Public Procurement World - Brazil

| Contents |
| --- |
| To generate table of contents, right-click here and select **Update Field.** |

# 1. The Laws

## a. What is the applicable legislation?

The basis for public procurement in Brazil is set forth in Law 8,666/93 (and in Law 13,303/16 regarding state controlled companies). This Law covers both public procurement and contracts entered into with the government (administrative contracts), and is the main legal reference regarding public procurement in Brazil. Also, Law 10.520/02 provides for a specific public procurement procedure (reversal bidding) and its electronic modality is regulated by Decree 5,450/05.

In the last few years, Brazilian public procurement has undergone some changes due to the hosting of the FIFA World Cup in 2014 and the Olympic Games in 2016. Decree 7,581/11 provided for a different treatment to be given to public procurement procedures related to these events. Some changes on the legislation were introduced to encourage national industry development, namely the possibility to favour national products and services in public procurement and the possibility to require offset measures in these proceedings. These last two changes have been brought by Law 12,349/10, which amended Law 8,666/93, and by Decree 7,546/11, which regulated these issues.

Also, Law 12,598/12, published in 2012 , provides for different treatment to public procurement in the defense area.

Finally, in 2016, Law 13,303/16 ("State Controlled Companies Statue") was enacted, which provides for the legal statute of state controlled companies - public companies, mixed-capital companies and their subsidiaries. The state controlled companies have up to 24 months, starting June 30, 2016, to adapt to the determinations of the State Controlled Companies Statue, which substitutes Law 8,666/93 for them . Such deadline has been generating controversies, due to the lack of precision regarding the extension of this "adaptation" and what can be done by the companies in this timeframe.

## b. Does the legislation relate to or interact with any applicable trade agreement, such as the European Union procurement rules, WTO Government Procurement Agreement (GPA) or the procurement requirements of the North American Free Trade Agreement (“NAFTA”)?

Law 8,666/93 provides that the same benefits provided to local companies in public procurement procedures can be extended to members of the Common Market of the South (Mercosur – Argentina, Brazil, Paraguay and Uruguay).

These benefits are basically the concession of preference margins to locally manufactured products or local services that comply with Brazilian technical norms, so that when competing against foreign companies, the local company will have a margin within which its products or services may be of higher prices than the competitor's and still have the contract awarded to it. Such margins can also be extended to products or services from members of Mercosur.

## c. What are the basic underlying principles of the legal framework?

The basic principles are defined by Brazilian Constitution and the abovementioned legislation. The main principles applicable to the public sector are: legality, impersonality, morality, equality, publicity, administrative probity, binding nature of the public tender request for proposals document and objective judgment, isonomy, search for the best offer to the public entities, and promotion of national sustainable development. These principles are meant to ensure that the administration gets better "value for money".

## d. Is aerospace and defense procurement treated differently from other types of procurement?

Yes. On March 2012, Law 12,598/12 was issued setting forth new regulation for public procurement in these areas. It creates a registry of defense companies before the Ministry of Defense and concedes to these companies some benefits when participating in public procurement. When the government is procuring defense goods, it may restrict competition to companies registered and these companies will also enjoy tax benefits to perform activities related to defense.

For a company to register before the Ministry of Defense, it must comply with requirements to grant that the company is seated in Brazil, performs activities of research and development in Brazil and is effectively ruled by Brazilian partners.

Also, such law provides that administrative contracts related to defense must provide for specific clauses, such as the (i) continuity of the production of the technology offered, and (ii) technology transfer and offset rules, which will be set forth by the Ministry of Defense and/or by the request for proposal and the contract (aiming, among other objectives, the development of the national industry).

The Ministry of Defense, together with Brazilian Armed Forces, have already adopted the usage of requiring offset and technology transfer measures in its contracts by means of internal ordinances and rulings.

# 2. Application of the Statutory Procurement Laws

## a. Which public agencies are covered by the laws?

Every public agency is covered either by Law 8.666/93 or by Law 13.303/16. The first law covers all public agencies except for the state controlled companies, governed by Law 13.303/2016.

## b. Which private entities are covered by the laws?

Except for some specific hypothesis, the public procurement legislation is not applicable to private entities, please note, however that mixed-capital companies (even those who direct perform activities in the private markets) in which the state detains the majority of the voting capital is considered a state controlled company and subject to Law 13,303/16.

As mentioned above, public procurement legislation (or its principles) may end up being applicable for private parties in specific cases. As an example, public procurement principles should be observed by entities of the third sector, such as non-governmental and nonprofit organizations, when managing public resources. Also, private companies when acting as covenants of the public administration (also managing public funds) should observe public procurement principles.

## c. Are co-operations between contracting authorities exempted from public procurement law? If so, what are the conditions for the exemption?

Contracts executed between public bodies (e.g. a public company providing services or supplying goods for another public entity) are, as a rule, exempted of a public procurement procedure (according to Article 24 of Law 8,666/93) but not from public procurement law itself. This means that a public entity may directly engage other public body fin relation to certain activities.

## d. Which types of contracts are covered?

Every contract entered into with the public administration (administrative contracts).

## e. How are changes to an existing contract dealt with? Do changes require a new procurement procedure?

The Public Procurement legislation details the rules for any changes to existing public contracts.

Extensions do not necessarily require a new public procurement procedure, as long as the total term of the administrative contract is limited to the term of the respective budget of the regulated entities, except for:

Contracts for continued services can be extended up to a maximum of 60 months (5 years), after which a new public procurement procedure must be carried out to contract the company that will continue such services.

The contracts for equipment leasing and software use are limited to a maximum of 48 months.

Contracts that involve national security, the purchase of standard material for the Brazilian Armed Forces and national defense can be effective for up to 120 months.

Certain contracts (for R&D) under Innovation Law (Law 10.973/04) can also be effective for up to 120 months.

Amendments and changes of scope, do not necessarily require a new public procurement procedure as long as the scope increases or suppressions are limited to 25% of the initial contract, or up to 50%, if the contract is related to reform of a building or equipment.

## f. What is the applicable regime for framework agreements?

Law 8,666/93, regulated by Decree 7,892/13 provides that a framework agreement shall not exceed twelve months (one year), including possible extensions. The framework agreement is terminated at the earliest of its term or the provision of the totality of the object registered therein.

According to article 2 of the abovementioned Decree, the following types of public entities can use the framework agreement:

Management Entity - Entity responsible for the price registration and management of the framework agreement.

Participating Entity - Entity that participates in the initial procedures of the price registration and also integrates the framework agreement.

Non-participating entity (hitchhiking) - Entity that uses the framework agreement signed by other entities in order to procure the same object from the same provider.

In order for the Non-participating entity to "hitchhike" on the framework agreement, during its term, it is necessary to follow requirements, such as: (a) demonstration of the economic advantage of using the framework agreement instead of conducting a new public tender procedure; (b) the consent of the managing body; (c) agreement of the supplier; (d) the need to comply with quantitative limits to be contracted through the framework agreements.

Furthermore, the legislation allows multiple-suppliers - list of bidders who have agreed to the list of goods or services at prices with the same prices presented by the successful bidder, following the correspondent classification of the bid. The presentation of these new proposals will not affect the outcome of the bid classification.

The existence of registered prices does not oblige the administration to contract, making it possible the launch of a specific tender for the intended acquisition, with preference being given to the supplier registered through a framework agreement. In this sense, the supplier should respect the conditions of the request for proposal/framework agreement.

## g. What is the applicable regime for public-private partnerships (PPPs)?

On December, 2004, Law 11,079/04, was enacted, regulating Public and Private Partnerships ("PPPs").

The PPP regime for transferring the execution of public services to the private sector applies and may be used by all entities of the direct public administration, and by the special funds, governmental agencies, foundations, public companies and other entities controlled by the Federal Government, States and Municipalities.

Besides the common concession of public services, as provided in the next chapter (Concession of Public Services Law - No. 8,987/95), two other modalities of public services concession were created for PPPs: the sponsored concession ("*Concessão Patrocinada*") and the administrative concession ("*Concessão Administrativa*"). Sponsored concession is the concession of public services and public works in which the remuneration of the private partner involves, besides the tariffs paid by the users, additional remuneration provided by the public partner. Administrative concession is the service agreement in which the Public Administration is the direct or indirect user (e.g., building, operation and management of public buildings), even if it involves the execution of works or the supply and installation of goods.

Law 11,079/2004 allows (i) variable remuneration of the private party, based on the performance indexes and (ii) the payment of the private partner during the construction period anticipating the compensation of the private partner for the works. It also establishes limits for contracting Public and Private Partnerships, setting forth it may not execute contracts:

involving less than R$ 20 million;

with a final term of less than five (5) years; or

with the sole purpose of manpower supply, supply and installation of equipment, or execution of public works or construction.

The administrative contracts regulated by the PPP Law shall have terms compatible to the amortization of the investments performed by the private partner – never less than five (5) and more than thirty-five (35) years, including a possible extension. For the execution of these contracts, the creation of a Specific Purpose Company will be demanded, with the exclusive scope of implementing and managing the PPP projects.

## h. How are concessions dealt with?

Law 8,987/95 ("Concessions Law") is the specific legislation on concession matters. For purposes of the Concession Law, these definitions apply (according to its Article 2):

Public Service Concession. Delegation for the rendering of services, made by the granting authority (the relevant public entity), by means of a competitive tender process, to the legal entity or consortium of companies that demonstrates capacity for performance thereunder, on its own account, and for a definite period;

Public Service Concession Preceded by Execution of Public Work. The total or partial construction, maintenance, remodeling, extension or improvement of any works of public interest, delegated by the granting authority, by means of a competitive tender process, to the legal entity or consortium of companies that demonstrates the capacity for execution thereof, on its own account, in such a way that the investment of the concessionaire is remunerated and amortized by means of the exploration of the service or work for a definite period;

Public Service Permission. The delegation (on a temporary and revocable basis), by means of a competitive tender process, of the rendering of public service, made by the granting authority to the individual or legal entity that demonstrates the capacity for performance thereof on its own account.

Every concession of public service is subject to a public tender procedure, according to specific law and with observance of the public law principles. The award criteria may be: (a) lowest tariff value; (b) highest offer, in cases of payment to the granting authority for the grant of the concession; (c) the combination of the criteria referred to in the items "a" and "b"; (d) best technical offer, with price settled in the request for proposal; (e) the combination of lowest tariff value and best technical offer; (f) combination of highest offer for the grant of the concession and best technical offer; or (g) best payment offer for the grant after qualification of technical offer.

## i. Are there anti-avoidance rules (including laws on bid rigging)?

Yes, Law 8,666/93 itself provides those who violate its provisions are subject to administrative and criminal penalties according to the nature of the violation, which includes bid rigging. Law 8,429/92 provides for penalties to be applied to public personnel who practice improbity acts.

Also, bid rigging or other conducts that violate competition standards are subject to criminal penalties provided for in Law 8,137/90.

# 3. Procurement Procedures

## a. What procurement procedures can be followed?

Article 22 of Law 8,666/93 provides for three main public procurement procedures that can be followed: public tender, price survey, and invitation to participate in a tender (Law 13,303 does not provide for the invitation to participate in a tender).

The public tender is open to whoever wants to participate, provided it can present all qualifying documents required in the bid call document before the bidding procedure is begun. In the price survey, the bidding proceedings occur with competitors previously registered, which exempts the qualifying stage prior to the biddings since it already occurred at the time of the register. Finally, the invitation to tender is the procedure where the public administration invites companies to participate in the competition.

Law 10,520/02 provides for a different procedure that is usually used for acquiring common goods and services, where performance and quality may be objectively defined in the request for proposal according to market standards.

## b. What status do electronic means/procedures have?

Law 10,520/02, sets forth the Reverse Auction ("*Pregão*") in its electronic modality. Its main characteristic is an inversion of the bidding procedure stages: the biddings occur prior to the analysis of the qualification documents, which will be analyzed only for the company that submitted the best bid.

Law 13,303/16, applicable to state controlled companies, determine that the Reverse Auction must be conducted in the electronic modality.

## c. Where are contract notices, i.e. calls for bid, published?

Generally public tenders and contract notices are published in the Official Gazette of the Union or States or it can also be published in the public bodies websites. The rules are:

Publication in the Official Gazette of the Federal Government, when it is a tender made by an entity of the Federal Public Administration, and also, in case of works partially or totally financed with federal resources or guaranteed by federal institutions;

Publish in the Official Gazette of the State, or of the Federal District, when the tender is conducted by an entity of the State, Federal District or Municipal Public Administration;

Publish in a daily newspaper of great circulation in the State and also, if there is one, in a newspaper of circulation in the Municipality or in the region where the work will be carried out or the goods provided to; According to the size of the tender, other means can be used to disseminate the information in order to broaden the area of competition.

## c. Can certain prospective bidders be excluded from the competition?

Prospective bidders can be excluded if they do not present the documentation required by the request for proposal or do not follow its rules. High regard is given to the mandatory nature of the requirements in the bid call document. Therefore, most non-compliances, even if small or of no practical consequence, can be a reason for disqualifying the subject company.

Another possibility for exclusion of prospective bidders falls under the penalty of prohibition to contract with the public administration (debarment). Such sanction is applied in cases of corruption or illegal acts committed against the public administration and can reach a maximum duration of o 10 years in certain cases.

# 4. Bidder Selection

## a. Are there any rules on the selection criteria?

Public Procurement legislation expressly forbids public agents from allowing the public tender notice to contain any conditions that may restrict or frustrate in any way the competitive nature of the tender. Preferences or distinctions between bidders based on nationality, domicile, or other conditions irrelevant to the object of the tender are forbidden.

As a rule of thumb, public procurement rules in Brazil aim to obtain the best possible proposal to the public entities (usually meaning the most advantageous one from the economic standpoint) by an objective and fair competition between bidders.

However, Federal Law 12,349/2010 introduced a possibility of differentiated treatment between domestic and foreign companies. This legislation establishes beneficial treatment for certain products manufactured in Brazil or services provided by Brazilian companies in public tenders. Under this rule "nationally manufactured products" are the ones produced in the Brazilian territory complying with the "basic productive processes" or other regulations regarding a product's origin as defined by the Federal Administration. On the other hand, "national services" refer to any service performed in the country under the conditions determined by the Federal Administration.

The preference for national services or products can be up to 25% of the price offered by a foreign competitor. The exact percentage must be defined in the request for proposals.

## b. Is prequalification an option? If so, what are the requirements? What is the procedure?

Yes. Both Law 8,666/93 and Law 13,303/16 allows the public entity to conduct prequalification of competitors. The prequalification aims to allow the competitors to obtain the approval of their technical qualification and some of the required documents prior to the public tender procedures.

The public entity must previously allow the prequalification and will analyze the documentation presented by the potential bidder in order to determine its validity. In the cases were the prequalification is accepted, the mechanism can be specially relevant for companies that have de desire to participate in multiple tender procedures before the same public entity.

## d. Do “blacklists” for bidders exist? If so, what are the conditions for unlisting?

Yes. Companies debarred from participating in public tender procedures will be listed in a "blacklist" in the Transparency Portal called National Registry of Disreputable or Suspended Companies. Law 8,666/93 provides that, due to total or partial non-performance of the contract, the Administration may apply to the private party a temporary suspension from participation in public tenders and prohibition to hire with the Administration, for a period not exceeding 2 years. Note that, in case of sanctions applied by the Courts, due to Administrative Improbity, or sanctions applied by the Federal Accounts Court, such debarment period can be of up to 5 years. In those cases, the law does not determine any rehabilitating procedure in order to suspend the debarment decision.

It is possible, however, for a company to be subject to declaration of unsuitability to bid or enter into contracts with the Public Administration, sanction applied with the rule that rehabilitation is promoted before the same authority which imposed the penalty, which rehabilitation should be granted always when the contractor indemnifies the Administration for the resulting losses and after expiring the duration of the penalty imposed pursuant to the abovementioned.

Moreover, it is also important to stress that the legislation only states for the maximum duration of the penalties, which reserves to the Public Administration the duty to analyze each particular case in order to establish a sanction correspondent to the infraction committed, using, for that, the principles of reasonableness and proportionality.

## e. Does the involvement of a company in the set-up of a procurement procedure exclude the company from said procedure due to conflict of interest?

Yes. Both the Law 8,666/93 and Law 13,303/16 prohibits the companies involved in the set-up of public procurement procedures to participate of the same procedure.

On the other hand, in case of concessions (Law 8,987/95 and 9,074/95), public and private partnerships (Law 11,079/04) or contracts under Differentiated Contract Regime (Law 12,462/11), there may be exceptions, under which the authors or those responsible economically for the projects, surveys, investigations and studies (Basic Design) presented may be allowed to participate directly or indirectly in the public tender procedures.

Note, however, that the request for proposals and other public tender documents are always of sole responsibility of the public entity. Any participation of private parties in preparing such documents may be deemed as a violation to Public Procurement Legislation and subject such private parties to sanctions (including criminal).

## f. Can bidders combine to submit a bid (bidder consortia)? What limitations apply?

Consortia can be allowed by the public entities, which needs to be expressly determined in the request for proposals. Note that all companies that are part of a consortium will be jointly liable before the public administration for the submitted bid and for performing the contract in case of awarding.

Also, Brazilian anti-trust law (Law 12,529/11), sets forth it is an economic infraction the act of agree, combine, manipulate or adjust with competitor, in any form, prices, conditions, advantages or abstention in public biddings. Therefore, if the bid call document do not expressly permit the "consortium", any form of combinations between the bidders will be an economic infraction and can also be framed as a crime under the provisions of Law 8,666/93.

## g. Can members of a bidder consortium be changed during a procurement procedure?

At first glance, the change of the consortium members could be considered as an violation to the principle of isonomy and competitiveness. However, in exceptional cases and on a case-by-case analysis, the public administration may accept, under the execution of the competent contract amendment and as long as the new member also complies with the qualification requirements on the RFP, the alteration of the consortium members due to unforeseeable and/or new facts (not occurred before the bidding procedure).

## h. Do limitations apply for participation of related bidders in the same procurement procedure with competitive bids?

The legislation prevents no natural or legal person from being part of the corporate framework of more than one legal entity. The mere fact that companies with partners in common participate in the same procurement procedure does not allow the Administration to conclude that such action will occur in a fraudulent way or even to frustrate the bid objectives.

In case of participation of companies belonging to the same partners or the same economic group in the same public procurement, it will always be necessary to analyze the documentation provided by the companies to examine their legal and technical capacity, in order to verify their independence from each other and that no public procurement rule was violated (in special those related to equal and fair competition).

Note that, usually, when the requests for proposal allows for the participation of consortia, they determine that companies cannot bid for the same object or services under two different consortia.

# 5. Specifications

## a. Are there any rules on the specifications?

Basic and general criteria are set forth in Law 8,666/93 and Law 13,303/16 regarding documentation that must be presented in every public procurement procedure. These basic documents are, generally , related to (i) legal status (e.g., corporate documents), (ii) technical qualification – proof that the company can perform the contract's purpose adequately, (iii) economic and financial qualification – proof of the company's financial health, (iv) tax regularity – proof that the company duly complies with its fiscal obligations, and (v) declaration that the company complies with Article 7, section XXXIII of the Federal Constitution regarding employment of under-aged people.

Those basic criteria are required in every public procurement procedure. They are the criteria specified by the public administrator according to the needs of the public entity and the peculiarities of the acquisition, and always under the general principles of the Public Administration mentioned above (e.g. the technical criteria must not restrict competition more than strictly necessary to meet the administration's needs).

As a rule, in any and all public procurements the Administration has to establish in a clear and satisfactory manner the conditions of the procedure, avoiding any unnecessary information that might adversely affect the competition among the interest parties. More precisely, the Administration has to request proposals for the exact object of the procurement. All the relevant aspects of the public tender procedure must be detailed in the RFP in order to avoid doubts by interested parties.

## b. Are bidders allowed to change the specifications or submit their own standard terms of business?

No. Once the request for proposal is published, bidders can ask for qualifications from the public entity or challenge aspects of the request for proposal and the draft of contract that is presented with it. After the public tender procedure, the contract must be signed as it is defined by the request for proposal.

Note that in case of waiver of public tender, which usually happens when competition is impossible - mainly when only one company can provide the goods or services to be procured by the public entity - there is margin for direct negotiation of the contract with the public entity. That said, the law only allows for some clauses to be negotiated and traditionally public entities do not accept the negotiation of issues that are common in private contract, such as limitation of liability.

## c. Is the protection of Small and Medium Enterprises addressed in procurement legislation? If so, how?

Yes. Law 8,666/93 protects Small and Medium enterprises participants in a public tender procedure. Based in Complimentary Law 123/2006, small and medium enterprises can have preferential treatment in acquiring goods and services by the Public Authorities.

Public Administration must provide differentiated and simplified treatment to small and medium enterprises to promote economic and social development at the municipal and regional levels, the efficiency of public policies and the encouragement of technological innovation. Therefore, Public Administration:

must carry out a public bidding procedure destined exclusively for the participation of small and medium enterprises in the contracting items whose value is up to BRL 80,000.00;

may, in relation to public bidding procedure for the acquisition of works and services, require bidders to subcontract small and medium enterprises;

must establish, in tenders for acquiring goods that can be divided in batches, a quota of up to 25% (twenty-five percent) of the object for the contracting of small and medium enterprises.

# 6. Contract Award

## a. Are there any rules on the award of contracts?

According to Law 8,666/93 there are three types of rules upon which an awarding can be based: (i) the minor price, (ii) the best technique, or (iii) the minor price cumulated with the best technique.

Regarding minor price, the contract will be awarded to the company that offers the best price and complies with the minimal requirements in the bid call document. For best technique, the award will be conceded to the company that offers the best technical solution, but the price criteria is not set aside. As regard the third type, the award will be granted to the company that offers the best price with the best technical solution, based on scores given by the public administration.

Also, Law 13.303/2016, includes two additional awarding criteria, applicable to tender procedures involving state controlled companies: (i) higher discount and (ii) higher economic return.

## b. Are there any limitations regarding the offered bid price?

Yes. Law 8.666/93 establishes that proposals that do not meet the requirements of the tender notice and that the global value is higher than the limit established or with abnormally low values will be disqualified from the public bid.

## c. Are there any rules on alternative bids?

None. As mentioned before, the requirements in the request for proposal are the "law" of the public procurement procedure.

Any bid submitted in disagreement with these requirements will lead to disqualification of the submitter.

# 7. Exemptions to Competitive Bidding

## a. Are there any exemptions to competitive bidding, i.e. under what conditions is a direct award/single sourcing permissible?

Yes, Articles 24 and 25 of Law 8,666/93 and Articles 29 and 30 of Law 13,303/16 provide for cases in which competitive bidding can be exempted.

Article 24 of 8,666/93 and 29 of 13,303/16 set forth cases in which the public administration can waive public tenders. Competitive bidding may exempted only in the cases provided for in these articles, which leaves to the administrator's discretion the possibility to follow or not to follow the formal public procurement procedure. Such cases include, for example, acquisitions in small values, emergency situations, cases in which national security is at stake, and many others.

Articles 25 of 8,666/93 and 30 of 13,303/16 provide that competitive bidding may be waived when competition is impossible, such as when the supplier is the only company that can provide the goods or services to be procured. The provision sets forth some examples which are non- exhaustive (e.g., the formal public procurement procedure is waived every time that competition is impossible or every time it is impossible to fix objective criteria to classify the bidders).

Finally, it should be highlighted that using these provisions is subject to tight scrutiny by the regulator entities, such as the Courts of Accounts, since it could lead to fraud to public tenders.

## b. What are the consequences for violation of the competitive bidding requirement?

Law 8,666/93 establishes as crime any violation to the competitive nature of the bidding procedure, to obtain for itself or for others, an advantage resulting from the award of the object of the bidding, by means of adjustment, combination or any other expedient, being the penalty detention, from 2 to 4 years, and fine.

The Public Procurement Legislation (Law 8,666/93 and Law 13,303/16), also establishes that contractual breaches may result in the application of warnings, fines and other sanctions, such as the temporary suspension of the company on participating public tenders (debarment) and the unsuitability declaration for the participation of public tenders.

# 8. Remedies and Enforcement

## a. Are there any remedies and enforcement mechanisms in the procurement legislation?

It is possible to appeal to the public authorities responsible for the bidding procedure if any illegality occurs is present in the bid call document or in the conduct of the proceedings. If the appeal is not granted, it is still possible to sue to enforce the correction of the illegalities.

Almost every act of the public tender may be challenged. Article 109 of Law 8,666/93 provides for the hypothesis where the administrative appeals can be filed. Basically the interested party may challenge the habilitation/qualification of some company, the judgment/analysis of the bids, the annulation or revocation of the public tender, the dismissal of an inscription request, the termination of the contracts and applying penalties/sanctions.

## b. Are remedies available outside the scope of procurement legislation, e.g. civil law damage claims?

Yes. besides the administrative procedures, both the public and private parties may seek injunction measures on courts and claim damages.

## c. Is there a specific forum before which procurement disputes are heard?

Disputes can be heard before State or Federal Courts depending on the entity against which enforcement is sought.

As for the location of the court, it is usually provided for in the contract and normally corresponds to the location of the headquarters of the public entity with which the contract is signed.

Negotiation, mediation and arbitration are still very controversial procedures when it comes to disputes with the public sector.

## d. Are there any timing requirements for the review?

Administrative appeals against the request for proposal may be presented up to two working days before the bidding procedure is begun.

Administrative appeals against acts of the authorities conducting the bidding procedure may be presented up to five days after a decision was rendered, or 10 days after a decision that prohibits the company to contract with the public administration. Longer terms may be provided in the bid call document.

As for judicial measures, a party has 120 days beginning from performing an administrative act to file a writ of mandamus against such act. The statute of limitations to annual an administrative act through a judicial measure other than a writ of mandamus is five years.

It is worth highlighting that the timing to enforce judicial measures during public procurement procedures has much more to do with the duration of the proceeding than with the statute of limitations. This is because if the procedure is concluded, the contract signed or even terminated, judicial enforcement will be much harder, even if the term to sue has not expired.

## e. What are the main preconditions for review?

Administrative appeals must be presented in the term defined by the Law as mentioned above and must be presented to the right authority according to each case.

Judicial measures, such as Writ of Mandamus, must be presented in the term defined by the Law as mentioned above and also be based on an irrefutable right and unquestionable evidences.

## f. What are admissible grounds for starting a review proceeding?

During the public procurement procedure, a review proceeding can be started under the following conditions: (i) existence of an administrative decision on a certain stage of the procedure; (ii) filing of the request within the time limits prescribed by law; (iii) the request must be presented in written form, addressed to the authority that performed the act; (iv) the request must point the defects, misunderstandings or differences that motivated the filing of the review proceeding; (v) only the bidders have legitimacy to start a review proceeding; (vi) the bidder who intends to start a review proceeding should prove that the decision that is appealed against is prejudicial to his interest, as it violates his rights or prejudices his position within the public procurement.

Moreover, once the contract was already signed, administrative appeals, according to Law 8.666/93, must be based on one of the following grounds to be admissible: (i) Qualification or disqualification of the bidder; (ii) Judgement of proposals; (iii) Cancellation or revocation of the bid; (iv) Rejection of the application for registry, its amendment or cancellation; (v) Termination of the contract, in the cases provided by the law; (vi) Enforcement of the penalties of warning, temporary suspension or fine.

## g. Does a review proceeding affect an ongoing procurement procedure or an awarded contract respectively?

Depends on the case. In cases of qualification or disqualification of the bidder and judgment of proposals it the administrative appeal can have an injunction effect (suspension), in the other cases, it will depend on the judgment of the authority.

## h. What are the consequences of a successful review proceeding for the affected procurement procedure or awarded contract respectively?

It also depends on each case. The tender procedure can be cancelled or revoked or a bidder can be disqualified.

## i. How long does a judicial proceeding for review take?

There is not a defined term provided for in the law for deciding a judicial proceeding, however, based on our experience and on estimates, a judicial proceeding requesting the review of an act performed by a public authority, including first and second judicial instances, can last from up to 2 to 8 years.

## j. Must unsuccessful bidders be notified before the award? If so, when?

Basically depends on the modality in which the public tender is being conducted. Normally, all participating bidders are notified regarding the acts related to the Public Procurement until the end of the procedure (with the proper execution of the contract with the winner). However, in some cases (such as the electronic reversal bidding), the bidders may follow up the award proceeding through the electronic system at their will.

## k. Are review proceedings common?

Yes.

## l. Are damage claims in relation with procurement procedures common?

Yes, especially writ of mandamus filed by a participant unsatisfied with the result of the public tender.

## m. What are the leading court decisions involving procurement disputes?

Since Brazil is a civil law country, there are no unique leading decisions that set benchmarks to be followed. However, the majority of court decisions lead to the enforcement of principles provided for in the Federal Constitution or in Law 8,666/93, such as the principle of isonomy, public interest and competition. When a public procurement procedure is challenged in Brazilian courts, the tendency is to privilege these principles and allowing the participation of the biggest possible number of competitors without harming the public interest.

# 9. Other Relevant Rules of Law

## a. Are there any related bodies of law of relevance to procurement by public agencies?

As mentioned, there are several laws providing for public procurement other than Law 8,666/93. Aside from the Federal Constitution, laws provide for penalties such as Law 8,429/92 and there is the new regulation brought by Law 13,303/16 about public procurement procedures related to legal statute of public companies, mixed-capital companies and their subsidiaries.

There are internal regulations, mainly those issued by the Ministry of Defense and the Singular Forces providing for defense acquisitions and offset requirements. Of these, Ordinance 764 is the basis for defense acquisitions and ICA 360-1 and DCA 360-1 are very important rulings issued by the Brazilian Air Force that details acquisitions made by the Air Force and the proceedings involving offset requirements.

# 10. Industry sectors of special importance or with a specific procurement regime

## a. Are there any specific laws or practices that apply in the technology sector?

Yes, there are a few specific laws and practices that apply when procuring technology.

One of the most important provisions regarding procuring technology is Article 111 of Law 8,666/93 (which applies universally, regardless of the specific industry sector). It sets forth that, as a condition to the hiring, the bidders of the winning projects (i.e., those who had been chosen to contract with the government), should assign to the government the patrimonial rights of their software or computer program.

Article 24, XXV of Law 8,666/93 applies when procuring technology. It provides the exemption from bidding procedures with procurement contracting carried out by the Institute of Science and Technology ("ICT") or a funding agency for technology transfer and for licensing rights to use or exploit a protected creation.

In 2010, the Brazilian government issued Decree No. 7,174, which regulates the procurement of information technology goods and services and requires federal agencies and parastatal entities to give preferential treatment to locally produced computer products and goods or services with technology developed in Brazil. However, Brazil actually permits foreign companies with established legal entities in Brazil to compete for procurement-related contracts funded by multilateral development bank loans.

Notwithstanding the specific laws that apply when procuring technology, this area is also regulated in Brazil by: (i) the Software Act ("Law 9,609/98"), which protects software or computer programs as literary works; (ii) the Innovation Law (Law 10,973/04), the Copyright Law ("Law 9,610/98") on a subsidiary basis; and (iii) the Brazilian Civil Code ("Law 10,406/02"), as a general rule.

Finally, based on current practice when procuring technology, the Brazilian government and the public sector generally use their own draft agreements including the mandatory clauses in Article 55 of Law 8,666/93, rather than supplier's standard agreements.

## b. Are there any specific laws or practices that apply in the defense sector?

Law 12,598/12, provides for different treatment to public procurement in the defense area. This law establishes mechanisms to foster the Brazilian defense industry. Drafted by the Ministry of Defense, with the support of other government agencies, the law is an offshoot of a plan created to increase the competitiveness of the national industry, starting with incentives to technological innovation. In addition to setting up a special tax regime for the sector, exempting companies of multiple costs, the legislation reduces the production cost of companies legally classified as strategic enterprises and establishes incentives for the development of technologies considered indispensable to Brazil.

## c. Are there any specific laws or practices that apply in the health care sector?

Yes. Regarding the health care sector, there is the Law 9,961/00, which provides for the organization of the National Supplementary Health Agency ("ANS") and authorizes the agency to create its own public procurement norms. On February, 2000, ANS published its own Regulation containing its specific public procurement norms (RDC 9/00).Although Law 9,961/00 does not provide for specific rules for public procurement procedures, it must always be observed when preparing or participating in a public tender in the health care sector. Furthermore, the contracting of civil engineering works and services by ANS is also ruled by the public procurement norms provided for in the Law 8,666/93.

For works and services other than civil engineering, ANS may use its own contracting procedures, provided for in its own Regulation, in the modalities of consultation (*consulta*) and reverse auction.

## d. Are there any specific laws or practices that apply to any other particular industry sector?

First of all, it is important to stress that the Federal Public Procurement Legislation was elaborated with such detail it left little margin for the States and Municipalities to further legislate. Due to this , this article is solely based on the Federal Public Procurement Legislation.

Having this said, we have listed bellow two examples of additional rules on public procurement:

Law 9,472/97 - provides for the organization of the National Communications Agency (ANATEL) and authorizes the agency to create its own public procurement norms.

Law 9,478/97 - provides for the organization of the National Oil Agency (ANP) and authorizes the agency to create its own public procurement norms, authorizes Petrobrás (the Brazilian Oil Company) to comply with a simplified tender procedure (regulated by Decree 2,745/98).

About the abovementioned legislation, it is necessary to mention that within Brazil there are regulatory agencies, that perform according to its own federal legislation.

Such agencies were created to monitor the provision of public services by private initiative. Besides controlling the quality of service provision, they establish rules for each sector. There are ten regulatory agencies. Besides the sector mentioned above, there are also agencies related to matters such as ports, aviation, energy, etc. The regulation involves measures and actions of the Government that involve the creation of norms, the control and the inspection of market segments explored by companies, all that to assure the public interest.

# 11. Looking Ahead

## a. Are there any proposals to change the law in the future?

Yes. Law 8,666/93 is deemed by many as having antiquated provisions that do not fit current administrative needs. In this sense, there is the Bill 559/2013 was already approved by the Senate and is now under analysis by the House of Representatives. The bill, if approved, will replace and revoke Law 8,666/93. This new law, shall update the provisions and also bring changes, such as the reversal of phases in the tenders - the judgment of the proposals before the authorization - and the contracting of the insurance, which could guarantee the conclusion of a public work if difficulties occurs faced by the contracted company. The text also establishes the end of the basic and executive projects, inserting the figure of the "complete project".

Likewise, the recent legislative trends to provide for benefits in bidding procedures for local companies and for companies that perform research and development in Brazil are still developing and changing the way public procurement takes place in Brazil.

In the same manner, the Brazilian legal framework is still developing the treatment it gives to offset requirements in bidding procedures, and this is also a matter that will see new developments soon.

©Copyright © 2024 Baker & McKenzie. All rights reserved. **Ownership**: This documentation and content (Content) is a proprietary resource owned exclusively by Baker McKenzie (meaning Baker & McKenzie International and its member firms). The Content is protected under international copyright conventions. Use of this Content does not of itself create a contractual relationship, nor any attorney/client relationship, between Baker McKenzie and any person. **Non-reliance and exclusion**: All Content is for informational purposes only and may not reflect the most current legal and regulatory developments. All summaries of the laws, regulations and practice are subject to change. The Content is not offered as legal or professional advice for any specific matter. It is not intended to be a substitute for reference to (and compliance with) the detailed provisions of applicable laws, rules, regulations or forms. Legal advice should always be sought before taking any action or refraining from taking any action based on any Content. Baker McKenzie and the editors and the contributing authors do not guarantee the accuracy of the Content and expressly disclaim any and all liability to any person in respect of the consequences of anything done or permitted to be done or omitted to be done wholly or partly in reliance upon the whole or any part of the Content. The Content may contain links to external websites and external websites may link to the Content. Baker McKenzie is not responsible for the content or operation of any such external sites and disclaims all liability, howsoever occurring, in respect of the content or operation of any such external websites. **Attorney Advertising**: This Content may qualify as “Attorney Advertising” requiring notice in some jurisdictions. To the extent that this Content may qualify as Attorney Advertising, PRIOR RESULTS DO NOT GUARANTEE A SIMILAR OUTCOME. **Reproduction**: Reproduction or copying of the Content on this Site without express written authorization is strictly prohibited.