BRAZIL’S PUBLIC–PRIVATE PARTNERSHIP LAW
Establishes general rules and requirements for public-private partnership bidding processes and contracts within the jurisdiction of the government and public sector entities.

The National Congress hereby decrees:

CHAPTER I
SCOPE AND APPLICABILITY

Article 1 This law establishes general rules and requirements for public-private partnership bidding processes and contracts within the scope of the powers of the federal government, the states, the Federal District of Brasília and municipalities.

Sole Paragraph. This law applies to federal government entities, special funds, semi-autonomous agencies, public foundations, government-controlled companies, mixed public-private corporations and all other entities that are directly or indirectly controlled by the federal government, the states, the Federal District of Brasília, or municipalities.

CHAPTER II
PUBLIC-PRIVATE PARTNERSHIP CONTRACTS

SECTION I
CONCEPTS AND PRINCIPLES

Article 2 For the purposes of this law, public-private partnership contracts are deemed to be agreements entered into between government or public
sector entities and private sector entities that establish a legally binding obligation to establish or manage, in whole or in part, services, undertakings and activities in the public interest, in which the private sector partner is responsible for the financing, investment and management, pursuant to the following guidelines:

I – Effectiveness in fulfilling the missions of the State and in using society’s resources;

II – Respect for the rights and interests of those who should receive services, as well as the private entities responsible for providing those services;

III – There shall be no delegation of functions that are regulatory, jurisdictional or involve exercising police powers;

IV – Fiscal responsibility in entering into and executing partnerships;

V – Transparency in decision-making and other procedures;

VI – Distribution of risks in accordance with the contracting parties’ risk management capabilities; and

VII – Financial sustainability and social and economic advantages of the partnership project.

SECTION II
PARTNERSHIP ACTIVITIES

Article 3  A public-private partnership may include the following:

I – The total or partial assigned provision or management of a public service, which may or may not be preceded by a public works project;

II – The performance of an activity within the jurisdiction of the government or a public sector entity, which may or may not be preceded by a public works project;

III – Carrying out a public works project for the government or a public sector entity; and

IV – Carrying out a public works project for sale, rental or lease to the government or to a public sector entity.

§ 1 The types of contract provided for in this law, as well as the other types of contract provided for in the legislation in force, may be used separately, jointly or simultaneously in a single public-private partnership project, and may be submitted to one or more bidding processes.
§ 2 In the case of public service concessions and permits, government and public sector entities may offer a counterpart installment payment, in addition to the rate billed to the user or, when justified, may assume responsibility to pay the entire cost.

§ 3 In the event of carrying out a public works project, upon completion of the public-private partnership, the government or public sector entity shall retain ownership of the real estate or other asset(s), regardless of compensation, unless otherwise stipulated in the contract.

SECTION III
SPECIFIC RULES

Article 4 Public-private partnership contracts must contain the following clauses:
I – A period of validity compatible with the amortization of the investments made, with a limit of thirty years;
II – Penalties to be applied to government and public sector entities, and also to the private sector partner, in the event of failure to fulfill the contractual obligations;
III – Possible circumstances for contract termination prior to the end of the term of the contract, as well as criteria for calculating the required compensation payments owed; and
IV – Sharing with the government or public sector entity the economic gains arising from a change in financing conditions, pursuant to the terms stipulated in the contract.

SECTION IV
PAYMENTS

Article 5 Counterpart installment payments by the government and public sector entities in public-private partnership contracts may be made by means of:
I – cash payments;
II – granting credits other than tax credits;
III – granting of claims against the government or a public sector entity;
IV – granting of claims against public sector assets; or
V – other means of payment permitted by law.
§ 1 Payments to the private sector partner may be increased periodically, based on parameters and formulas, as stipulated in the public notice of the request for bid proposals.

§ 2 The contracts provided for in this law may stipulate that payments to be made to a private sector partner may vary as a function of its performance in executing the contract, in accordance with previously established quality and availability targets and standards.

§ 3 The release of financial and budgetary funds, as well as payments made in fulfillment of the contract with the private sector partner, shall take precedence over all other contractual obligations assumed by the government or private sector entity, except for those that exist between public sector entities, and in compliance with what is provided for in Article 9 of Complementary Law no. 101 of May 4, 2000.

§ 4 Item A, Clause XIV of Article 40 of Law no. 8,666, of June 21, 1993, shall not apply to the public-private partnership contract bidding processes provided for in this law.

SECTION V
GUARANTIES

Article 6  Consistent with the pertinent legislation and fiscal responsibility and, whenever applicable, especially Article 40 of Complementary Law no. 101 of 2000, the government and public sector entities are hereby authorized to provide guaranties for meeting obligations assumed by private sector partners, as a result of public-private partnership contracts.

Article 7  Public-private partnership contracts may stipulate that commitments related to counterpart installment payments owed by the government or a public sector entity may be paid off on behalf of the institution that financed the partnership project, as a guaranty for meeting financing conditions.

Sole Paragraph. The financial institution’s claim is limited to its entitlement to receive directly the amount confirmed by the government or public sector entity during the paying off phase, and it does not have the right to contest it.
Article 8  In order to meet the payment conditions stipulated in administrative contracts resulting from a public-private partnership, the earmarking of revenues or the creation or use of special funds shall be allowed, so long as these are provided for in a specific law.

Article 9  In order to grant additional guaranties for meeting the obligations assumed by the government or a public sector entity, the federal government is hereby authorized to make full payments into a Trust Fund to Encourage Public-Private Partnerships created by a financial institution, as established through an act of the Executive Branch.

§ 1 Making full payments into a fund, as referred to immediately above, may be carried out by means of the following types of government assets:

I – funds specifically allocated in the budget and additional credits;
II – transfer of non-financial assets; and
III – transfer of real estate and/or other asset(s), pursuant to what is provided for under law.

§ 2 Making full payments into a Trust Fund by means of transferring stock from government enterprises or other companies controlled by the government or by public sector entities, pursuant to clause II of paragraph 1 above, may not cause the federal government to lose majority control of voting stock.

§ 3 States, municipalities and the Federal District of Brasília may, through specific laws, authorize that full payments be made into trust funds with the characteristics specified in this article.

CHAPTER III
THE BIDDING PROCESS

Article 10  The contracting of public-private partnerships shall be preceded by a bidding process, pursuant to the following:

I – the public notice of the request for bid proposals shall expressly indicate that the bidding process and contract shall abide by the requirements of this Law;
II – competition shall be carried out under a pre-qualification system; and
III – in the public notice of the request for bid proposals, the government and public sector entities may:

a) require guaranties of bid proposals and of execution of the contract that are greater than those established in the legislation in force, provided that they are consistent with the financial or other burden(s) resulting from failure to comply with the terms of contract;

b) require that the bidder present a financing pledge made by companies or financial institutions that meet the requirements of strength and safety established in the public notice;

c) require, as a condition for entering into the contract, that the winning bidder must create a company for the specific purpose of setting up and managing the partnership activities, and also that it must adopt standardized accounting practices and financial statements;

d) provide that the winning bidder shall be put in charge of preparing the project plan for achieving the purpose of the partnership activity that was the subject of the bidding process, or allow an alternative project plan to be presented in the bidding process;

e) allow the possibility of adopting arbitration for the resolution of disputes arising from the execution of the contract; and

Article 11  After the pre-qualification stage and provided that it was stipulated in the public notice, the bidding process shall comply with the following procedures:

I – the government or public sector entity shall receive technical bid proposals from the bidders and may request that changes be made that it decides are suitable to serve the public interest, until the bid proposals are deemed to be satisfactory;

II – a reasonable and sufficient period of time shall be established for satisfying the requests made by the government or public sector entity;

III – once the stage for improving the technical bid proposals is completed, the government or public sector entity shall receive the price proposals from the bidders;

IV – the bidders may present new and successive price proposals until one is declared to be the winner, under the terms and conditions stipulated in the public notice;
V – the public notice may limit the right to present new and successive price proposals to bidders that are included in a specific range established in the public notice, relative to the proposal that initially places first;
VI – if there are not at least three proposals included in the range established in the public notice, those who present the three best proposals may present new and successive price proposals.

Article 12 In order to judge the bid proposals, the following criteria may be adopted:
I – the lowest rate;
II – the best techniques; and
III – the lowest counterpart installment payments for the government or public sector entity.
§ 1 The judging criteria provided for in this article may be combined.
§ 2 The government or public sector entity may require, as a means of breaking ties, that bidders provide evidence of social responsibility.

CHAPTER IV
GENERAL PROVISIONS

Article 13 An act by the Executive Branch shall create a managing agency that will be coordinated by the Ministry of Planning, Budget and Management, for the purpose of establishing procedures for contracting public-private partnerships within the scope of the government and public sector entities, as well as to identify activities, public works projects or services that should take priority over others in being carried out under a partnership system.

Article 14 The opening of a public-private partnership contract bidding process shall be contingent upon compliance with the following rules:
I – preparing an estimate of the financial and budgetary impact in the fiscal years when the public-private partnership contract will be in effect;
II – demonstrating the source of funds to defray its cost;
III – a statement from those ordering the expense that the resulting increase is consistent with the annual budget legislation, in terms of both
finances and budget, and is also compatible with the Multi-Year Plan and the Law of Budgetary Guidelines; and

IV – an assessment and authorization by the managing agency mentioned in Article 13.

§ 1 For the purpose of complying with clauses I and II above, the act shall be accompanied by evidence that the expense created or increased shall not affect fiscal targets provided for in the appendix mentioned in § 1 of Article 4 of Complementary Law no. 101 of 2000, with the financial effects being compensated for, in subsequent fiscal years, by a permanent increase in revenues or by a permanent decrease in expenses.

§ 2 The evidence referred to in § 1 shall include the calculation assumptions and methodologies used, notwithstanding the ability to examine whether the expense is consistent with other requirements in the Multi-Year Plan and the Law of Budgetary Guidelines.

§ 3 The expenses mentioned in this article shall not be incurred before the measures referred to in § 1 are implemented.

Article 15 The National Monetary Council (CMN) shall establish the conditions under which domestic financial institutions may grant credit to the government or public sector entity and its private sector partners in order to finance public-private partnerships.

Article 16 The Central Accounting Agency of the federal government shall issue general rules for the consolidation of public accounts applicable to public-private partnership contracts

CHAPTER V
FINAL PROVISIONS

Article 17 The provisions of Law no. 8,666 of 1993 shall apply to public-private partnerships, as will, in the case of concessions or permits to provide public services, the provisions of Law no. 8,987 of Feb. 13, 1995, and Law no. 9,074 of July 7, 1995, insofar as they are consistent with this Law.

Article 18 This Law shall take effect on the date of its publication.
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