

PROVISIONAL MEASURE Nº 544, OF SEPTEMBER 29 2011

Establishes special rules for purchases, contracts of products, of defense systems, and the development of products and defense systems, and regulates the rules regarding the promotion of strategic areas for defense and makes other provisions.

THE PRESIDENT OF THE REPUBLIC, in the use of the functions given to her by article 62 of the Constitution, adopts the following provisional measure, with force of law:

CHAPTER I

PRELIMINARY PROVISIONS

Article 1. This Provisional Measure establishes special rules for purchases, contracts of products, of defense systems, and of the development of products and of defense systems, and provides for stimulus rules for the strategic area of defense.

Sole paragraph. The bodies of the direct administration, special funds, government autonomous agencies, public foundations, government-owned and privately owned companies, mixed-capital companies, government agencies and entities that manufacture defense products, and any other entities controlled directly or indirectly by the Union, by the States, the Federal District and Municipalities are subject to the special regime for purchasing, contracts of products, of defense systems, and of development of products and defense systems.

Articles 2. For the purposes of this Provisional Measure the following are considered:

I – Produto de Defesa [Defense Product] - PRODE - every good, service, work or information, including weapons, ammunition, means of transportation and communication, uniforms and materials for individual and collective use in the purpose-related defense activities, except those for administrative use;

II – Produto Estratégico de Defesa [Strategic Defense Product] - PED - every PRODE that is of strategic interest for national defense because of its technological content, the difficulty in obtaining it or its indispensability, such as:

- a) naval, land and aerospace warfare resources;
- b) specialized technical services in the areas of design, research and scientific and technological development, and
- c) equipment and specialized technical services for the intelligence area;

III - Sistema de Defesa [Defense System] - SD - interrelated and interactive set of PRODE that serves a specific purpose;

IV - Empresa Estratégica de Defesa [Strategic Defense Company] - EED - any corporate legal person accredited by the Ministry of Defense through the cumulative fulfillment of the following conditions:

a) to have as its purpose, in its bylaws, the activities of research, design, development, manufacturing, production, repair, maintenance, overhaul, conversion, modernization, or servicing of PED in the country, including sale and resale only when together with the industrial activities mentioned above;

b) to have in the country its management and industrial, or equivalent to industrial, establishment;

c) to have in Brazil proven scientific or technological knowledge of its own or, in a complementary manner, through partnership agreements with a Scientific and Technological Institution to carry out joint activities of scientific and technological research and development of technology, product or process, related to the activity performed, subject to the provisions of item VIII of the **main clause**, and

d) to assure, in its articles of incorporation or in those of its direct or indirect controlling company, that the foreign set of partners or shareholders and groups of partners or shareholders cannot exercise at each general meeting, a number of votes greater than two thirds of total votes exercised by the Brazilian shareholders in attendance at the meeting;

V - Innovation - the introduction of new aspects or improvements in the productive environment that results in new PRODE;

VI – Offset - any and all practice agreed upon by the parties as a condition for the purchase or contract of goods, services or technology, aimed to generate benefits of technological, industrial or commercial nature, as defined by the Ministry of Defense;

VII – Offset Agreement - legal instrument that formalizes the commitment and obligations of the vendor to offset purchases or contracts made;

VIII - Instituição Científica e Tecnológica [Scientific and Technological Institution] - ICT - agency or entity of the government defined according to item V of the **main clause** of article 2 of Law n. 10.973 of December 2 2004;

IX - Brazilian Partners or Shareholders:

a) Brazilian individuals, born or naturalized, residing in Brazil or abroad;

b) corporate legal persons under private law organized in accordance with Brazilian law that have their headquarters and management in the country and that do not have foreign persons as controlling shareholder, or as parent company, and that are controlled, directly or indirectly, by one or more natural persons described by subitem "a"; and

c) funds or investment clubs, organized in accordance with Brazilian law that have their headquarters and management in the country, and whose managers

or co-owners, holders of the majority of its shares, are persons that comply with the requirements under subitems "a" and "b"; and

X - Foreign Partners or Shareholders – corporate legal persons or individual persons, funds or investment clubs and any other entities not listed in item IX of the **main clause**.

Sole Paragraph. The EED will be submitted to evaluation of the conditions set forth in item IV of the **main clause** according to the procedure regulated by the Ministry of Defense.

CHAPTER II

THE PURCHASE AND THE CONTRACT OF PRODUCTS, DEFENSE SYSTEMS AND THE DEVELOPMENT OF PRODUCTS AND DEFENSE SYSTEMS

Article 3. The purchase and contract of PRODE or SD, and of its development, will comply with the provisions set forth in this Provisional Measure.

1st paragraph. The Government may start a bidding process:

I - exclusively for the participation of EED when it involves the supply or development of PED;

II - designed exclusively for the purchase or contract of PRODE or SD produced or developed in the country or that uses domestic inputs or innovation developed in the country, and, if the SD involves PED, the provisions of item I of this paragraph are applicable, and

III - to ensure to the national company producing PRODE or to the ICT, in accordance with the percentage established in the solicitation and in the contract, the transfer of the technological knowledge employed or the participation in the production chain.

2nd paragraph. The following shall be included in the solicitations and contracts related to PED or SD:

I - rules of production continuity;

II - rules relating to transfer of intellectual or industrial property rights, and

III - rules that allow the Executive Power to provide for:

a) creation or alteration of PED involving Brazil or not, and

b) acquisition of capability, by third parties, with regard to technology for PED.

3rd paragraph. The criteria for the selection of the proposals may include an evaluation of the funding offers submitted by the bidders.

4th paragraph. The consortium of companies may be admitted, including in the form of a special purpose company, provided that its formation is formalized before the conclusion of the contract, subject to the following rules:

I - when there is the supply or development of PED, the leadership of the consortium will be the responsibility of the company accredited by the Ministry of Defense as EED, and

II – if the participation of the consortium is by means of a special purpose company, the formalization of its formation must occur before the conclusion of the contract and its shareholders will be the companies that are parties to the consortium, with the same number of shares held in the consortium.

5th paragraph. The solicitation and the contract may determine the segregation of an area reserved for research, design, development, production or industrialization of PRODE or SD.

Article 4. The solicitation and contracts that involve the import of PRODE or SD will contain provisions defined by the Ministry of Defense with regard to technological, industrial and commercial offset agreements.

1st paragraph. Under proof of impossibility of compliance with the provisions set forth in the **main clause** of this article and if the urgency or relevance of the operation is demonstrated, the import may be performed regardless of offset, at the discretion of the Ministry of Defense.

2nd paragraph. In the case of the 1st paragraph, the Ministry of Defense may require that the import of PED is made with the involvement of an EED able to perform or conduct, in the national territory, one of the activities under subitem "a" of item IV of the **main clause** of article 2.

Article 5. The hiring of PRODE or SD, and its development may be held in the form of an administrative concession referred to by Law n. 11.079 of December 30, 2004, subject, whenever appropriate, to the legal regime applicable to the cases that may compromise national security.

1st paragraph. The solicitation will establish, amongst other criteria, those relating to the estimated value of the contract, the period in which the services will be provided and the object.

2nd paragraph. The solicitation and the concession contract will provide for the possibility and the requirements for concessionaire to enter into subcontracts.

3rd paragraph. If the contracts provided for in the **main clause** involve supply or development of PED, even if under the responsibility of the concessionaires, their purchases will follow the criteria and rules set by this Provisional Measure.

CHAPTER III

INCENTIVE TO STRATEGIC AREA OF DEFENSE

Article 6. The EED will have access to special tax regimes and funding for programs, projects and actions relative to, respectively, the national defense goods mentioned in item I of the **main clause** of article 8 and the PED, pursuant to law.

Article 7. The Special Tax Regime for the Industry of Defense – RETID is hereby established, in accordance to the terms and conditions set forth in this Chapter.

Article 8. The beneficiaries of the RETID are:

I – the EED that manufactures parts, pieces, tools, components, equipments, systems, subsystems, inputs and raw materials, or provides the services listed in article 10, to be applied in the maintenance, servicing, modernization, repair, overhaul, conversion, industrialization of the national defense goods defined in an act by the Executive Power; and

II – the corporate legal person that produces goods or provides the services listed in article 10, used as inputs in the production of goods listed in item I of the **main clause**.

1st paragraph. In the case of item II of the **main clause**, only those corporate legal persons that preponderantly supply the corporate legal persons listed in item I of the **main clause** may be qualified in the RETID.

2nd paragraph. The preponderant supplier mentioned in the 1st paragraph is the corporate legal person that obtain seventy percent or more of its total income from the sale of goods and services, in the calendar year preceding the qualification, resulting from the sum of sales:

I – to the corporate legal persons referred to in item I of the **main clause**;

II – to the corporate legal persons that manufactures national defense goods defined in an act by the Executive Power, as mentioned in item I of the **main clause**; and

III – of foreign exports.

3rd paragraph. For the purposes of the 2nd paragraph, the amount of taxes and contributions levied on the sale are not calculated as part of the income.

4th paragraph. The fruition of the benefits provided by the RETID is subject to the corporate legal person's cumulative compliance of the following requisites:

I – accreditation by the competent body in the Ministry of Defense;

II – prior qualification in the Secretariat of the Federal Revenue of Brazil; and

III – fiscal regularity in relation to the taxes and contributions managed by the Secretariat of the Federal Revenue of Brazil.

5th paragraph. The corporate legal persons that opt for the *Regime Especial Unificado de Arrecadação de Tributos e Contribuições devidos pelas Microempresas e Empresas de Pequeno Porte - Simples Nacional* [Special Unified Regime of Collection of Taxes and Contributions owed by Microcompanies and Small Companies – National Simple], pursuant to Complementary Law 123, of December 14 2006, and the legal persons referred to in item II of article 8, main clause, of Law 10.637, of December 30 2002, and

item II of article 10, main clause, of Law 10.833, of December 29 2003, cannot qualify for the RETID.

6th paragraph. The Executive Power shall discipline the RETID through regulation.

Article 9. In the case of sales for the domestic market or of importing of the goods referred to in article 8, the following are suspended:

I – the requirement of the *Contribuição para o Programa de Integração Social e de Formação do Patrimônio do Servidor Público - PIS/Pasep* [Contribution for the Program of Social Integration and Assets Formation of the Public Servant – PIS/PASEP] and the *Contribuição para o Financiamento da Seguridade Social – COFINS* [Contribution for the Financing of Social Security – COFINS] charged on the income of the seller corporation, when the acquisition is made by a corporate legal person that is a beneficiary of the RETID.

II – the requirement for the Contribution for the PIS/Pasep-Import and for the COFINS-Import, when the import is made by a legal person that is a beneficiary of the RETID;

III – the Imposto sobre Produtos Industrializados – IPI [Tax on Industrialized Products – IPI] levied on the exit of the industrial establishment or equated, in cases when the acquisition in the domestic market is made by an industrial establishment of a corporate legal person that is a beneficiary of the RETID; and

IV – the IPI levied on import, when made by an industrial establishment of a corporate legal person that is a beneficiary of the RETID.

1st paragraph. The invoices relative to the following must contain:

I – the sales referred to in item I of the **main clause**, the expression “Sale made with the suspension on the requirement of the Contribution for the PIS/Pasep and the COFINS”, specifying the corresponding legal clause and;

II – the outputs referred to in item III of the **main clause**, the expression “Output with suspended IPI”, specifying the corresponding legal clause, being that the registry of the tax on the mentioned invoices is prohibited.

2nd paragraph. The suspensions mentioned in this article are converted to zero tax rate:

I – after the employment or use of the goods acquired or imported under RETID, or of the goods resulting from their industrialization, maintenance, servicing, modernization, repair, overhaul, conversion, industrialization of the national defense goods defined in the act of the Executive Power referred to in item I of the **main clause** of article 8, when meant for sale to the Union, for exclusive use by the Armed Forces, except when for personal and administrative use; and

II – after exporting the goods with suspended taxation or the goods resulting from their industrialization.

3rd paragraph. The corporate legal person that does not utilize the goods in the manner provided by the 2nd paragraph is obligated to collect the unpaid taxes resulting from the suspension defined in this article, with added interest and fines, be it default or voluntary interest, pursuant to the law, counting from the date of acquisition or registry of the Declaração de Importação– DI [Declaration of Importation], in the condition:

I – of taxpayer, in relation to the Contribution for the PIS/Pasep-Import, COFINS-Import and IPI levied in the customs clearance on import; and

II – of person responsible for the collection, in regard to the Contribution for the PIS/Pasep, COFINS and IPI.

4th paragraph. For the purposes of this article, the corporate legal person that acquires foreign goods is equated to an importer, in the case of import made on their own account and volition through the intermediation of an importer company.

Article 10. In the case of sale or import of basic industrial technology services, technological development and innovation, technical assistance and transfer of technology, meant for companies that are beneficiary of the RETID, the following requirements are suspended:

I – the Contribution for the PIS/Pasep and COFINS levied on the revenue for the rendering of services provided by a corporate legal person established in the Country, when provided for a corporate legal person that is a beneficiary of the RETID; and

II – the Contribution for the PIS/Pasep-Import and COFINS-Import levied on services, when imported directly by a corporate legal person that is a beneficiary of the RETID.

1st paragraph. The suspensions mentioned in this article shall be converted to zero tax rate after the employment or use of the services for the purposes referred to in items I and II of the **main clause** of article 8.

2nd paragraph. The corporate legal person that does not employ or use the services in the manner provided by the 1st paragraph is obligated to collect the unpaid taxes resulting from the suspension defined in the **main clause**, with added interest and fines, be it default or voluntary interest, pursuant to the law, counting from the date of:

I – the payment, credit, delivery, employment or shipment of the amounts, in the condition of taxpayer, in relation to the Contribution for the PIS/Pasep-Import and COFINS-Import; and

II – the acquisition, in the condition of the person responsible for the collection, in regard to the Contribution for the PIS/Pasep and COFINS.

3rd paragraph. The rule provided in item I of the **main clause** also applies in the case of revenue from the rental of machines, apparatuses, instruments and equipments, when contracted by corporate legal persons qualified for the RETID.

4th paragraph. The fruition of the benefit provided in this article depends on the effective verification that the service was provided for the purposes listed in article 8.

Article 11. The benefits provided in articles 9 and 10 may be enjoyed for up to five years, counting from the date in which this Provisional Measure is publicized, in the acquisitions and imports made after the qualification of the corporate legal persons that are beneficiaries of the RETID.

Article 12. The operations of export of PRODE made by the EED may receive the coverage of the guarantee of the Insurance of Credit to Export, through the intermediation of the *Fundo de Garantia à Exportação - FGE* [Fund of Guarantees for Export – FGE], referred to by Law 9.818, of August 23, 1999, including the guarantees rendered by the Union in internal credit insurance operations for the production of PED.

CHAPTER IV FINAL PROVISIONS

Article 13. The provided in this Provisional Measure does not exclude the control and restrictions on import, export, manufacturing, commercialization and use of controlled products.

Article 14. The purchases and contracts to which this Provisional Measure refers will observe the foreign policy guidelines and the international commitments ratified by Brazil in the area of defense, especially those concerning safeguards.

Article 15. Law 8.666, of June 21 1993, shall be complementarily applied to public bids and to the contracts governed by this Provisional Measure.

Article 16. The Executive Power shall regulate the rules of this Provisional Measure.

Article 17. This Provisional Measure takes effect in the date of its publication.

Brasília, September 29 2011; 190th year of the Independence and 123rd year of the Republic.

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