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Changes in concession and partnership agreements with the Brazilian Federal Administration

Provisional measure ("*Medida Provisória*") 752, of November 24, 2016, issued by the Brazilian Federal Administration, instituted guidelines applicable to the extension as well as to novel bidding procedures in relation to agreements entered with the Federal Government with respect to railroads, toll roads and airports; as well as to the submission of concession agreements underway to new bidding procedures ("*relicitação*"). The relevant agreements are those entered into under the framework of the Program for Investment Partnerships (*PPI*) created by Law 13,334 of September 13, 2016, which encompasses the various forms of agreements with entered with the administration. The new guidelines aim to ensure greater efficiency in the rendering of the relevant services; and also to enhance the solidity of the legal arrangements required for the extension and renewal of the contracts entered under in the transportation industry, so as to foster new investments.

Under the new rules, partnership agreements may be renewed only once, and this may be effect in two possible ways. The so-called contractual extension takes place following a formal request to be filed no later than twenty-four months prior to the term of the relevant agreement; if renewed, the relevant agreement shall then follow the same terms and conditions of the original contract. Under the so-called anticipated extension, in turn, investment commitments not included in the original agreement shall be undertaken; this extension may be requested once 50% of the contractual term has elapsed, up until 90% of the contractual term. Should the relevant agreement relate to highways, there is an additional condition – namely, the completion of 80% at least of the construction works provided for under the relevant agreement. In the case of railroads, production and safety targets applicable to the preceding five years of the relevant agreement must have been met as a requirement for the request to be granted.

The recent guidelines also instituted the possibility that services which are the subject-matter of agreements underway be submitted to new bidding procedures. This must follow an agreement between the party having originally won the relevant bid and the relevant government agency, which will act according to a public interest analysis. This possibility was created as a means to remedy the problematic concessions, as have been coined the numerous agreements in relation to which performance has fallen behind schedule. This possibility will only come into play should it be established that the relevant party cannot fulfill its contractual obligations. The guidelines contain impediments to the participation of the party to the original agreement in the new bidding procedures.

Provisional Measure 752 of 16 also provides for dispute resolution through arbitration, which is a novelty. This encompasses, in theory, requests for the restablishment of the economic-financial equation of the relevant agreements in light of changed circumstances, as well as indemnification claims following the premature termination of agreements and transfer of obligations.

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