ARE SHARE-IN-SAVINGS CONTRACTING AND PUBLIC-PRIVATE PARTNERSHIPS CAPABLE OF CHALLENGING TRADITIONAL PUBLIC PROCUREMENT PROCESSES?

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I. INTRODUCTION

Innovative attempts to create new instruments to finance public procurement have occurred worldwide. Share-in-savings (SiS) contracting and public-private partnerships (PPPs) are examples of these new instruments. Although there has been resistance in applying them, there also have been efforts aimed at overcoming the obstacles that appear when new instruments are put in practice.[1] The relation between these innovative attempts and fiscal accountability stems from principles of public procurement law,[2] which provide the framework to procurement enhancement.

It is well established that "the full funding concept [is] the best way to ensure recognition of commitments embodied in budgetary decisions and to maintain governmentwide fiscal control."[3] Problems arise when full funding is not available and it is necessary to search for private funding to accomplish procurement goals. Therefore, most developed and developing countries are constantly looking for "a balanced assessment of opportunity costs presented by alternative funding means."[4]

In the United States, SiS contracting was first established in the Clinger Cohen Act of 1996.[5] Its authority has been expanded through section 210(b) of the E-Government Act of 2002.[6] In Brazil, PPPs have been established in Federal Law No. 11,079/2004, *Lei de Parcerias Público-Privadas*.[7] The statutory

1. Kenneth J. Buck, *Overcoming Resistance to a Paradigm Shifting Change in the Federal Sector: Share-in-Savings Contracting—From Concept to Application*, *in* Challenges in Public Procurement: an International Perspective 249 (Khi V. Thai et al. eds., PrAcademics Press 2005).

2. *See* Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 Pub. Procurement L. Rev. 103–10 (2002).

3. Buck, *supra* note 1, at 250. *Full funding* is defined as "appropriations enacted that are sufficient in total to complete a useful segment of a capital project before any obligations may be incurred for that segment." Ralph C. Nash Jr., Steven L. Schooner & Karen R. O'Brien, The Government Contracts Reference Book 266 (The George Washington Univ. 2d ed. 1998).

4. Buck, *supra* note 1, at 250.

5. Pub. L. No. 104-106, 110 Stat. 642; *see* Nash, Schooner & O'Brien, *supra* note 3, at 470; Buck, *supra* note 1, at 249; Press Release, U.S. Gen. Servs. Admin., GSA Promotes "Share-in-Savings" IT Contracting (Nov. 6, 2003), *available at* http://www.gsa.gov/Portal/gsa/ep/contentView.do?P=T&contentId=14409&contentType=GSA_BASIC (last visited Mar. 10, 2009).

6. Pub. L. No. 107-347, § 210(b), 116 Stat. 2899, 2933 (2002) (codified at 41 U.S.C. § 266a (2000)).

7. Lei No. 11.079, de 30 de dezembro de 2004, D.O.U. 31.12.2004 (Brazil).

law and some examples of its implementation will provide the framework to analyze the capability of these instruments to challenge traditional public procurement preferences through innovative government contracting. Aspects involving risk allocation, financing, fiscal accountability, and collateral political impacts are obstacles encountered in the most recently implemented initiatives. This Article aims to provide sound baselines in connection with community participation to overcome these obstacles.

SHARE-IN-SAVINGS CONTRACTING

A. *Background*

The Clinger Cohen Act of 1996, section 5311, established the SiS pilot program as follows:

> (a) Requirement.—The Administrator may authorize the heads of two executive agencies to carry out a pilot program to test the feasibility of—
> (1) contracting on a competitive basis with a private sector source to provide the Federal Government with an information technology solution for improving mission-related or administrative processes of the Federal Government; and
> (2) paying the private sector source an amount equal to a portion of the savings derived by the Federal Government from any improvements in mission-related processes and administrative processes that result from implementation of the solution.
> (b) Limitations.—The head of an executive agency authorized to carry out the pilot program may, under the pilot program, carry out one project and enter into not more than five contracts for the project.
> (c) Selection of Projects.—The projects shall be selected by the Administrator, in consultation with the Administrator for the Office of Information and Regulatory Affairs.[8]

The U.S. Congress enacted the above Act to allow private finance initiatives over the past decade.[9] Two examples noted by Angela B. Styles are the "energy savings performance contracts" and the E-Government Act of 2002.[10] These examples provide background to a proposed rule regarding SiS's incorporation into the Federal Acquisition Regulation (FAR) in 2003.[11] This proposed rule "adds a new subpart 39.3 addressing share-in-savings contracting and also adds a cross-reference in FAR part 16 to both subpart 39.3

8. 40 U.S.C. § 1491.
9. *See id.*
10. Angela B. Styles, *Share-in-Savings Contracting: The Big Lie*, 40 Procurement Law. 1, 14 (2004). The "energy savings performance contracts" model can be considered as a transition towards the SiS model established under the E-Government Act of 2002.
11. Tanya N. Ballard, *Acquisition Officials Push Share-in-Savings IT Contracting*, Government Executive.com, Oct. 3, 2003, http://www.govexec.com/dailyfed/1003/100303t1.htm; *see also* GSA Promotes "Share-in-Savings" IT Contracting, *supra* note 5.

and the section dealing with energy savings performance contracts."[12] In July 2004 this proposed rule was published in the *Federal Register* by the Department of Defense (DoD), the General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA).[13]

B. *Energy Savings Performance Contracts*

The National Energy Conservation Policy Act[14] represents the U.S. Congress's efforts towards energy savings. Its intention was "[t]o reduce federal energy consumption costs . . . [by] allow[ing] the federal government to enter into long-term energy savings performance contracts (ESPCs)."[15] This goal could be achieved by "allow[ing] federal agencies to waive their standard requirements for up-front capital funding and one-year contracts and enter into contracts for up to 25 years with energy service companies (ESCOs) for the purpose of saving energy-consumption costs at federal installations."[16]

In 2001, Brazil faced one of the biggest energy crises of its history,[17] and in 2004, its Congress enacted specific legislation to prevent a crisis from occurring again.[18] The Organisation for Economic Co-operation and Development (OECD) conducted a survey on the Brazilian regulation of the electricity sector in 2005.[19] The survey presented the following data regarding the new model for the electricity sector:

12. Gregg Sharp, *Contract and Fiscal Law Development of 2003—The Year in Review: Contract Formation: Contract Types*, 2004-Jan Army Law. 23–24.

13. Dep't of Def., Gen. Servs. Admin. & Nat'l Aeronautics and Space Admin., Federal Acquisition Regulation; Share-in-Savings Contracting, 69 Fed. Reg. 40,514-01 (July 2, 2004).

14. Pub. L. No. 99-272, § 7201, 100 Stat. 142 (1986) (codified at 42 U.S.C. §§ 8260, 8287 (2000)).

15. John A. Herrick, *Federal Project Financing Incentives for Green Industries: Renewable Energy and Beyond*, 43 Nat. Resources J. 77, 96 (2003).

16. *Id*. Mr. Herrick points out that "[t]he energy savings that result from the installation and use of the equipment by a private contractor can be shared between the government and the contractor." He explains that

> [t]ypically under such contracts, ESCOs will risk their own capital or apply traditional private-sector, project financing techniques to fabricate, install and service their own equipment, or to provide major facility improvements, such as a cogeneration facility, at federal installations at no cost to the government. The ESCO then shares in the energy savings generated by his product at a negotiated percentage. That percentage assures that the contractor's costs and debt service will be amortized over the life of the contract and provides the contractor with a profit. At the end of the contract term, the government can take title to the improvements or exercise an option to purchase, depending upon the original contract terms.

Id. at 96–97; *see also* Anne Laurent, *Shifting the Risk*, GovernmentExecutive.com, Aug. 30, 1999, http://www.govexec.com/features/99top/08a99s1.htm.

17. Organisation for Econ. Co-operation & Dev., OECD Economic Survey of Brazil 2005: Regulation of the Electricity Sector 2 (2004), *available at* http://www.oecd.org/dataoecd/12/11/34427493.pdf [hereinafter OECD Economic Survey of Brazil 2005].

18. A list of the relevant legislation appears on the Brazilian House of Representatives' website: http://www2.camara.gov.br/legislacao/legin.html/visualizarNorma.html?ideNorma=533148&PalavrasDestaque=Ambiente%20de%20Contratação%20Regulado,%20ACR.

19. OECD Economic Survey of Brazil 2005, *supra* note 17, at 2.

> Electricity demand and supply will be coordinated through a "Pool" (*Ambiente de Contratação Regulado*, ACR). Demand will be estimated by the distribution companies, which will have to contract 100 per cent of their projected electricity demand over the following 3 to 5 years. These projections will be submitted to a new institution (*Empresa de Planejamento Energético*, EPE), which will estimate the required expansion in supply capacity to be sold to the distribution companies through the Pool. The price at which electricity will be traded through the Pool is an average of all long-term contracted prices and will be the same for all distribution companies. All current electricity procurement contracts remain in place; therefore, each distribution company will have different portfolios of contracts. To optimize the functioning of the Pool, self-dealing (*i.e.*, the purchase of electricity by distributors from their own subsidiaries) will no longer be possible. As such, vertically-integrated companies will need to be unbundled.[20]

The Brazilian Congress made attempts towards creating a system very similar to the United States' energy-saving performance contracts because there was also the possibility of having electricity bought from the free market.[21] An OECD survey has concluded that "although establishing a common mechanism for the purchase of energy, the model allows market risk to be shared among participants instead of being borne exclusively by the government, which acts rather like an auctioneer than a buyer."[22]

C. *Education Case Study*

The U.S. Department of Education relied on the SiS concept to enhance their federal student aid program. The Department awarded a contract to Accenture, which "agreed to finance the development and implementation of a new and complex system through replacement and consolidation of antiquated legacy systems."[23] The contract had good results and turned out to be an example of the advantages of SiS contracting because the "concept proved to be a natural incentive for the contractor to manage its costs and produce a quality solution in the shortest possible time."[24]

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20. *Id*. at 4. The new model for the electricity sector can be considered as a transition towards the PPP model.

21. *Id*. This possibility is pointed out as follows:

> In parallel to the "regulated" long-term Pool contracts, there will be a "free" market (*Ambiente de Contratação Livre*, ACL). Although in the future, large consumers (above 10 MW) will be required to give distribution companies a 3-year notice if they wish to switch from the Pool to the free market and a 5-year notice for those moving in the opposite direction a transition period is envisaged during which these conditions will be made more flexible. These measures should reduce market volatility and allow distribution companies to better estimate market size. If actual demand turns out to be higher than projected, distribution companies will have to buy electricity in the free market. In the opposite case, they will sell the excess supply in the free market. Distribution companies will be able to pass on to end consumers the difference between the costs of electricity purchased in the free market and through the Pool if the discrepancy between projected and actual demand is below 5 per cent. If it is above this threshold, the distribution company will bear the excess costs.

Id.

22. *Id*. at 3.

23. Buck, *supra* note 1, at 255.

24. *Id.*

Nonetheless, an audit report revealing some of the program's flaws was released by the Department's inspector general (IG) in 2002.[25] Specifically regarding the SiS concept, the report found that "[t]he share-in-savings task order baseline was overstated."[26] However, its overall analysis concluded that "FSA payments to the Modernization Partner [Accenture] were accurate and in accordance with the terms of the authorizing task orders."[27] The report's executive summary explains that "[t]he Modernization Partner Agreement is a Blanket Purchase Agreement between the Department of Education (Department) and Accenture (ED-99-DO-0002). Federal Student Aid (FSA) uses the Modernization Partner Agreement to implement its Modernization Blueprint."[28] A blanket purchase agreement (BPA) is defined as "[a] simplified method of filling the Government's anticipated repetitive needs for supplies or services by establishing charge accounts with qualified sources of supply."[29]

D. *Federal Information Technology Purchases*

1. E-Government Act of 2002

The E-Government Act of 2002 states:

> The head of an executive agency may enter into a share-in-savings contract for information technology . . . in which the Government awards a contract to improve mission-related or administrative processes or to accelerate the achievement of its mission and share with the contractor in savings achieved through contract performance.[30]

However, the concept of SiS contracting in information technology purchases was not well-accepted by some agencies,[31] and the Project on Government Oversight (POGO)[32] has created an online archive for news about SiS contracting.[33]

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25. U.S. Dep't of Education, Office of the Inspector Gen., Audit of FSA's Modernization Partner Agreement: Final Audit Report, ED-OIG/A07-B0008, at Executive Summary (Nov. 2002), *available at* http://www.ed.gov/about/offices/list/oig/auditreports/a07b0008.pdf.

26. *Id.* (emphasis omitted). The report points out that "[a]n overstatement creates a larger contractor payment than is actually earned. The baseline was overstated because it did not reflect savings from a prior, separate FSA initiative." *Id.*

27. *Id.*

28. *Id.* It also explains that "[i]n September 1999, the Department issued a Blanket Purchase Agreement (BPA: ED-99-DO-0002) with Accenture (formerly known as Andersen Consulting) as the FSA Modernization Partner." *Id.*

29. Nash, Schooner & O'Brien, *supra* note 3, at 63; *see also* FAR 13.303.

30. Pub. L. No. 107-347, 116 Stat. 290 (codified at 41 U.S.C. § 266a(1) (Supp. 2004)).

31. Buck, *supra* note 1, at 256.

32. Project on Government Oversight, About Us, http://www.pogo.org/about/ (last visited Mar. 10, 2009). POGO's website states that it was founded in 1981 "as an independent nonprofit that investigates and exposes corruption and other misconduct in order to achieve a more accountable federal government." *Id.*

33. Project on Government Oversight, Share In Savings Archive, http://www.pogowatercooler.org/p/contracts/ShareInSavingsArchive.html. POGO also explains its reasons for opposing SiS contracting on its website. *See* Letter from Scott Amey, Gen. Counsel, Project on Gov't Oversight, to Laurie Duarte, Regulatory Secretariat, Gen. Servs. Admin. (Aug. 31, 2004), *available at* http://www.pogo.org/pogo-files/letters/contract-oversight/co-rcv-20040831.html.

Some of the claims supporting SiS contract implementation were summarized by Angela Styles,[34] an opponent of SiS contracts, as follows: "(1) share-in-savings will save the taxpayers billions of dollars; (2) share-in-savings contracts only pay the contractor for results; and (3) share-in-savings is a new and innovative contracting method." In opposition to the first claim, Styles pointed out that "[t]he efficiency savings would be achieved without regard to whether the purchase was made with a direct appropriation or was financed by private sector through an SIS contract."[35] The statute defines "savings" as "(A) monetary savings to an agency; or (B) savings in time or other benefits realized by the agency, including enhanced revenues (other than enhanced revenues from the collection of fees, taxes, debts, claims, or other amounts owed the Federal Government)."[36]

Kenneth J. Buck and David A. Drabkin, proponents of SiS contracting, wrote an article[37] in response to Styles' arguments. They argue that "[t]here is ample evidence to support the proposition that SiS is a viable form of contracting in situations where savings can be clearly identified."[38] The authors emphasize that understanding "savings" is crucial in this context because "[a]s long as the generated savings exceed the cost of implementing a particular solution, then SiS is viable."[39] Regarding this argument, the statute provides specific guidance on the establishment of a savings share ratio:

> Contracts awarded pursuant to the authority of this section shall include a provision containing a quantifiable baseline that is to be the basis upon which a savings share ratio is established that governs the amount of payment a contractor is to receive under the contract.[40]

The second claim in support of SiS contracts, as summarized by Styles, refers to the amount payable in case of cancellation or termination.[41] The statute provides that "[t]he amount payable in the event of cancellation or termination of a share-in-savings contract shall be negotiated with the contractor at the time the contract is entered into."[42] Styles assumes that "[t]his provision only requires the government and the contractor to 'negotiate'; the parties do not have to actually reach an agreement on the amount payable in the event of termination."[43] Buck and Drabkin counter this assumption by arguing that "no 'new' appropriated money, beyond that which may be

34. Styles, *supra* note 10, at 15.
35. *Id*. at 16.
36. 41 U.S.C. § 266a(c)(2) (Supp. 2004).
37. Kenneth J. Buck & David A. Drabkin, *Share-in-Savings Contracting: The Truth Will Set You Free*, 40 Procurement Law. 1, 18 (2005).
38. *Id.*
39. *Id*. at 19.
40. 41 U.S.C. § 266a(a)(4) (Supp. 2004).
41. Styles, *supra* note 10, at 16–17.
42. 41 U.S.C. § 266a(b)(2).
43. Styles, *supra* note 10, at 17.

needed to cover potential termination or cancellation costs, is required to be appropriated by Congress for the particular program."[44]

The third claim supporting SiS contracts, as summarized by Styles, regards the method's innovativeness.[45] Styles asserts that "[c]ontrary to the SiS claims, as far back as 1817, the executive branch has been using backdoor financing techniques to fund federal projects where congressional appropriations were not available."[46] Buck and Drabkin disagree with Styles' assertion and point out that "[t]he key attributes that make it an attractive tool are the ability to incentivize contractors to produce 'real' savings, to reduce the funding for termination liability, and to allow agencies to retain the savings generated to be reallocated to approved, prioritized, but unfunded IT projects."[47] Specifically regarding an increase in SiS implementation, Buck affirmed that "the publication of [a] Proposed Rule, which outlined in detail a process by which SiS could be accomplished . . . along with the issuance of blanket purchase agreements to six contractors, resulted in the most dramatic increase" in savings.[48] The six contractors who were awarded the blanket purchase agreements from the GSA for SiS information technology (IT) task orders in 2004 were Accenture Ltd., Hamilton, Bermuda; CGI Group Inc., Montreal, Canada; Computer Sciences Corp., El Segundo, California; IBM Corp., Armonk, New York; Science Applications International Corp., San Diego, California; and SRA International Inc., Fairfax, Virginia.[49]

The statute provides that "[n]o share-in-savings contracts may be entered into under this section after September 30, 2005."[50] Accordingly, "[e]ach [blanket purchase agreement] winner has until September 2005 to win up to $500 million in share-in-savings IT jobs. The E-Government Act of 2002 provision authorizing the share-in-savings contracts expires that month."[51]

2. Office of Management and Budget Circular No. A-11, Exhibit 300 (2004)

One of the main concerns regarding SiS contracting is related to the overall analysis of outsourcing and its effects toward taxpayers. Styles stresses that

44. Buck & Drabkin, *supra* note 37, at 19; *see also* 41 U.S.C. § 266a(b)(1)(A)–(C).
45. Styles, *supra* note 10, at 17.
46. *Id.*
47. Buck & Drabkin, *supra* note 37, at 20.
48. Buck, *supra* note 1, at 266. *See generally* FAR 13.303; Dep't of Def., Gen. Servs. Admin. & Nat'l Aeronautics and Space Admin., Federal Acquisition Regulation; Share-in-Savings Contracting, 69 Fed. Reg. 40,514-01 (July 2, 2004); Nash, Schooner & O'Brien, *supra* note 3; Andrew Kantner, *Contract and Fiscal Law Developments of 2004—The Year in Review: Contract Formation: Contract Types*, 2005-Jan Army Law. 1, 16.
49. Gail R. Emery, *GSA Jump-Starts Share in Savings*, Wash. Tech., July 31, 2004, http://washingtontechnology.com/articles/2004/07/31/gsa-jumpstarts-share-in-savings.aspx.
50. 41 U.S.C. § 266a(d).
51. Emery, *supra* note 49.

"[t]he only loser is the taxpayer. The taxpayer effectively foots a $34 million bill for $20 million of IT equipment."[52]

Buck and Drabkin strongly object to this argument. They emphasize that

> Congress established clear control mechanisms to manage the use of the concept. These management controls reduce the government's risk significantly. Secondly, Congress required a report from the OMB in December 2004 on how SiS was used and how savings were allocated. Further, it requires the GAO to audit that report. Thirdly, OMB already has included in its OMB Circular No. A-11 a procedure for agencies to justify any SiS business cases.[53]

OMB Circular No. A-11, Exhibit 300[54] provides Congress with the relevant information on IT purchases. Specifically regarding the requirements that Exhibit 300 fulfils, they "are designed to be used as one-stop documents for many of IT management issues such as business cases for investments, IT security reporting, Clinger Cohen Act implementation, E-Gov Act implementation, Government Paperwork Elimination Act implementation, agency's modernization efforts, and overall project (investment) management."[55]

3. Office of Management and Budget Circular No. A-76 (2003)

Styles also argues, as ramification concerns for the federal workforce,[56] that SiS contracting should be emphatically discouraged because "[u]nder OMB Circular A-76, agencies cannot outsource the work currently performed by federal employees to a contractor without a public-private competition."[57] OMB Circular No. A-76 defines "inherently governmental activity" as "an

52. Styles, *supra* note 10, at 15. Styles' remark is based on the argument that "[s]omehow forgotten when Congress authorized these SiS initiatives is the fact that the federal government is different than the individual consumer in two important respects: (1) the federal government is spending someone else's money (the taxpayer's); (2) the federal government has the means to finance its own purchases." *Id*. at 14.

53. Buck & Drabkin, *supra* note 37, at 20.

54. Office of Mgmt. & Budget, OMB Circular No. A-11, Planning, Budgeting, Acquisition, and Management of Capital Assets, pt. 7, § 300 (2008), *available at* http://www.whitehouse.gov/omb/circulars/a11/current_year/s300.pdf.

55. *Id*. at 7.

56. Styles, *supra* note 10, at 18. The author thanks "the American Federation of Government Employees for providing funding and support to make this article possible." *Id*. at 13.

57. *Id*. at 18. The author explains that

> [o]nly if work is not currently performed by federal employees (defined as "new work" in the Circular A-76), may agencies execute a contract with the private sector without allowing federal employees to compete. With an alluring private sector financing tool that allows cash-strapped agencies to buy new goods and services off-budget without having to ask Congress or the Office of Management and Budget for authority, agencies will attempt to characterize work as "new work" to avoid the constraints of public-private competition and utilize the private sector financing tool offered by SIS contracts.

Id.

activity that is so intimately related to the public interest as to mandate performance by government personnel."[58]

Professor Charles Tiefer points out that "[t]he heart of A-76 is a comparison between the cost of the private contractor proposal, and the cost of continuing to perform the operation in-house."[59] By analyzing SiS contracting in this context, he explains that "[a]n SIS contractor would insist that, by definition, its proposal commits to producing savings hence, the very process of making an SIS offer and receiving an SIS award, demonstrates that the SIS alternative must be superior to performing the function in-house."[60] Significantly, the proposed rule[61] aimed at incorporating SiS contracting into the Federal Acquisition Regulation would have "requir[ed] agencies to follow guidelines in Circular A-76, the rule book on competitive sourcing, when a share-in-savings contract would affect in-house jobs."[62]

E. *Government Accountability Office Reports*

The Government Accountability Office (GAO) has played a very important role in SiS contracting because it has published many reports specifically addressing the issue.

Report number GAO-03-327 was intended to "examine its use by industry in terms of whether there were any key conditions that needed to be in place to make this technique successful."[63] It concluded that "SiS can be a highly effective contracting technique to motivate contractors to generate savings and revenues for their clients. But to be successful, clients and their contractors

58. Office of Mgmt. & Budget, OMB Circular No. A-76, Performance of Commercial Activities, at A-2 (2003), *available at* http://www.whitehouse.gov/omb/circulars/a076/a76_incl_tech_correction.pdf.

59. Charles Tiefer, "*Share-in-Savings*" *Contracts: Risky Business*, Project on Gov't Oversight, June 13, 2001, http://www.pogo.org/pogo-files/alerts/contract-oversight/co-rcv-20010613.html.

60. *Id*. In contrast, the author also explains that

> [h]owever, the debate over A-76 is a large one, beyond the confines of SIS, and to use SIS as an end-run around A-76 would require resolving the A-76 debate first. The reason for the careful scrutiny in an A-76 operation is to identify the potential downsides of privatizing. An SIS arrangement entered into without A-76 scrutiny exposes the government to the downsides of privatizing, without the appropriate prior scrutiny.

Id.

61. Dep't of Def., Gen. Servs. Admin. & Nat'l Aeronautics and Space Admin., Federal Acquisition Regulation; Share-in-Savings Contracting, 69 Fed. Reg. 40,514-01, 40,513–17 (July 2, 2004).

62. Amelia Gruber, *Share-in-Savings Contracting Policy to Be Unveiled Next Week*, Government Executive.com, Mar. 25, 2005, http://www.govexec.com/dailyfed/0305/032505a1.htm.

63. U.S. Gov't Accountability Office, Report No. GAO-03-327, Contract Management: Commercial Use of Share-in-Savings Contracting, at Highlights (Jan. 2003). The conditions that facilitate success that were found by GAO are the following: "[a]n expected outcome is clearly specified, incentives are defined, performance measures are established, and top management commitment is secured." *Id*. (emphasis omitted).

need to be specific and in agreement in their goals and objectives, as well as how to achieve them."[64]

Report number GAO-03-1011 analyzed SiS contracting regarding energy savings performance contracts.[65] As an overall conclusion, it stated that "[f]rom a governmentwide perspective . . . the costs associated with these financing approaches may be greater than with full, up-front budget authority. Regardless of the financing approach . . . agencies would receive the same program benefits."[66] Regarding this specific conclusion, Buck argues that it "fails to consider that there can be higher costs to the taxpayer by *not* funding programs that could ultimately improve the efficiency and effectiveness of government operations."[67]

Report number GAO-05-12 was aimed at reviewing the implementation status of the E-Government Act of 2002.[68] However, it "did not review section 210, which concerns share-in-savings contracts, since this section mandates a separate, more in-depth GAO review on the implementation and effects of this provision at a future date."[69]

In report number GAO-05-736, which was GAO's assessment of the effectiveness of SiS contracts under the E-Government Act of 2002, GAO advised that no agency had awarded SiS contracts. The report noted that "11 agencies cited several reasons the share-in-savings contracting authority for information technology has not led to the award of share-in-savings contracts. Reasons include a lack of final implementing regulations and OMB guidance on how to budget and account for retained savings and the difficulty of determining baseline costs."[70]

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64. *Id*. It added that "[t]his can be a difficult task for more complex services, but the companies we spoke with found that pursuing this type of arrangement was worth the extra effort." *Id.*

65. U.S. Gov't Accountability Office, Report No. GAO-03-1011, Budget Issues: Alternative Approaches to Finance Federal Capital 3 (Aug. 2003); *see also* Buck, *supra* note 1, at 250.

66. GAO Report No. GAO-03-1011, *supra* note 65, at Highlights.

67. Buck, *supra* note 1, at 250. Buck also points out that "what is notably absent from GAO's analysis is a balanced assessment of opportunity costs presented by alternative funding means." *Id.*

68. U.S. Gov't Accountability Office, Report No. GAO-05-12, Electronic Government: Federal Agencies Have Made Progress Implementing the E-Government Act of 2002, at 4–5 (Dec. 2004), *available at* http://www.gao.gov/cgi-bin/getrpt?GAO-05-12.

69. *Id*. at 2.

70. U.S. Gov't Accountability Office, Report No. GAO-05-736, Federal Contracting: Share-in-Savings Initiative Not Yet Tested 7 (July 2005), *available at* http://www.gao.gov/cgi-bin/getrpt?GAO-05-736 [hereinafter Share-in-Savings Initiative]. It also states:

> Some officials said contractors are reluctant to get involved in share-in-savings contracts because the return on investment is believed to be too low. In addition, officials told us that even though contractors would provide up-front funding for a share-in-savings contract, some amount of appropriated funds would still be required. Officials also said that too few acquisition personnel have been trained to use this innovative contracting technique.

Id.

F. *Current Status*

The GSA was in charge of promoting SiS contracting.[71] Nonetheless, its website states that "[t]he Share-in-Savings program is no longer operational."[72] *Federal Computer Week* published an article stating that "[t]he agency councils that proposed procurement rules have withdrawn a measure that would have set parameters for share-in-savings contracting."[73] It also mentioned that "[a] July 2005 Government Accountability Office report states that agencies shied away from the contracts because of the lack of specific rules and a general belief that the contracts don't offer worthwhile returns on investment. As a result, share-in-savings contracting remained largely unused and untested."[74] The reasons for these occurrences will be analyzed *infra* Part IV, where there will be proposals regarding modifications in SiS contracting.

III. PUBLIC-PRIVATE PARTNERSHIPS

A. *Preliminary Remarks*

According to the broad Brazilian definition, PPPs "are continuing negotiated agreements between the Government and the private sector so as to accomplish the development, under the private sector's responsibility, of activities that contain at least some aspects of public interest."[75] Before the enactment of Federal Law No. 11,079/2004, *Lei de Parcerias Público-Privadas*,[76] there had been many discussions about implementing PPPs in Brazil by the Brazilian Congress, but authorization came more than a year after the proposal was first presented.[77]

The Brazilian legal definition of PPP does not correspond to the definition of PPPs in other countries. There seem to be differences related to its breadth of scope. It is generally defined as a concession abroad, regardless

71. U.S. Gen. Servs. Admin., GSA Promotes "Share-in-Savings" IT Contracting (Nov. 6, 2003), *available at* http://www.gsa.gov/Portal/gsa/ep/contentView.do?P=T&contentId=14409&contentType=GSA_BASIC (last visited Mar. 10, 2009).

72. *Id.*

73. Matthew Weigelt, *Share-in-Savings on Life Support: Congress Fails to Renew Authority for Acquisition Method*, Fed. Computer Week, Feb. 13, 2006.

74. *Id*. By remaining largely unused and untested, SiS contracting did not correspond to a transition towards the enhancement of public procurement processes at this point.

75. Carlos Ari Sundfeld, *Guia Jurídico das Parcerias Público-Privadas* [*Juridical Guide to Public-Private Partnerships*], *in* Parcerias Público-Privadas [Public-Private Partnerships] 22 (Malheiros ed. 2005). Sundfeld also defines PPPs narrowly, as follows: "'PPPs' are negotiated agreements raised under sponsored concessions and administrative concessions, as defined by Federal Law 11.079/2004." *Id*. at 22–23 (author's translation); *see also* Lei No. 11.079, de 30 de dezembro de 2004, D.O.U. 31.12.2004, art. 2 (Brazil).

76. Lei No. 11.079, art. 2.

77. *See, e.g.*, Rose Ane Silveira, *Lula Sanciona Lei Para as Parcerias Público-Privadas* [*Lula Authorizes Law on Public-Private Partnerships*], Folha de S. Paulo Online (Braz.), Dec. 30, 2004, http://www1.folha.uol.com.br/folha/brasil/ult96u66489.shtml.

of the occurrence of appropriations from the public sector.[78] As an illustration, in spite of lacking special rules to streamline PPPs, the European Union has presented a green paper on the subject through its Commission.[79] The Commission pointed out that

> [t]his Green Paper analyses the phenomenon of PPPs with regard to Community law on public procurement and concessions. Under Community law, there is no specific system governing PPPs. PPPs that qualify as "public contracts" under the Directives coordinating procedures for the award of public contracts must comply with the detailed provisions of those Directives. PPPs qualifying as "works concessions" are covered only by a few scattered provisions of secondary legislation and PPPs qualifying as "service concessions" are not covered by the "public contracts" Directives at all.[80]

Professor Christopher H. Bovis acknowledges that the Commission "distinguishes two major formats of public private partnerships: the contractual format, also described as the concession model, and the institutional format which is often described as the 'joint-venture model.'"[81]

Moreover, the International Monetary Fund (IMF) has also noted that "[t]he term PPP is sometimes used to describe a wider range of arrangements."[82] It also points out that, generally, PPPs are framed as "schemes which combine traditional public investment and private sector operation of a government-owned asset. This arrangement sometimes takes the form of an operating lease, although in cases where the private operator has some responsibility for asset maintenance and improvement, this is also described as a concession."[83] More recently, the World Bank and the Public-Private Infrastructure Advisory Facility (PPIAF) published a report on case studies of PPPs in different countries.[84] The report "uses a broad definition of PPP because of the different goals of each country's PPP strategy."[85]

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78. *See* Brazilian Ministry of Planning, Budget and Management, Experiências Internacionais [International Experiences],http://www.planejamento.gov.br/hotsites/ppp/conteudo/Experiencia_Internacional/index.htm (last visited Mar. 11, 2009).

79. Comm'n of the European Communities, Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions, Apr. 30, 2004, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0327:FIN:EN:PDF.

80. Comm'n of the European Communities, Initiative on Public Private Partnerships and Community Law on Public Procurement and Concessions, http://ec.europa.eu/internal_market/publicprocurement/ppp_en.htm (last visited Mar. 11, 2009).

81. Christopher H. Bovis, *Public Procurement in the European Union: Lessons from the Past and Insights to the Future*, 12 Colum. J. Eur. L. 53, 119 (2005–2006); *see also* Peter Trepte, Public Procurement in the EU: A Practitioner's Guide 405 (Oxford Univ. Press 2d ed. 2007).

82. International Monetary Fund, Public-Private Partnerships 7 (Mar. 12, 2004), *available at* http://www.imf.org/external/np/fad/2004/pifp/eng/031204.pdf (emphasis omitted).

83. *Id.*

84. World Bank & Public-Private Infrastructure Advisory Facility, Public-Private Partnerships Units: Lessons for Their Design and Use in Infrastructure (Oct. 2007), *available at* http://www.ppiaf.org/documents/other_publications/PPP_units_paper.pdf.

85. *Id.* at 13. Accordingly, the report defines a PPP as

> an agreement between a government and a private firm under which the private firm delivers an asset, a service, or both, in return for payments. These payments are contingent to some extent on the long-term quality or other characteristics of outputs delivered.

The Inter-American Development Bank also launched an action plan related to its multilateral investment fund.[86] The plan compares a traditional definition[87] of PPPs to a new model that has been developing more recently, a model that "involves the public and private sectors staying involved over the life cycle of a project including construction, financing and operations."[88] The plan identifies risk assessment as an important characteristic of the new model, and defines that characteristic as when "the government shares the risks with the private sector making it more attractive for private sector investors and providing fiscal sustainability for governments."[89]

B. *Brazilian Legal Analysis*

1. Relevant Legislation

The Brazilian Constitution[90] gives its Federal Government exclusive responsibility to set principles, general rules, and procedures on public procurement and public contracts that are binding on federal, state, federal district, and local agencies, foundations, state-owned enterprises, and joint-venture corporations.[91] The Constitution also specifies that construction projects, services, acquisitions, and public property transfers must be accomplished through public bidding that provides equal conditions to all bidders.[92] Its clauses must contain payment provisions based on the proposal.[93] The public bidding must be construed under economic and technical qualifications that are to guarantee the contractors' performance.[94]

Federal Law No. 8,666/1993 sets forth the basic rules referring to public procurement and government contracts in Brazil.[95] It provides regulation related to general determinations, definitions, construction projects, services,

Id. It also explains that

> [m]any definitions of PPP might exclude privatization, but some countries' programs designed to encourage private sector participation do not place much weight on the distinction between, for example, divestiture and concessions. Both are viewed simply as different ways of introducing private sector participation, and pursued under the same strategy, and by the same body.

Id.

86. Inter-American Development Bank & Multilateral Investment Fund, MIF Cluster Action Plan: Supporting Competitiveness Through Public Private Partnerships (Oct. 21, 2005), *available at* http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=843651.

87. The traditional definition is "a legally-binding contract between government and business for the provision of assets and the delivery of services that allocates responsibilities and business risks among the various partners." *Id*. at 3–4 (emphasis omitted).

88. *Id*. at 4.

89. *Id*. As a result, the plan explains that "[t]he basic principle of this new approach to a PPP is the clear, transparent and contracted transfer of reasonable risk from the public to private sector, while achieving greater efficiency because of private sector service provision." *Id.*

90. Constituição da República Federativa do Brasil, de 5 de outubro de 1988.

91. *Id*. art. 22, XXVII.

92. *Id*. art. 37, XXI (author's translation).

93. *Id*. (author's translation).

94. *Id*. (author's translation).

95. Lei No. 8.666, de 21 de junho de 1993, D.O.U. de 22.06.1993 (Brazil).

specialized and professional technical services, acquisitions, and public property transfers.[96] Moreover, it provides rules for specific bidding procedures, including thresholds, sole source, qualification, and award.[97] Its third chapter refers to the public contracts and its characteristics: general determinations, clauses and provisions, changes, performance, and types of termination.[98] Its final chapter provides guidance on administrative dispute resolution and judicial review.[99]

The Constitution also provides for the delivery of public services. These services must be delivered by the public administration directly or under concession or permission that are to be held through public procurement.[100]

Federal Law No. 8,987/1995 establishes the concession and permission regimes regarding the delivery of public services.[101] Concession is defined as the transfer of the public service performance to a private entity, which will carry its execution for a specific timeframe.[102] It is important to emphasize that this transfer involves only the execution of the service because the public administration remains responsible for it, as set forth at the Constitution.[103]

Federal Law No. 8,987/1995 treats permission as a type of narrow concession, as its contract contains fewer provisions and is considered a standard contract.[104] Like concessions, permissions are also held through public bidding and are to be executed for a specific timeframe.[105] The public administration may terminate the contract unilaterally, according to its convenience.[106]

Complementary Law No. 101/2000, the Fiscal Responsibility Act, establishes public finance regulation for responsibility in the fiscal management.[107] It also plays an important role in the PPPs' regulatory framework in Brazil.

2. Federal Law No. 11,079/2004, Lei de Parcerias Público-Privadas

a. Preliminary Determinations

This statute establishes general principles, rules, and procedures to streamline public procurement and government contracts based on PPPs.[108] These general rules are binding on federal, state, federal district, and local levels.[109]

96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. Constituição da República Federativa do Brasil, de 5 de outubro de 1988, art. 175.
101. Lei No. 8.987, 13 de fevereiro de 1995, D.O.U. de 14.02.1995 (Brazil).
102. *Id.*
103. *See generally* Luiz Eduardo Diniz Araujo, *Concessão de Serviço Público e Ato Jurídico Perfeito* [*Public Service Concession and Perfect Juridical Act*], Jus Navigandi, Mar. 23, 2007, http://jus2.uol.com.br/doutrina/texto.asp?id=9633(author's translation).
104. Lei No. 8.987, art. 40.
105. *Id.*
106. *Id.*
107. Lei Complementar No. 101, de 4 de maio de 2000, D.O.U. de 05.05.2000. (Brazil).
108. Lei No. 11.079, de 30 de dezembro de 2004, D.O.U. 31.12.2004, art. 1 (Brazil).
109. *Id.*

PPPs are defined as concession contracts, which can be either sponsored or administrative.[110] Sponsored concession is the public service concession or the construction concession under Federal Law No. 8,987/1995[111] when it involves, in addition to the fees charged from the users, counterpayment from the public partner to the private partner.[112] Administrative concession is the services contract used directly or indirectly by the public administration, even if it involves construction or supplies.[113] The ordinary concession established at Federal Law No. 8,987/1995[114] is not considered to be a PPP if it does not provide counterpayment from the public partner to the private partner.[115] A PPP contract is not possible when the contract is below R$ 20,000,000, if the service is to be performed for less than five years, or if its only purpose is for equipment supplies or construction.[116]

The statute provides that Federal Law No. 8,987/1995[117] is also applied in a subsidiary manner when administrative concessions are regarded.[118] When sponsored concessions are considered, it is also applied in the same fashion.[119] It explains that ordinary concessions are only established under Federal Law No. 8,987/1995.[120] Federal Law No. 11,079/2004 is not to be considered in this case.[121] All other types of government contracts that are not ordinary concessions, sponsored concessions, or administrative concessions are established under Federal Law No. 8,666/1993.[122]

b. Public-Private Partnerships Contracts

PPP contract clauses are defined according to Federal Law No. 8,987/1995.[123] These clauses establish the contracts' length of time, which cannot be shorter than five years or greater than thirty-five years, including any extensions that may be necessary to accomplish its goal.[124] The clauses also determine the sanctions applied to the public administration and to the contractor in case of termination of the contract; the allocation of risk between them, including acts of God, force majeure, and acts of the Government in either its sovereign or contractual capacity; payment types and price adjustments; the criteria to

110. *Id*. art. 2; *see also* Sundfeld, *supra* note 75.
111. Lei No. 8.987, de 13 de fevereiro de 1995, D.O.U. de 14.02.1995 (Brazil).
112. Lei No. 11.079, art. 2, ¶ 1.
113. *Id*. art. 2, ¶ 2.
114. Lei No. 8.987.
115. Lei No. 11.079, de 30 de dezembro de 2004, D.O.U. 31.12.2004, art. 2, ¶ 3 (Brazil).
116. *Id*. art. 2, ¶ 4.
117. Lei No. 8.987, de 13 de fevereiro de 1995, D.O.U. de 14.02.1995 (Brazil).
118. Lei No. 11.079, art. 3.
119. *Id*. art. 3, ¶ 1.
120. Lei No. 8.987.
121. Lei No. 11.079, de 30 de dezembro de 2004, D.O.U. 31.12.2004, art. 3, ¶ 2 (Brazil).
122. Lei No. 8.666, de 21 de junho de 1993, D.O.U. de 22.06.1993 (Brazil).
123. Lei No. 8.987, de 13 de fevereiro de 1995, D.O.U. de 14.02.1995, art. 23 (Brazil).
124. Lei No. 11.079, art. 5, I.

evaluate the contractor's performance; warranties provided by the contractor, specifically related to performance and risks; and other aspects concerning these factors.[125]

The counterpayment from the public administration to the contractor can be done through a bank order, credit transfer, or any other type of payment authorized by law.[126] The public administration and the contractor have the option of structuring the contract with incentives related to the contractor's performance, which represents a new mechanism in procurement in Brazil.[127] It is important to emphasize that the public administration counterpayment occurs necessarily after the services that correspond to the contract's object are initialized.[128]

c. Guarantees

The Government's payments are guaranteed by appropriations according to the limits set forth in the Constitution,[129] special funds authorized by law,[130] insurance provided by insurance companies that are not controlled by the Government,[131] guarantees from international organizations or financial institutions that are not controlled by the Government,[132] guarantees provided by a guarantee fund or state-owned enterprise created to meet this scope,[133] or any other mechanism authorized by law.[134]

d. Specific-Purpose Company

Before a contract is entered into, a specific-purpose company whose purpose is to implement and execute the partnership's object must be created.[135] This company's control may be transferred upon express authorization from the public administration according to the terms of the solicitation and the contract, and pursuant to the parameters set forth in Federal Law No. 8,987/1995.[136] The company's shares may be negotiated through the capital

125. *Id*. art. 5, II, III, IV, VII, VIII.
126. *Id*. art. 6.
127. *Id*. In the United States, an incentive contract is "[a] negotiated pricing arrangement that gives the contractor higher profits for better performance and/or lower profits for worse performance in prescribed areas (cost, delivery, or technical performance). The standard types of incentive contracts are prescribed in FAR Subpart 16.4." Nash, Schooner & O'Brien, *supra* note 3, at 294.
128. Lei No. 11.079, de 30 de dezembro de 2004, D.O.U. 31.12.2004, art. 7 (Brazil).
129. *Id*. art. 8, I; *see also* Constituição da República Federativa do Brasil, de 5 de outubro de 1988, art. 167.
130. Lei No. 11.079, art. 8, II.
131. *Id*. art. 8, III.
132. *Id*. art. 8, IV.
133. *Id*. art. 8, V.
134. *Id*. art. 8, VI.
135. *Id*. art. 9.
136. *Id*. art. 9, ¶ 1; *see also* Lei No. 8.987, de 13 de fevereiro de 1995, D.O.U. de 14.02.1995, art. 27 (Brazil).

market.[137] Furthermore, the company must follow corporate governance and accountancy standards.[138]

The public administration is prohibited from owning the majority of the voting capital regarding these companies.[139] This prohibition does not apply to any acquisition of the majority of the voting capital from any public entity controlled by the public administration, in case of noncompliance of financial contracts.[140]

e. Procurement

PPP contracting must be preceded by a sealed bidding procedure.[141] The procedure will be open upon completion of the following requirements: a finding by the agency of the convenience and need for PPP contracting; an acknowledgment that the incurred debt will not impact the fiscal planning referred to in Complementary Law No. 101/2000;[142] the estimated impact of the PPP contract over the budget during the period that the contract will be executed;[143] publication of a synopsis for the invitation for bids and the contract in order to receive public comments;[144] relevant prior environmental authorization or guidance;[145] and other requirements concerning these requirements.[146] In sponsored concessions where more than seventy percent of the payment to the private sector is to be paid by the public administration, there must be specific legislative authorization.[147]

The invitation for bids must have the contract synopsis, indicating that the sealed bidding procedure will occur according to the determinations set forth under Federal Law No. 11,079/2004 and Federal Law No. 8,987/1995.[148] It also may determine the following: insurance provided by the contractor, ac-

137. Lei No. 11.079, de 30 de dezembro de 2004, D.O.U. 31.12.2004, art. 9, ¶ 2 (Brazil).
138. *Id*. art. 9, ¶ 3.
139. *Id*. art. 9, ¶ 4.
140. *Id*. art. 9, ¶ 5. PPP contracts may also establish conditions so that the public partner can authorize the transfer of control over the specific-purpose company to the public partner's surety to achieve financial restructuring and ensure that public service delivery is not interrupted. *Id*. art. 5, ¶ 2, I (establishing step-in rights in PPPs' contracts).
141. *Id*. art. 10.
142. *Id*.; *see also* Lei Complementar No. 101, de 4 de maio de 2000, D.O.U. de 05.05.2000, art. 4, ¶ 1, annex (Brazil). Federal law also emphasizes that "the financial effects of the incurred debts must be compensated by the permanent increase in assets or permanent decrease in liabilities, throughout subsequent periods." Lei No. 11.079, art. 10, I(b).
143. *Id*. art. 10, II.
144. *Id*. art. 10, VI. The synopsis "must inform the justification for the contract, the object's identification, the length of the contract, its estimated cost. There must at least 30 days to the suggestion's submission and the deadline is to occur at least seven days before the anticipated publication of the invitation for bids." *Id.*
145. *Id*. art. 10, VII.
146. *Id*. art. 10, I(c), III, IV, V.
147. *Id*. art. 10, ¶ 3.
148. *Id*. art. 11; *see also* Lei No. 8.987, de 13 de fevereiro de 1995, D.O.U. de 14.02.1995, art. 15, ¶¶ 3, 4, arts. 18, 19, 21 (Brazil).

cording to the thresholds set forth in Federal Law No. 8,666/1993,[149] and the use of alternative dispute resolution procedures to resolve controversial issues, including arbitration, which must occur in Brazil and in the Portuguese language, as provided by Federal Law No. 9,307/1996.[150] The invitation for bids must also indicate the counterpayments from the public partner to the private partner, in case they occur.[151]

The use of PPP contracting must be developed under the procedures determined by current laws on public procurement and government contracts and one of the following two procedures: (1) the bid evaluation may be preceded by technical evaluation, where the bids that cannot achieve the minimum scoring will not be considered,[152] or (2) the bid evaluation may proceed according to the procedures established under Federal Law No. 8,987/1995, in which bids are evaluated for the lowest counterpayment by the public administration and the best technical evaluation, according to the scoring system provided by the invitation for bids.[153]

The invitation for bids must define the strategy for the price evaluation.[154] These strategies may be either written sealed bids or written sealed bids followed by a reverse auction.[155] At the reverse auction stage, the invitation for bids cannot establish a limit on the number of bids that bidders may make to reach the best proposal, except for limits on unrealistic proposals.[156] The invitation for bids may also limit the offerors in the reverse auction to those whose written sealed bid was twenty percent more than the best bid received.[157] The technical analysis evaluation must be justified according to specifications, parameters, and performance-based elements related to the contract's object, which are to be clearly defined on the invitation for bids.[158]

f. Determinations Related to the Federal Government

Federal Law No. 11,079/2004 established a specialized government unit—*órgão gestor de parcerias público privadas federais*—through Decree No. 5,385/2005.[159] The specialized government unit's scope is to define the priorities of services to be executed under PPPs,[160] establish procedures regarding

149. Lei No. 11.079, de 30 de dezembro de 2004, D.O.U. 31.12.2004, art. 11, I (Brazil); *see also* Lei No. 8.666, 21 de junho de 1993, D.O.U. de 22.06.1993, art. 31, III (Brazil).
150. Lei No. 11.079, art. 11, III; *see also* Lei No. 9.307, de 23 de setembro de 1996, D.O.U. 24.09.1996 (Brazil).
151. Lei No. 11.079, art. 11.
152. *Id*. art. 12, I.
153. *Id*. art. 12, II(a), (b); *see also* Lei No. 8.987, art. 15, I, V.
154. Lei No. 11.079, art. 12, III.
155. *Id*. art. 12, III(a), (b).
156. *Id*. art. 12, ¶ 1, I.
157. *Id*. art. 12, ¶ 1, II.
158. *Id*. art. 12, ¶ 2.
159. *Id*. art. 14; *see also* Decreto No. 5,385, de 4 de março de 2005, D.O.U. de 07.03.2005 (Brazil).
160. Lei No. 11.079, de 30 de dezembro de 2004, D.O.U. 31.12.2004, art. 14, I (Brazil).

PPP contracts,[161] authorize sealed bidding and invitations for bids,[162] and administer the contracts' execution reports.[163] The specialized government unit must submit annual performance reports regarding PPP contracts to the Congress and to the Brazilian Audit Tribunal—*Tribunal de Contas da União*.[164] The Federal Government, its agencies, and foundations are authorized to take part in the PPPs' guarantee fund—*Fundo Garantidor das Parcerias Público Privadas (FGP)*—limited to a threshold of R$ 6,000,000,000, whose purpose is to assure payment to the private partner.[165] Decree No. 5,411/2005 authorized the PPPs' guarantee fund.[166]

3. Case Study

The Ministry of Planning, Budget and Management announced the first PPP to be contracted on the federal level framed as an administrative concession in 2006.[167] Its object is the building and operation of a data center to be used by Banco do Brasil and Caixa Econômica Federal.[168] Banco do Brasil is a state-owned bank whose capital is composed exclusively of ordinary shares, and, as of March 2008, the National Treasury held 65.3% of these shares.[169] Caixa Econômica Federal is defined as the "main agent for the federal government's public policies."[170]

These two financial institutions have decided to maintain a consortium to launch the first PPP administrative concession in Brazil.[171] The contract

161. *Id*. art. 14, II.
162. *Id*. art. 14, III.
163. *Id*. art. 14, IV.
164. *Id*. art. 14, ¶ 5.
165. *Id*. art. 16.
166. Decreto No. 5,411, de 6 de abril de 2005, D.O.U. de 07.04.2005 (Brazil).
167. *See generally* Press Release, Brazilian Ministry of Planning, Budget and Management, Ministro Participa de Lançamento da Primeira PPP Administrativa [Minister Takes Part in the Launching of the First Administrative PPP] (Oct. 30, 2006), *available at* http://www.planejamento.gov.br/hotsites/ppp/conteudo/noticias/noticias2006/061030_ministro_participa.htm (author's translation) [hereinafter Brazilian Ministry Press Release].
168. *Id.*
169. Banco do Brasil, Ownership Structure, http://www.bb.com.br/portalbb/page22,136,3595,0,0,2,8.bb?codigoNoticia=3269&codigoMenu=3322 (last visited Mar. 11, 2009). Its website also provides information on its history: "[t]oday, Banco do Brasil is the largest financial institution in the Country with 24.4 million clients and 15.1 thousand points of service in 3.1 thousand cities and 22 countries and it serves every segment of the financial market. Throughout its 198 years of existence, the first bank to operate in the Country has collected stories of pioneer actions and leadership." Banco do Brasil, History, http://www.bb.com.br/portalbb/page1,136,3527,0,0,2,8.bb?codigoNoticia=3266&codigoMenu=3317 (last visited Mar. 11, 2009).
170. Caixa Econômica Federal, Presentation, http://www1.caixa.gov.br/idiomas/ingles/index.asp (last visited Mar. 11, 2009). Its website also points out that "[t]hrough all these functions, CAIXA has repassed [sic] over R$ 115 billion to the economy in 2005, an amount which represents around 6% of the GDP. By acting in the sectors of housing, basic sanitation, infrastructure and services, CAIXA plays a primordial role in the promotion of urban development and social justice in the country, contributing to improve the population's quality of life, particularly the lower income ones." *Id.*
171. *See generally* Brazilian Ministry Press Release, *supra* note 167.

is to be executed for a twenty-five-year period and will cost approximately R$ 800,000,000, with R$ 300,000,000 to be directed to the data center's building. According to the estimates by Banco do Brasil and Caixa Econômica Federal, there will be savings amounting to R$ 30,000,000 as a result of the consortium.[172]

On February 23, 2007, the consortium published Procurement No. 2007/001[173] regarding public hearing 2008/001.[174] Like the invitation for bids regarding Procurement No. 2007/001,[175] the goal of the sealed bidding procedure is to create a PPP under Federal Law No. 11,079/2004[176] between the consortium (public partner) and the bidder (private partner), who will be awarded the contract on the basis of the least judgment value (*i.e.*, the lowest counterpayment to be paid).[177]

The PPP contracts to be established are to be executed over a twenty-five-year period and the private partner's obligation is to provide services related to maintenance, management, and operation of the data center complex building infrastructure, to be constructed on land provided by Banco do Brasil, located in Brasília.[178] The data center complex is to be maintained under the performance requirements set forth under the PPP contracts, with personnel in charge of IT infrastructure for the public partner, according to a co-location type.[179] The facilities must provide room for Banco do Brasil and Caixa Econômica Federal separately and also provide for intercommunication within their mainframes located in Brasília.[180]

The contract will authorize the private partner to build additional areas to provide services related to IT to be outsourced to third parties.[181] These services must be established under the private partner's own risk.[182] In case these services are provided, the counterpayment provided from the public partner will be reduced by ten percent for the preceding month.[183] The private partner will have a five-year grace period before providing the public partner with

172. *Id.*
173. *See* Brazilian Ministry of Planning, Budget and Management, Projetos—Projeto Datacenter [Projects—Data Center Project], http://www.planejamento.gov.br/hotsites/ppp/conteudo/Projetos/data_center.htm (last visited Mar. 11, 2009) (author's translation).
174. Banco do Brasil, Resumo da Licitação [Procurement Synopsis], http://www.bb.com.br/portalbb/page22,8899,8899,0,0,1,6.bb?codigoNoticia=6927 (last visited Mar. 11, 2009) (author's translation).
175. Procurement No. 2007/001, Consórcio Datacenter [Data Center Consortium] 1 (on file with author) (author's translation).
176. Lei No. 11.079, de 30 de dezembro de 2004, D.O.U. 31.12.2004 (Brazil).
177. Procurement No. 2007/001.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id*. The permissible services are "hot-site, datacenter, co-location, hosting, cage, BPO, BTO, [and] outsourcing." *Id.*
182. *Id.*
183. *Id.*

a reduction.[184] There are many other details regarding the amortization of the investments that the private partner may make, if the outsource occurs.[185] At the end of the contracts' execution, all of the facilities and the improvements must be reverted to the public partner.[186] This model has been recognized as a BOOT model, which is defined as a model "used to involve the private sector in large-scale infrastructure investments . . . where the private sector is granted a concession from the state to build, finance, own and operate a facility and after the time specified in the concession period is obliged to hand it back to the state."[187]

One of the most important aspects of this project is the one related to the special-purpose company to be established by the winning bidder. The special-purpose company must be established under specific conditions: it must be established under a corporate model, preferably as a closed capital entity whose securities may be negotiated in the open market but may not be converted into shares, according to the public partner's previous authorization.[188] In the event that the winning bidder is a consortium, its bylaws must be preserved under the special-purpose company's articles of incorporation[189] and its articles of incorporation must establish restrictions regarding securities transfer to third parties, which are to occur only after the public partner's express authorization.[190] The company also must be established under corporate governance standards[191] and its minimum capital requirement must be two percent of the incurred cost of the contract.[192] Finally, it must follow accountancy principles from corporations that are held as open market entities.[193]

184. *Id.*
185. *Id*. at 20–24.
186. *Id*. at 1.
187. International Project Finance Association, About Project Finance, http://www.ipfa.org/about_pf.shtml (last visited Mar. 11, 2009). There are many different variations regarding acronyms in this context, as the article points out:

> The acronym BOT stands for "build, own and transfer" or "build, operate and transfer" (these terms are often used interchangeably). The "owning" is an essential element since the main attraction to host governments is that the promoter's equity stake underwrites its commitment to a project's success. Other variants include BOOT (build, own, operate and transfer) and BOO (build, own, operate). In BOO projects the promoter finances, designs, constructs, and operates a facility over a given period but it does not revert to the government as it would using the BOOT strategy. Further extensions of the concept are BRT or BLT (build, rent/lease and transfer) or simply BT (build and transfer immediately, but possibly subject to instalment [sic] payments of the purchase price). Another approach, BTO (build, transfer and operate), has become increasingly popular in the Far East and is particularly preferred by power and telecommunications authorities. It is a simpler transaction or concept than BOT and BOOT that can be implemented in a shorter time without the need for the formation of a project company and with the project assets being owned by the public sector.

Id.
188. Procurement No. 2007/001, Consórcio Datacenter [Data Center Consortium] 48–49.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id*. at 49.

The project's sealed bidding procedure has encountered administrative challenges, some of which are still under analysis.[194] The most current information available can be found on the Banco do Brasil website.[195]

IV. INNOVATIVE GOVERNMENT CONTRACTING

SiS contracting and PPPs are mechanisms whose purpose is to achieve the best value in public procurement. The former has not been successful due to lack of political commitment to implement it, whereas there are important constraints on outsourcing programs when one considers the U.S. federal acquisition system. On the other hand, PPPs have evolved in a parallel fashion in Brazil with a different outcome. This implies a basic proposition in the development of these instruments: their structure is entirely dependent upon the revenues and collaterals that countries actually own, which basically determines whether to outsource or not.

Therefore, to analyze the question of whether SiS contracting and PPPs are capable of challenging traditional public procurement processes, it is necessary to investigate some of their most controversial aspects, such as their risk allocation, their financing and fiscal accountability, and their collateral political impacts. Analyses regarding community participation in their decision making and the importance of sound baselines in the processes are also part of the response.

A. *Risk Allocation*

In SiS contracting, risk allocation is a very relevant issue as it brings about the framework for deciding whether to contract out or not. Buck and Drabkin have argued that "there is no empirical evidence to support the contention that a[n] SiS contract presents a *significant* risk to the government."[196]

194. Projeto DataCenter, PPP Datacenter 2008/2001: Duvidas/Sugestoes/Respostas, *available at* http://www.bb.com.br/docs/pub/siteEsp/dilog/dwn/Duvidas2.pdf.

195. Banco do Brasil, Resumo da Licitação [Procurement Synopsis], http://www.bb.com.br/portalbb/page22,8899,8899,0,0,1,6.bb?codigoNoticia=6927 (last visited Mar. 11, 2009) (author's translation).

196. Buck & Drabkin, *supra* note 37, at 19. They reached this conclusion by asserting that

> in most cases the risk to the government is minimal since the contractor is paid primarily from any savings that accrue. In fact, the primary risk to government is limited to those situations where the government chooses to either prematurely terminate the contract before the contractor has recovered its investment or where Congress chooses not to appropriate monies to cover the government's "potential" termination liability. Such cases increase risk because the government is required to terminate or cancel the contract and negotiate a settlement with the contractor. However, if the government does not terminate prematurely, there is no risk since no "new" monies will have to be paid to the contractor. All payments will come from the savings pool.

Id.

Likewise, Wendell C. Lawther and Lawrence L. Martin advise on the relationship between governments and contractors specifically in contracts for IT-based systems where there is usually "a high degree of risk,"[197] by pointing out that "[t]he ideal partnership between governments and IT contractors is characterized by a relationship built on trust, confidence that implementation problems will be fixed, and an ongoing dialogue."[198]

Risk allocation also has been considered a relevant issue in PPP implementation worldwide. In the United Kingdom, risk assessment and its subsequent allocation are key to the PPP concept.[199] Moreover, in the European Union, risk allocation is strictly connected with financial accounting of PPPs because it "benefits national governments as the assets involved in a public-private partnership should be classified as non-government assets."[200] In Brazil, it has been established under Federal Law No. 11,079/2004[201] that in PPP contracts there must be objective risk allocation between the partners.[202] Therefore, this law brought about a new technique to Brazil: "an intermediary solution, which allows the partners to decide about risk allocation according to the specificity of the actual contract."[203]

B. *Financing and Fiscal Responsibility*

The core issue in deciding whether to outsource or not has been mostly related to the actual necessity of having third parties' revenues to contemplate the Government's goals or to count on the Government's own revenues. This question raises specific issues regarding fiscal accountability that have implications on the public administration budget and the availability of appropriations considering intrinsic differences between developed and developing countries. The economic stability inherent in developed countries is the reason why mechanisms such as SiS contracting faded away, due to a lack of understanding of how difficult it is not to have financial means to

197. Wendell C. Lawther & Lawrence L. Martin, *Public Procurement Partnerships, in* Challenges in Public Procurement: An International Perspective 156 (Khi V. Thai et al. eds., PrAcademics Press, 2005).

198. *Id*. at 157. The authors also explain that "[c]ontinual exchange of ideas and information as well as collaborative efforts are the hallmarks of successfully implementing complex information technology-based projects." *Id.*

199. *See* World Bank & Public-Private Infrastructure Advisory Facility, *supra* note 84, at 49.

200. Bovis, *supra* note 81, at 119. Bovis points out that nongovernment assets are "recorded off balance sheet for public accountancy purposes, subject to two conditions: i) that the private partner bears the construction risk, and ii) that the private partner bears at least one of either availability or demand risk." *Id.*

201. Lei No. 11.079, de 30 de dezembro de 2004, D.O.U. 31.12.2004 (Brazil).

202. *Id*. art. 4, VI; *see also id*. art. 5, III.

203. Marcos Barbosa Pinto, *Repartição de Riscos nas Parcerias Público-Privadas* [*Risk Allocation in Public-Private Partnerships*], 25 Revista do BNDES 155, 157 (2006) (Brazil), *available at* http://www.bndes.gov.br/conhecimento/revista/rev2506.pdf.

accomplish the Government's goals. The argument that "[n]o private sector company can finance capital purchases for less money than the federal government"[204] is a valid argument when one considers a developed country scenario.

On the other hand, a developing country scenario provides the private sector with a wider range of possibilities concerning financial approaches, which shifts the burden to the public sector that has to include various guarantees on its ruling, so that there can be reasons related to profitability for the private sector to contract. It is extremely relevant to keep in mind, though, that crises occur everywhere and developing countries are accustomed to facing economic crises throughout their history. It is equally important not to underestimate recent facts related to the U.S. fiscal future[205] and Brazil rising to the top of the emerging markets list,[206] which denote subtle modifications in deficiencies originated in idiosyncrasies concerning labeling countries on development grounds.

Technically, SiS contracting brought about more doubts than certainties, and that is one of the reasons why it failed. Matthew Weigelt stressed that at a congressional hearing in 2003, Angela Styles testified that "OMB opposed expanding the E-Government Act's authority for share-in-savings contracting. That authority allowed agencies to end contracts without fully paying the termination costs . . . . 'Agencies should account fully for the government's obligations when they enter into contracts.'"[207] These concerns were increased because "[m]uch of the lending to government contractors takes the form of lines of credit secured by the assignment of the contractors' accounts receivable."[208] The Assignment of Claims Act[209] "permits contractors to assign the right to payment to 'financing institutions.'"[210] To explain the origin of the Assignment of Claims Act,[211] Schooner and Schooner emphasize that "[t]wo statutes address assignments by the federal government: The Anti-Claims Act and the Anti-Assignment Act."[212]

204. Styles, *supra* note 10, at 14.

205. *See* Brookings Inst., Taking Back Our Fiscal Future 2 (Apr. 2008), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2008/04_fiscal_future/04_fiscal_future.pdf.

206. *See, e.g.*, Heide B. Malohtra, *Brazil Tops Emerging Markets List*, Epoch Times, Mar. 13, 2008, at A1.

207. Weigelt, *supra* note 73.

208. Heidi M. Schooner & Steven L. Schooner, *Look Before You Lend: A Lender's Guide to Financing Government Contracts Pursuant to the Assignment of Claims Act*, 48 Bus. Law. 535, 535 (1993).

209. 31 U.S.C. § 3727 (2000); 41 U.S.C. § 15 (2000).

210. John Cibinic Jr., Ralph C. Nash Jr. & James F. Nagle, Administration of Government Contracts 1144 (The George Washington Univ. 4th ed. 2006) (1981).

211. 31 U.S.C. § 3727; 41 U.S.C. § 15.

212. Schooner & Schooner, *supra* note 208, at 537. The authors explain that "[t]he two statutes often are referred to collectively as the 'Anti-Assignment Acts' because their general provisions invalidate transfers of claims against the government." *Id.*; *see also* Anti-Claims Act, 31 U.S.C. § 3727; Anti-Assignment Act, 41 U.S.C. § 15.

The Assignment of Claims Act is addressed in the FAR,[213] as follows:

> Under the Assignment of Claims Act, a contractor may assign moneys due or to become due under a contract if all the following conditions are met:
>
> (a) The contract specifies payments aggregating $1,000 or more.
>
> (b) The assignment is made to a bank, trust company, or other financing institution, including any Federal lending agency.
>
> (c) The contract does not prohibit the assignment.
>
> (d) Unless otherwise expressly permitted in the contract, the assignment—
>
> (1) Covers all unpaid amounts payable under the contract;
>
> (2) Is made only to one party, except that any assignment may be made to one party as agent or trustee for two or more parties participating in the financing of the contract; and
>
> (3) Is not subject to further assignment.
>
> (e) The assignee sends a written notice of assignment together with a true copy of the assignment instrument to the—
>
> (1) Contracting officer or the agency head;
>
> (2) Surety on any bond applicable to the contract; and
>
> (3) Disbursing officer designated in the contract to make payment.

The Anti-Claims Act[214] and the Anti-Assignment Act[215] "prohibit contractors from assigning contracts."[216] SiS contracting has been considered to provide low returns on investments[217] and the determination referred to under the aforementioned acts reinforces this consideration. The dispersion of debt is constrained by the Anti-Assignment request.

The contractors' permission to assign the right to payment to financing institutions is also implemented under Federal Law No. 11,079/2004 in Brazil.[218] The idea provided by SiS contracting has been developed under Procurement No. 2007/001,[219] which refers to PPPs as administrative concessions in Brazil.[220] In the United States, however, there seems to be "a long standing policy against recognizing the transfer of claims against the federal government."[221] Nonetheless, there is a special mechanism regarding PPPs that can be very well established if one considers reviving SiS contracting.

213. FAR 32.802.
214. 31 U.S.C. § 3727.
215. 41 U.S.C. § 15.
216. Nash, Schooner & O'Brien, *supra* note 3, at 42.
217. Share-in-Savings Initiative, *supra* note 70.
218. Lei No. 11.079, de 30 de dezembro de 2004, D.O.U. 31.12.2004, art. 5, ¶ 2, II (Brazil).
219. Procurement No. 2007/001, Consórcio Datacenter [Data Center Consortium].
220. *See supra* note 181; *see also* Weigelt, *supra* note 73. Referencing Professor Steven Kelman's comments, the author points out that "[s]hare-in-savings contracting was the 'ultimate in pay-for-performance contracting' . . . . If the vendors did not save the agency money, they didn't get paid." *Id.*; *see also* Steven Kelman, *Remaking Federal Procurement*, 31 Pub. Cont. L.J. 581, 606 (2002).
221. Kirk Cypel, *Federal Assignment-Backed Securities (FAst-BackS): Financing Federal Accounts Receivable Through Securitization*, 27 Loy. L.A. L. Rev. 1195, 1212–13 (1994). The author explains

The private finance initiative, which was first envisioned in the United Kingdom,[222] is defined as "a form of public private partnership (PPP) that marries a public procurement programme, where the public sector purchases capital items from the private sector, to an extension of contracting-out, where public services are contracted from the private sector."[223] In a private finance initiative environment and in SiS contracting, "the greatest risk for the financing entity is related to the phase prior to the actual services' delivery. At this moment, there are no operational assets, only liabilities."[224] There is a special type of feature in a private finance initiative, where the contractor and its financing entity "choose a financial institution (as a *trustee*) to charge and receive payments from the services' delivery."[225] It is essentially the same mechanism provided by the Assignment of Claims Act.[226] The main difference is that a special-purpose company can be created in order to administer the private finance initiative. In this case, the financing burden is considered an off-balance liability, as there is a substitution regarding the actual guarantees and future receivables from the public sector to the special-purpose company.[227]

By applying this model to SiS contracting, future savings will be incentivized because the more money that is saved, the less liability there will be and the less these types of contracts will cost the Government. The special-purpose companies' assets are then liberalized to be used in new projects. In cases where the U.S. Congress decides not to appropriate money, which leads the Government to terminate the contract for convenience, the financing entities' legitimacy to receive indemnity can be agreed upon.

The PPP model in Brazil provides for a similar agreement, which is established under Federal Law No. 11,079/2004.[228] The fiscal accountability regarding these procedures is monitored through performance reports,

that "[t]his policy is designed to protect the government from secret assignment arrangements, to prevent possible multiple claims, and to block parties from accumulating claims which would enable them to exert undue influence over government." *Id.*

222. *See generally* Grahame Allen, Econ. Policy & Statistics Section, House of Commons Library, The Private Finance Initiative (PFI) (Dec. 18, 2001), http://www.parliament.uk/commons/lib/research/rp2001/rp01-117.pdf.

223. *Id.* at 10. The author notes its characteristics, by pointing out that

> PFI differs from privatisation in that the public sector retains a substantial role in PFI projects, either as the main purchaser of services or as an essential enabler of the project. It differs from contracting out in that the private sector provides the capital asset as well as the services. The PFI differs from other PPPs in that the private sector contractor also arranges finance for the project.

Id.

224. Maurício Portugal Ribeiro & Lucas Navarro Prado, *Comentários à Lei de PPP-Parceria Público-Privada, Fundamentos Econômico-Jurídicos* [*Comments on the PPP Law—Public-Private Partnership, Juridical and Economic Fundaments*] 162 (Malheiros ed. 2007) (author's translation).

225. *Id.*

226. 31 U.S.C. § 3727 (2000); 41 U.S.C. § 15 (2000).

227. *See generally* Ribeiro & Prado, *supra* note 224, at 162.

228. Lei No. 11.079, de 30 de dezembro de 2004, D.O.U. 31.12.2004, art. 5, ¶ 2, III (Brazil).

which must be submitted to the Brazilian Congress and to the Brazilian Audit Tribunal by the specialized government unit in charge of federal PPPs.[229] The fiscal accountability concerning SiS contracting is achieved through OMB Circular No. A-11, Exhibit 300.[230] To minimize the impact related to unexpected appropriations and to fulfill fiscal accountability thoroughly, it is possible to deem the investment strictly under the private sphere and therefore, off the public sector balance, according to the risk allocation agreed upon.[231]

C. *Collateral Political Impacts*

To the extent that in the DoD "[f]ederal employees won 90% of all competitions conducted under the regulations in Office of Management and Budget Circular A-76 in FY-2004 and FY-2003,"[232] the issue related to biased competition and its collateral political impact is consequently raised for the following reasons:

> Competitions are expensive in terms of money, disruption, and mistaken contracting. In some cases, work is contracted out without allowing government workers to compete, often for ideological reasons. The concern is that, otherwise, the government should win every competition because it has a natural advantage in providing a lower-cost service since it need not make a profit, pays no taxes, and has a lower cost of borrowing.[233]

On the other hand, the Government is in charge of collecting taxes and this duty plays a very important role in the way its decisions affect taxpayers, who are actually the ones who benefit from the services provided. Therefore, "[t]he more pertinent question becomes how the political system defines the tax base to secure certain social outcomes, and how it determines what each individual or business must transfer to the public sector."[234]

This issue has a much greater impact in so-called developing countries in the PPP context. The risk that political mismanagement will delay or even terminate payments related to a PPP contract because a new party was elected and this specific party disagrees with its implementation is a very worrisome problem. This risk may be mitigated by the establishment of specific-purpose funds and appropriations being directed to the contract by law.[235]

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229. *See supra* note 164 and accompanying text.

230. *See* OMB Circular No. A-11, *supra* note 54; *see also* Buck & Drabkin, *supra* note 37, at 20.

231. *See generally* Ribeiro & Prado, *supra* note 224, at 32.

232. Ellen Dannin, *Red Tape or Accountability: Privatization, Public-ization, and Public Values*, 15 Cornell J.L. & Pub. Pol'y 111, 113 (2005).

233. *Id*. at 114; *see also* Janna J. Hansen, *Limits of Competition: Accountability in Government Contracting*, 112 Yale L.J. 2465, 2478–79 (2003).

234. Mary L. Heen, *Congress, Public Values, and the Financing of Private Choice*, 65 Ohio St. L.J. 853, 893 (2004).

235. *See generally* Ribeiro & Prado, *supra* note 224, at 210.

D. *Community Participation and Sound Baselines*

In a recent article about the current reform program of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Procurement,[236] there are details on the recommendations related to community participation in procurement. The article points out that "[i]t has been suggested that the most efficient way to implement a project may sometimes be through the participation of users (known as community participation). Those users have an incentive to ensure good quality in the performance of work affecting them directly."[237]

Pursuant to a PPP contract in Brazil, the specific-purpose company that has to be created by the winning bidder may have its shares negotiated through the capital market.[238] This possibility increases the spectrum concerning community participation. This participation is also open to government employees as long as their participation does not impair the public interest inherent to these projects.[239] The specific-purpose company approach under PPPs provides the opportunity for federal employees to become shareholders and, therefore, money can be invested instead of being spent.

Under OMB Circular A-76,[240] a most efficient organization (MEO)[241] can be created. Daniel I. Gordon explains that an MEO is "typically a slimmed-down version of the workforce currently performing the work, and that MEO is compared to the best offer received from the private sector to see whether the work should be retained in-house or contracted out."[242] In SiS contracting, Gordon points out that "[a]gencies, challenged by the perceived complexities of the A-76 process, are hiring consulting firms to help them—to help the federal employees put together their MEO staffing proposal . . . ."[243] When one considers the cost of the aforementioned practice, there seems to be no doubt that contracting out directly represents less cost to the Government.

The Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the U.S. Congress[244] established sound baselines to improve implementation of performance-based acquisition (PBA) in the Federal Government.[245] In a nutshell, there are seven steps to be implemented

236. Caroline Nicholas, *The UNCITRAL Model Law on Procurement—The Current Reform Programme*, 15 Pub. Procurement L. Rev. NA161–66 (2006).
237. *Id*. at NA165.
238. Lei No. 11.079, de 30 de dezembro de 2004, D.O.U. 31.12.2004, art. 9, ¶ 2 (Brazil).
239. *Id.*
240. *See* OMB Circular No. A-76, *supra* note 58.
241. *Id*. at B-7.
242. Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, 35 Pub. Cont. L.J. 25, 33 (2005).
243. *Id*. at 36.
244. Acquisition Advisory Panel, Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress (Jan. 2007), *available at* http://www.acquisition.gov/comp/aap/24102_GSA.pdf.
245. *Id*. at 167–215.

in order to achieve this goal: "1. Designate COPR and Form the Team";[246] "2. Assess Baseline Performance and Desired Outcomes";[247] "3. Examine Private Sector and Public Sector Solutions";[248] "4. Select Transformational or Transactional PBA Model";[249] "5. Focus on Key Performance Indicators";[250] "6. Select the Right Contractor";[251] and "7. Manage, Monitor, and Improve Performance."[252] Those steps, if applied correctly in SiS contracting, could assist both the public and private sectors with effective implementation of PBA.

E. *Overall Comparison*

By comparing the SiS contracting process with the PPP process, one is able to identify key issues that should be analyzed in both scenarios.

In the United States, the Office of Management and Budget (OMB) provides agencies with guidance towards fiscal accountability through its Circular A-11,[253] which should be applied in cases of SiS contracting. One of its most interesting characteristics is that "[a]lthough [it] provide[s] for substantial regulation of the budget preparation process, the guidelines offer a fair degree of latitude."[254] This characteristic could be applied in the PPP process related to Federal Law No. 11,079/2004.[255] That law states that the National

246. *Id*. at 203. According to the report:

> The modification of this step is meant to create the position of and place responsibility on the Contracting Officer Performance Representative ("COPR") to assist the Contracting Officer in coordinating program and technical input for performance management throughout the life cycle of the acquisition, as well as take responsibility for performance management.

Id.

247. *Id*. According to the report, "[t]he modification of this step is meant to reinforce the practice of selecting outcome measures and assessing the existing baseline at the beginning of an acquisition—all with an eye toward improving the performance need/requirements definition." *Id.*

248. *Id*. According to the report, "[t]his step remains the same, with the results of market research conducted included in the 'Baseline Performance Case' to ensure the agency has its finger on the pulse of market innovation in a particular service area." *Id.*

249. *Id*. at 204. According to the report, "[t]his step reflects the two categories of PBSA suggested by the Panel—as part of an effort to move beyond a one-size-fits-all use of PBA and provide clarification on when to use an SOO versus PWS." *Id*. PBSA stands for "performance-based service acquisition." *Id*. at 169 n.1 (emphasis omitted). SOO stands for "statement of objectives." *Id*. at 175. PWS stands for "performance work statements." *Id.*

250. *Id*. at 204. According to the report, "[t]his refinement reflects the Panel's desire to limit the number of performance measures included in a PBA contract to a 'sampling' or representative index of measures." *Id.*

251. *Id*. According to the report, "[t]his step remains the same." *Id.*

252. *Id*. According to the report, "[t]his step would be modified to include the establishment of milestones for the vendor to prepare 'Performance Improvement Plans' as well as the agency's review and use of those plans to monitor and improve performance." *Id.*

253. OMB Circular No. A-76, *supra* note 54.

254. Cheryl D. Block, *Congress and Accounting Scandals: Is the Pot Calling the Kettle Black*? 82 Neb. L. Rev. 365, 391 (2003). The author provides an example: "[A]gencies are warned that the OMB may centrally calculate outyear policy estimates for long-term consequences of proposed programs, but offers agencies the opportunity to identify and justify deviations." *Id*. (emphasis omitted).

255. Lei No. 11.079, de 30 de dezembro de 2004, D.O.U. 31.12.2004 (Brazil).

Treasury Secretariat shall issue, according to the related legislation, general rules to address public fiscal accountability applied to PPP contracts.[256] The Brazilian Treasury would certainly fulfill this goal more effectively if a model such as the one presented by Circular A-11[257] were applied.

Lack of competition is another problem that undermined the SiS contracting process because "SiS proponents have suggested authorizing at least some of SiS contracting on a non-competitive bases [sic]."[258] This would represent a great impact over loss of fiscal control. The decision to use BPAs[259] in SiS contracting limits competition because "[a]ll vendors should have the opportunity to compete for a BPA to ensure the best value to the government, instead of having the contracting officer select one vendor for a multi-million dollar long-term BPA."[260] Moreover, by imposing a time limit for SiS contracting, its statute provides grounds for low or no competition.[261] In contrast, the decision to use stringent invitations for bids in PPP contracting enhances competition because it becomes "an impediment for those who are not technically qualified to impose anti-competitive prices."[262]

The issues that arise from collateral political effects in SiS contracting related to the OMB Circular A-76[263] have not resulted in significant modifications to the Government's decisions towards contracting out according to federal spending data.[264] These data reflect the fact that "[t]he government has no choice but to employ contractors in large numbers . . . because it doesn't have enough employees to keep the promises that Congress makes to the public."[265] The PPP process has been used due to "shortage of public revenue to be applied in structural projects in essential areas [such] as highways, railways, harbors, wastewater treatment, prisons, health care, housing and public equipment in general."[266]

256. *Id*. art. 25.

257. OMB Circular No. A-11, *supra* note 54.

258. Tiefer, *supra* note 59.

259. Nash, Schooner & O'Brien, *supra* note 3, at 664.

260. Dana J. Chase, *Competitive Quotes on FSS Buys: Hold the Pickle, Hold the Mayo—Can You Have It Your Way and Still Have Competition*? 184 Mil. L. Rev. 129, 148 (2005); *see also* Robert Mahealani M. Seto, *Basic Ordering Agreements: The Catch-22 Chameleon of Government Contract Law*, 55 SMU L. Rev. 427, 447–48 (2002).

261. 41 U.S.C. § 266a(d) (2000).

262. Egon Bockmann Moreira, *A Experiência das Licitações para Obras de Infra-estrutura e a Nova Lei de Parcerias Público-Privadas* [*The Procurement Experience on Infrastructure Construction and the New Law on Public-Private Partnerships*], *in* Parcerias Público-Privadas [Public-Private Partnerships] 134 (Malheiros ed. 2005) (author's translation).

263. *See* OMB Circular No. A-76, *supra* note 58.

264. *See* USASpending.gov, Contracts and Other Spending in Billions of Dollars, http://www.usaspending.gov/ (last visited Feb. 3, 2009).

265. Florence Olsen, *Contractors Are Here to Stay*, Fed. Computer Week, Apr. 11, 2008, *available at* http://fcw.com/Articles/2008/04/11/Contractors-are-here-to-stay.aspx.

266. Vera Monteiro, *Legislação de Parceria Público-Privada no Brasil—Aspectos Fiscais desse Novo Modelo de Contratação* [*Legislation on Public-Private Partnership in Brazil—Fiscal Aspects Related to This New Contracting Model*], *in* Parcerias Público-Privadas [Public Private-Partnerships] 80 (Malheiros ed. 2005) (author's translation).

State government initiatives have developed both SiS contracting and PPPs. Namely, Buck and Drabkin explain that "as experienced by the Commonwealths of Virginia and Massachusetts, SiS contracting provides a substantial incentive for the contractor to deliver a quality solution in the shortest possible time . . . ."[267] Moreover, the PPP process has been applied in the Florida Department of Transportation.[268]

In Brazil, before the enactment of Federal Law No. 11,079/2004,[269] many states had already enacted state laws regarding PPPs.[270] The states' initiatives functioned as incentives for the Federal Government to enact a federal law on PPPs.

V. CONCLUSION

To enhance the current stage of development of public procurement law worldwide it is important not to underestimate efforts towards the creation of mechanisms that are usually complex on one hand, but on the other hand are able to provide countries with the best value for public procurement processes, as opposed to more traditional processes that are commonly and easily applied.

In the United States, the evolution of the SiS contracting mechanism did not have a successful outcome, despite good examples regarding energy savings performance contracts and the IT project accomplished by the Department of Education. By considering its implementation in federal IT purchases in general, the efforts were outweighed by uncertainties regarding financing costs that could be higher than using public funds for financing. The accomplishment of PPPs in Brazil faced many legislative discussions on how risks could be allocated and on its budgetary impact over the years, as PPPs are usually conducted as long-term contracts. These mechanisms involve overall assessments on benchmarks that are not always easily recognized in the short term because they will reflect the Government's liabilities in the long term. Securitization and its consequent amortization on the Government's savings are ingenious instruments to achieve the best value in this scenario.

267. Buck & Drabkin, *supra* note 37, at 19.

268. Fla. Dep't of Transp., Project Finance Office, Public-Private Partnerships, http://www.dot.state.fl.us/financialplanning/finance/private_transportation_facilities.shtm (last visited Feb. 11, 2009); *see also* Fed. Highway Admin., U.S. Dep't of Transp., State PPP Enabling Statutes—Analysis for State of Fla., http://www.fhwa.dot.gov/PPP/tools_state_legis_florida.htm (last visited Mar. 11, 2009).

269. Lei No. 11.079, de 30 de dezembro de 2004, D.O.U. 31.12.2004 (Brazil).

270. Luiz Tarcísio Teixeira Ferreira, Parcerias Público-Privadas: Aspectos Constitucionais [Public-Private Partnerships: Constitutional Aspects] 27 (Fórum ed. 2006) (author's translation). *See generally* Brazilian Ministry of Planning, Budget and Management, Parcerias Público-Privadas: Experiências Estaduais—Legislação Estadual [Public-Private Partnerships: State Experiences—State Legislation], http://www.planejamento.gov.br/hotsites/ppp/conteudo/Experiencias_Estaduais_Municipais/index.htm (last visited Mar. 11, 2009).

However, the decision-making process cannot be tainted by controversial interests, which are sometimes connected with collateral political impacts that could undermine the whole process. Also, community participation should always be more effective in this decision-making process, not only through hearings and comments, but mainly by holding economic interests in investments done through the capital market. By applying these attitudes, sound baselines are achieved under a framework based on trust and integrity.

These attitudes also lead to a rationalized environment that is able to "produce a legislative and regulatory template for procurement procedures which are fundamentally sound."[271]

271. Christopher R. Yukins & Steven L. Schooner, *Incrementalism: Eroding the Impediments to a Global Public Procurement Market*, 38 Geo. J. Int'l L. 529, 565 (2007).