

Provisional Measure regarding extension and new public tenders of projects within Brazil's Investment Plan

Today, the Brazilian Federal Government issued the Provisional Measure 752/2016 ("PM"), with new rules for extending the term of some concessions of railways, highways and airports, in consideration for additional investments ("Extension"). Those rules also apply to termination of certain supposedly problematic concessions, which will be subject to new bids to replace the service provider ("New Tenders"). Those rules were issued in the context of the recent Brazil's Investment Partnership Plan (the "Plan"), however there was no official announcement of which projects will be handled under the new PM.

Both initiatives will be preceded by the elaboration of technical studies that to prove the necessity of the Extension or New Tender and propose new goals, investment plans and ways to mitigate the operational issues faced during the original contracts (i.e. the PM mentions the right of usage of railways by third parties, which is an important controversy).

The Extensions will be submitted to public hearing while the New Tenders will be submitted to public consultation procedures.

Extensions

In the case of extensions, only the partnership contracts that meet the following criteria will be eligible: a) between 50% -80% of the original term has passed; b) for highways, fulfilment of 80% of the contract; and c) for railways, fulfilment of production and safety goals defined in the original contract.

New Tenders

The New Tenders can occur in relation to the contracts that are under violation or risk of violation by the service provider. The definition of conduction a New Tender must be taken by irrevocable agreement of the parties. The previous service provider or its shareholders that detain at least 20% of its shares will not be able to participate in the New Tender.

The previous service provider, among other duties must: a) cooperate by providing information regarding the object of the contract; b) justify the need and advantages of the New Tender; and c) remain responsible for the continuity of the services until a new contract is signed (up to 24 months).

The future service provider, however, will be responsible for: a) payment of indemnities to the previous contractor, defined by arbitration or other conflict resolution methods; and b) possible assumption previous service contractor's debts. In case of airports, the future service provider must pay for compensation for costs related to INFRAERO's personnel.

Arbitration

The PM establishes that the concession agreements between the government and the private parties in this program will have either an arbitration clause or another ADR provision, such as

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November 25th, 2016



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mediation. The private party will fully advance the costs and expenses of the arbitration, but the final arbitral award may sentence the government to pay back such costs. The arbitration will be held in Brazil and the language will be Portuguese. The rules clarify that the following matters can be submitted to the arbitration: (i) compensation to reestablish the economic equilibrium of the contract; (ii) the indemnification due to termination or transfer of the contract; and (iii) whether or not a party breached a contractual obligation. The federal government will issue a decree with the criteria for choosing the arbitral chambers which will manage the procedures.

Those rules show that the Brazilian government's commitment to arbitration, which will not only be the venue to resolve disputes on the new concessions, but will also address one of the most sensitive issues on the old concessions, that is to say, the value of indemnification due to early termination.

Please note that under Brazilian Law Provisional Measures immediately produce the same effects of laws, but they have to be confirmed by the Congress, which can reject them or modify their contents. Therefore, those new rules may still be subject to change. The new privatization program is expected to start being rolled out by the second quarter of 2017, when Provision Measure 752/2016 will have been analyzed by the Congress.

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