
**SCHOOL OF BUSINESS AND PUBLIC MANAGEMENT**
**IBI - INSTITUTE OF LATIN AMERICAN BUSINESS AND PUBLIC MANAGEMENT ISSUES**
**Washington - DC**

# GOVERNMENT EMPOWERMENT IN PPP DECISION

**Kiyoshi Nakamai**

**Prof. Nicholas Vonortas - Advisor**

## ACKNOWLEDGEMENTS

*For Edna, Luiz Fellipe and Kamilla for all the love and support*

*To Astrogildo, Armando, Josias and Barra for all the friendship during my career*

**TABLE OF CONTENTS**

**ABSTRACT**

As a rule enforced for some time, expansion of state enterprises in the Brazilian electricity sector are made through auctions in the modality of Public-Private Partnerships (PPP), a process that requires long-term coexistence between the various participants, each one with different interests which, many times, are divergent, especially when it comes to government and private companies. This paper aims to portray this situation considering the standpoint of the government and to provide solutions that allow a balance in the management of the partnership.

Key Words: Public-Private Partnership (PPP), conflicts, corporate governance.

## 1. INTRODUCTION

The purpose of this paper is to present an analysis of the Public-Private Partnership in the infrastructure energy sector from the point of view of the government-owned company and to propose ways to reach a balance of power between partners while still being able to manage it. To achieve this objective, we will primarily consider our experience in Eletrobrás-Eletronorte Company. The Public-Private Partnership (PPP) is a contractual agreement between public agencies and a private sector entity. By this agreement, each partner shares its resources and the risks of the operation in order to deliver a service or facility to public consumers. This procedure is adopted in many countries to provide the economic development needed through the flexibility and agility in business management and through the obtainment of resources in the financial market. This is an effective tool to make infrastructure projects viable, but a deeper analysis reveals a problem: by law, the State Owned Enterprise (SOE) must be a minor shareholder in the PPPs and so, the greatest decision power will inevitably belong to the private partner. Also, this joint partner often has conflicting interests requiring special attention.

At this point, we should make it clear that this work does not intend to examine the question of the PPP policy implemented by the Government in the energy sector, nor to suggest changes in its legislation, but rather to find a way to participate in a partnership that enables the State Companies to develop a more active management in pursuit of better outcomes for the project by establishing rules and criteria for coexistence to mitigate conflicts and provide the best solutions to the participants. For this, the author will propose the use of the tools of corporate governance and complementary actions to strengthen their position.

## 2. PUBLIC PRIVATE PARTNERSHIPS

Nowadays, there is no way not to consider the State as a provider. The old way of viewing the citizens as simple people is not viable anymore: now, they are taxpayers. And, by its intrinsic nature and needing to give back what subjects invest, the Government has to deliver welfare and this means, infrastructure and services development. But, many times, the State does not have the resources nor the agility necessary to implement these projects. On the other hand, the market guides the private sector, so, it needs to be quick in order to be competitive. Also, it usually has more facilities to obtain funds and is always seeking greater profit. In this scenario, a clever solution has emerged called Public-Private Partnerships.

Although it may look like a new legal concept, the Public-Private Partnership originated, at least, during the Roman Empire, where road tax collection was made by private entities [1]. But the current model is relatively new. It was conceived in England in the early 1990s, in order to circumvent the scarcity of State resources and aim to resume the investments in the sectors of basic infrastructure [2]. Since then, many definitions of PPP have emerged.

One of them, according to Klijn defines PPPs as ‘‘cooperation(s) between public and private actors with a durable character in which actors develop mutual products and/or services and in which risk, costs, and benefits are shared” [3]. But there are other definitions that can be used. For instance, the HM Treasury characterize this process as “an arrangement between two or more entities that enables them to work cooperatively towards shared or compatible objectives and in which there is some degree of shared authority and responsibility, joint investment of resources, shared risk taking, and mutual benefit”[4]. The most inquisitive have already noticed that some concepts/keywords are present in both of the definitions above: cooperation and services, meaning that whatever the interpretation chosen, it will always denote two entities working toward delivering a common service or facility.

As seen above, this cooperation must bring benefits to the partners. When it comes to Public-Private Partnership, it should be taken into consideration that the

essence of its formation is a mutual benefit provided by them from the initial phase of the project [5]. What is common to all successful partnerships is the recognition and sincere belief that cooperation can bring great dividends for both parties [6]. These definitions, combined with the difficulty in maintaining the State investments are the main arguments for adopting this mode of operation.

## 3. PUBLIC PRIVATE PARTNERSHIPS IN BRAZIL, IN THE ENERGY SECTOR

In Brazil, the State Companies must fulfill some objectives instituted by law: they have a social role, benefiting the society while being a fully operating business enterprise, presenting good results in the financial report and following the same rules applicable to their private counterparts. Because of its social side, sometimes State Companies make investments with low return. This differs from the private sector where there is a bigger flexibility and agility, away from the ties that bind and submit the State Companies to many regulation agencies. Thus, the participation of the government as a minor shareholder features the PPP as a private society, giving it the flexibility and agility needed in the acquisition of goods and services within the required time for the execution of the project. Besides, the PPPs allow the SOE to obtain resources through the private partner and to provide the necessary guarantees for financial institutes, since, on occasion, the State Companies were prohibited to perform this operation. All these features have made this process widespread in the Brazilian electricity sector.

Historically, the development process of the Brazilian economy was linked to the State's capacity to support investment in infrastructure and, until 1990, all the electricity needs were supplied by government companies in all segments: generation, transmission and distribution. These strategic segments required huge investments that were possible only with the Federal Government participation. But the scarcity of public resources has made it unviable for the country to expand the electrical system as necessary in order to attend to future demand. The Federal Government began to have difficulties to finance its companies in doing important infrastructure projects forecasted in long term strategic plans. The duration of the problem has resulted in an insufficient cash flow. Loans and financing available were not enough to give the necessary capacity to increase production. Obtaining external financial resources became more difficult and, besides those problems, the SOEs have had several rules to follow, which

did not allow flexibility to do business like private companies, due to law restrictions and public control entities like Brazilian Energy Regulatory Agency (Agência Nacional de Energia Elétrica – ANEEL).

If the Federal Govern wants to develop the economy, it must guarantee the energy supply. Investments in capacity of production and transmission lines can be necessary to attend the demand increase over time. There were no conditions to make them only with Government resources.

Then, in 1990, the Brazilian Government began an intensive reform in the energy sector by enforcing new rules and laws regarding energy and privatization programs for generation and transmission, allowing private companies to participate in energy projects, ensuring a competitive environment to decrease the final price for consumers. According to Castro & Leite, [7] "reforms in the industry structure in the 1980s and 90s reduced quite substantially the State's participation as a direct stakeholder in production and financing. The main goal was to enhance social welfare and introduce competition in generation segment". The new rule introduced the competition in market through an auction – low price of energy or low revenue of transmission line. Private and government companies could be contenders or could implement a partnership. Either way, reasonable prices should be offered to consumers. This is the main target of ANEEL (Brazilian Energy Regulatory Agency). The competition demanded the State companies to review their production costs and to implement the cost reduction policy. In this new age, they have to plan their work like a private company.

Regarding Eletrobrás-Eletronorte, for some time it has presented losses on their balance sheets due to high investments, hindering its participation in future projects of energy with partnerships. Moreover some of the investments with private partnership had low profitability. These are reflections of previous auctions with high levels of competitiveness due to the aggressiveness of foreign companies, mainly from Spain, supported by high incentives from their government.

With the worsening of the economic and the financial situation of their subsidiaries, Eletrobras took the initiative to improve corporate governance policy that allowed an effective management in the group as a whole, establishing operational goals and demanding results, such as operating efficiency targets for each of its subsidiaries and establishing a minimum return policy for new investment among others.

The Public-Private Partnership was established by the 11079 Federal Law on December, 30, 2004 [8], aiming to solve the shortage of government resources to support projects of national infrastructure and to provide a greater economic efficiency to the state by attracting private capital from entrepreneurs, builders, contractors and others, for the execution of public works and services through concession. This law established the general rules for bidding and contracting public-private partnerships within the public administration.

### 3.1. THE PUBLIC-PRIVATE PARTNERSHIP CREATION LAW 11.079

It is important to remember that the 11.079/2004 Law mandates the creation of the society as a public company and precludes the public administration to have the majority of the voting capital, not allowing it to be responsible for management.

According to this law, the following guidelines must be followed for hiring Public-Private Partnership:

I - Efficiency in the fulfillment of the State missions and in the placement or society's resources;

II – Respect to the interests and rights of the services' recipients and of the private entities responsible for their implementation;

III – Non-delegation of the regulatory function, the judging function, the exercise of police power and other exclusive activities of the State;

IV - Fiscal responsibility in the implementation of partnerships;

V - Transparency of procedures and decisions;

VI - Objective sharing of risks between the parties;

VII - Financial sustainability and socioeconomic benefits of partnership projects.

The Act sets out the obligations of each participant in the partnership highlighting the need for transparency in the proceedings and decisions.

In addition, the partnership contracts should include:

I - The term of the contract, consistent with the amortization of investments made, in not less than 5 (five) and no more than 35 (thirty five) years, including a possible extension;
II - The penalties applicable to the government and to the private partner in case of breach of the contract, always fixed in a proportional rate depending on the seriousness of the misconduct and on the contractual obligations;
III - The sharing of the risks between the parties, including those related to fortuitous events, force majeure and an unpredictable economic fact;

IV - The ways of paying and updating contract values;
V - The mechanisms for preserving the novelty of the services;

VI - The facts that characterizes the absence of payment of the public partner, the modes and the deadline for regularization and, when needed, how to retrieve the guarantee;

VII - The objective criteria for assessing the performance of the private partner;

VIII - The provision by the private partner of sufficient and compatible safeguards adequate to the onus and risk of the operation, between legal limits;

IX - The sharing with the public administration of the economic gains of the private partner gained from reduced credit risk of the funding used by the private partner;

X - The inspection of reversible goods. The public partner may retain the payments to the private partner, in the necessary value to repair the irregularity that should be detected.

### 3.2. SPECIAL PURPOSE COMPANY (SPC)

According to this law, before the conclusion of the partnership, it should be established as Special Purpose Company (SPC), which purpose is to plan and manage its subject, making the business management between public and private entities possible. According to Féres [9], "one can conceptualize the SPC as one company organized under one of corporate types described in existing law, trying to achieve the creation of an entity, with assistance of public and private sectors, to celebrate a partnership contract, which is awarded after bidding "

The SPC is widely used for structuring businesses, mainly in the energy sector, in order to participate in the process of auctions for concessions of power and, in this case, is governed by the Brazilian Corporations Law. Their formation takes place through the conclusion of an agreement or bylaw, which shall contain the legal and management clauses to reach the purpose it was proposed. Among its members it may have representatives from the private businesses and the government, being forbidden to the last to hold the majority of the voting capital. The joint stock of the SPCs can be paid in currency or with goods or rights from the participants. On establishment, it acquires its own legal personality and must answer for the rights and obligations of the work concession, if it was obtained through competitive bidding. If the public and private entities wish to obtain energy concessions, they need to form partnerships through SPCs, considering all legal and statutory formalities, and then participate in the

auction process. The whole process of the partnership constitution has a specific and limited purpose, that is, ANEEL makes the auction for the concession and monitors it and the SPC must maintain its own accounting and periodically give information about it.

According to the 11.079/2004 Law:

a) The Special Purpose Company (SPC) transfer of control shall be subject to the express authorization of the Public Administration, according to the contract, and legislation;
b) The Special Purpose Company (SPC) may take the form of limited companies with securities admitted on the market;
c) The Special Purpose Company (SPC) must follow standards of corporate governance and adopt standardized accounting and financial statements, in accordance with regulation;
d) It is forbidden to the government holding the majority of the voting shares of the companies mentioned in this chapter;
e) This prohibition does not apply to an eventual acquisition of the majority of the voting stock of the Special Purpose Company (SPC) by a financial institution controlled by the government in the event of defaulting in financing agreements.

## 4. PUBLIC VERSUS PRIVATE COMPANIES

There are great difficulties in formatting the PPP; problem lie in the nature of the participants. The State owned and private companies have their own unique and distinctive characteristics and objectives. The privately held company aims to profit and its revenue is derived from sales to the market, whereas, the public company profit comes from energy distribution's company sales and large aluminum company sales (Eletrobrás-Eletronorte). In PPP, various groups are involved, each with particular interests and pressure power. In general, while the private company's goals are primarily the search of economic results, the public company objectives are basically to provide the necessary infrastructure to attend the Govern program of investment to grow the GDP and, of course, to achieve social purposes.

Kwak et al. [10] said that reasonable financial incentives and a stable revenue stream are critical to attract private investments, and also added that a private entity, with the goal of making profits, will only participate in a PPP project that can provide a reasonable rate of return. For projects that have great economic and social value, but are not financially viable, the government may need to provide necessary supports and guarantees to make them financially viable. The Brazilian Government has guaranteed access to funding for infrastructure works through the National Bank of Social and Economic Development (BNDES) and other regional development banks.

In some cases private companies are less interested in participating as shareholders. They prefer to sell services such as EPC - Engineering, Procurement and Construction, a form of contracting arrangement within the construction industry. Under an EPC contract, the contractor must do everything: design the installation, procure the necessary materials and construct it, either through his own labor or by subcontracting part of the work (this is the most common way). The contractor carries the project risk for schedule as well as budget in return for a fixed price. Moreover all infrastructure projects in the energy sector are long-term, requiring from 20 to 30 years of useful life. Private companies expect short-term returns, unless the project has good future

prospects, such as some projects in the Eletrobrás-Eletronorte portfolio. These problems may occur for any reason, after the formation of the partnership the private company sorts out the project. In this case, it can be sold to other shareholders that are interested in it. This is complying with the agreement previously signed.

## 4.1. CONFLICTS

Omobowale et al. [11] say that conflict of interests have been studied in many areas including politics, health and business, but very little material can be found regarding these conflicts within the PPPs. Thompson [12] defines conflict of interest as a set of conditions in which professional judgments concerning a primary interest tends to be unduly influenced by a secondary interest (such as financial gain). This conflict, if not properly resolved, may bring serious consequences, including leading the company to bankruptcy, as it has occurred in some large corporations in recent years, where executives were acting on their own benefit, and, therefore, with bad faith, leaving a huge liability to investors. Private investment seeks the return on invested capital and the security that a SOE brings, while the public enterprise seeks to preserve the rights of public users and an adequate service, coupled with a financial result that grants capital for investments in new projects.

Teamwork, as in PPP, is involved, and it is almost certain that conflicts will emerge due to the fact that they are comprised of different people possessing different perceptions, personalities, and behaviors. These barriers must be overcome to allow the growth and continuation towards the common goals of the group [13].

The PPPs are project-based organizations. And so, they are unique, goal-oriented systems where technical, procedural, organizational, and human elements are integrated, consequently, being intrinsically complex in their nature [14]. All the actors on the stage must be synchronized. It is a system in which one's failure can compromise the whole goal. It is an interdependent relationship.

But the participants may not distinguish it this way. Apart from the difference in behavior, background, values and attitude, people from different organizations, also, perceive the same information differently. Also, research on alliances from different corporations has found that alliance members have unique organizational identities and different corporate loyalties. And so, these individuals and their companies may have different reasons for entering an alliance and even these motives can change [15].

Diversity in the PPP is inevitable. One particular research conducted by Ruuska and Teigland [16] collected impressive data. They evaluated conflicts in a Swedish PPP that involved 16 organizations from the private sector, academia and government. After interviewing the participants, they reached interesting conclusions:

1. The objectives diverged immensely. The government, obviously, wanted the welfare of its citizens by implementing an internet portal involved in building houses;
2. A private organization was merely interested in acquiring knowledge and technical competence in order to offer to private consumers “tested and tried” solutions;
3. The academia was only interested in conducting research in order to publish leading edge findings.

The most impressive finding was that even in the same sector, the objectives were different. For instance, the local government objectives differed from the national government ones. The authors proposed communication-based ways to solve these problems.

In the same line, Robinson [17] proposed a simplified equation for cost-benefit analysis to establish the balance between partners. He also states that there must be perfect consensus between the parties involved regarding what each sees as a cost-effective, and also, in a partnership that intends to be long term, there should be full transparency regarding the results because of the risk of potential conflict that may culminate in disruption of business. However, even he admits that there are problems arising from different interests that each participant has with the project, as common in

all the partnership projects. He also said that PPP projects require a specific organization structure, so that the conflict of interest can be managed and that the structure should focus on the constraints when PPP projects are organized and managed.

As seen above, conflict of interests is almost inevitable. With a great diversity of interests, disagreement will arise. And as a major shareholder, the private partner will always have the upper hand in resolving the conflict, as it seems fit.

## 4.2 CONFLICT OF INTERESTS IN BRAZILIAN PPPs

As mentioned in the beginning of this chapter, usually large parts of private partners are, at the same time, shareholders and vendors of services or equipment. In large projects in Brazil, many entrepreneurs and investors participate as contractors and suppliers of works or services. That is, they gain as suppliers during the construction phase and benefit from dividends in the operational phase. This kind of participation might bring some trouble for partnerships. Usually the private companies have more interest in obtaining short-term returns. They do not have much attraction to participate in long-term SPC, whose partnership requires from 20 to 30 years, but they have an interest in building works and selling goods and services during the construction period, which is usually 2 to 5 years maximum. After this period they can sell their share to other participants or even sell it to other companies.

On the other hand, there are private companies that are willing to remain in the partnership when they have attractive returns or to increase market share in the energy area, especially the foreign energy companies. Some of them are also interested in acquiring shares of the other SPE already in operation.

Among other actions to find the solution about the questions posed above, it is necessary to go through the process of corporate governance as done by Eletrobrás in its subsidiaries.

## 5. CORPORATE GOVERNANCE

In Brazil, some time ago, companies had a high concentration of capital, managed under family management. Minor shareholders and boards of directors were not the protagonists. However, the growth of competition from international companies and the necessity for expansion in order to survive showed that the familiar management model was outdated, requiring a professional management and opening their capital to search for resources in the market, therefore, distributing the control. This search stimulated a better management, more adequate to the practices of the market, in order to make them more attractive to investors.

This phenomenon was accelerated by the deregulation of the economy resulting in a more competitive environment, opening the way to more active institutional investors and increasing the need for efficiency and transparency in management.

Corporate governance arose from the need to protect shareholders from abuses committed by members of the executive board of the company and the failures of the board of directors. A modern definition calls it “the framework of rules and practices by which a board of directors ensures accountability, fairness, and transparency in the firm's relationship with its stakeholders (financiers, customers, management, employees, government, and the community). This framework consists of (1) explicit and implicit contracts between the firm and the stakeholders for distribution of responsibilities, rights, and rewards, (2) procedures for reconciling the sometimes conflicting interests of stakeholders in accordance with their duties, privileges, and roles, and (3) procedures for proper supervision, control, and information-flows to serve as a system of checks-and-balances”[18]. The Brazilian Institute of Corporate Governance affirms that corporate governance had as its purpose to overcome the "agency conflicts" arising from the separation of ownership (shareholders) and corporate management (executive) [19]. The manager's interests are not always aligned

with the owner is, resulting in an agency conflict. To try to ensure that the decisions of executives are aligned with the interests of shareholders, corporate governance should create a set of supervising mechanisms to ensure that the behavior of the executives is always aligned with the interests of shareholders.

Good corporate governance practices provide strategic management to shareholders ensuring transparency in the management accountability, responsibility in the conduction of business and equity between company and shareholders. It requires the company to seek greater balance between major and minor shareholders. The purpose is to seek balance between the parties. Shareholders and stock investors should have free access to company information. The greater the transparency and quality of information, the bigger the chance of attracting new capital to run their businesses. Therefore, it is an extremely important tool to improve the company's market value.

To ensure control over the management of the property the following tools were conceived: board of directors, fiscal council and independent auditing.

In addition, the Ministry of Planning, concerned with the management of state companies, has created a special "code of conduct" for representatives of the Federal Government acting on the boards of the same [20]. This manual aims to unify the understanding of the government's powers and duties, conflicts of interest, payment and best practices. This type of action brings more credibility to the market, especially for the Eletrobrás system, which acts in the capital markets in Brazil and abroad. It is a practice of Corporate Governance to establish a level of understanding in search of a positive outcome for participating in partnerships.

## 6. DEVELOPMENT OF A POLICY OF STATE PARTICIPATION IN PPP

Concerned about the economic and financial situation of some existing partnerships and considering the need to expand their businesses, the companies of the Eletrobrás group need to improve their management and to implement a policy of state participation in the partnerships, trying to find a way to provide a better management in SPCs and a minimum acceptable return within long-lasting projects. One way is to use Corporate Governance, which Eletrobras has been using in its subsidiaries, with some changes in the procedures for participation in the partnerships, creating specific rules for a good and effective management.

### 6.1. CORPORATE GOVERNANCE IN SPC

All SPCs should be the focused on the result, making permanent monitoring in the phases of implementation and operation. Within the principle of corporate governance to create an efficient set of mechanisms for monitoring management in order to meet the interests of shareholders and, at the same time, to establish a strategic management, state enterprises should develop criteria for establishing a partnership. Moreover, the fact that the SOE enters as a minor shareholder, often leaves them in an unfavorable position, which cannot be a hindrance to good management at SPC.

One of the difficulties currently faced by State enterprises regarding forming partnerships is the absence of a prior definition of the configuration. They should prepare all the essential conditions to characterize them in the Shareholders Agreements and Laws. The success of an enterprise depends mainly on its design and its implementation. Reijniers [21] said that the causes of the problems of PPPs often arise when the projects are organized and managed. Furthermore, the results of the Project should be measurable and they can be monitored every time. The progress should be

monitored during the implementation period and continued in the operation time until the end of the concession.

Many papers on corporate governance talk about the management of companies that were already formed during the operation phase. But, it is in their constitution phase that the participants must be careful to establish rules that will guide the company and protect them from adversity, providing a secure management in a process that requires long-term coexistence. In this kind of procedure, one must seek to protect the interests of each participant seeking common ground for agreement and acting in a clear and transparent way.

Some of Eletrobras actions can be adapted and applied in partnerships, including those in the design rules of SPCs, such as maintenance of minimum return on investment, goals of operational efficiency established through contracts and monthly monitoring, transparency in management and communication skills. Implementing them in a partnership requires very harsh and lengthy negotiations. Not only the formation of a Board or an Audit Committee, but, above all, a strong and forceful action, established in the Bylaws and in the Shareholders Agreement, because auctions revealed that negotiations between partners, as well as between suppliers of goods and services, are an exhausting and difficult process often requiring more time than that given in the auction phase. That is, a negotiation to reach an agreement requires a larger space of time because of the several variables involved. In other words, it requires a detailed planning of all phases, before and after the auction.

Eletrobrás - Eletronorte, since the beginning of the formation of the SPCs, has adopted certain corporate governance procedures, such as the appointment of an internal member to the executive board, to the Board of Directors and to the Audit Committee. The SOE's Committee that participates in the negotiation process for the formation of the SPE participates in the preparation of the Bylaws and the Shareholders Agreement, indicating representatives for both the Executive Board and the councils. Moreover, it is customary upon the formation of SPCs to create committees among the participants to

take care of specific issues in each segment, such as: Technical Committee on issues of facilities works, equipment and environment; Financial Committee and Operational Committee. After the auction, when winning a project, they participate in continuing the process to assess the actions needed to achieve the commitments of the enterprise in question.

### 6.1.1. SHAREHOLDERS AGREEMENT

It is an instrument used to regulate different interests among the members and regulate conflicts that, perchance, may occur. According to Koury Lopes [22] "its regulation is the one of civil and commercial contracts in general, despite having several reflections in the corporate field", and "In the shareholder agreement, the partners seek to regulate their individual interests in the society". Usually the interests of private partners do not coincide with those of state enterprises. They are conflicting and sometimes difficult to deal with. This document is one of the most important pieces to establish an adequate and transparent management among participants. This is, along with the bylaws, the core of the process, which negotiation is critical to the future success of the venture. SOEs need to be prepared and able to negotiate this, considering that they participate as minority shareholders. However, this does not mean it cannot participate in the management of the company in an active and decisive way. The interests of SPCs cannot overrun the ones of the State enterprises, which have their own rules and need to respect the entities of surveillance and control.

In the case of an SPC, which creation is focused on a particular concession and with a limited lifespan, its management should be restricted to it, with their own staff and a leader recruited in the market, with experience and ability to manage the team and the project as a whole. He/she would report to a committee composed of representatives of public and private companies, which can be a Board of Directors whose responsibility would be to provide strategic guidelines and to establish management assignments of its responsibility. Its management must be separate and independent to avoid pressure from a shareholder.

With independent management, SOEs, which are a minority, are able to participate in the process and should always be prepared to impose conditions that permit them to have a more determinant weight in the decision of the fate of the partnership. Claiming a greater participation in the management and in the board of directors is the minimum that can be done to reach this objective. The SOE must not allow any changes that negatively affect the results unless in exceptional cases due to inconceivable abnormalities.

### 6.1.2. BYLAWS

The bylaws are a standing rule governing the regulation of a corporation's or society's internal affairs. Thus, a given bylaw tends to match a relatively fixed set of behaviors that can be expected of an individual in a given situation and the obligations of the society. In the specific case of partnerships, we must establish a set of principles of coexistence regarding various levels of stakeholders' interests, taking into account the transparency, the permanent flow of information and a management guided by results.

A social contract should be well prepared considering the fundamental principles of corporate governance to achieve a good management of partnerships by establishing clear rules and transparency, with rights and obligations, approved by the shareholders meeting. This should also contain most of the acts of management, including technical, operational, financial and administrative issues, to avoid future problems for the society. There also must be included in this contract, the procedures for withdrawal, purchase or sale of equity shares, to set out the succession of business.

## 6.2 BUSINESS PLAN

Planning is essential to the success of the company. It means setting goals and targets for future guidelines to managers and, above all, requiring from them the achievement of the desired results. These goals must be realistic and within the strategic objectives established by the company and must be constantly monitored.

Eletrobrás demanded the elaboration of a business plan from its subsidiaries. This should contain all strategic information, analysis of economic and financial feasibility of all expansion projects, investment planning and an estimative of expenses and revenues for a period of 20 years, considering the structure of the capital and its financiability and the internal rate of return, identifying all the positive and negative aspects to assess the risks involved in the project. This plan is a most valuable strategic tool to determine the objectives and actions of the enterprise. It must always reconcile the outlined strategy with the business reality and must be constantly updated to serve as a valuable tool for the management of the company.

The Business Plan should clearly contain the actual layout to obtain financing within the period provided in the financial schedule with a cost equal to or less than the one planned in the feasibility study. Getting the resources with all the provided features on time depends on the actions of managers in implementing the process under those parameters, making the financial consultancy hired for that purpose to obtain what has been proposed as a better option. This should be a contractual obligation. This is a crucial point that many projects are facing, but, that ultimately depends on a strong and decisive action from managers so that the preset assumptions are met.

As Eletrobrás, in the formation of partnerships, it should be required a Business Plan in which the SPC is committed to comply with all the assumptions and parameters

established to participate in the auctions. This does not represent anything new, because financial institutions require it for the concession of funding.

## 7. CONCLUSION

It is common to have different interests among partners in the PPP's formation. These differences range from administrative issues to financial ones that could jeopardize the financial results expected for the project, but this is the policy adopted by the Brazilian government to continue the development of the electricity sector and all of the planned expansion in the sector will be through auctions. Nevertheless, the facts discussed in this paper result in a conclusion that, in Brazil, it is possible to make certain adjustments to improve the results. It is true that in any way that is followed in search of improvements, SOEs and private companies need to have much ability and willingness to put them into practice. These adjustments are made through the corporate governance process and additional instruments such as a business plan.

The tools of corporate governance should be widely used in the formation of partnerships. With the growth of partnerships, companies need to organize and implement the best practices of this tool as a way of effectively managing the SPCs, making the Bylaws and the Shareholders' Agreement contain clauses that balance the decision power between partners and establishing rules of coexistence throughout the partnership. Undoubtedly, the participation of State enterprises in the composition of the Management Board and Supervisory Board is of fundamental importance to have the balance of power and a good management in the SPCs. SOEs cannot waive the right to demand participation in the boards. Within the Brazilian model, they have a strong participation by being an arm of the Government, assuring safety and reliability to the project. In addition, a business plan should be required to monitor all activities and be able to manage the partnership.

SPE should have an independent administration devoted solely to the company, with competent professionals hired on the market and able to manage conflicts of interest and learn to communicate and maintain relationships and dialogue with various levels within and outside the enterprise environment with all parameters and values adopted in line with the principle of transparency.

Finally, the Government companies should actively participate to implement the premises of Corporate Governance in the SPCs and establish clear goals to be achieved by them and to meet their obligations.

## 8. BIBLIOGRAPHY


1. FORRER, John; KEE, James Edwin; NEWCOMER, Kathryn E.; BOYER, Eric. Public–Private Partnerships and the Public Accountability Question. Administration Review, May/Jun2010, Vol. 70 Issue 3, p475-484, 10p
2. In 1990 The Private Finance Initiative (PFI) was a creation of the Conservative Government in the early 1990s, but it has been embraced by Labor Party to build roads, schools, prisons and hospitals out of the tax money. Under PFI, contractors pay for the construction cost and then rent the finished project back to the public sector. This allows the Government to build this infrastructure and offers the service public without raising taxes. BBC News World Edition, 12 February 2003 "What are Public-Private Partnership?"
3. KLIJN, EH; TEISMAN, GR. Institutional and strategic barriers to public–private partnership: an analysis of Dutch cases. Public Money Manage 2003(July): 137–46.
4. HM Treasury, Partnerships for Prosperity: the Private Finance Initiative, London, 1998.
5. GRANT, Tony, Keys to Successful Public-Private Partnership – Canadian Business Review (USA), September 22,1996
6. WOODWARD, Craig, Partnership: More than a Buzzword – Economic Development Review (USA), 1994
7. CASTRO, Nivalde J; LEITE, ALS – Regulatory Challenges: Competition Defense in the Brazilian Electricity Sector. 2009 Nova Science Publishers, Inc

8. 11079 Federal Law, December 30, 2004 – Establishes General Rules for Bidding and Contracting of Public-Private Partnership
9. FERES, Marcelo Andrade – As Sociedades de Propósito Específico (SPE) No Âmbito das Parcerias Público-Privadas (PPP) Algumas Observações de Direito Comercial sobre o art. 9º. Da Lei no. 11.079/2004– Fevereiro/2005 Jus Navigandi
10. KWAK at al. Towards a Comprehensive Understanding of Public-Private Partnerships for Infrastructure Development. California Management Review, Vol SI, No 2, Winter 2009
11. OMOBOWALE, E; KUZIW, M; NAYLOR, MT, DAAR, AS; SINGER, PA. Addressing conflicts of interest in Public Private Partnerships. BMC International Health and Human Rights 2010, 10:1-8
12. THOMPSON, D. Understanding Financial Conflicts of Interest. The New England Journal of Medicine 1993, 329:573-576
13. SIKES, Brittany; GULBRO, Robert D; SHONESY, Linda. Conflict in Work Teams: Problems and Solutions. Allied Academies International Conference: Proceedings of the Academy of Organizational Culture, Communications & Conflict (AOCCC), Apr2010, Vol. 15 Issue 1, p15-19, 5p
14. FRAME, DJ. Managing projects in organizations. How to make the best use of time techniques and people. San Francisco: Jossey-Bass Publishers; 1995.
15. LERPOLD, L. Lessons in alliance integration – the case of BP-Statoil. Eur Bus Forum 2000:4.
16. RUUSKA, I; TEIGLAND, R. Ensuring project success through collective competence and creative conflict in public–private

partnerships – A case study of Bygga Villa, a Swedish triple helix e-government initiative. International Journal of Project Management 27 (2009) 323–334

17. ROBINSON, Richard D. – Major Issue in Joint Ventures Between Developed and Developing Countries, UK 1979
18. The BRAZILIAN INSTITUTE OF CORPORATE GOVERNANCE (IBGC). Research: Publications: Code of Best Practice. www.ibgc.org.br
19. The BRAZILIAN INSTITUTE OF CORPORATE GOVERNANCE (IBGC). Research: Governance homepage www.ibgc.org.br
20. Code of Conduct for Representatives of the Federal Government. Ministry of Planning and Budget. www.planejamento.gov.br
21. REIJNIERS, JJAM. Organizational of Public-Private Partnership Projects: The Timely Prevention of Pitfalls, 1994 Elsevier Science Ltd
22. LOPES KOURY, Caminha U, Shareholders' Agreement: a Tool for Organizational and Interest's Composition in Corporation

## 9. KEY DOCUMENTS SEARCHED

FEDERAL LEGISLATION

LAWS

Law. 12.204 of August 27, 2009

Amends Law 11.079 of December 30, 2004.

Law. 11.079 of December 30, 2004

Establishes general rules for bidding and contracting of public-private partnership within the public administration

ORDINANCE

Ordinance 614 of the National Treasury

Establishes general rules relating to the consolidation of public accounts for contracts for Public-Private Partnership - PPP that is the Law. 11.079, 2004

DECREES

Decrees 5.977 to December 1, 2006

Regulates the article 3 and § 1 of Law. 11.079 of December 30, 2004, which provides for the application to public-private partnerships, of article 21 of Law. 8.987 Of February 13, 1995, and of article 31 of Law. 9074 of July 7, 1995 for

submission of projects, studies, surveys or investigations, to be used in modeling, public-private partnerships within the federal public administration, and other matters

RESOLUTIONS OF THE FEDERAL STEERING COMMITTEE OF PPP

Resolution no. 2, September 19, 2005

Provides for the creation of task forces to implement projects of Public-Private Partnerships

INSTRUCTIONS OF THE COURT OF AUDIT (TCU)

Normative TCU n. 52 July 4, 2007

Provisions on control and monitoring of bidding procedures, contracting and contract implementation of Public Private Partnerships (PPP), to be exercised by the Court of Audit

2009 ELETROBRAS BOARD ANNUAL REPORT

www.eln.gov.br

2009 ELETROBRAS-ELETRONORTE BOARD ANNUAL REPORT:

www.eletrobras.com.br

ELETROBRAS STRATEGIC PLAN:

www.eletrobras.com.br

BRAZILIAN ENERGY REGULATORY AGENCY – ANEEL – Regulation issues:

www.aneel.gov.br

MINISTRY OF MINES AND ENERGY – MME

www.mme.gov.br