

TELECOMS SERIES

BRAZILIAN 5G BIDDING CALL – V
APPEALS, PENALTIES AND
OTHER PROVISIONS

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Brazilian 5G Bidding Call – V Appeals, Penalties and Other Provisions

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The National Telecommunications Agency (ANATEL), by means of its Board of Directors, approved in last February the version of the public notice proposed for the auction of radio frequencies (RFs) in the 700 MHz, 2.3 GHz, 3.5 GHz, and 26 GHz bands, which is expected to take place in Brazil in 2021.

This bidding, to be held on a date not yet determined, will be extremely important for the country as a whole, since it will expand the population's access to connectivity, in addition to implementing 5G technology locally, which should foster the Brazilian economy and its various sectors, such as agribusiness.

Although the terms proposed for the conduct of the bidding procedure may be changed until official publication of the public notice's final version, the approved draft, which is currently being analyzed by the Federal Accounting Court (TCU), contains several provisions of interest.

Among such stipulations, the proposed wording provides for the possibility of filing appeals against the acts and decisions of the Special Bidding Commission (CEL) issued during the classification and qualification phases of the bidding procedure, as well as against the award of the bidding's object. It is important to emphasize, at this point, that the public notice draft's intent is to confer, upon such appeals, a suspensive effect with regard to the affected lot.

The aforementioned appeals, as proposed in the draft, should be addressed to ANATEL's Board of Directors, by means of the Chairman of CEL.

Regarding the deadline, it is worth mentioning, the wording intended for the public notice provides that the appeal should be filed by the bidder(s) within three (3) business days from the end of the public session, when held, or disclosure thereof, if applicable, in the DOU.

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Then, CEL will inform the other bidders classified in the same lot in order for the same to make statements about the appeal, within two (2) business days, to be counted from receipt of the communication accompanied a copy of the appeal, or instructions for the document records' electronic examination. It will be possible to proceed with the filing of technical opinions, which should be attached to the administrative proceeding's records.

For the appeals' or counter-arguments' cognizance, the same should be submitted by a plea to the Chairman of CEL, directly in the Information Electronic System (SEI), on ANATEL's website (www.gov.br/anatel). In addition, it will also be necessary to inform **(I)** the appellant's identification and qualification; **(II)** the name and qualification of the signatories, who may be the bidder's legal representatives or attorneys-in-fact; **(III)** the object of the plea, with a clear indication of the acts and documents questioned; and **(IV)** the grounds for the request, with the possibility of attaching technical opinions.

Following receipt of the appeal and expiration of the aforementioned period of three (3) business days, as well as after the period of two (2) business days for the bidders' counter-arguments, CEL should reconsider or uphold its decision within three (3) business days.

Following the maintenance or reversal of CEL's decision, the proceeding's records will

be forwarded to ANATEL's Board of Directors, which will proceed with the appeal's judgment within three (3) business days following receipt thereof, hearing the Specialized Federal Attorney General's Office with the Agency.

According to the wording proposed for the public notice, should the Board of Directors uphold the decision of CEL due to a reasoning different from that adopted by the same, there will be notification to the interested bidder with indication of the factual and legal reasons of the act that is intended to be performed. The bidder, in turn, will then have a period of three (3) business days, from the aforementioned notification, to make a statement.

After the period referred to in the previous paragraph, or subsequently to the bidder's statement, the Board of Directors will decide to uphold the decision of CEL due to the new reasonings indicated, or to accept the appeal.

It is worth mentioning that the full records (safeguarding the legal hypotheses of secrecy, as assessed by CEL) might be viewed by means of the SEI. In this same system, documents delivered in public session, to be digitalized, will also be available.

Furthermore, it is relevant to emphasize that the public notice draft under analysis also contains provisions regarding the applicable penalties.

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In this regard, the proposed wording determines that failure to comply with the duties inherent to the use of RFs and the exploitation of telecommunications services will subject violators, in accordance with the terms of Law No. 9,472/1997 (General Telecommunications Law, LGT), to penalties defined in the related legislation.

In addition, the winning bidder's withdrawal in relation to a given lot due to **(I)** non-submission of the applicable Guarantee of Execution of Commitments; **(II)** non-payment of the first installment of the public price due for the Authorizations for the Use of Radio Frequencies resulting from the bidding, in accordance with and within the term provided for in the public notice (payment in arrears of up to 30 days being allowed, but with payment of a late payment fine, as well as monetary adjustment and interests until actual payment); **(III)** refusal to sign the relevant Authorization Term; **(IV)** non-maintenance of the conditions for participation in the bidding procedure in accordance with the public notice terms; or **(V)** non-renewal of the Guarantee of Maintenance of the Price Proposal, will characterize full non-compliance with the obligation undertaken, which, in turn, will result in the loss of the right resulting from the bidding and subject the company to a fine of ten percent (10%) on the price offered in the winning bid.

Furthermore, in case of non-compliance with the commitments undertaken in the

bidding procedure, the guarantees presented may be executed, and a Procedure for the Assessment of Non-Compliance with Obligations (PADO) might be instituted, in which scope ANATEL will decide on the sanction applicable to the specific situation.

The proposed version of the public notice, in addition, contains interesting provisions that might encourage the participation of several service providers and suppliers. In this regard, as stated in the document, when contracting services and purchasing equipment related to the public notice's object, the authorized company should consider the offer of independent suppliers, including Brazilian ones, and base its decisions *"with respect to the various offers submitted, in compliance with objective criteria regarding price, delivery conditions, and technical specifications set forth in the relevant regulation"*.

Furthermore, in case of equivalence between the offers, it is provided for that *"the preference for services offered by companies located in the Country, equipment, computer programs (software) and materials produced in the Country and, among them, those with national technology"* will serve as a tiebreaker criterion. Such equivalence, to wit, will be verified when, cumulatively, **(I)** the national price is less than or equal to the price of the imported item, placed in the national territory with the inclusion of the applicable taxes; **(II)** the delivery time is

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compatible with the service needs; and **(III)** the technical specifications set forth by the applicable regulation are met and there is a certification issued or accepted by ANATEL, when applicable.

The aforementioned services, in turn, would comprise those “*related to research and development, planning, design, implementation and physical installation, operation, maintenance, as well as the acquisition of computer programs (software), supervision and evaluation tests of telecommunications systems, the information of which might be required by ANATEL at any time*”, in accordance with the terms contained in the approved public notice draft.

The public notice's omission situations will be decided by the CEL. In addition, the Venue of the Judicial Section of the Federal Justice of Brasília, DF, Brazil, is expected to be that competent to settle issues related to the public notice, as stated in the version under analysis.

Finally, we emphasize that this material contains only a brief summary of some points of the public notice proposal. Therefore, there may be the applicability of other aspects not herein mentioned and, therefore, this material should not be understood as legal advice regarding the bidding procedure, which requires in-depth analysis.

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