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BRAZILIAN 5G BIDDING CALL - II  
QUALIFICATION FOR PARTICIPANTS

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# Brazilian 5G Bidding Call - II

## Qualification for Participants

By Ricardo Barretto Ferreira and Sylvia Werdmüller von Elgg Roberto

The Board of Directors of the National Telecommunications Agency (ANATEL) approved, at a meeting held on February 25, 2021, the proposal of a new version of the public notice of the 5G technology auction, which will take place in Brazil, aiming the issue of Authorizations for the Use of Radio Frequencies (RFs) in the 700 MHz, 2.3 GHz, 3.5 GHz, and 26 GHz bands.

Although the terms of the draft made available by ANATEL may be changed until the final version of the public notice is published, which will occur after the analysis by the Federal Accounting Court, currently in progress, important conditions regarding certain aspects of the bidding process, such as the conditions for the participation of bidders, have been established in the published proposal of public notice.

Thus, the wording draft determines that bidders interested in participating in the event must have previous qualification, being deemed qualified those holding authorization/concession for the exploitation of telecommunications services of collective interest.

Should the interested bidders not be

qualified as per the aforementioned, the same will be deemed qualified in case there is a grant request for the provision of such services in a conformity analysis approved by the competent authority, and the document of approval of said request should be included in the Documents of Identification and Tax Regularity.

In this regard, the public notice wording proposal specifies that, on a date yet to be determined, ANATEL will receive from the parties interested in participating in the administrative procedure related to the bidding process, by means of the Special Bidding Commission (“CEL”), different envelopes containing **(I)** the aforementioned Documents of Identification and Tax Regularity, which might not contain erasures, amendments or content between the lines; and **(II)** the Price Proposals for the issue of the aforementioned authorizations. CEL will be responsible for analyzing these documents.

Still regarding the qualification, the draft determines that the aforementioned grant request must be forwarded to ANATEL, with the following documents: **(I)** trade registry, in the case of a sole proprietorship; **(II)** by-

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laws or articles of incorporation and amendments or restatement thereof, and the company's corporate object must include the provision of telecommunications services; **(III)** in the case of a consortium, the provision of telecommunications services must be included in the corporate object of at least one of the consortium members; **(IV)** minutes of election of the current managers of corporations and the list of their shareholders, which must contain the number, value and type of shares of each shareholder holding at least 5% of the voting capital on the date of receipt of the Documents of Identification and Tax Regularity, Price Proposals and Qualification Documentation, and in case there is a shareholder deemed a controlling shareholder in accordance with the terms of ANATEL's Resolution No. 101/1999, additional requirements must be met; **(V)** in the case of a bidding consortium, Term of Consortium Organization in accordance with the respective template contained in the public notice; and **(VI)** for a foreign company operating in Brazil, the duly filed Authorization Decree, as well as the Registration or Authorization Act for operation, issued by a competent body, if applicable to its activity.

At this point, it is necessary to note that foreign companies are exempted from submitting the grant request for the provision of telecommunications services. However, they must deliver to ANATEL, up to 30 days before the date on which will be

held the Public Session for the receipt of the Documents of Identification and Tax Regularity, as well as Price Proposals, the documents listed in the previous paragraphs, in addition to others as applicable.

Additionally, foreign legal entities, whether or not members of a consortium, must have a legal representative or attorney-in-fact in Brazil, with powers to receive service of process and respond administratively and judicially, as well as submit a statement in accordance with the template contained in the public notice proposal.

Furthermore, in case the bidder does not hold authorization/concession for the exploitation of telecommunications services of collective interest, it should also provide proof of its technical qualification, by submitting the bidder's registration before the Regional Council of Engineering and Agronomy ("CREA") of the location of its headquarters; a statement (according to the template of the public notice) that the bidder, or at least one of the consortium members, has among its employees a professional holding an Annotation of Technical Responsibility for telecommunications services on the date of delivery of the Documents of Identification and Tax Regularity, Price Proposals, and Qualification Documentation.

The bidder should also provide proof its economic and financial qualification,

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submitting, among other items, as applicable: **(I)** balance sheet and financial statements of the last fiscal year, proof of equity, and independent audit opinion, in the case of corporations; **(II)** certified copy of the special journal of the limited liability companies in which the balance sheet has been transcribed, or as provided for in Decree No. 6,022/2007; and **(III)** in the case of investment funds, balance sheets and financial statements of the last fiscal year, in addition to the opinion of an independent auditor, to be submitted by the managing institution. Moreover, it should be mentioned that the amounts in foreign currency contained in financial statements of foreign companies must be converted into Brazilian Reais according to the sales rate published by the Central Bank of Brazil, complying with specific requirements in this regard, as included in the public notice draft.

Regarding foreign companies that do not operate in Brazil, the requirements related to the qualification should be complied with by means of documents equivalent to those listed in the public notice, as published in the future.

Attention should also be paid to the fact that documents in a foreign language should be notarized, certified by a Brazilian Consulate or Diplomatic Representation in their country of origin, in addition to being translated into Portuguese by a sworn translator.

It is also important to emphasize that in case a bidder fails to submit any of the required documents, or should the submitted documents not meet the requirements, contain flaws or inaccuracies that cannot be remedied in accordance with the terms of the public notice, such bidder will be deemed disqualified. A consortium in which any of the members does not meet the qualification requirements will also be deemed disqualified.

Specifically with regard to the participation conditions, individually or in a consortium, companies organized in accordance with Brazilian laws, with headquarters and management in Brazil, the purpose of which includes the exploitation of telecommunications services, may participate in the bidding process. The majority of the quotas or shares with voting rights of these companies must be held by natural persons resident in Brazil or companies also organized according to Brazilian laws, with headquarters and management in Brazil. Foreign companies or companies that do not meet such requirements should, by means of a statement in accordance with the template contained in the public notice, undertake to proceed with their adaptation or organize a company with the aforementioned characteristics, always in compliance with the bidding process requirements.

On the other hand, legal entities prevented by law, prohibited from bidding or contracting

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with the Government, which have been declared disreputable, and which in the 2 years prior to the date set for the delivery of the Documents of Identification and Tax Regularity and Price Proposals have been punished with determination of caducity of a concession, permission, or authorization, will not be allowed to participate in the bidding process. In this regard, in addition to the Documents of Identification and Tax Regularity, a statement that they are not included in any of these hypotheses, in accordance with the template contained in the public notice, must be submitted by the bidders, and, in the case of a consortium, the statement should be submitted by each of the participating companies.

In addition, it is important to note that, in accordance with the terms of the proposed draft, no change in the composition of consortia will be allowed between the date of delivery of the Documents of Identification and Tax Regularity and Price Proposals and the date of issue of the Authorization Term.

Another restriction refers to the impossibility of bidders linked to each other to submit more than one (1) proposal for the same lot, in which case the best proposal submitted will be maintained, with the disqualification of the others. The link is determined by the control or coalition relationship between the bidders, or by a legal entity that submits more than one proposal, by means of more than one consortium or individually.

In turn, the aforementioned envelope with the Documents of Identification and Tax Regularity to be received by CEL must contain: **(A)** public or private power of attorney, according to the template of the public notice; **(B)** by-laws or articles of incorporation, amendments or restatement thereof, and minutes of election of the current managers of the corporation and the list of its shareholders; **(C)** statement of residence in Brazil of the shareholders holding the majority of the quotas or shares with voting rights, in the case of natural persons; should such partners be legal entities, proof of their organization in line with the applicable terms of Decree No. 2,617/1998; **(D)** proof of tax compliance before ANATEL, which will include tax and non-tax credits, definitively constituted, even if not registered in overdue tax liability or in the Informative Register of Unpaid Credits of the Federal Public Sector ("CADIN"), which may be replaced by a statement in accordance with the template included in the public notice; **(E)** proof of registration in the National Legal Entities Registry ("CNPJ") and in the state taxpayers registry referring to the headquarters of the legal entity, which must be relevant to the branch of activity and also compatible with the object of the bidding process; **(F)** bidder's statement, together with its affiliates, controlled companies or controlling companies, that there was no decree of caducity of the concession, permission or authorization for at least 2 years, as well as that there is no default with ANATEL's regulation, as verified by means of

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an administrative proceeding with a final decision by the aforementioned Agency, in accordance with the template contained in the public notice; and **(G)** proof of regularity related to the Guarantee Fund for Length of Service (“FGTS”).

In addition to the listed documents, the bidding legal entity, or each member of the consortium, should include in said envelope a certificate of no bankruptcy filing issued by the distributors of the location of its headquarters, in Brazil or abroad, the date of which must not be earlier than 90 days, and this certificate may be replaced by a statement that the bidder is not in bankruptcy filing, according to the template contained in the public notice.

Other items that make up the Documents of Identification are related to the Proof of Tax Compliance, issued by an authority of the location of the bidder’s headquarters, of the Federal Treasury and the Office of the General Counsel for the Federal Treasury, the Federal District or State Treasury, and the Municipal Treasury, in accordance with the requirements contained in the public notice draft.

There are also other statements that should be submitted to CEL together with the Documents of Identification and Tax Regularity, the templates of which are also attached to the public notice draft proposed. For example, by means of one of these statements, the bidder might affirm that it is not prevented from transacting

with the Direct or Indirect Administration of the Union, of the States, of the Federal District and of the Municipalities.

Despite all the briefly summarized content above, it is necessary to note that complementary requirements might be applicable to foreign companies and should be subject to careful evaluation.

It is also appropriate to emphasize that the aforementioned conditions concern the parties interested in participating in the bidding process as bidders. Therefore, their interest should not be confused with the interest of some Brazilian and foreign legal entities in acting as suppliers of equipment and other miscellaneous items that might be necessary for the implementation and operation of the 5G technology in Brazil, as well as for the achievement of other bidding objectives.

In fact, it will be the winning bidding companies, i.e., the telecommunications service providers, that will contract the suppliers, which, in turn, are subject to regulations different from those applicable to the service providers and those contained in the scope of the auction mentioned herein.

Therefore, the possibility of Chinese companies participating in the 5G technology market in Brazil, such as the giant Huawei, is envisaged, including for meeting the requirement for the adoption of the standalone 5G technology, despite all

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the controversy that has been involving the topic, and this can strengthen relations between this country and China, as well as contribute to the Brazilian economic recovery.

Finally, we emphasize that this material contains only a brief summary of some relevant subjects contained in the public notice proposal. Within the scope of the bidding process, there are several additional requirements to be met and complementary points to be considered, including those of a technical nature. Therefore, this article should not be understood as a legal advice regarding any specific aspects of the bidding process, which require in-depth and individualized analysis.

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**Authors**

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



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