

The International Comparative Legal Guide to:

Public Procurement 2009

A practical insight to cross-border Public Procurement



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Brazil

Antonio Felix de Araujo Cintra



Claudia Elena Bonelli



TozziniFreire Advogados

1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

In Brazil, agreements entered into by Public Administration entities are, as a rule, regulated by Federal Law n. 8,666/93 (“Public Procurement Procedure Law” or “PPPL”). Said law regulates both the public procurement procedures themselves and the agreements for the acquisition of goods and services by the Public Administration. It also regulates the procedure for the sale of publicly owned goods and establishes certain crimes and administrative penalties.

In addition, there are rules regarding public procurement proceedings in Federal Law n. 8,987/95, which regulates permissions and concessions for the rendering of public services; and Federal Law n. 10,079/04, which sets forth general rules regarding private public partnerships.

1.2 How does the regime relate to supra-national regimes including the GPA and/or EC rules?

As mentioned in question 1.1, agreements entered into by the Public Administration must comply with the PPPL and all other applicable national laws. However, the rules set forth in international agreements, protocols, covenants or treaties approved by the Brazilian National Congress are also applied to the performance of works, rendering of services or acquisition of goods funded by resources from financing or donation made by international cooperation agencies or multilateral financial organizations to which Brazil is a party.

1.3 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

All acts performed by public entities must be in compliance with the principles set forth by article 37 of the Brazilian Federal Constitution, which are: legality; impersonality; morality; publicity and efficiency. Regarding the specific case of agreements, since the main purpose of public procurement procedure is to assure the compliance of the principle of equality and select the most advantageous bid made to the Public Administration, in both technical and economic aspects, article 3 of the PPPL sets forth that principles of equality, administrative probity, abidance by the bid document, objective judgment and other related principles, such as lowest-price principle,

must also be considered. These principles are of the utmost importance when interpreting the rules of the PPPL.

1.4 Are there special rules in relation to military equipment?

In Brazil, the armed forces are subjected to all rules set forth in the PPPL. However, the PPPL itself provides exceptions to the obligation of performing a public procurement procedure and, therefore, admits the direct contracting for the acquisition of goods and services in cases of: (i) war; (ii) severe public disorder; (iii) national security risks in cases established by a Presidential decree based on the opinion of the National Defence Council, which is the consultant organ of the President regarding national sovereignty and protection of legal democratic State matters; (iv) purchase or hiring of services for supplying of ships and vessels, aircraft or troops and their movement, when the fulfillment of legal formalities compromises strategic success of the operation; and (v) purchase of material when it is necessary to maintain the pattern required by the logistic support structure of naval, air and land transport.

2 Application of the Law to Entities and Contracts

2.1 Which public entities are covered by the law and is it possible to obtain a ruling on this issue?

The PPPL and other laws mentioned in question 1.1 apply to all the bodies and entities of the direct and indirect Public Administration of Federal Government, States, Federal District and Municipalities. Direct Public Administration comprises State Secretariats, Ministries and other governmental bodies without legal personality subordinated to the Executive Branch Chief. Indirect Public Administration comprises autonomous governmental agencies, regulatory agencies, public foundations, public companies and mixed-capital companies.

Even though public companies and mixed-capital companies are also subject to private legal regimes, they are directly or indirectly controlled by governmental entities (Federal Government, States, Federal District and Municipalities) and, thus, considered as public entities.

Nevertheless, article 173 of the Brazilian Federal Constitution allows public companies and mixed-capital companies that exploit economic activities to have their public procurement procedures regulated by a specific law. However, since this law is yet to be enacted by the Brazilian National Congress, said entities are still subjected to the PPPL, an exception is made for *Petróleo Brasileiro*

S.A. - *PETROBRAS*, whose public procurement procedures are regulated by Federal Decree n. 2.754/98.

Rules set forth by the PPPL are also applied to Judiciary and Legislative bodies in relation to agreements for the purchase of goods and services, which are considered agreements of an administrative nature. Furthermore, States, the Federal District and Municipalities may also enact their own laws and rules on public procurement procedure, as long as they do not conflict with or modify the content of the PPPL.

2.2 Which private entities are covered by the law and is it possible to obtain a ruling on this issue?

Private companies are only required to follow the PPPL when supplying goods or rendering services to public entities.

2.3 Which types of contracts are covered?

The PPPL regulates the execution of administrative agreements for the purchase of goods or the rendering of services to Public Administration entities, as well as agreements for the sale of publicly owned goods.

2.4 Are there threshold values for determining individual contract coverage?

There are threshold values to define the types of public procurement procedures described in the PPPL that should be followed and also the circumstances in which the procedure is dismissed, as further detailed in question 3.1 and question 4.1. Moreover, the PPPL establishes time limits for the execution of administrative agreements. As a rule, execution periods are limited to the existence of budgetary resources within the Brazilian Government's financial year (January, 1, through December, 31). The exception to this rule is the agreement for the rendering of services with ongoing execution and projects included in the Multiyear Government Plan. In the case of agreements with ongoing execution, the period shall be up to 60 months including renewals.

2.5 Are there aggregation and/or anti-avoidance rules?

Yes. There are different types of public procurement procedures described in the PPPL and Federal Law n. 10,520/02, from which the Public Administration must choose according to the contracting purpose and value, as detailed further in question 3.1. In this regard, the Public Administration must organise its agreements in order to avoid illegalities when choosing the type of public procurement procedure which can cause said procedure and the subsequent administrative agreement to be declared null and void.

2.6 Are there special rules for concession contracts?

Yes. General rules for public service concessions are set forth in article 175 of the Brazilian Federal Constitution, as well as in Federal Law n. 8,987/95, which regulates the system of public service concessions and permissions, and Federal Law n. 9,074/95 that also sets forth rules about granting concessions and permits. These general rules are regulated by supplementary laws for different sectors of infrastructure. For instance, Federal Law n. 11,445/07 establishes relevant definitions and rules regarding the basic sanitation sector (water distribution and sewage) and also provides specific rules about the concession of such services.

3 Procedures

3.1 What procedures can be followed, how do they operate and is there a free choice amongst them?

The PPPL and Federal Law n. 10,520/02 set forth the following types of public procurement procedure:

Competitive Bidding (*Concorrência*): a type of public procurement procedure to be applied when the Public Administration is procuring works and engineering services whose value exceeds R\$ 1,500,000.00 (equivalent to approximately US\$ 975,000.00) and for other services whose value exceeds R\$ 650,000.00 (equivalent to approximately US\$ 422,500.00).

Request for Quotation (*Tomada de Preços*): a type of public procurement procedure to be applied when the Public Administration is procuring works and engineering services whose value is equal to or less than R\$ 1,500,000.00 (equivalent to approximately US\$ 975,000.00) and for other services whose value is equal to or less than R\$ 650,000.00 (equivalent to approximately US\$ 422,500.00).

Invitation to Bid (*Convite*): a type of public procurement procedure to be applied when the Public Administration is procuring works and engineering services whose value is equal to or less than R\$ 150,000.00 (equivalent to approximately US\$ 97,500.00) and for other services whose value is equal to or less than R\$ 80,000.00 (equivalent to approximately US\$ 52,000.00).

Contest Bidding (*Concurso*): a type of public procurement procedure to be applied when the Public Administration is procuring technical, scientific or artistic work, upon granting a prize or remuneration to the winners.

Auction (*Leilão*): a type of public procurement procedure to be applied when the Public Administration wishes to sell useless public goods or legally seized or confiscated goods, as well as publicly owned real estate.

Live Auction (*Pregão*): a type of public procurement procedure suitable whenever the Public Administration is procuring common goods and services that can be detailed based on usual market specifications. In general, such type of public procurement procedure is not applied when the Public Administration procures works and engineering services, since they are complex services and cannot be specified through usual market definitions.

The aforementioned types of public procurement procedures and the circumstances in which they must be adopted by the Public Administration are expressly provided by law. Competitive Bidding, Request for Quotation and Invitation to Bid must be necessarily applied to agreements regarding civil works, engineering services and other complex works, and the choice between them shall be made based on the work's value. On the other hand, the choice between Contest Bidding, Auction and Live Auction results solely from the nature of the relevant object regardless of value.

The choice between different types of public procurement procedures does not lie within the Public Administration sole discretion and will vary according to the complexity and value of the agreement, which requires a case by case analysis. The more complex the object of the agreement is, the more complex is the public procurement procedure that must be used by the Public Administration.

3.2 What are the rules on specifications?

Article 40 of the PPPL sets forth that the bid document must

provide, among other requirements, complete specification of the goods to be purchased or services to be hired; basic and executive projects, including all the drawings, specifications and other supplementary information, as well as the presumed budget displayed in value plans and unitary prices. In the case of Live Auctions, Federal Law n. 10,520/02 provides that the object's definition must be exact, sufficient, clear and brief.

3.3 What are the rules on excluding tenderers?

Article 3 of the PPPL requires the Public Administration to perform a public procurement procedure before entering into agreements, in order to ensure compliance with the principle of equality and to sort the most advantageous bid. In this regard, said rule expressly prohibits the admission, inclusion or provision, in the bid document, of rules that compromise, restrain or hinder the competitive aspect of the procedure. Preference of candidates due to their nationality, head office or domicile location, as well as any other irrelevant circumstances with regard to the assets or services to be acquired, are expressly forbidden.

A principle to be observed is that of widest participation of interested parties in the procedure. The inclusion of clauses or rules, in the bid document, that restrain the participation of interested parties is only accepted when such restriction is pertinent and suitable to the object of the public procurement procedure.

3.4 What are the rules on short-listing tenderers?

According to article 27 of the PPPL, the qualification of interested parties in the procedure shall be made through documents evidencing their legal standing, technical qualification, economic and financial qualification and also fiscal regularity. In addition, documents proving that the interested parties do not employ workers younger than 18 years old in night shifts and dangerous or hazardous activities, as well as workers younger than 16 years old in any position, an exception is made for apprentices, are also required.

3.5 What are the rules on awarding the contract?

Once the public procurement procedure is performed, after the judgment of the bids, the object of the procedure shall be awarded to the winner of the competition, i.e., the candidate that presented the best bid to the Public Administration and also complied with all the qualifying requirements. The winner acquires the right to enter into an administrative agreement with the Public Administration, and any changes in the qualifying order of the bidders are expressly forbidden.

The judgment of the bids shall be straight and objective, based on criteria established in the bid document, as well as the following: lowest price; best technique; best technique and best price; or higher bid in case of Auction.

3.6 What methods are available for joint procurements?

Article 33 of the PPPL allows the Public Administration to accept the participation of interested parties united as a consortium in the public procurement procedure. It is a mere option that may be granted or not by the Public Administration, according to the complexity of the agreement's object.

3.7 What are the rules on alternative bids?

There are no other types of public procurement procedures other than those detailed in question 3.1 above. Public procurement procedure types must be created through law, and the Public Administration is expressly forbidden from adopting any type of procedure not listed in question 3.1.

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions and who determines their application?

There are two main exceptions on the constitutional obligation imposed to Public Administration entities to perform public procurement procedures before entering into agreements: (i) circumstances authorising dismissal of the procedure; and (ii) circumstances in which the procedure is not required.

The only circumstances authorising dismissal of public procurement procedures are listed in articles 17 to 24 of the PPPL, which refer to situations where a public procurement procedure would be possible, but is dismissed by law for public interest reasons.

Cases in which public procurement procedures are not required are provided by article 25 of the PPPL, and refer to the unique characteristics of the object or the procedure, as well as the exclusive nature of a supplier or the notorious expertise of a provider of services making the competition among bidders unfeasible.

4.2 How does the law apply to "in-house" arrangements, including contracts awarded within a single entity, within groups and between public bodies?

According to article 116 of the PPPL, its rules are applied whenever they are applicable to conventions, agreements, arrangements and memoranda of understandings entered into by public entities with third parties, among the three branches (Executive, Legislative and Judiciary) or among organs and public entities within the same sphere of Public Administration.

5 Remedies and Enforcement

5.1 Does the legislation provide for remedies/enforcement and if so what is the general outline of this, including as to *locus standi*?

Yes. Article 41 of the PPPL grants to bidders and third parties the right to challenge the bid document, whenever the Public Administration commits irregularities when applying the rules of the PPPL to the bid document.

Furthermore, article 109 of the PPPL entitles bidders to file an administrative appeal against administrative acts that have: (i) qualified or disqualified a bidder; (ii) judged the proposal; (iii) declared the public procurement procedure null and void; (iv) terminated the agreement by sole decision of the Public Administration; and (v) imposed the administrative penalties of warning, temporary suspension from taking part in public procurement procedures and fines. The aforementioned article also allows interested parties and contractors to file a complaint against a decision rendered by the Public Administration, when no other appeal is available besides requesting reconsideration of such

decision to State Ministry or to Municipality and State Secretaries, in cases the Public Administration declares the private party to lack good standing to enter into agreements with public entities.

The Public Administration may also revoke public procurement procedures due to public interest reasons, duly justified and resulting from major adverse events. Private parties are allowed to withdraw from the public procurement procedure, as long as they do so before the qualifying phase of the procedure.

Furthermore, during the execution of the administrative agreement, partial or complete default by the private party may cause the imposition of fines, warnings, temporary suspension from taking part in public procurement procedures (for no longer than two years), besides the statement of lack of good standing to enter into agreements with the Public Administration, until the private party's discharge. In any case, the imposition of penalties by the Public Administration shall be preceded by an administrative process, in which the legal defence of the private party is guaranteed.

Administrative sanctions can be imposed in addition to any relevant criminal responsibility, since the PPPL also establishes certain crimes that can be committed in public procurement procedures and during the execution of administrative agreements.

5.2 Can remedies/enforcement be sought in other types of proceedings or applications outside the legislation?

Yes. In addition to the specific remedies provided in the PPPL, the parties are always entitled to seek any rights they might have by resorting to the Judiciary as generally ensured by the Federal Constitution and the rules governing judicial proceedings.

5.3 Before which body or bodies can remedies/enforcement be sought?

Administrative appeals detailed in question 5.1 above shall be filed with the body or entity of the Public Administration that has performed the public procurement procedure or entered into the administrative agreement with the private party. The only exception to this rule is the reconsideration request, which shall be filed with the State Ministry or State and Municipality Secretaries, as the case may be.

In addition, interested parties and third parties may file a complaint addressed to the Courts of Accounts, which are responsible for controlling acts performed by public entities involved in public procurement procedures and administrative agreements.

5.4 What are the legal and practical timing issues raised if a party wishes to make an application for remedies/enforcement?

Regarding the challenge of bid documents, previously detailed in question 5.1 above, the deadline to third parties is 5 (five) business days before the date scheduled to the opening of proposals. However, interested parties have a term of only 3 (three) business days before the date scheduled to the opening of proposals.

Regarding administrative appeals and complaints described in question 5.1 above, the deadline is 5 (five) business days, counted as of the act notice or transcription of the minute of the session performed by the Public Procurement Procedure Committee. The deadline for the reconsideration request, also detailed in question 5.1 above, is 10 (ten) days counted as of the act notice.

The imposition of administrative sanctions may occur both during the public procurement procedure and during the execution of said

agreement. The statute of limitations for the imposition of administrative penalties is generally of 5 (five) years.

5.5 What remedies are available after contract signature?

Once the administrative agreement is executed, the Public Administration can terminate it at its sole decision or create unilateral changes to the agreement. In cases of termination derived from the Public Administration's decision, (i) the agreement's object shall be immediately assumed by the Public Administration, (ii) the site shall be occupied and the equipments, materials and employees used in the execution of the object shall return to the Public Administration and (iii) any amounts due to the private party up to the amount of Public Administration losses caused by the private party can be withheld. If the termination was not related to a default by the private party, it will have the right to be compensated from any losses it may have suffered. The private party may also seek the early termination of the agreement by mutual consent, or through a judiciary decision.

5.6 What is the likely timescale if an application for remedies/enforcement is made?

It is hard to estimate the timescale if an application for remedies/enforcement as described in question 5.5 is made. There are no time limits provided by law and the workflow of each court highly affects the timing of the process. However, there is an exception in cases of challenging the bid document, which, according to article 41 of the PPPL, must be judged within 3 (three) days counted as of the date when the appeal was filed.

5.7 Is there a culture of enforcement either by public or private bodies?

A stronger culture of enforcement has started to develop in the last 15 years following privatisation efforts and the opening of different economic sectors to private players, including foreign investments.

5.8 What are the leading examples of cases in which remedies/enforcement measures have been obtained?

There are no specific leading cases that could be appointed as the most significant in terms of remedies or enforcement, as most cases deal with particular circumstances of a given procurement procedure or administrative contract.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) or changes to contract terms post-signature? If not, what are the underlying principles governing these issues?

Yes. Article 65 of the PPPL establishes that the contractor is obligated to accept, in the same conditions set forth in the agreement, increases or decreases on the contracting made by the Public Administration, up to the limit of 25% (twenty five percent) of initial value, with monetary correction, a limit which can be raised up to 50% (fifty percent) in cases of remodeling of building or equipment.

6.2 In practice, how do purchasers and providers deal with these issues?

As a rule, suppliers and services providers formally request the Public Administration to modify the administrative agreements' conditions. If the request is accepted, the parties shall enter into an amendment in order to implement the agreement's modifications.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

Yes. The privatisation of companies directly or indirectly controlled by the Federal Government, States, Federal District and Municipalities; of public services that are subjected to concessions, permissions and authorisations; of public financial institutions and also of public assets shall be previously authorised by law. Federal Law n. 9,491/97 regulates these matters on a federal level. States, the Federal District and Municipalities enact their own laws to regulate privatisation of their holdings and assets.

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

Yes. Private Public Partnerships - PPPs were created by Federal Law n. 11,079/04. PPPs were introduced in Brazil as concession agreements of two different types: sponsored concession; and administrative concession, pursuant to article 2 of said law.

The sponsored concession is the ordinary concession of public services and public works regulated by Federal Law n. 8,987/95, in cases in which there are government subsidies plus tariffs charged for consumers. The administrative concession also has government subsidies granted by the Public Administration to the private party. However, it is more similar to administrative agreement than to a concession agreement. Its purpose is the rendering of services, but with more flexible characteristics than those included in the PPPL. In fact, PPPs in Brazil follow the ordinary types of concession agreements and service agreements with some different aspects, especially the possibility of granting governmental subsidies to the private party.

In PPP agreements, the Public Administration creates guarantees to assure the payment of the government subsidy to the private party; the agreements' value shall be at least R\$ 20,000,000.00 (equivalent to approximately US\$ 13,000,000.00); and the execution period must be at least 5 years. A PPP agreement cannot be entered into with the sole purpose of executing public works, supply of workers, or installation and supply of equipment.

8 Other Relevant Rules of Law

8.1 Are there any related bodies of law of relevance to procurement by public and other bodies?

Yes. Federal Supplemental Law n. 101/00, which regulates public finances and fiscal liability; Federal Law n. 4,320/64, which establishes rules on financial law, and also Federal Law n. 8,429/92, which determines the penalties applicable for public agents in cases of illegal enrichment and to private parties that entered into agreements with the Public Administration and cooperated to the practice of improbity acts.

9 The Future

9.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

Yes. Currently, the Bill of Law n. 32/2007, which conveys proposals to change the PPPL, is before the Federal Senate. The main proposals relate to the obligation to officially disclose all acts and facts related to the public procurement procedure in the relevant public entity's website; inversion of the phases of the public procurement procedure (the current rules of the PPPL establish that the qualifying phase shall occur before the judgment of bids) whenever it is feasible; new limits for widening or lessening the scope of administrative agreements and also increase in the State power to control and inspect the execution of agreements.

**Antonio Felix de Araujo Cintra**

TozziniFreire Advogados
Rua Borges Lagoa 1328
04038-904 São Paulo SP
Brazil

Tel: +55 11 5086 5256
Fax: +55 11 5086 5555
Email: afcindra@tozzinifreire.com.br
URL: www.tozzinifreire.com.br

Antonio Felix de Araujo Cintra is a partner in TozziniFreire Advogados' Capital Markets, Banking, Project Finance and Publicly Held Corporations practice groups. He graduated from the Law School of *Universidade de São Paulo* (USP) in 1986 and has an LL.M degree from the University of Notre Dame (London Law Centre). Admitted to the Brazilian Bar Association in 1988, he is a member of the Brazilian Institute of Finance Executives of São Paulo (IBEF), the Brazilian Association of Banks (ABBC) and the Urban Land Institute (ULI). His previous experience includes work as a foreign associate at the law firm of Cleary, Gottlieb, Steen & Hamilton in New York, USA, in 1990. He is fluent in English.

**Claudia Elena Bonelli**

TozziniFreire Advogados
Rua Borges Lagoa 1328
04038-904 São Paulo SP
Brazil

Tel: +55 11 5086 5114
Fax: +55 11 5086 5555
Email: cbonelli@tozzinifreire.com.br
URL: www.tozzinifreire.com.br

Claudia Elena Bonelli is the partner responsible for the Administrative Law practice group of TozziniFreire Advogados. She has deep knowledge of matters involving the public sector, especially procurement, administrative contracts and agreements, public service concessions, governmental authorisation, and administrative laws and rules such as the Fiscal Responsibility Act. Claudia Bonelli's vast experience comprises assistance not only to private parties but also to entities in the public sector, which has earned her recognised expertise in public-private relations. She graduated from the Law School of *Universidade Federal de Santa Catarina* (UFSC) in 1988, having also an LL.M. degree in International Law from the University of Osnabrück, Germany. Claudia Bonelli was admitted to the Brazilian Bar Association in 1999 and is fluent in German.

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