TozziniFreire's German Desk Newsletter

Was Ist Los? in Brasilien

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TOZZINIFREIRE ADVOGADOS

New Public Procurement Act: A New Perspective for Sales to the Brazilian Government

Initial remarks

Overview of the upcoming Public Procurement Act

GENERAL REMARKS: A NOT SO BRAND-NEW RULE FOR PUBLIC PROCUREMENT

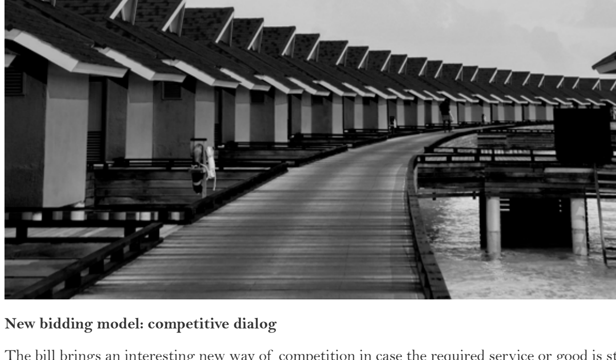
MAIN TOPICS OF THE NEW STATUTE

Enforcement

Unification of bidding rules

Clarity

Incentives to better planning of procurement



Standardization

New bidding model: competitive dialog

Direct contracts: dismissal and unenforceability of bidding proceedings

Performance bonds

Integrated and semi-integrated contracts

Procedure for Expression of Interest (PMI)

Efficiency contracts

Insertion of alternative dispute resolution mechanisms

Criminal provisions

Compliance

- The existence of a program will serve as criterion in case of draws between proposals;
- When seeking rehabilitation, companies that are debarred from public bids as result of illicit acts provided by the Anti-corruption Act must have compliance programs in place.

Antitrust

The new bidding model (competitive dialog) will demand interaction with the antitrust authority (CADE) to develop some guidelines and best practices for implementation as it may create incentives for anti-competitive conduct. The envisaged pre-bidding conversations between the authority conducting the bid and potential suppliers may generate incentives for collusion among competitors to rig the bids and/or exchange commercial and competitively sensitive information, which is not justifiably necessary for achieving the best solution for the public procurement. It also calls the attention from the antitrust standpoint the lack of clear rules and protocol regarding the proceedings and leniency negotiations in practices that could be characterized as bid rigging by both the Competition Act (Law No. 12,529/2011) and the New Procurement Law. The bill provides for some clarity about this matter in relation to the Anti-corruption Act, but there is no reference to CADE and the antitrust leniency negotiations.

Sanctions

The new statute brings important updates to sanctions:

- It reduces the discretion of the public body by listing in an objective way which sanction is applicable to each kind of infraction, while the current statute only sets forth the possible penalties (fine, warning, suspension of the right to bid and declaration of disreputable status) without criteria for their application;
- It sets a range for the amount of the fine – 0.5 to 30 per cent of the contracted amount;
- It solves a long-standing problem involving the current legislation, by making clear that the suspension of the right to bid is applicable only to bids and contracts with bodies of the same federal level of the body that imposed the sanction (e.g. if the sanction is imposed by the government of a given State, only other entities connected to that same State can debar the sanctioned company from its bids and contracts); while the declaration of disreputable status (*declaração de inidoneidade*) prevents companies from entering into contracts with public bodies of governments of all levels – Federal, State and Municipal;
- It makes clear that the suspension of bidding rights is extendable to other companies of the same group – controlled, controlling, and affiliated entities – whenever such other companies are used to overcome the effects of the sanction;
- The bill creates a 'rehab process' for companies that are suspended from bidding or have a disreputable status declared. The following is required: (i) compensation for damages to the Treasury; (ii) payment of the fine; (iii) passage of at least one year of suspension of bidding rights, or three years in case of declaration of disreputable status; (iv) fulfilment of other rehabilitation conditions set forth in the punitive act. In case of conducts that are also wrongdoings under the Anti-corruption Act, or in case of false statements and presentation of false documentation during the bid or contract performance, the company also must demonstrate the implementation or improvement of a compliance program.

While those innovations bring relevant clarification for the sanctioning rules, our view is that some opportunities of improvement were lost. First, the range of possibilities for leniency agreement should be broader, once it is possible only in case of offenses to the Anti-corruption Act. It could also encompass settlement between the contractor and government in case of irregularities of any nature detected during the bid or the contractual performance. Second, the minimum period for the sanction of declaration of disreputable status is still too long (three years). Companies that have revenues substantially leveraged by public contracts might not survive during this period.

Leniency agreements

Another innovation of the bill is the inclusion of a possibility of settlement for possible illicit practices in the context of public procurement and contracts. It strengthens a trend in Brazilian Public Law towards the adoption of consensual solutions to disputes involving matters between government and companies. In case of practices that are both illegal under the New Procurement Law and the Anti-corruption Act (Law No. 12,846/2013), the wrongdoer and the public body will have the possibility to enter into a settlement (leniency agreement) that exempts the company from penalties set forth in the New Procurement Law.

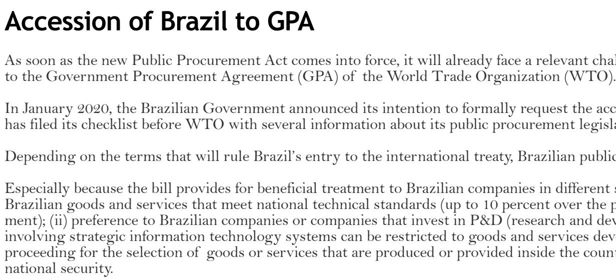
This point used to be a source of legal uncertainty, since an agreement based on the Anti-corruption Act not necessarily prevented the imposition of penalties under the procurement legislation. Besides, the bill also expressly allows the audit courts to exempt the company from sanctions set forth in its legislation by formally agreeing to the terms of the leniency agreement.

This alignment between different sanctioning systems should be an incentive for settlement involving wrongdoings in the context of public bids and contracts. Currently, several bodies have the jurisdiction to impose sanctions, and settlements reached by one of them are not binding on others.

Statute of limitation

The new statute also provides for a period of statute of limitation, which is also an innovation in relation to the current legislation. The application of penalties set forth in the bill will be time-barred after five years counting from the date when the authority became aware of the illicit practice. As in other statutes with similar provisions (e.g., the Anti-corruption Act), it is unclear what characterizes the awareness of the authority (which is the starting point for the counting of the five-year period), but it is a clear improvement in procurement framework.

It is worth noting that under the new legislation the execution of leniency agreements interrupts the counting of time for the statute of limitation. Therefore, once the agreement is signed, the counting of the five-year term is restarted.



Environmental, Social and Corporate Governance (ESG)

The old statute already expressly provided the "national sustainable development" as a pillar to public procurement proceedings and some incentives to adoption of good ESG practices by contractors. The new bill brings new incentives in this regard, such as:

- In case of illegalities detected in bidding proceedings and contracts, the public body must consider social and environmental impacts of the contract during the assessment of possible termination;
- The remuneration of the contractor can be set based on performance, which will be measured according to criteria of environmental sustainability, quality standards, and deadlines;
- Adoption of compliance program by companies that enter into contracts with amounts higher than R$ 200 million (or for rehabilitation in case of imposition of certain sanctions);
- The reference sheet of the procurement proceeding must include description of social impacts, mitigating factors, low energy consumption requirements, reverse logistics for recycling.
- The bill also prohibits the participation in any public procurement of people and companies that have been rendered a final and binding ruling for child labor, submitting workers to conditions analogous to slavery or for hiring adolescents in unlawful cases;
- Government entities can demand from its contractors that a minimum percentage of the work force in charge of performing the contract be composed by women that suffered domestic violence or citizens that left the prison system.

Despite the positive advances in Human Rights matters related to labor conditions, the bill failed to provide for the breadth stablished by the National Directives on Business & Human Rights (Resolution No. 05/2020). The National Directives provide that the Public Power will cease any contracts or relation with companies involved in Human Rights violations resulting directly or indirectly from its activities. The bill does not expressly encompass other forms of Human Rights violations and those caused indirectly by the person or company.

Accession of Brazil to GPA

As soon as the new Public Procurement Act comes into force, it will already face a relevant challenge: to seek consistency with the accession of Brazil to the Government Procurement Agreement (GPA) of the World Trade Organization (WTO).

In January 2020, the Brazilian Government announced its intention to formally request the accession of Brazil to GPA. On October 5, 2020, Brazil has filed its checklist before WTO with several information about its public procurement legislation, which will be now assessed by the organization.

Depending on the terms that will rule Brazil's entry to the international treaty, Brazilian public procurement legislation will need to be amended.

Especially because the bill provides for beneficial treatment to Brazilian companies in different situations: (i) granting of a preference margin to Brazilian goods and services that meet national technical standards (up to 10 percent over the price offered by competitors that do not fill the requirement); (ii) preference to Brazilian companies or companies that invest in P&D (research and development) in the country in case of tiebreak; (iii) bids involving strategic information technology systems can be restricted to goods and services developed in the country; (iv) dismissal of competitive proceeding for the selection of goods or services that are produced or provided inside the country and that involve high technological complexity and national security.

The entry of Brazil into the GPA will definitely bring good opportunities to Brazilian companies abroad. Currently, GPA has 29 members, including the United States and the countries of the European Union. The Brazilian public procurement in general should also benefit from it, once new competitors, with new technologies, services and goods will be encouraged to enter Brazilian public market.

However, the country has a long tradition of protection to its internal market. The new Public Procurement Act reflects it. The update of its provisions in this regard is indeed a major challenge for the upcoming years.

1 According to *Portal da Transparência* official website, in 2020 the Brazilian Government carried out 130,988 bidding processes (including regular bidding processes, waiver of bidding process or non-requirement of bidding process) that summed approximately BRL 54 billion. More information available at: http://www.portaltransparencia.gov.br/licitacoes?ano=2020

2 Directive No. 2004/18/CE, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0018&from=EN

3 Directive No. 2014/24/UE, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024

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