



**PUBLIC-PRIVATE  
PARTNERSHIPS**

Legal Frameworks for PPP's

# The need for a legal framework

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- Two different questions:
  - Is it necessary to have special PPP law (legislation)?
  - Is it convenient to have standardization of contract clauses and procurement procedures?

# Is it necessary to have special PPP law?

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- Different legal systems around the world
- The need for special PPP law depends on characteristics of each legal system
- Civil Law countries quite often have detailed laws about government procurement and contracting
  - Little room for developing new contractual arrangements without specific legislation
  - In Brazil, there is the understanding that the government can only do what the law authorizes

# The need for flexibility

- Usually, traditional law on public works and on contracts to render services to the government do not provide sufficient flexibility to structure PPP's
  - In Brazil
    - Focus on inputs instead of service output specifications
    - Payment mechanisms are not linked to the quality level of the services delivered
    - Risk sharing is quite limited
    - Short-term perspective (contracts limited to 5 yrs)
- Concession acts are more likely to present such flexibility

# Fragmented Brazilian PPP legal framework

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- Several federal acts were enacted since mid 1990's (privatization)
  - Federal Acts 8.987/95 and 9.074/95 (concession law)
  - Specific sector acts (transportation, energy, telecommunications etc.)
  
- Effort to promote
  - Competition among players
  - Infrastructure expansion
  - Real management by private partners
    - In old-fashioned Brazilian concessions, management decisions were in practice taken by the government
  - Safe conditions to investors
    - Independent regulatory agencies
    - Guarantee of financial equilibrium of the contracts

# The recent Federal Act n° 11.079/04 – so called “PPP Federal Act”

- Allows subsidies in traditional concessions contracts
  - The law used to require the legislative branch authorization to grant subsidies to concessionaires
- Makes it possible to implement a PFI like program in Brazil
- Main issues developed by the PPP Federal Act
  - Government default risk / need for guarantees
  - Effort to adapt the PPP Federal Act to the Fiscal Responsibility Act
  - More flexibility on the sharing of risks arrangements

# Worries with flexibility in structuring and contracting PPP's

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- Risk of not complying with the best practices
- Need for well prepared public staff (before and after the contract is signed)
- Need for a sophisticated consultancy market
- Need for well defined accounting rules and fiscal responsibility controls

# How much flexibility should be given to structure PPP's?

- **Trade-off between detailed regulation and flexibility**
  - Detailed regulation potentially helps to spread best practices and to avoid misuse of PPP
  - On the other hand, it leaves little room to model innovation and may reduce efficiency gains
  
- **Finding the right balance between flexibility and detailed regulation is a hard task**
  - It depends on specific characteristics of each government, State and culture
  - Legal theory debate on the economic efficiency of using standards or rules to regulate a given branch of the law

## An example from Brazil: the discussion about competitive negotiation

- For competitive negotiation
  - Unclear points of the contract can be clarified
  - Possibility to improve risk allocation
  - Possibility to improve technical solutions proposed
  
- Against competitive negotiation
  - Need for strong technical capacity of public servants to negotiate (Federal, State and Local)
  - Difficulties to comply with transparency duties imposed by government overseers

# Is it convenient to have standardization?

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- Among other reasons
  - It reduces transaction costs
  - It fastens the process of structuring, procuring and contracting PPP's
  - It facilitates the spread of best practices (as long as best practices are standardized)
  - It provides guidelines to all levels of government
  
- There is no loss of flexibility
  - Deviation from the standard can be justified and approved by an specific body

# Contact information

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