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Government Procurement in Brazil: an international view

The Internationalization of Government Procurement Regulation

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Brazilian Government Procurement: an outline

- Constitution, articles 22 (powers) and 37 (basic principles)
- Domestic regulation: federal, uniform for sub-federal
  - Federal GP Act (1993): sealed competitive tender as general method; no competitive dialogue: expressions of interest PMI-PPP
  - Reverse Auction Act (2001): reverse auction or electronic reverse auction, with post qualification: in practice, 67% of federal purchases (2013/2014 tendered: 16% in number; 71% in value)
  - Framework agreements/IDIQ ("price registration") in purchases
  - RDC Act (2011): simplified and flexible; post qualification; possible absence of basic design; preferably electronic; sealed estimate
  - SME (2006), Buy National (2010), Specific Sectors (Defense, 2011)
  - Coverage: special regulations for companies (e.g. Petrobras, 1998)
- **Key problem**: contract administration (post-award)

Road toward international models: positive aspects

- Compatibility of the current legislation
  - Minor necessary changes in procedural aspects. Formal equal treatment of domestic and foreign bidders since the 1990's
- Concentration of legislation at the federal level
  - Relative irrelevance of local and state legislation
- Growing internationalization of Brazilian companies: access to foreign government marketplaces
- International attention to Brazilian PP market (estimated USD 250-300 billion, based on GDP; USD 30 billion federal purchases)
- Effective domestic review, protest and challenge system
  - Protests and appeals within the procuring agencies
  - Challenges before TCU/TCE (eq. GAO) or courts

Road toward international models: difficulties

- Brazil's focus on Mercosur
  - Mercosur Government Purchases Protocol pending ratification. Reference to Mercosur in domestic legislation (Buy National Act)
  - [Note: Argentina is already a GPA observer]
- Excessively intense agenda at the WTO: focus on private trade
- Government procurement as a public policy tool (2006)
  - SME preferences
  - Domestic production/technology transfer preferences
  - Protected sectors (defense, IT) and sustainability (green procurement: no restriction based on scope or certainty)
- Insecurity about actual access to foreign marketplaces: lack of pressure from the private sector

SME Preferences

- Practical relevance of SME Act, of 2006
  - Federal Purchases (2008-2014): 21% to 30% for domestic SME

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Valor das compras por porte – Órgãos SISG

Ano	Micro Empresa	Pequena Empresa	Outros	Total[1]
2008	8.091.226.108,90	10.002.053.452,07	59.279.329.105,74	**77.372.608.666,71**
2009	10.500.048.038,93	9.466.313.411,65	57.785.376.671,85	**77.751.738.122,43**
2010	14.774.913.003,12	6.423.251.444,84	63.143.100.945,33	**84.341.265.393,30**
2011	12.178.566.388,62	7.049.034.578,06	45.883.817.070,62	**65.111.418.037,30**
2012	11.036.209.275,97	7.286.522.542,50	68.028.064.748,57	**86.350.796.567,04**
2013	12.847.975.542,14	10.173.726.780,03	53.967.340.300,87	**76.989.042.623,05**
2014[2]	4.993.021.359,87	3.807.375.622,99	21.624.714.158,03	**30.425.111.140,89**

[1] Valores corrigidos pelo IPCA Dessazonalizado.

[2] Janeiro a julho.

Fonte: Comprasnet .

Elaboração: SLTI/MP.

SME Preferences

- Brazil-based only, by statute
- SME: micro (annual gross income up to USD 150,000) and small companies (up to USD 1,500,000)
- Procedural preferences: facilitated requirements
- "Fictitious tie": right of first refusal; opportunity for final bid if up to 5% or 10% above best non-SME offer
- Small value contracts (up to USD 30,000) in SME-only tenders (71% of total in 2013)
- Preference in single source awards in small value contracts
- Mandatory subcontracting of SME (optional tool for the procuring agency)
- 25% quota in contracts for separable goods

"Buy National" Preferences (2010)

- Price margins for local production and compliance with Brazilian technical standards (services and goods)
- Additional price margins for local development and technological inovation (up to 25% total)
- Margins set for 5 years by Presidential Executive Orders (19 Executive Orders up to August 2014)
- Rules of origin based on PPB (“basic production process“)
- Requirements of “local (domestic) content” (recent WTO challenge)
    - oil and gas equipment; access to funding by BNDES
- Exceptions. Extension to Mercosur by Buy National Act
- Local-only, restricted competitive biddings (strategic defense goods and systems, strategic IT services)

Protests, Challenges and Bid-Review

- Equally available to domestic and international bidders; even non-bidders within a certain framework
- Three-level system
  - Pre-bid protest against the solicitation (5 to 2 days in advance, depending on method; no automatic stay)
  - Appeal within the bidding proceeding: sealed bidding (step by step) v. reverse auction and RDC (one final appeal)
  - Challenge at TCU/TCE (eq. GAO): variety of remedies, including power to stay, recommend termination, sanctions, debarment
- Entitlement to transparency (sealed price estimate: RDC)
- Immediate access to courts: independent Judiciary
- Cost-free, easy litigation: highly contentious proceedings
- Arbitration: contract phase; PPPs and concessions

Conclusions: prospects for internationalization

- **Relatively easy harmonization. Well-established and mature system. Transparency (www.comprasnet.gov.br)**
- **Centralization of decision-making, regardless of the federal structure of Brazil. Reform bill in Congress (2013)**
- **Possibly favorable environment for negotiation of exceptions under the GPA ("the BRICS race")**
- Widespread use of protectionist mechanisms to favor local technology and production
- Increased awareness by public officials of the instrumental use of the government purchasing power to advance public policies
- Lack of awareness by Brazilian companies of the potential gains from internationalization, resulting in lack of political and economic pressure on the government for GPA/PTA or internationalization in general