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BRAZILIAN 5G BIDDING CALL – IV
PRICE PROPOSALS, AWARD OF LOTS,
HOMOLOGATION OF RESULTS AND
FORMALIZATION OF GRANTS

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Brazilian 5G Bidding Call – IV Price Proposals, Award of Lots, Homologation of Results and Formalization of Grants

By Ricardo Barretto Ferreira and Sylvia Werdmüller von Elgg Roberto

In February 2021, the Board of Directors of the National Telecommunications Agency (ANATEL) approved the public notice draft proposed for the auction to be held in Brazil for the issuance of Authorizations for the Use of Radio Frequencies in the 700 MHz, 2.3 GHz, 3.5 GHz, and 26 GHz bands, which will result in the implementation of 5G technology in the country and other benefits for its population.

Although the public notice draft in the version made available at [ANATEL's website](#) does not mention the pricing for the bands to be auctioned, the topic was the object of a technical study by the Agency. [The document and the results of this study were forwarded to the Federal Accounting Court \(TCU\) for consideration in mid-March](#) and the analysis thereof is in progress. [The bidding is intended not have a collection nature](#), and therefore a large part of the amounts to be spent is related to obligations to be undertaken by the winning bidders with regard to each of the lots won.

The terms of the draft may be changed until the final version of the public notice is published in the Brazilian Official Gazette (DOU), but the wording of the document, as proposed, already covers important aspects of the bidding procedure.

Thus, on a date yet to be determined, by means of the Special Bidding Commission (CEL), ANATEL will receive envelopes containing **(I)** the Documents of Identification and Tax Regularity, as well as **(II)** the Price Proposals.

As determined by the wording draft, envelopes with Price Proposals must be presented for all lots auctioned, even if the purpose is only to declare, in line with the model contained in the public notice in this regard, that no offer will be submitted. The minimum value of each lot, it is worth clarifying, will be revealed later.

The Price Proposals must be presented in an identified envelope, specific for each of

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the lots of interest, with the indication of their respective value in Brazilian Reais, in figures and in words; in case of doubts, the value in words will prevail.

In addition, as a condition for the Price Proposal's acceptability, the so-called Guarantee of Maintenance of Price Proposals must be submitted. This might correspond to the modalities of **(I)** letter of bank guarantee (in Portuguese, "carta de fiança bancária"), issued by a commercial, investment or multiple bank authorized by the Central Bank of Brazil to operate in the country; **(II)** guarantee in cash (in Portuguese, "caução em dinheiro"), to be made at Caixa Econômica Federal; or **(III)** bid bond (in Portuguese, "seguro-garantia"), which is to be submitted electronically. However, it should be noted that each of these modalities must also meet other requirements, as applicable to the specific case. According to the terms of the public notice wording approved by ANATEL, a single Guarantee may be presented for all lots of interest of the same type, provided the guarantee corresponds to the highest value among the guarantees' values of the respective lots of the same type. The Guarantees of Maintenance of the Price Proposal will be returned to unsuitable bidders later, within fifteen (15) days after a formal communication regarding the unfitness; to the winners, within fifteen (15) days following the execution of the Authorization Terms regarding each lot; and to the classified and unsuccessful bidders,

within fifteen (15) days following the execution of the Terms mentioned in the previous item.

The draft determines that the envelopes with Price Proposals of bidders which have not met all the conditions for participation in the bidding procedure will be returned sealed to the same. The opening of the suitable bidders' envelopes, in turn, will follow the order set forth by the final version of the public notice and will take place on a date yet to be determined.

Irregular proposals will be eliminated, and the remaining ones will be classified. The classification will take place based on the value of the Price Proposal, in line with several guidelines set out in an annex to the public notice. The highest value proposed will be ranked first and the subsequent classification will occur in decreasing order of proposed values.

The blocks of radio frequencies (RFs) auctioned will be allocated to the winning bidders also in accordance with the terms of the public notice, as they appear in its final version. In this regard, it is worth noting that, according to the current public notice draft, the bands auctioned are divided into Provision Areas I to IX, as well as Lots of Types A (A1 to A15), B (B1 to B4), C (C1 to C8), D (D1 to D36), E (E1 to E8), F (F1 to F8), G (G1 to G5), H (H1 to H21), I (I1 to I10) and J (J1 to J42) ([see article](#)).

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Furthermore, it is also appropriate to mention that the proposed public notice imposes maximum limits on the authorizations of RF sub-bands of the bidding procedure that might be granted to the same bidder, its subsidiaries, controllers, or affiliates in the same geographic area, in addition to other restrictions. ANATEL will be responsible for controlling the quantities of spectrum, and it should be noted that the possibility of grouping the lots, by winning bidder, into contiguous blocks has been provided for.

In addition, but not less relevant, for different specific lots, the current version of the public notice draft provides for the need for the winning bidder to undertake commitments to comply with additional requirements. For example, the winners of certain lots will have to refund “the costs for the migration of the reception of the free and open television signal by means of satellite dishes in the satellite C band to the Ku band and the costs resulting from the vacancy of the 3,625 MHz to 3,700 MHz band”, according to the determinations contained in the public notice draft.

Some of the obligations provided for by the current wording have been subject to criticism, since they might, for example, increase the costs of implementing 5G technology in Brazil and encumber the final consumer, as considered by the National Federation of Installation and Maintenance of Telecommunications and Informatics Network Infrastructure (FENINFRA).

However, as mentioned, there may be changes in such aspects.

In case it is not possible to conclude the judgment of the lots auctioned in the first session for the opening, analysis and judgment of Price Proposals, the session will be suspended until the first subsequent business day or another date as defined by CEL. In this case, at the end of said session, the envelopes with the unopened Price Proposals will be returned to their respective bidders, which will sign the receipt term thereof; should the envelopes with the unopened Price Proposals not be received by their respective bidders, the same will be destroyed by ANATEL.

ANATEL's Board of Directors will decide on the homologation of the result of each lot auctioned based on a report by CEL. After the homologation, the bidder which has submitted the best price offer for each lot will be given the respective Authorization for the Use of Radio Frequencies.

However, in case the winning bidder is a foreign company or consortium, it should organize a company meeting all the public notice's requirements prior to executing the Authorization Term. Alternatively, in the case of a consortium, it has been provided for the possibility of appointing one or more consortium members (which must individually meet all applicable qualification requirements) to sign the Term; however, should more than one consortium member be appointed, the geographic areas (not

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inferior to the area of municipalities) associated with each Authorization Term should be defined, being forbidden, for the same geographical area, the distribution of RF bands associated with the lot.

In addition, according to the current draft, the fulfillment of commitments contained in the public notice and in the aforementioned Authorization Term should be covered by a Guarantee of Execution of Commitments (guarantee in cash, letter of bank guarantee and bid bond) with a minimum validity period of twenty-four (24) months, to be submitted up to five (5) days prior to the execution of the Authorization Terms. This Guarantee might be redeemed in the event of proof of compliance with the commitments and delivery of a new guarantee corresponding to the value of the remaining commitments. On the other hand, in case of non-compliance with the commitments undertaken, such Guarantee might be executed, without prejudice to other applicable sanctions.

Execution of the Authorization Term will occur within ten (10) business days after the winning bidder's call, and such term might be extended once for an equal period, upon a duly justified request of such winning bidder.

However, in case the winning bidder's illegitimate participation is recognized, the object will be awarded to the second-ranked bidder (in case it meets the conditions of the public notice), for the amount of the bid

initially offered, if there are only two bidders; or by the value of the last bid offered and prior to the waiver of the third-ranked bidder in submitting a substitute Price Proposal. Furthermore, if due to another reason the winning bidder fails to execute the Term in question, the object will be awarded to the second-ranked bidder (also, in case it meets the conditions of the public notice), and so on, for the value of the last bid offered.

Regardless of the quantity of lots awarded, there will be a single Authorization Term for the Use of Radio Frequencies when the respective provision areas are part of the same region provided for in the General Plan of Authorizations of the Personal Mobile Service (SMP) referred to in ANATEL's Resolution No. 321/2002.

The Authorizations for the Use of Radio Frequency mentioned in the public notice will be granted against payment; the amount is defined by the value of the winning proposal of each lot, with the deduction of additional obligations, if applicable, plus the public price for the right to exploit telecommunications services, in case the winner does not hold an authorization for the exploitation of telecommunications services of collective interest.

The public price due for the aforementioned Authorizations may be paid in a single installment, in a lump sum; or in equal yearly installments, the maximum number

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of which will be equal to the term, in years, of the right to use the RFs, and in this case, the amount of each installment will be subject to the due monetary correction and should be equal to or greater than BRL 500.00. The deadline for payment of the single installment or the first yearly installment will be thirty (30) days following receipt of a notification from ANATEL.

Despite the uncertainties about the definitive terms according to which the bidding procedure will take place, this is already deemed one of the largest spectrum biddings in the world, which is why not only telecommunications services providers, but also equipment suppliers, have shown great interest in the continuation thereof, largely targeting the opportunities brought by 5G technology.

We also emphasize that this material contains only a brief summary of some relevant points of the public notice proposal and should not be understood as legal advice regarding specific aspects within the scope of the bidding procedure, which shall be the object of in-depth analysis.

To receive the main legislative news and positioning on this and other topics related to telecommunications, follow the Technology, Media and Telecommunication (TMT) team of Azevedo Sette Advogados.

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