

Azevedo Sette

ADVOGADOS

TELECOMS SERIES

BRAZILIAN 5G BIDDING CALL – III
REQUESTS FOR CLARIFICATIONS,
OPPOSITIONS AND SUSPENSION
OF THE BIDDING PROCEDURE

B
R
A
N
I
L

Brazilian 5G Bidding Call - III

Requests for Clarifications, Oppositions and Suspension of the Bidding Procedure

By Ricardo Barretto Ferreira and Sylvia Werdmüller von Elgg Roberto

In order to carry out the bidding procedure that will impact the implementation of the 5G technology in Brazil and will imply other benefits for the population in relation to the availability of telecommunications services, the Board of Directors of the National Telecommunications Agency (ANATEL) approved, in February 2021, the proposal of public notice for the auction of radio frequencies (RFs) in the 700 MHz, 2.3 GHz, 3.5 GHz and 26 GHz bands.

The public notice draft and the technical study on the pricing of the bands are under consideration by the Federal Accounting Court (TCU) since March. Although initially there was the expectation of the Minister of Communications that the TCU could complete this analysis within 60 days, with the publication of the public notice 40 days later, ANATEL signaled that the evaluation could be extended and, therefore, the publication of the public notice may be postponed. Given the complexity of the bidding procedure, there was a manifestation by a public prosecutor with the TCU in this regard.

Although the terms of the draft made available by ANATEL may be changed until the final version is published in the Brazilian Official Gazette (DOU), the current wording proposal already sets forth some aspects that may involve the continuation of the bidding procedure.

In accordance with the terms approved by the aforementioned Agency, it was expressly provided for the possibility to request clarifications regarding the public notice and its annexes, within ten (10) days after the publication of the corresponding Bidding Notice in the DOU.

Said requests should be addressed to the Chairman of the Special Bidding Commission (CEL), by means of a request to be filed in the Information Electronic System (SEI) on the ANATEL's website (available at www.gov.br/anatel).

In addition, in order for the analysis of the request to be carried out, certain requirements must be met. Thus, among others, the following must be informed:

LEGAL – REGULATORY

(I) the applicant's identification and qualification; (II) date and name and, in case of a legal representative of a legal entity, his/her position, with a power of attorney with specific powers being required in the case of an attorney-in-fact; (III) object of the request, clearly indicating which items of the notice the question refers to; (IV) rationale for the request; and (V) electronic signature. Registration of the applicant's representative in the scope of the SEI is also necessary.

Consultations will be answered by CEL up to ten (10) days before the date of receipt of the Documents of Identification and Tax Regularity and Price Proposals to be submitted by the bidders. The location of and how the interested parties will have access to the clarifications will be published in the DOU, and such clarifications will also be made available at the aforementioned ANATEL's website.

Furthermore, regardless of requests from interested parties, CEL itself might provide clarifications on the public notice, which will be posted at the ANATEL's website, and the location of and how to access such content will be published in the DOU.

The draft under analysis also provides that, for reasons of public interest or due to legal requirements, the terms of the public notice may be changed prior to the receipt of the Documents of Identification and Tax Regularity and Price Proposals, and in case

the submission of the same is impacted by such changes, a new date for the submission of such documents will be set forth, which will be duly published in the DOU, not being prior to that initially stipulated for this purpose.

Another relevant aspect for the continuity of the bidding procedure refers to the possibility of oppositions to the public notice and its annexes, which, it is especially important to emphasize, will not have a suspensive effect.

Any oppositions must be forwarded to CEL, also by means of the SEI, and also within ten (10) days after the publication of the bidding procedure public notice, and the same requirements previously mentioned and others as applicable should be complied with.

In the event of failure to submit an opposition within the aforementioned period, with this absence being followed by the delivery of the Documents of Identification and Tax Regularity and Price Proposals, it will be assumed that the bidder is fully aware of the public notice and unconditionally accepts its terms. Subsequent allegations regarding ignorance or disagreement with the terms of the public notice and annexes, or with the applicable regulatory rules, are expressly prohibited, in accordance with the provisions of the current proposed wording. In fact, it has been specifically mentioned in

LEGAL – REGULATORY

the draft that, even with the indication of failures or irregularities, the interested party which does not file an opposition within the established deadline will no longer have the right to oppose to the terms of the public notice.

In accordance with the applicable terms of ANATEL's Resolution No. 65/1998 (which approved the Regulation of Bidding for the Concession, Permission and Authorization of Telecommunications Service and Use of Radio Frequency), CEL must comment on the oppositions and forward the same, with the opinion of the Specialized Federal Attorney General's Office with ANATEL, to the Board of Directors of such Agency.

Decisions regarding the oppositions, in turn, will occur until the date of receipt of the Documents of Identification and Tax Regularity and Price Proposals.

Should the opposition be accepted, a Notice containing information on the parts of the public notice that have been the object of changes will be published in the DOU. At this point, it is important to emphasize that the bidding might be redone from the beginning, except in the case in which the changes do not imply a modification of the conditions for the preparation of the proposals.

In addition, if the alterations to the public notice are meaningful or relevant for the preparation of the Documents of Identifica-

tion and Tax Regularity, as well as of the Price Proposals, specifically such changes might also be the object of opposition; however, in this case, the deadline for its submission is five (5) days after publication thereof.

All oppositions submitted and their respective decisions will be attached to the records of the administrative proceeding for public knowledge and will be available in the aforementioned SEI.

The wording proposed for the draft sets forth that the Board of Directors of ANATEL may suspend, interrupt, invalidate and revoke the intended bidding, with indication of the factual and legal basis supporting such decision. In this case, the interested parties will be notified, by means of the DOU, so that they can manifest themselves within three (3) working days.

In addition, it was expressly provided that the bidding should be invalidated due to a legal defect, due to the authority's own initiative or due to provocation by third parties, in accordance with the terms of the aforementioned Regulation of Bidding for the Concession, Permission and Authorization of Telecommunications Service and Use of Radio Frequency.

It is also important to note that the draft provides that, in the event of suspension, interruption, revocation or invalidation of the bidding procedure, bidders will not be

LEGAL – REGULATORY

entitled to any indemnification.

Finally, we emphasize that this material contains only a brief summary of some relevant points of the bidding public notice and, therefore, should not be understood as legal advice regarding any specific aspects of the bidding procedure, which require in-depth and individualized 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.

São Paulo, April 27, 2021.

Authors



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



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