LEGAL CERTAINTY

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National Confederation of Industry
Brazil
CNI. THE STRENGTH OF THE BRAZILIAN INDUSTRY

LEGAL CERTAINTY AND GOVERNANCE OF INFRASTRUCTURE

- *The infrastructure sector faces legal uncertainty caused by weak standards, excessive control and political interference in strategic infrastructure projects.*

- *In Brazil, poorly designed projects, coupled with the almost complete ineffectiveness of internal control agencies, cause investment in infrastructure to present numerous problems. This situation often leads to stalled projects, either on the initiative of control agencies or because managers fear the responsibility of proceeding with the projects.*

- *It is required to monitored projects in the planning phase, to minimize sanctions and interruptions in its development, strengthen internal control agencies and reduce the cost and time required for settling disputes.*

The quality of governance, of legal certainty and of sectoral regulation is essential for unlocking infrastructure investments in Brazil. Low quality not only raises the risk of investing due to poor regulation but also increases project costs and implementation time, thus reducing the return and attractiveness of investments.

Brazil has a poorly structured governance model, with inconsistent institutionality due to the lack of resources in government agencies responsible for selecting, structuring and implementing infrastructure projects. Inadequately designed projects coupled with an almost complete ineffectiveness of internal control agencies cause infrastructure investments to present a series of challenges.

External control agencies, which have more resources, autonomy and legal certainty than the managing entities, have identified many of these problems. This has led to a not very constructive relationship between managers and controllers bodies within the govenment, since the problems are recurring and addressed only on an ex-post basis.

The challenges stem in part from the fact that sanctions are imposed on an individual basis, while the difficulties are systemic and affect management agencies as a whole. Therefore, there is a mismatch between sanctions and desired incentives, which helps explain the recurrence of problems.

This situation often leads to paralyzes, either on the initiative of control agencies or because managers fear the responsibility of proceeding with the works.

There is a perception of increasing legal uncertainty on the part of the stakeholders involved, in particular because controllers are constrained by excessive legalism - which sometimes conflicts with general public interest - and have failed to provide a stable and uniform interpretation of standards.

To address the issue, new regulations have been passed, especially Law 13,655/2018, which is intended to ensure more legal certainty for managers and companies.

MAIN PROBLEMS FOUND IN AUDITS CONDUCTEC BY THE COMPTROLLER GENERAL'S OFFICE (CGU)

Problem	Incidence (%)
Delays or failures in processing by local government	47%
Delays in execution	46%
Low quality of works	31%
Non-compliance with procurement laws	30%
Overbilling, overpricing or payments for unaccomplished services	22%
Execution interrupted during auditing	20%
Discrepancy between works and object contracted	17%
Partial execution	16%
Deficiency in basic project design	10%
Delays in release of resources by Federal Government	9%
Delays or errors in procedural protocol by Federal government	8%
Conflicts/obstacles with regulatory or judicial institutions	8%
Inadequate work plan	6%
Execution not started	5%
Deficient monitoring by Federal Government	4%
Amendment for value increase	4%
Delays or errors in procedural protocol by State Government	1%

Source: CGU - Relatórios do Programa de Fiscalização a Partir de Sorteios Públicos – 2015 Edition. (2015, apud WORLD BANK. De volta ao planejamento: como preencher a lacuna de infraestrutura no Brasil em tempos de austeridade, 2017).

Main recommedations

1 The measures provided for in Law 13,655/2018 should be implemented and **PLS (Senate Bill) 441/2017 providing for the interruption of public works should be passed.**

2 The **macro and micro-planning** of the infrastructure sector should be strengthened. In this regard, creating a **National Infrastructure Unit** should be considered.

3 Agencies responsible for structuring and executing infrastructure projects should be equipped and **strengthened**, including by promoting greater coordination and exchange of information among them.

4 Internal control agencies should become operational.

5 Arbitration should be used for settling disputes in large projects as one of the ways to increase the speed and efficiency of contract resolution.

6 Applied studies on governance and legal certainty should be conducted for large infrastructure projects in Brazil, notably as regards the performance of external control agencies.

7 The Public Procurement Law should be modernized to enable procuring better projects, studies and external consultants.

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