

SCHMIDT, VALOIS, MIRANDA, FERREIRA & AGEL

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Deuxièmes rencontres Franco - Brésiliennes
de la Société de Législation Comparée

Contractual Renegotiation with Public Entities

June - 2010



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✓ **Principles of Public Contracting**

✓ **Public Bids**

- Except in cases specifically provided for by law, any and all public contracting shall be made through a bid process

✓ **Principles of Public Contracting**

✓ **Public Bids**

- Law # 8,666/93 regulates the contracting of goods and services by the Public Administration. For this purpose, the concept of Public Administration also encompasses companies which are wholly owned or have a majority of its voting stock controlled by the Government and are created by law (i.e. ELETROBRAS)
- The Oil Law granted to PETROBRAS the opportunity to use a simplified bid procedure in accordance with the rules set forth in a Presidential Decree

✓ **Governmental Participation in Economic Activities**

- According to the Brazilian Constitution public entities will have their legal statute established by law, and shall be subject to the same legal regime as private companies

- Public companies shall participate in bids for public contracting on equal terms with other companies. Public companies are also forbidden to have tax benefits which are not available for private entities

✓ **Public Contracts**

- The main types of public contracting are (i) concession of public services, (ii) concession of economic activity; and (iii) Public Private Partnerships
- Concession of a Public Service is the rendering of a public service by the private sector, at its own cost and risk, under conditions established by the government, with the private sector being compensated via the payment of a tariff
- Concession of Economic Activity is the exploration of an economic activity by the private sector, from a good or asset owned by the State (i.e. hydrocarbons and mining resources)

- Differently from the Concession of Public Services, O&G concession contracts may be assigned to other parties, partially or in total
- Public Private Partnerships (“PPP”) are defined as “the administrative concession contract of the sponsored or administrative type”. PPPs have as a main purpose supplying the investment needs in infrastructure
- PPPs may be an interesting alternative for the development of infrastructure projects for the World Cup and the Olympic Games

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- The sponsored variety of PPP Contracts are used in cases in which the public partner makes payments to the private party for the works performed, in addition to the tariff charged from the end user
- The administrative variety of PPP Contracts are used in cases in which the Public Administration is a direct or indirect user of the service, even if it involves the works or the supply of goods; Public Administration being responsible for the payment of the compensation to the private sector

✓ **Renegotiation of Public Contracts**

- Vested right, the perfected legal act or *res judicata*
- Prevalence of the Public Interest over the Private Interest
- Contractual Price Revision
- Act of State
- Unpredictability Doctrine
- Standstill Clauses

✓ **Closing Remarks**

- Expropriation trends in Latin America
- Creeping and Direct Expropriation

“Where does Brazil fit in this context?”

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Merci Beaucoup!

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