

Azevedo Sette
ADVOGADOS

TELECOMS SERIES

BRAZILIAN 5G BIDDING CALL – X
THE 3.5 GHZ BAND AND
COMMITMENTS TO BE UNDERTAKEN

**B
R
A
N
I
L**

São Paulo | Belo Horizonte | Brasília | Rio de Janeiro | Goiânia | Recife
www.azedosette.com.br

Brazilian 5G Bidding Call - X

The 3.5 GHz Band and Commitments to be Undertaken

By Ricardo Barretto Ferreira and Sylvia Werdmüller von Elgg Roberto

Access to connectivity is, without a doubt, an extremely relevant issue for the development of a nation. In Brazil, just as it happened worldwide, this fact became even more evident with the changes in daily life caused by the Covid-19 pandemic from March 2020.

Since then, there has been a significant increase in demand for the provision of telecommunications services. Social isolation, the need to perform remote tasks, as it was the case of distance education, and the escalation in the consumption of entertainment content, together with the large increase in electronic commerce, still in 2020, positively affected the demand for broadband services; in line with this reality, mobile telephony also grew by more than 6% in 12 months.

Many of the changes expeditiously implemented at the end of the first quarter of 2020 have become definitive. Especially in large urban centers, for example, the lack of need for physical presence in the facilities

where the work had traditionally been provided resulted in less expenditure, combined with time savings for employees, in addition to savings for the business community. The hybrid work regime, or even "*work from anywhere*", which was a mere trend, started to be considered as a relevant factor for many professional talents in Brazil, and should be maintained in the post-pandemic period. Therefore, it is essential to have connectivity available, as well as quality in the services provided to users. And, because of this, the forecast is that the telecommunications sector will continue to contribute directly to minimize the pandemic's negative impacts and for the achievement of future positive economic results, similar to what has been noted in 2021.

Given this scenario, the importance of the Brazilian bidding procedure that will auction radio frequencies ("RFs") in the 700 MHz, 2.3 GHz, 3.5 GHz and 26 GHz bands is unquestionable, resulting in the implementation of the fifth-generation

LEGAL – REGULATORY

technological standard (“5G”) in the country, as well as in the expansion of coverage of voice and data services also by means of the Long Term Evolution – LTE Advanced Release 10 of 3GPP standard (“4G”).

Undeniably, the auction will benefit the society as a whole, including with service to populations and locations currently underserved. In addition, many key economic activities in the country, such as agribusiness and domestic industry, might be impacted by the new uses that 5G will make viable, generating an increase in productivity associated with less financial losses.

With a total of 3,710 MHz being auctioned, this will be the largest bid in the history of the National Telecommunications Agency (“ANATEL”) since its creation in 1997, which is expected to take place in 2021, despite the uncertainties regarding its date, in part arising from the analysis of the respective public notice, which is currently being conducted within the scope of the Federal Accounting Court (“TCU”).

Although the public notice might be changed until publication of its definitive version, the draft approved by ANATEL last February contains the provisions that the Agency intends to see accepted in terms of requirements to be met and commitments to be undertaken by the winning bidders, which will be briefly summarized below, based on the current wording.

As mentioned in a previous article, the commitments to be undertaken by spectrums’ purchasers vary according to the auctioned lots, with both general and specific commitments of the RF bands. But it is for the 3.5 GHz band, the most licensed band for 5G in the world, that the greatest number of obligations has been foreseen. The applicable coverage commitments will be included in the respective Term of Authorization for the exploitation of the Personal Mobile Service (“SMP”) or for the Use of Radio Frequencies, and non-compliance therewith will subject the winners to the execution of any guarantees, as well as to the sanctions provided for in the public notice and in the regulation. In addition, it will be necessary to establish procedures and conducts in line with the Cyber Security Regulation Applied to the Telecommunications Sector (ANATEL’s Resolution No. 740/2020).

The spectrum to be auctioned in the sub-bands from 3,300 MHz to 3,700 MHz was divided into national and regional blocks (types B, C and D), with the respective authorization for the use of RFs being issued to the winning bidders as per the terms of ANATEL’s Resolution No. 711/2019, as amended by Resolution No. 742/2021 of the same Agency, and of the applicable technical requirements, for a period of twenty (20) years, renewable against payment. However, within the same geographic area, the same bidder, controlled companies, parent companies or

LEGAL – REGULATORY

affiliates thereof will be subject to some restrictions: (a) maximum authorization limit of 100 MHz for the set comprising lots of types B, C and D; (b) for type D lots, only the winning bidder of type B lots will be allowed to participate; and (c) each bidder may purchase a maximum of two (2) type C lots (limit not applicable to type D lots).

With regard to commitments specifically deemed applicable to the 3.5 GHz band, according to the current public notice draft, the winning bidders of lots B1 to B4 and D33 to D36 should reimburse certain costs, such as:

- (I) Costs for the migration of reception of the free and open television signal ("TV") by means of satellite dishes in the satellite C band to the Ku band, according to Ordinance No. 1924/SEI-MCOM/2019 of the Ministry of Communications ("Ordinance");
- (II) Costs for vacating the band from 3,625 MHz to 3,700 MHz, currently assigned to the Fixed Satellite Service ("FSS"), to Brazilian or foreign satellite operators;
- (III) Costs for the implementation of the Integrated and Sustainable Amazon Program ("PAIS", *Programa Amazônia Integrada e Sustentável* in Portuguese), pursuant to the aforementioned Ordinance; and
- (IV) Costs for the implementation of a Private Communication Network of the Federal Public Administration ("Private

Network"), also in accordance with the aforementioned Ordinance.

The migration of TV signal reception will imply the distribution, installation and setting of equipment enabling the reception of the TV signal in the Ku band, to beneficiaries eligible for reimbursement, defined according to the following cumulative criteria: (a) reception, in the residence, of the TV signal transmitted in satellite C band; (b) existence, in the residence, of a member of the Federal Government Single Registry for Social Programs corresponding to the Low Income Family; and (c) request, by the interested party, until the applicable deadline, to be established by the so-called Group for Monitoring the Implementation of Solutions for Interference Problems in the band from 3,626 to 3,700 MHz ("GAISPI", *Grupo de Acompanhamento da Implantação das Soluções para os Problemas de Interferência* in Portuguese). Regarding the issue, anticipating the publication of the definitive public notice and expecting that the obligation will remain within the scope thereof, operators are preparing for such migration, as reported in the specialized press.

Said GAISPI, to wit, will be constituted following publication of the Terms of Authorization for the Use of Radio Frequencies in the 3.5 GHz Band excerpts in the Brazilian Official Gazette ("DOU"), being coordinated and chaired by an ANATEL Officer, and composed of representatives of

LEGAL – REGULATORY

this Agency and of the winning bidders of certain lots, among others, with the objective of regulating and inspecting **(a)** the migration of the TV signal and the cleaning of the band by the FSS stations; and **(b)** the activities of the Managing Entity of the 3.5 GHz Band (“EAF”, *Entidade Administradora da Faixa de 3,5 GHz* in Portuguese). EAF, in turn, will aim to operationalize, in an isonomic and non-discriminatory manner, procedures related to the obligations to which the costs to be reimbursed with the migration of the TV signal, vacancy of the band from 3,625 MHz to 3,700 MHz, implementation of PAIS and the Private Network refer, being constituted by the applicable winning bidders within 90 days following the creation of GAISPI.

The costs for vacating the band from 3,625 MHz to 3,700 MHz will result from **(a)** the change in the operating frequency of land stations operating in the band, considering the receivers registered with ANATEL and licensed transceiving and transmitting stations, with the acquisition and installation, or adaptation, if possible, of equipment and infrastructure necessary for the FSS stations operation, including equipment substitution, repointing of antennas, technical services and payment of any fees; and **(b)** the mitigation of harmful interference in the reception of the signal from FSS stations that operate in the band from 3,700 MHz to 4,200 MHz, until December 31, 2026, for land stations operating in accordance with good engineering practices.

In turn, the implementation of PAIS, which is part of the *Norte Conectado* Program, should be completed within 4 years from the execution of the applicable term of authorization for the use of RF. The *Norte Conectado Program*, to wit, aims to expand the communications infrastructure in the Amazon Region with the implementation of a optical fiber backbone launched in a sub-fluvial environment and with the installation of antennas in remote areas, to meet public policies (telecommunications, education, health, defense and others), expand access to the Internet and promote integration with the neighboring countries being part of the Pan Amazon (Peru, Colombia and French Guiana); the intended total coverage is approximately 10,000 km, to benefit around 9.2 million inhabitants.

According to the public notice draft, the Private Network should also be completed within a period of up to 4 years from the execution of the applicable term of authorization for the use of RF, being composed of: **(a)** a mobile network, using the band from 703 MHz to 708 MHz and from 758 MHz to 763 MHz, limited to the Federal District, dedicated to public safety, defense, rescue and emergency services, disaster response activities and others, as well as to serve federal public bodies; and **(b)** a fixed network, complementary to the existing government network, aimed at serving federal public bodies.

Thus, the public notice draft determines that the use, by winners, of the sub-band of RFs

LEGAL – REGULATORY

from 3,300 MHz to 3,700 MHz might be started as of:

- (I) 300 days from the publication of the Term of Authorization for the Use of Radio Frequencies in the DOU, in municipalities being state capitals and in the Federal District;
- (II) 390 days from the publication of the aforementioned Term in the DOU, in municipalities with a population equal to or greater than 500,000 inhabitants;
- (III) June 30, 2023, in municipalities with a population equal to or greater than 200,000 inhabitants and in at least 25% of the municipalities with a population of less than 30,000 inhabitants;
- (IV) June 30, 2024, in municipalities with a population equal to or greater than 100,000 inhabitants and in at least 50% of the municipalities with a population of less than 30,000 inhabitants;
- (V) June 30, 2025, in at least 75% of the municipalities with less than 30,000 inhabitants; and
- (VI) January 1, 2026, in other municipalities.

Notwithstanding the schedule, the use of such sub-band might be anticipated in municipalities without FSS systems or TV signal reception in the band from 3,625 MHz to 3,700 MHz; or, also, when the activities to vacate the band have already been carried

out and the activities to migrate the reception of the aforementioned TV signal to the Ku band have already started.

Additional commitments have also been foreseen for lots B1 to B4, C1 to C8 and D1 to D36. In fact, the draft specifies that the winning bidders should build transmission networks (*backbone or backhaul*) to meet, by December 31, 2023, 2024 and 2025, respectively, at least 40%, 70% and, finally, 100% of Brazilian municipalities which currently do not have optical fiber transport infrastructure and being assigned to them. Up to 6 months prior to these deadlines and upon proven unfeasibility of service, purchasers might request to ANATEL to replace the municipalities with others without the concerned infrastructure and which have not been chosen by the applicant itself or by other winners.

In order for a municipality to be deemed served, the implementation of optical fiber transport infrastructure with a minimum capacity of 01 Gbps end-to-end should occur in municipalities with a population of less than 20,000 inhabitants, or 10 Gbps end-to-end in those with more than 20,000 inhabitants, making possible the connection at least from a point located in its home district to a traffic exchange point (“PTT”) in accordance with the characteristics defined in the General Plan of Competition Goals (ANATEL’s Resolution No. 694/2018). Such commitments may be met with third parties’ infrastructure or resources, and the infrastructure will be subject to sharing as of

LEGAL – REGULATORY

its installation, even though the Agency might waive such sharing in certain cases of competition in the relevant market.

The draft of the public notice also determines that the winners of lots B1 to B4 and D33 to D36 should install Radio Base Stations ("ERBs") to offer SMP by means of a technological standard equal to or higher than the 5G NR Release 16 of the 3GPP, by activating a carrier with continuous bandwidth equal to or greater than 50 MHz and ensuring the feasibility of Ultra Reliable Low Latency ("URLLC"), massive Machine Type Communication ("mMTC") and enhanced mobile broadband ("eMBB"), to serve:

(I) By July 31, 2022, the State capitals and the Federal District, at the minimum proportion of one station for every 100,000 inhabitants (should the aforementioned release for the use of the RF sub-band from 3,300 MHz to 3,700 MHz occur after June 30, 2022, this deadline should be postponed for up to 30 days from the release);

(II) By July 31, 2023 and 2024, the State capitals, as well as the Federal District, at the minimum proportion of one station for every 50,000 and 30,000 inhabitants, respectively;

(III) At the minimum proportion of one station for every 15,000 inhabitants:

(a) By July 31, 2025, the State capitals and the Federal District, as well as certain municipalities with a population equal to or greater than 500,000 inhabitants;

(b) By July 31, 2026 and 2027, municipalities with a population equal to or greater than 200,000 and 100,000 inhabitants, respectively;

(c) By July 31, 2028, at least 50% of the municipalities with a population equal to or greater than 30,000 inhabitants; and

(d) By July 31, 2029, municipalities with a population equal to or greater than 30,000 inhabitants.

Commitments to install ERBs to offer SMP by means of the same technological standard equal to or greater than the 5G NR Release 16 of the 3GPP, with continuous bandwidth equal to or greater than 50 MHz and guaranteeing the concepts of URLLC, mMTC and eMBB, will also be applicable to purchasers of lots C1 to C8 and D1 to D32, with the objective of serving at least 30%, 60%, 90% and, finally, 100% of the municipalities with a population of less than 30,000 inhabitants, by December 31 of the years 2026, 2027, 2028 and 2029, respectively.

In compliance with the commitments to install ERBs with the 5G standard described in the previous paragraphs, other sub-bands for which the winners hold an authorization for the use of RFs, in addition to third parties' infrastructure or resources might be used, even if in a shared way. However, in the event of implementation by third parties, before ANATEL, purchaser will remain solely liable for the commitments assumed.

LEGAL – REGULATORY

Additionally, the public notice draft sets forth that the values offered by purchasers exceeding the minimum prices of each applicable lot will be converted into additional obligations, so that said companies should serve:

(I) In the case of lots B1 to B4, C1 to C8 and D1 to D36, with the construction of transmission networks (backbone or backhaul), 100% of the municipalities which currently do not have optical fiber infrastructure and which have been associated with the authorization for the use of RFs as a result of such conversion, by December 31, 2026; and

(II) in the case of lots C1 to C8 and D1 to D32, with the installation of at least one ERB for the offer of SMP by means of a technological standard equal to or greater than the 5G NR Release 16 of the 3GPP, 100% of the locations of municipalities with a population of less than 30,000 inhabitants assigned to them, by December 31, 2030.

In this regard, it is interesting to mention that, as recently reported, the price of the bands calculated by ANATEL was BRL 44 billion, of which BRL 37 billion should correspond to the investment commitments to be undertaken by the winners (BRL 30 billion with coverage on highways, locations and cities, *backhaul* and others).

It should also be noted that, with regard to said obligations, the mentioned municipalities and/or locations refer to those municipalities and/or locations as listed in the relevant annexes of the public notice final version to be published in the future.

Notwithstanding the points summarized herein, it is also important to emphasize that many of the obligations provided for in the public notice draft have been the object of considerations, either by potential participants in the auction, by lawmakers (who intend to include obligations to provide connection to public schools), by the Ministry of Communications or other interested parties, so that it will be necessary to await the outcome of the TCU analysis and the subsequent publication of the public notice final version for full knowledge of all applicable obligations.

In addition, due to the various particularities and other obligations of the bidding, this article should not be understood as legal advice in regard thereto.

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.

São Paulo, August 02, 2021.

Authors



Ricardo Barretto Ferreira da Silva - Senior Partner
barretto@azevedosette.com.br



Sylvia Werdmüller von Elgg Roberto - Associate
selgg@azevedosette.com.br