ACT 11.079, ENACTED ON DECEMBER 30TH, 2004

Establishes general norms for public-private partnership tenders and contracts within the Public Administration

This is a free translation of the Brazilian Federal Act 11.079, enacted on December 30th, 2004. Only the version published in the Federal Government's Official Journal can be legally enforced. This translation employs, whenever appropriate, equivalent terminology from the American/British Law.

Chapter I

PRELIMINARY PROVISIONS

Art. 1. This Act establishes general norms for public-private partnership tenders and contracts within the Federal Government, States, Federal District and Municipalities.

Sole paragraph. This Act shall apply to entities of the direct Public Administration, special funds, agencies, public foundations, state-owned enterprises, corporations with mixed public and private capital and other entities that are directly or indirectly controlled by the Federal Government, States, Federal District and Municipalities.

Art. 2. A public-private partnership is a concession contract, in the sponsored or administrative forms.

§ 1 A sponsored concession is a concession of public services or public works as established in Act 8987, dated February 13th, 1995, when it involves, in addition to user charges, a direct payment from the public sector to the private partner.

§ 2 An administrative concession is a contract for the direct or indirect provision of services to the Public Administration, even when it involves carrying out construction works or supplying and installing fixed assets.

§ 3 An ordinary concession, understood as the concession of public services or public works set forth in Act 8987, dated February 13th, 1995, shall not be considered a public-private partnership when no direct payment from the public sector to the private partner occurs.

§ 4 Public-private partnerships may not be contracted in cases where:

I – the contract value is less than R$ 20,000,000.00 (twenty million reais);

II – the term for the provision of services is less than 5 (five) years; or

III – the sole scope of the contract is the supply of labor, the supply and installation of equipment or the execution of public works.

Art. 3. Administrative concessions shall be regulated by this Act and additionally by art. 21, 23, 25 and 27 to 39 of Act 8987, dated February 13th, 1995, and art. 31 of Act 9074, dated July 7th, 1995.

§ 1 Sponsored concessions shall be regulated by this Act, subject to the subsidiary application of the provisions of Act 8987, dated February 13th, 1995 and its related acts.

§ 2 Ordinary concessions shall continue to be regulated by Act 8987, dated February 13th, 1995 and by its related acts, not being subject to the provisions of this Act.

§ 3 Administrative contracts not characterized as ordinary, sponsored or administrative concessions shall continue to be regulated exclusively by Act 8666, dated June 21st, 1993, and by its related acts.

Art. 4. The following guidelines shall be observed when contracting public-private partnerships:

I – efficiency in the fulfillment of the missions of the State and in the use of public resources;

II – respect for the interests and rights of service users and of private entities responsible for service provision;

III – non-delegation of regulatory and jurisdictional functions, as well as the exercise of enforcement powers and other State activities;

IV – fiscal responsibility when contracting and implementing partnerships;

V – transparency of procedures and decision-making;

VI – objective risk sharing among the parties;

VII – financial sustainability and socio-economic benefits of the partnership projects.

Chapter II

PUBLIC-PRIVATE PARTNERSHIP CONTRACTS

Art. 5. The clauses of public-private partnership contracts shall be in accordance with the provisions of art. 23 of Act 8987, dated February 13th, 1995, as applicable, and shall also state:

I – the term of the contract, which shall be in line with the amortization of the investments to be made by the private partner, not shorter than 5 (five), and not longer than 35 (thirty-five) years, including possible extensions;

II – the penalties applicable to the Public Administration and to the private partner in case of non-compliance with contractual obligations, which shall always be determined proportionately to the magnitude of the offence committed and to the obligations assumed;

III – the sharing of risks among the parties, including those that refer to acts of God, force majeure, acts of State and unforeseeable events;

IV – the forms of remuneration and adjustment of contractual values;

V – the mechanisms to preserve the nature of the service provision;

VI – the facts that trigger public sector payment default, the means and terms for reestablishing the payment stream and, if applicable, the form by which guarantees are enforced;

VII – the objective criteria for evaluating the performance of the private partner;

VIII – the provision by the private partner of performance guarantees compatible with the burdens and risks involved, subject to the limits established in §§ 3 and 5 of art. 56 of Act 8666, dated June 21st,1993, and, with regard to sponsored concessions, the provisions of item XV of art. 18 of Act 8987, dated February 13th, 1995;

IX – the sharing with the Public Administration of the economic gains of the private partner resulting from the reduction of credit risk related to the funding contracted by the private partner;

X – the inspection and due diligence of the assets to be transferred to the public sector, which shall enable the public authority to withhold payments to the private partner, in the amount necessary to repair any irregularities that may be detected.

§ 1 Clauses for automatic adjustment of contractual values based on indices and mathematical formulas, if any, shall be applied without need for express approval by the Public Administration, except when the latter publishes, in the official press, not later than 15 (fifteen) days after presentation of the invoice, reasons based on this Act or on the contract to reject the adjustment.

§ 2 In addition, the contracts may provide for:

I – the requirements and conditions under which the public sector can authorize step-in-rights in favor of the financial institutions that funded the special purpose company, with the objective of promoting its financial restructuring and ensuring the continuity of service provision, for which purpose item I of the sole paragraph of art. 27 of Act 8987, dated February 13th, 1995 shall not apply;

II – the possibility that public sector payment can be made directly to project funders;

III – the legitimacy of project funders to receive compensation for early termination of the contract, as well as payments made by funds and state-owned enterprises acting as guarantors of public-private partnerships.

Art. 6. The payments from the Public Administration to the private partner in public-private partnership contracts may take the form of:

I – bank draft;

II – assignment of non-tax credits;

III – granting of rights against the Public Administration;

IV – granting of rights over real estate owned by the government;

V – other means permitted by law.

Sole paragraph. The contract may stipulate a variable payment to the private partner linked to its performance, which shall be assessed against required quality and availability standards.

Art. 7. The payment provided by the Public Administration shall obligatorily be preceded by service delivery.

Sole paragraph. According to the terms of the contract, the Public Administration may pay the private sector partner for the portion of the service that is made available.

Chapter III

GUARANTEES

Art. 8. The payment obligations undertaken by the Public Administration under a public-private partnership contract may be guaranteed by:

I – attachment of revenues, subject to the provisions of item IV of art. 167 of the Federal Constitution;

II – creation or use of special funds established in law;

III – obtaining surety bonds from insurance companies not controlled by the state;

IV – guarantees granted by international organizations or by financial institutions not controlled by the state;

V – guarantees provided by a guarantee fund or by a state-owned enterprise set up for this purpose;

VI – other mechanisms permitted by law.

Chapter IV

SPECIAL PURPOSE COMPANY

Art. 9. Before contract award, bidders must set up a special purpose company, which shall be responsible for implementing and managing the project.

§ 1 Transfer of control over the special purpose company shall be conditioned to authorization by the Public Administration, as established in the invitation to tender and in the contract, subject to the provisions of the sole paragraph of art. 27 of Act 8987, dated February 13th, 1995.

§ 2 The special purpose company may be a publicly traded corporation.

§ 3 The special purpose company shall comply with corporate governance standards and adopt standardized accounting and financial statements, as required by regulations.

§ 4 The Public Administration is forbidden from holding the majority of the voting capital of the special purpose company.

§ 5 The prohibition set forth in § 4 shall not apply to the possible acquisition of the majority of the voting capital of the special purpose company by a state-controlled financial institution, should the special purpose company default in its obligations under a loan agreement.

Chapter V

TENDERING PROCESS

Art. 10. Public-private partnerships shall be procured by competitive tendering. The opening of the tendering process requires:

I – authorization by the public authority, based on a technical study that shall demonstrate:

a) the convenience and appropriateness of contracting a public-private partnership, by identifying the reasons that justify the choice of a partnership model;

b) that the expenses created or increased shall not affect the targets in terms of fiscal results provided for in the Annex referred to in § 1 of art. 4 of Complementary Act 101, dated May 4th, 2000, such that its financial effects, in subsequent periods, shall be compensated by a permanent increase in revenues or by a permanent reduction in expenditures; and

c) when applicable, in accordance with art. 25 of this Act, the compliance with the limits and conditions resulting from the application of art. 29, 30 and 32 of Complementary Act 101, dated May 4th, 2000, in relation to the payment obligations undertaken by the Public Administration in partnership contracts;

II – estimate of budgetary and financial impact in the periods in which the public-private partnership contract shall be in effect;

III – statement by the party responsible for authorizing the expenditure that the obligations undertaken by the Public Administration in a partnership contract are in line with the Budget Guidelines Act and have been considered in the Annual Budget Act;

IV – estimate of long-term flow of public funds, necessary for fulfilling, throughout the term of the contract and in each fiscal year, the financial obligations undertaken by the Public Administration;

V – the project is included in the Multi-Year Plan in effect;

VI – submission of the draft invitation to tender and the draft contract to public consultation, which should be advertised in the official press, in newspapers of general circulation and in electronic media, informing the arguments for contracting a partnership, the scope and term of contract, its estimated value, setting a minimum period of 30 (thirty) days for comments and suggestions, which shall end at least 7 (seven) days prior to the scheduled date for publishing the invitation to tender; and

VII – prior environmental license or release of guidelines for the environmental licensing of the project, as required by regulation.

§ 1 The evaluation of long-term public sector commitments, as stated in sub-items "b" and "c" of item I of the *caput* of this article, shall contain the assumptions and methodology used for calculation, subject to the general norms for public accounts, notwithstanding the examination of compatibility of the expenditures with the norms of the Multi-Year Plan and the Budgetary Guidelines Act.

§ 2 Whenever contract award occurs in a fiscal year other than the one in which the invitation to tender was published, the studies and evaluations referred to in items I to IV of the *caput* of this article must be updated.

§ 3 Sponsored partnerships in which more than 70% (seventy per cent) of the revenue of the private partner is to be paid by the Public Administration shall be subject to specific legislative authorization.

Art. 11. The invitation to tender shall contain a draft contract, shall expressly indicate the submission of the tendering procedures to the norms

of this Act, observing, as applicable, §§ 3 and 4 of art. 15, art. 18, 19 and 21 of Act 8987, dated February 13th, 1995, and may further provide for:

I – requirement of bid bond, subject to the limit established in item III of art. 31 of Act 8666, dated June 21st, 1993;

II – (OVERRRULED)

III – the use of private mechanisms for dispute resolution, including arbitration, to be conducted in Brazil and in the Portuguese language, according to Act 9307, dated September 23rd, 1996, in order to resolve conflicts that may arise in relation to the contract.

Sole paragraph. The invitation to tender shall specify, when applicable, the payment guarantees to be granted by the public sector to the private partner.

Art. 12. The competitive tendering for contracting public-private partnerships shall comply with the procedures set forth in the legislation that regulates tenders and administrative contracts and also the following:

I – the bid appraisal may be preceded by a qualifying stage of technical proposals, in which bidders that do not attain a minimum number of points are disqualified, not taking part in the subsequent stages;

II – the bid appraisal may adopt the following criteria, in addition to those provided for in items I and V of art. 15 of Act 8987, dated February 13th, 1995:

a) lowest payment by the Public Administration;

b) best proposal as the result of a combination of the criterion of sub-item "a" with the best technical proposal, in accordance with the weights established in the invitation to tender;

III – the invitation to tender shall define the form for presenting the proposals, allowing the following formats:

a) written proposals in sealed envelopes; or

b) written proposals in sealed envelopes, followed by open outcry auction;

IV – the invitation to tender may allow bidders to amend proposals in order to rectify faults, insufficiencies or yet make corrections of a formal nature during the course of the proceedings, provided bidders are able to comply with the requirements within the time period established in the invitation to tender.

§ 1 In reference to sub-item "b" of item III of the *caput* of this article:

I – the bids in the open outcry auction shall always be submitted in the reverse order of classification of the written proposals and the invitation to tender shall not limit the number of bids;

II – the invitation to tender may restrict the participation in the open outcry auction to those bidders whose written proposals are at most 20% (twenty per cent) greater than the value of the best proposal.

§ 2 The assessment of technical proposals, for purposes of qualification or bid appraisal, shall be conducted by a motivated act, based on requirements, parameters and indicators that are related to the scope of the contract, clearly and objectively defined in the invitation to tender.

Art. 13. The invitation to tender may allow a reverse tendering procedure, in which the bid appraisal stage precedes the qualifying stage. In this case:

I – after the bid appraisal, the envelope with the qualification documents from the bidder who made the best offer shall be opened, in

order to verify compliance with the requirements established in the invitation to tender;

II – after compliance with the requirements of the invitation to tender has been attested, the bidder who made the best offer shall be declared winner;

III – if the bidder who made the best offer is not qualified, the qualification documents of the second best proposal shall be examined, and so forth, until a classified bidder complies with the requirements established in the invitation to tender;

IV – upon announcement of the final result of the tendering process, the contract shall be awarded to the winner, in accordance with the technical and economic conditions proposed.

Chapter VI

PROVISIONS APPLICABLE TO THE FEDERAL GOVERNMENT

Art. 14. An inter-ministerial council to manage the federal public-private partnerships program shall be established, by decree, with the following responsibilities:

I – definition of priority services to be procured in the public-private partnership format;

II – establishment of procurement procedures;

III – authorization for opening tendering processes and approval of invitations to tender;

IV – evaluation of contract performance reports.

§ 1 The council mentioned in the *caput* of this article shall be composed by nominated representatives and their substitutes from each of the following ministries:

I – Ministry of Planning, Budget and Management, which shall be responsible for coordinating the activities;

II – Ministry of Finance;

III – Civil Cabinet of the Presidency.

§ 2 A representative of the body of the Public Administration whose technical field is directly related to the partnership contract under analysis shall take part in the meetings of the council described in the *caput* of this article.

§ 3 Decisions made by the council in relation to contracting public-private partnerships shall be based on prior and sound statements formulated by:

I – the Ministry of Planning, Budget and Management, with regard to the merit of the project;

II – the Ministry of Finance, with regard to the viability of granting public payment guarantees and their form, relative to the risks for the National Treasury and compliance with the limit set forth in art. 22 of this Act.

§ 4 For carrying out its functions, the council described in the *caput* of this article may create a technical support structure staffed with representatives of public institutions.

§ 5 The council described in the *caput* of this article shall present to the National Congress and to the Federal Audit Office, on an annual basis, reports on the performance of the public-private partnership contracts.

§ 6 In order to comply with the provisions of item V of art. 4 of this Act, with the exception of information classified as confidential, the reports described in § 5 of this article shall be made available to the public on a public network for data transmission.

Art. 15. The Ministries and Regulatory Agencies shall be responsible, within their respective jurisdictions, for submitting the invitation to tender to the inter-ministerial council, carrying out the tendering process, monitoring and controlling the public-private partnership contracts.

Sole paragraph. The Ministries and Regulatory Agencies shall present to the body described in the *caput* of art. 14 of this Act, every six months, detailed reports on the performance of the public-private partnership contracts, as defined by regulation.

Art. 16. The Federal Government and its executive agencies are hereby authorized to participate, up to a total limit of R$ 6,000,000,000.00 (six billion reais), in a Public-Private Partnership Guarantee Fund – FGP, set up with the purpose of guaranteeing the Federal Government's payment obligations under partnerships made according to the provisions of this Act.

§ 1 The FGP shall possess its own assets, separate from its quotaholders', and have the stand to sue and be sued.

§ 2 The FGP capital shall be formed by assets and rights transferred by its quotaholders and by the proceeds generated from its administration.

§ 3 The assets and rights to be transferred to the FGP shall be previously evaluated by experts, which shall indicate the valuation criteria and shall include detailed documentation regarding the assets evaluated.

§ 4 Payment for subscriptions of quotas in the FGP may be made in cash, government bonds, real estate, equipment and other assets, including shares of government-owned enterprises that exceed the amount necessary for the maintenance of public control.

§ 5 The FGP shall meet its obligations with its own assets so that its quotaholders shall not be responsible for meeting any of the Fund's obligations, except when there are subscriptions not fully paid in, in which case the quotaholders shall be liable for the unpaid subscription.

§ 6 Government tender regulations do not apply to the subscription of quotas paid with the assets referred to in § 4 of this article. The transfer of assets shall be proposed by the Minister of Finance and approved by the President of the Republic.

§ 7 The transfer to the FGP of assets with special use or common use shall be authorized on an individual basis.

Art. 17. The FGP shall be created, administered, managed and represented by a financial institution controlled by the Federal Government, subject to the rules referred to in item XXII of art. 4 of Act 4595, dated December 13th, 1964.

§ 1 The by-laws and regulations of the FGP shall be approved by the board of quotaholders.

§ 2 The representation of the Federal Government at the board of quotaholders shall be in accordance with item V of art. 10 of Decree-Act 147, dated February 3rd, 1967.

§ 3 The financial institution shall be responsible for the management and disposal of the assets and assignment of rights of the FGP, while promoting its profitability and liquidity.

Art. 18. The guarantees of the FGP to each quotaholder shall be made in proportion to the value of his quotas. Taking into account the guarantees already granted and other obligations, the FGP shall not provide guarantees with a net present value that exceeds the total value of its assets.

§ 1 The guarantee shall be granted as approved by the board of quotaholders, in the following forms:

I – contractual guarantee;

II – attachment of FGP's assets or assignment of its rights, without transfer of possession of the assets and rights before the execution of the guarantee;

III – mortgage of the FGP's real estate;

IV – fiduciary transfer of ownership, remaining the possession of the assets, until execution of the guarantees, with the FGP or with a trustee contracted by the Fund;

V – other contracts that produce the effect of a guarantee, provided they do not transfer the ownership or direct possession of the FGP assets to the private partner before the execution of the guarantee;

VI – trust funds settled by the FGP to provide guarantees to the private partners.

§ 2 The FGP may provide counter-guarantees to insurance companies, financial institutions and international organizations that guarantee the public payments in public-private partnership contracts.

§ 3 The payment by the public authority of each debt installment guaranteed by the FGP shall result in a proportionate reduction of the guarantee.

§ 4 When the public partner fails to pay for invoices that have already been accepted, the private partner may execute the guarantees 45 (forty-five) days after the date of maturity.

§ 5 When the public partner fails to pay for invoices that have not yet been accepted nor have been expressly rejected, the private partner may execute the guarantee 90 (ninety) days passing maturity.

§ 6 The payments by the FGP to the private partner will entail subrogation of the credits of the private partner against the public partner.

§ 7 In case of FGP default, the FGP assets may be submitted to seizure in order to fulfill its obligations.

Art. 19. The FGP shall not pay any dividends to its quotaholders. The quotaholders shall have the right to make full or partial redemptions of quotas, corresponding to equity as yet unused for the concession of guarantees. The redemption price shall be determined based on the equity value of the FGP on the date of redemption.

Art. 20. The dissolution of the FGP, as decided by the board of quotaholders, shall be subject to prior settlement in full of the guaranteed obligations or the release of guarantees by the creditors.

Sole paragraph. After the dissolution of the FGP, its equity shall be divided among the quotaholders, based on the equity position of the Fund on the date of dissolution.

Art. 21. The FGP may set up trust funds to provide guarantees to specific private partners. The trust funds assets will not be subject to search and seizure resulting from other obligations of the FGP.

Sole paragraph. The constitution of trust funds shall be registered by a Real Estate Notary in the case of real estate or by a Regular Public Notary in the case of other types of assets.

Art. 22. The Federal Government may enter into a public-private partnership contract only when the sum of the current expenditures derived from the partnership contracts already signed has not exceeded, in the previous year, 1% (one per cent) of the net current revenue of the fiscal year, and the annual expenditures of the contracts in effect, in the 10 (ten) subsequent years, do not exceed 1% (one per cent) of the net current revenue forecast for the respective fiscal years.

Chapter VII

FINAL PROVISIONS

Art. 23. The Federal Government is authorized to grant incentives, within the scope of the Program of Incentives for Implementing Projects of Social Interest (*Programa de Incentivo à Implementação de Projetos de Interesse Social* – PIPS), established by Act 10735, dated September 11th, 2003, for the financial assets in investment funds, created by financial institutions, which entail credit rights in public-private partnership contracts.

Art. 24. The National Monetary Council shall establish, in accordance with the appropriate legislation, guidelines for the concession of credit facilities for financing public-private partnership projects, as well as for the participation of pension funds in funding partnership contracts.

Art. 25. The National Treasury Office shall publish, in accordance with the appropriate legislation, general norms regarding public accounts in relation to public-private partnership contracts.

Art. 26. The item I of § 1 of art. 56 of Act 8666, dated June 21st, 1993, shall be in effect with the following wording:

"Art. 56. .....
§ 1 .....

I - collateral in cash or government bonds, which must have been issued in book entry form, by registration in a central system for settlement and custody authorized by the Central Bank of Brazil and appraised at their economic value, as defined by the Ministry of Finance;

....." (NR)

Art. 27. Credit operations made by state-owned enterprises or by corporations with mixed public and private capital controlled by the Federal Government shall not exceed 70% (seventy per cent) of the total sources of funds of the special purpose company. For areas in the North, Northeast and Central-West regions where the Human Development Index – HDI is below the national average, this amount shall not exceed 80% (eighty per cent).

§ 1 A limit of 80% of the total sources of funds of the special purpose company, or 90% for areas in the North, Northeast and Central-West regions where the Human Development Index – HDI is below the national average, must be applied for credit operations or capital contributions made cumulatively by:

I – pension funds;

II – state-owned enterprises or corporations with mixed public and private capital controlled by the Federal Government.

§ 2 In the provisions of this article, sources of funds shall be understood as credit operations or capital contributions to the special purpose company.

Art. 28. The Federal Government may not grant guarantees in credit operations or make voluntary transfers to the States, Federal District and Municipalities if the sum of current expenditures derived from the partnerships already contracted by these authorities has exceeded, in the previous year, 1% (one per cent) of the net current revenue for the fiscal year, or if the annual expenditures of the contracts in effect, in the 10 (ten) subsequent years, exceed 1% (one per cent) of the net current revenue forecast for the respective fiscal years.

§ 1 The States, Federal District and Municipalities that procure public-private partnerships must send to the Senate House and to the National Treasury Office, prior to contracting, the necessary information for compliance with the provisions of the *caput* of this article.

§ 2 For complying with the limits established in the *caput* of this article, the calculation shall include expenditures derived from partnerships contracted by the direct Public Administration, agencies, public foundations, state-owned enterprises, corporations with mixed public and private capital and other bodies directly or indirectly controlled by those entities.

§ 3 (OVERRULED)

Art. 29. The penalties provided for in Decree-Act 2848, dated December 7th, 1940 – Criminal Code, in Act 8429, dated June 2nd, 1992 – Administrative Misconduct Act, in Act 10028, dated October 19th, 2000 - Fiscal Crimes Act, in Decree-Act 201, dated February 27th, 1967, and in Act 1079, dated April 10th, 1950, shall apply to public-private partnerships, notwithstanding the financial penalties provided for in contract.

Art. 30. This Act shall be in effect from the date of its publication.

Brasilia, December 30th, 2004.

ACT 11.079, ENACTED ON DECEMBER 30TH, 2004

MINISTRY OF
PLANNING

BRASIL
BRAZILIAN GOVERNMENT