Hiane de Moura and Filipe Scherer Oliveira[1]

I INTRODUCTION

The Brazilian Constitution establishes that, as a rule, all purchases and sales made and all services and works hired by the public administration shall be preceded by a public bid. Federal Law 8,666/1993, which must be observed by all three branches of government, sets forth the general framework applicable to all public bids in the country. The Constitution also establishes principles by which the Brazilian public administration is bound: legality, impersonality, morality, publicity and efficiency. Federal Law 8,666/1993 added to these the concepts of 'strict adherence to the request for proposal' (RFP), and 'objective judgement' as principles that must be observed in public bids. As a consequence, the winning bidder is not the only entity legally attached to the terms and conditions set forth in the RFP: the administration is also forbidden to deviate from its terms throughout the tender process and the subsequent execution of the contract awarded thereby.

Different statutes regulate specific public bids and contracts. Federal Law 8,987/1995, for instance, sets the general framework applicable to public services and public works concessions and permissions. As concessions usually involve long-term contracts, and as public services are of utmost relevance for the Brazilian economy and for the well-being of its citizens, this statute continues to be of high importance in the local legal framework. In 2004, Federal Law 11,079/2004 introduced public–private partnerships (PPPs) into the Brazilian legal system; in their national version, they roughly consist of (1) a public services or public works concession in which the compensation to be paid to the private party will result from a combination between tariffs charged from citizens and direct payments made by the administration; or (2) a long-term contract for the rendering of services to the administration, coupled with the execution of a construction project or the supply of goods, or both.

In 2011, Congress passed Federal Law 12,462/2011, which created the Differentiated Government Procurement Regime. This regime was created in order to expedite the bidding procedures for the infrastructure works necessary for Brazil to host the 2014 FIFA World Cup and the 2016 Olympic Games in Rio de Janeiro. Subsequently, however, such statute was repeatedly amended so as to allow the regime to be applied to other public projects – such as (1) infrastructure works included in the Growth Acceleration Programme created by the federal government; (2) works and engineering services related to public healthcare; (3) works and engineering services for the construction and reform of criminal facilities;

1 Mauro Hiane de Moura is a counsel and Filipe Scherer Oliveira is a partner at Veirano Advogados.

(4) actions in public safety; (5) works and engineering services related to urban mobility and logistics infrastructure; and (6) actions executed by entities dedicated to science, technology, and innovation.

In 2016, the Bill of the State-Owned Companies (Federal Law 13,303/2016) created a specific framework for public bids held by state-owned companies that is supposed to be more flexible than the general rules on the basis that state-owned companies compete in the market. In the same year, a new governmental programme called the Investment Partnership Programme (PPI) was launched to coordinate the most important infrastructure projects at the national level, and to serve as a one-stop shop for investors and other interested private parties. The PPI comprises (1) a council, headed by the President himself and formed by central and sectoral line ministries, alongside presidents of federal banks (BNDES, Caixa and Banco do Brasil); and (2) a secretariat, staffed to exert advisory functions to the council, with support from the state-owned company EPL.

II YEAR IN REVIEW

Bills aiming at producing a general overhaul in public tender and contracting regulations have slowly progressed in Congress – most notably Bill 6,814/2017, which, after having been approved by the Senate, is now under scrutiny at the Chamber of Representatives along with Bill 1,292/1995. If converted into law, the new bill will supersede, among others, Laws 8,666/1993 and 12,462/2011. At the end of 2018, a special commission created by the Chamber of Representatives approved its official report – along with a new version of Bill 1,292/1995. On 12 March 2019, the plenary chamber of the Chamber of Representatives decided that this bill should be submitted to a fast track procedure; at the time of writing, however, the date on which a final vote will be taken has not been set.

Also pending is the issuance of a presidential decree allowing Federal Law 13,448/2017 to be fully executed. Certain concessions awarded during the Rousseff administration, owing to a combination of incorrect modelling and supervening events, were rendered unprofitable. Federal Law 13,448/2017 allowed these concessions to be amicably 'returned' to the federal administration in order to be subsequently awarded to a different party. Although concession holders have manifested their interest in this procedure, the Temer administration refrained from issuing a decree that would have enabled its employment – even though it is rumoured that a draft version of such a document was prepared by the presidency. The Bolsonaro administration is expected to address the issue shortly.

Although not directly meant to regulate public procurement and public contracts, the enactment of Federal Law 13,655/2018 is bound to affect these areas. This federal statute included, in Federal Decree-Law 4,657/1942, 10 articles meant to serve as general guidelines and principles for the 'creation and enforcement of public law' – and marking a clear turn toward consequentialism. The new statute requires, for instance, that (1) the public administration, audit courts and the judiciary shall not decide based solely on 'abstract legal values' regardless 'taking into account the practical consequences of its decision';[2] (2) 'in the interpretation of rules about public management, the actual obstacles and difficulties faced by public managers shall be taken into account';[3] and (3) administrative or judicial review of administrative action shall be based on 'general [legal] guidelines established at the time when

2 Article 20, Federal Decree-Law 4,657/1942, as amended by Federal Law 13,655/2018.

3 Article 22, Federal Decree-Law 4,657/1942, as amended by Federal Law 13,655/2018.

the administrative action under review was issued', so that it shall not be possible for 'fully established legal situations to be declared null and void because of subsequent modifications in such general guidelines'.[4]

The new rules introduced by Federal Law 13,655 will certainly affect administrative and judicial litigation involving public procurement procedures and public contracts. They are expected to reduce legal uncertainty and, thus, enable the administration to move forward with its projects and contracts in a more expedited manner. As the Bolsonaro administration has recently assembled a task force in order to 'study, consolidate and present legislative proposals regarding general rules of economic law',[5] it is expected that additional modifications in the foundations of the Brazilian public law system will take place within the next few years.

Another attempt to simplify the current legal framework was made by the Temer administration through Federal Decree 9,188/2017, which created a 'special divestment regime for [federal] state-owned enterprises' (SOEs). Under this special regime, SOEs would be able to sell some of their assets through a simplified 'competitive procedure'[6] – with the support of 'independent and specialized financial institutions'.[7] On 27 June 2018, however, Justice Ricardo Lewandowski of the Brazilian Supreme Court granted an injunction affirming that this simplified procedure could not be employed, regardless of previous and specific statutory authorisations, for transactions involving the sale of corporate control of state-owned enterprises or their subsidiaries. On 18 December 2018, the Federal Attorney's Office presented a legal opinion supporting Justice Lewandowski's position. The Supreme Court is expected to render a decision on the merits of the issue within the coming months.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

The Brazilian Constitution states that entities directly or indirectly controlled by the federal, state or municipal governments must comply with the applicable government procurement rules. In other words, federal, state and municipal governments, autonomous government entities, public foundations, regulatory agencies, state-owned companies, and mixed capital companies controlled by the government are subject to those rules. States and municipalities are allowed to pass their own legislation regarding public bids as long as they do not deviate from certain parts of the regime set forth in Federal Law 8,666/1993 (or in other laws regarding public bids passed by the National Congress).

In an exemption to the general rule, Petrobras, the state-owned oil company, adopted a simplified bidding proceeding under the Decree 2,745/1998. Although the simplified rules followed the general ideas structured in Federal Law 8,666/1993, Decree 2,745/1998 was heavily criticised over the years, especially after the beginning of the Operation Car Wash investigation. As of mid-2018, Petrobras – as other state-owned and controlled enterprises – follows the rules set forth in the Bill of the State-Owned Enterprises (Federal Law 13,303/2016) and created a new internal procedure for the purposes of procuring goods

4 Article 24, Federal Decree-Law 4,657/1942, as amended by Federal Law 13,655/2018.

5 Administrative Order No. 32, issued by the Minister of Economy on 14 January 2019.

6 Article 5, Federal Decree 9,188/2017.

7 Articles 19 and 20, Federal Decree 9,188/2017.

and services. Petrobras has complied with this command as of October 2017. Most Brazilian state-owned enterprises issued their sets of procurement regulations, complying with Federal Law 13,303/2016, by the end of June 2018.

ii Regulated contracts

In Brazil, as a general rule, any contract involving a public entity (entities directly or indirectly controlled by the federal, state or municipal governments), such as contracts for supply of goods, services, works, transfer of lands, among others, must be regulated by government procurement rules and subject to a prior public bid and its principles.

However, Federal Law 8,666/1993 sets forth some exceptional and specific cases in which a prior public bid may be deemed unnecessary. For example, the competitive procedure can be dismissed in cases of extreme urgency, war or state of emergency, failed prior procurement, services or products estimated at less than US$5,000, providing materials to army forces and transference of real estate between public entities, among others. In addition, the competition can be considered unfeasible and, as a result, unnecessary, when the nature of the product or service required is singular and only one supplier has the expertise needed by the public administration. In such cases, the public entity must justify the reasons why the public bid is unnecessary, appointing the situation of emergency, the singularity of the object of the contract, the study of the market, etc.

Federal Law 13,303/2016 grants state-owned enterprises more leeway to enter into contractual relationships regardless of a public tender. These entities are allowed to freely choose their business partners 'when such choice results from [the partner's] particular features, is connected to defined and specific business opportunities, and [the SOE] duly justifies why it would not be feasible to promote a competitive procedure [in the case at hand]'.[8] This provision's proper scope of application, though, is still under discussion – as an abuse of this prerogative could easily undermine the very purposes for which Federal Law 13,303/2016 was enacted.

The transference of the contract to third parties is only accepted when the RFP and the contract itself expressly allows so, and usually it is subject to the prior consent of the public entity, who will check if the new party meets the requirements of the RFP and the contracts. Therefore, any merger, spin-off, partial or total subcontracting, association with other company, total or partial assignment or transfer of the contractual object that is not previously authorised in the RFP or the contract can lead to its termination, according to Brazilian law.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

Central purchasing is still a relatively new concept in Brazil and has only been implemented in a few contexts. For example, aside from other state-level initiatives, in 2014 a Central Purchasing Department was created under the Ministry of Planning for common purchases at the federal level, but its activities have so far been limited.

A more widely used framework relevant to common purchases is the reverse auction and, especially, its electronic version. These procedures were created in 2002 and 2005 and

8 Article 28, §3º, II.

have been paramount ever since. Among the reasons for their large acceptance was the possibility to use the Portal de Compras Governamentais (ComprasNet) online system, and the inversion of phases so that only the winning bidder would have its qualification documents analysed. The use of this online system is not mandatory, but many bidding authorities have preferred it for its agility and convenience.

Furthermore, when using such online system, providers file their common qualification evidence (legal and tax regularities and financial-economic requirements) within the Unified System for the Registry of Providers (SICAF), dispensing them to supply the same documentation again in each new bid. Bidding authorities at the federal level are obliged to previously consult SICAF before purchasing common goods and services. Besides SICAF, other bodies and entities can maintain complementary supplier registries, such as, for example, the CADTEC within the Ministry of Defence.

ii Joint ventures

When allowed by the RFP, a group of bidders can participate jointly in a bid. The common structure required for this participation is the consortium or the commitment to create a consortium, and if the group of bidders win, they are required to either create a special purpose company (SPE) or a consortium before signing the public contract.

The bidders are bound by the rules on public contracts since they provide a bid bond or offer a proposal to a given item of the RFP, and penalties can apply if they refuse to participate in the bid after such actions. The consortium can provide jointly the technical qualification documents, and must maintain *pro rata* the minimum net worth required in the RFP (which can be up to 30 per cent higher for consortia). Further specific rules applying to the SPE or the consortium are set out in each RFP, including provisions about subcontracting with a consortium member.

PPPs are a type of concession, in Brazil, and require a competitive tender for the selection of the private partner. However, the RFP may allow the winning bidder to contract with third parties, in which case such contract may require the prior consent from the bidding authority, but by default does not require a new tendering process. In very specific cases, the RFP may also allow the use of qualification evidences from this contracted party.

V THE BIDDING PROCESS

i Notice

The public authority must publish the bidding notice as an RFP in the Official Gazette. In the RFP, the public authority defines all the conditions for the bidders' participation, the bidding and contracting time frames, acts and procedures adopted in the course of the bidding proceeding and, eventually, the guarantees required to the bidders. In addition, the RFP must contain a draft form of the intended public contract, designs and other forms relevant to the RFP or the future public contract.

Moreover, the public authority must define the tender model adopted for the public bidding in the RFP. Federal Law 8,666/1993 allows the following models:

a competitive bidding (most commonly used);
b price quotations (preferred for routine purchases using a preselected list of providers);
c invitation to bid (used for lower value purchases);

d bidding contests (used for technical, scientific or artistic works); and
e auction (used for selling of goods).

With respect to the auction, Federal Law 10,520/2002 prescribes simplified conditions to procurement for the purchase of ordinary goods and services by the public authority (Federal Decree 5,450/2005 also prescribes conditions to the electronic version of auctions).

Pursuant to the principle of strict adherence to the request for proposal, which is one of the most important principles prescribed in Federal Law 8,666/1993, the conditions set forth in the RFP bind the public authority and the bidders during the bidding proceeding and the performance of the public contract.

ii Procedures

Following the publishing of the RFP, the bidders must present their qualification documentation and commercial (and technical, if applicable) proposals in the form and date prescribed in the RFP's conditions. The qualification documentation serves to evidence the due legal existence and the financial good standing of the bidders and to attest that the bidders comply with the conditions and requirements established by the public authority in the RFP to perform the future public contract. Foreign bidders, when allowed to participate, must present documentation from their jurisdictions, observing the rules related to the public appositive prescribed in Hague Convection (in force in Brazil since August 2016).

Through the ordinary procedure prescribed in Federal Law 8,666/1993, the analysis of the bidders' qualification takes place before the opening of the commercial proposals. The public authority will rank only the qualified proposals under the RFP's conditions, and adjudicate the winning bid in accordance with the criteria chosen for the bidding proceedings, which may be (1) best price; (2) best proposal in technical terms; or (3) a combination of best price and best technical proposal.

In addition to the procedure established in Federal Law 8,666/1993, there are some special procedure forms set forth in specific legislation. For instance, in the case of reverse auctions, after the presentation of the relevant documentation by the bidders, the public authority should initiate a phase of oral bidding or an electronic auction with the purpose of increasing the value of the proposals offered by the bidders. The main difference in that case is the inversion of phases of the bidding proceeding, which means that the public authority will analyse the qualification documentation of the winning bidder.

It is worth mentioning that the trend to simplify the bidding procedure (such as the inversion of phases prescribed to reverse auctions) has been incorporated in the Brazilian public procurement framework. Specific legislation on the regulatory agencies for certain market sectors (such as telecommunication and oil and gas) already prescribed the adoption of simplified procedures to the bidding proceedings that were not concerned with the hiring of civil engineering works. In addition, the recent Federal Law 13,303/2016 established that all state-owned companies should adopt simplified bidding rules in their internal proceedings.

iii Amending bids

In accordance with the ordinary procedure, after the presentation of the relevant documents to the public authority, bidders are not able to change or amend their qualification documents or commercial proposals.

VI ELIGIBILITY

i Qualification to bid

The main qualification requirements to be met by each bidder include legal, tax and labour regularity, and technical and financial requirements:

a Legal regularity: constitution documents and power of attorney or corporate resolution appointing a legal representative with powers to represent the bidder (additional requirements may be set, such as a corporate structure diagram for groups of bidders and power of attorney to a legal representative in Brazil for foreign bidders).

b Tax and labour regularity: certificates of compliance issued by tax authorities within the federal, state and municipal levels, by labour guarantor funds (FGTS) and by labour judicial courts.

c Technical requirements: companies' registration with the competent association, if any, and evidence that the bidder is fit to perform the activities in conformity with the characteristics, quantities and deadlines of the bid's object.

d Financial requirements: certificates that the company is not insolvent or under judicial restructuring proceedings, good financial conditions according to current financial statements and overall liquidity ratios, and minimum net worth (which may be increased by 30 per cent in the case of consortia).

These requirements must be met in the exact form established in the RFP. Public bidding is a very strict and formal procedure in Brazil, which may give cause to disqualification because of minor defects in the documentation. The Brazilian Administrative Law entitles bidders to file administrative and judicial defences and appeals to preserve their rights, such as in cases of wrongful disqualification of proposals and non-compliance with the RFP with applicable legal requirements.

ii Conflicts of interest

The RFP can provide requirements to avoid conflicts of interest, such as, for example, the prohibition on bidders hiring staff from the bidding authorities. The RFP may also have provisions for the bidders with requirements or limitations on contracting with third parties.

Furthermore, Federal Law 8,666/1993 establishes that the author of a basic or executive project cannot participate in the bids to execute such project or to provide goods necessary to the project. The Law also prohibits public servants who work for the administrative entity promoting the RFP to be bidders.

Additionally, in some states, such as São Paulo, private individuals can be allowed an exclusive authorisation to perform previous studies and project planning for a PPP, within the expression of interest (EOI) procedure. In such cases, when an exclusive authorisation is granted, the private individual authorised may not participate in the future bidding, nor can the future bidders be affiliated to such party, to avoid conflicts of interest. These limitations do not apply to EOI within the federal level, when authorisations are granted in a non-exclusive manner.

iii Foreign suppliers

When allowed by the RFP to participate directly, foreign entities functioning in the country should provide an authorisation decree duly registered with the competent body according to

the company's activity; and foreign entities not functioning in the country must establish a legal representative in Brazil with express powers to be served and to respond administratively and judicially.

In these cases, equivalent qualification evidence available in the relevant jurisdiction should be provided and all foreign documents must be certified by a notary public as according to the originals and, if signed, must have the signatures certified by a notary public, and the notarisations must be legalised with the Brazilian consulate incumbent in the jurisdiction. Legalisation of documents is not needed in the event the acquirer is from a country party to the Apostille Convention. Furthermore, documents must be translated into Portuguese by a sworn translator in Brazil.

When submitting documents that are equivalent to Brazilian documents and where there are no equivalent documents, the foreign entity must obtain a statement from the applicable consulate declaring that the documents are equivalent to Brazilian documents or that there are no equivalent documents, as the case may be.

If the foreign entity decides to set up a local subsidiary to participate in the bid, attention must be given to the requirements of technical qualification, since the RFP can request evidence of the company's or its employees' track record. When consortia and SPEs are allowed, these requisites may be supplied by a Brazilian partner.

Depending on the activity, there may be limitations or restrictions for foreign suppliers in areas such as nuclear energy; newspapers, magazines and other publications; television and radio networks; health services; business on frontier zones and rural lands; post office and telegraph services; domestic flight concessions and the aerospace industry.

VII AWARD

i Evaluating tenders

For competitive biddings, only the proposals presented by the bidders qualifying under the RFP should be ranked, and the winning bid should be adjudicated according to the criteria chosen for the public bid described in the RFP, which may be one of the following:

a best price;
b best proposal in technical terms; or
c a combination of best price and best technical proposal.

For reverse auctions, following the presentation of the initial proposals by the bidders, an oral bidding or an electronic auction takes place, in order to allow the bidders to improve their bid. The main difference of this modality is the inversion of the phases of qualification and competition described above, with only the qualification documentation of the winning bidder being analysed.

Under Federal Law 8,987/1995, which establishes the regime for concessions and permissions of certain public services, the possible criteria may be one of the following:

a lowest tariff;
b highest offer;
c best technical proposal, with the price established in the RFP;
d lowest tariff combined with the best technical proposal;
e highest offer combined with the best technical proposal;
f highest offer after the technical proposal qualification; or

g a combination of two of the lowest tariff, highest offer and highest offer after the technical proposal qualification.

Federal Law 11,079/2004, which created the PPP, sets as awarding criteria the lowest tariff with predetermined government compensation or the lowest government compensation with a predetermined tariff.

ii National interest and public policy considerations

As provided for by Law 12,349/2010, national products and services can be preferred in public biddings in certain cases, such as those related to science and IT systems considered strategic for the federal government. This preference must be disregarded whenever the price of the Brazilian product or service exceeds the price of the foreign product or service by at least 25 per cent.

Under Complementary Law 123/2006, micro-enterprises and small businesses may also be given preference in certain bids, when the winning bid is up to 10 per cent better than their proposals. In these cases, such companies must be given the opportunity to present a new bid and improve their price.

VIII INFORMATION FLOW

The Brazilian public authority must carry out the bidding proceeding through an administrative proceeding that should observe the guiding principle of transparency. This means that the public authority should disclose all available information not only to the bidders, but also to the public in general. That is why the public authority must publish the RFP in the Official Gazette. As a rule, all bidders are informed of the decisions of the administration and of the results of an RFP at the same time, so there is no asymmetry of information. Brazil also has an Information Access Law (Federal Law 12,527/2011), which allows any person to solicit the access of documents and general information with the administration.

Once the public authority publishes the RFP, the interested parties can raise questions or challenge the conditions of the bidding procedure. Additionally, Federal Law 8,666/1993 sets forth that any citizen may file an opposition to the RFP in the event of irregularities or any violation of the law.

IX CHALLENGING AWARDS

All formal decisions issued by the authority in charge of the bidding process may be challenged administratively and judicially in Brazil.

It is common for some level of litigation to occur in public bids. Bidders commonly file administrative appeals and (less frequently, but still commonly) judicial lawsuits in order to challenge bids' final or partial results (such as decisions that find certain bidders qualified to continue in the bidding process).

The chances of success of a challenge to any given decision will obviously depend on the quality of the facts and argument of law. Administrative authorities are usually more conservative in their interpretation of the law, so they tend to adhere more to literal interpretations than the judiciary.

Litigation in public bids is one of the most common reasons why bidding processes are stalled, sometimes for long periods, as injunctions may be granted to freeze the proceedings

until the judiciary resolves the case. How long a dispute will take to be resolved varies dramatically depending on the complexity of the case and whether the challenge was brought administratively or judicially (administrative proceedings are usually very quick and may be resolved in a matter of few days, while judicial proceedings may take several months).

Disputing an award administratively will typically not involve the payment of fees. Also, administrative challenges do not need to be written by licensed attorneys, and this may contribute to keeping costs low. On the other hand, judicial litigation does involve payment of fees (which are usually calculated considering the amount in dispute), require the involvement of a licensed attorney and, in the event the plaintiff loses the dispute, he or she may have to pay attorneys' fees to the opposing party's counsel.

i Procedures

Federal Law 8,666/1993 sets the general framework for administrative appeals in bidding processes. It states that a bidder may file an administrative appeal to a higher administrative authority within five days from the date in which a decision was officially rendered. As a default, only challenges to decisions that (1) qualify or disqualify bidders to continue in the contest and (2) that decide the winner of the bid entail the suspension of the proceeding until the appeal is decided; however, the competent authority may determine the suspension of the proceeding in other cases if it considers it to be in the public interest. The RFP usually defines who is the competent authority to review an administrative appeal.

Judicial challenges are commonly brought by bidders in the form of a writ of mandamus, in which the bidder (plaintiff) alleges that there was a clear violation of a given right that may be demonstrated by documental evidence only. Parties usually prefer the writ of mandamus because it has an expedited procedure compared to the other types of civil lawsuits that can also be filed in more complex cases. A writ of mandamus can be filed up to 120 days after the date on which a party discovered the violation of the right that will be litigated.

Judicial review of administrative decisions can also be initiated by any citizen (in the form of a 'popular lawsuit', a special type of lawsuit provided for in Federal Law 4,717/1965 that allows any citizen to request the nullity of acts that cause harm to the Public Administration) and by the public prosecutors.

Audit courts also review awards and performance of contracts executed by the Public Administration and may determine the suspension of a given act or contract (which must be subsequently decided by the legislative branch). Audit courts are inspecting bodies that assist the legislative branch in controlling the acts taken by the Public Administration that entail expenditures of public money.

ii Grounds for challenge

Decisions in public bids may be challenged for violations of the rules set forth in the RFP or violations of any applicable laws, or both.

iii Remedies

Courts have wide discretion in establishing the applicable remedies in the course of litigation. For instance, they may (1) grant injunctions suspending acts or allowing acts to occur, and (2) annul acts or decisions taken by the administration in the course of the public bid.

Judicial review of administrative acts, however, is typically limited to the analysis of the legality of the acts. Courts are not allowed to second-guess decisions regarding discretionary administrative acts with regard to their convenience or efficiency, but they may scrutinise whether or not the administration has abused its discretion.

X OUTLOOK

After a controversial and polarised presidential election in 2018, the newly elected President Bolsonaro kicked off 2019 with promises of radical changes in the country's economy. The first major project tackled by the new government is pension reform; the new government believes that, without a substantial modification in its pension system, the country will not be able to maintain steady growth. Many commentators believe that Bolsonaro's ability to implement new projects and radically shape Brazil's economy will be tested with the results of his proposed pension reform, a naturally controversial subject, which is expected by to be voted on in the Chamber of Representatives in the first half of 2019. Moreover, it is certain that public opinion will be shaped, and Bolsonaro's legacy will be measured, by how much his reforms will allow the economy to grow after several years of recession.

The markets have reacted fairly well in the first months of the new government, with the IBOVESPA index of the São Paulo market exchange reaching a historical high in mid-March 2019.

The market's appetite is in line with the liberal agenda being implemented by the new President, who has elected as one of his priorities the sale of public assets and the concession of public services to private parties. For example, in March 2019, a major public bid took place regarding the concession of 12 airports, and a new bid was announced for 2020 for the concession of 22 airports – as the Bolsonaro administration intends to have all national airports managed by private companies by the year 2022. Furthermore, several privatisation and concession projects are expected to occur in the near future, including: (1) three concessions of railroads; (2) 19 leases of ports; (3) the privatisation of Eletrobras (the power company controlled by the Federal Government); (4) eight concessions of major federal roads; (5) the concession of the Federal Lottery; and (6) the privatisation of the Brazil Mint.

Appendix 1

ABOUT THE AUTHORS

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Mauro Hiane de Moura is a counsel who concentrates his practice on administrative and regulatory law, competition law and dispute resolution. Since joining the firm, he has specialised in complex administrative and judicial litigation – especially in matters of public law, governmental contracts and regulated industries. In his activities, Mr Moura allies a solid academic background (LLB *summa cum laude*, Federal University of Rio Grande do Sul; LLM, The University of Chicago; LLM, Federal University of Rio Grande do Sul; specialist in business economics, Federal University of Rio Grande do Sul; PG Dip in economics for competition law, King's College London) to a wide practical experience. Clients value the combination of analytic precision, empirical knowledge and strategic reasoning offered by him. Mr Moura is the head of the firm's government and regulatory practice.

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Filipe Oliveira is a partner and member of the Porto Alegre Dispute Resolution team and focuses his practice on judicial and arbitral disputes related to mergers and acquisitions, complex commercial contracts and matters involving the public administration. He has strong experience in representing clients in class actions, as well as in domestic and international arbitrations regarding infrastructure projects and corporate and commercial disputes. Mr Oliveira also assists Brazilian and international companies with drafting and negotiating complex commercial contracts, as well as with writing legal opinions to assist clients' strategic business decisions. He has expertise in matters involving administrative and regulatory law, advising clients throughout all stages of the public bidding process and during the performance of the contracts.

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