The Legal 500 Country Comparative Guides

Brazil: Public Procurement

This country-specific Q&A provides an overview to public procurement laws and regulations that may occur in Brazil.

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1. Please summarise briefly any relationship between the public procurement / government contracting laws in your jurisdiction and those of any supra-national body (such as WTO GPA, EU, UNCITRAL)

Brazil is a federation, composed of 27 States and the Federal District, along with more than 5000 municipalities. Nonetheless, the general rules governing public bidding processes and government contracting fall within federal jurisdiction, according to article 22(XXVII) of the Federal Constitution.

Federal Law 8.666/93 is the main legislation governing public procurement and government contracting, and it does not have any direct relationship to rules issued by supra-national bodies. Where international organisations are involved in the financing of works, services, or acquisition of goods, article 42§5 of Law 8.666/93 allows the rules of the financing organisation to apply instead of the rules of Brazilian law.

In January 2020, during the World Economic Forum, Brazil’s Minister of the Economy, Paulo Guedes, said that Brazil plans to join the WTO’s GPA, although that decision must be formalised by the Executive Branch and ratified by National Congress.

2. What types of public procurement / government contracts are regulated in your jurisdiction and what procurement regimes apply to these types of procurements?

As a rule, any government contract must be preceded by a formal public bidding process known as a licitação, except in the cases set out in the legislation. The general rules on public bidding processes and government contracts are found in Law 8.666/93, which also deals with federal government contracts for works, goods and services.

The General Government Contracting Law (Lei Geral de Licitações, as Law 8.666/93 is known) provides for three types of bidding processes for contracting works, services, and the supply of goods, depending on the amount involved: Invitation (Convite), Request for Quotation (Tomada de Preços), and Open Competition (Concorrência). The greater the amount involved, the greater the formality and degree of publicity required for the contract.

Open Competition, which is the most rigorous complex bidding process under Law 8.666/93, is open to participation by any interested party and is used for high-value contracts (cf. amounts mentioned in topic 3). A Request for Quotation is an intermediate process, in which previously-registered parties bid for the contract. The Invitation process is used for lower-value contracts, and involves sending letters of invitation to bid to at least three companies in the relevant business sector.

In addition to these three types of bidding process, there are also Contests (Concurso), which are intended for the selection of technical, artistic, or scientific works, and Auctions (Leilão), used for the sale of government property.
As for the criteria to be used in choosing between competing bids, Law 8.666/93 provides that the government department or agency conducting the process must base its decision on objective grounds, which translates into a set of factors that lead to the most favourable bid. In general, there are three categories of selection criteria: “best price”, “best technical proposal” or “technical proposal and price”, which is a combination of the first two. In Auctions, the criterion for selection is “best bid or offer”.

Another type bidding process is the **Open Bidding Session (Pregão)**, provided for in Law 10.520/02. This is a simpler procedure, applicable only to contracts for common goods and services, that is widely used by government. Open bidding sessions can be held electronically or in person.

Law 12.462/11 created another type of contracting process, the **Differentiated Government Contracting Regime (RDC – Regime Diferenciado de Contratações Públicas)**, which was intended to simplify some of the rules on government contracts and contracting in the context of sports mega-events like the 2014 World Cup and the 2016 Olympic Games.

Over time, the RDC, was extended to other areas, such as actions under the Accelerated Growth Programme (PAC – Programa de Aceleração do Crescimento), public security initiatives, engineering works and services within the Unified Health Service (SUS – Sistema Único de Saúde), improvements in urban mobility, expansion of logistics infrastructure, public education systems, research, science and technology, and built-to-suit contracts.

Contracts for advertising and publicity services rendered by advertising agencies are governed by specific legislation, Law 12.232/10.

State-owned enterprises (whether mixed-economy or entirely state-owned) that engage in economic activity are also required to conduct competitive bidding processes. Contracting by state-owned enterprises is governed by Law 13.303/16, which establishes a process similar to Open Bidding Sessions.

Contracts for public services have their own legislation. The Federal Constitution allows public services to be delegated to the private sector, and this delegation may occur under Law 8.987/95, which provides for the regime of **Concession and Permit (Concessão e Permissão)** to provide public services, or Law 11.079/04, which provides for bidding processes for, and contracting of, **Public-Private Partnerships (PPPs)**. In ordinary concessions, the services rendered by the concessionaire are paid for by the users of the services, while in PPPs, the government pays for part (**Sponsored PPPs**) or all (**Administrative PPPs**) of the services rendered by the private partner.

3. **Are there specified financial thresholds at which public procurement regulation applies in your jurisdiction?**
Under Law 8.666/93, the type of bidding process that is required is a function both of the nature of the works, services or goods contemplated by the contract and the estimated value of the contract, as shown in the following table:

<table>
<thead>
<tr>
<th>Type</th>
<th>Minimum period for submission of bids</th>
<th>Supply of goods and services other than engineering services</th>
<th>Engineering works and services</th>
</tr>
</thead>
<tbody>
<tr>
<td>Open Bidding Session (Pregão)</td>
<td>8 business days</td>
<td>No financial limit, as long as the contract is for common goods and services</td>
<td></td>
</tr>
<tr>
<td>Invitation (Convite)</td>
<td>5 business days</td>
<td>Up to BRL 176,000</td>
<td>Up to BRL 330,000</td>
</tr>
<tr>
<td>Request for Quotation (Tomada de preços)</td>
<td>As a rule, 15 consecutive days; 30 consecutive days, for “best technical proposal” or “technical proposal and price” processes</td>
<td>Up to BRL 1.43 million</td>
<td>Up to BRL 3.3 million</td>
</tr>
<tr>
<td>Open Competition (Concorrência)</td>
<td>As a rule, 30 consecutive days; 45 consecutive days, for turnkey projects and “best technical proposal” or “technical proposal and price” processes )</td>
<td>More than BRL 1.43 million</td>
<td>More than BRL 3.3 million</td>
</tr>
</tbody>
</table>

Thus, as noted in topic 2, the greater the value of the contract, the greater the degree of formality and publicity required in the bidding process, increasing from the least formal Invitation, to the intermediate Request for Quotation, and then to the most formal Open Competition process. In contrast, common goods and services can be procured through the Open Bidding Session process, regardless of the value of the contract.

Concessions for public services and public works having a cost greater than BRL 10 million can be granted in the form of Public-Private Partnerships under Law 11.079/04, for a period of five to thirty-five years.

4. **Are procurement procedures below the value of the financial thresholds specified above subject to any regulation in your jurisdiction? If so, please summarise the position.**

Yes. Among the various possibilities of direct contracting discussed in topic 20 are cases where a bidding process is “unnecessary” under the General Government Contracting Law because of the small value of the contract. The “unnecessary” threshold is 10% of the financial limit for Invitation processes. According to article 26 of Law 8.666/93, however, even where a bidding process is not required, suppliers must meet the qualifications applicable to bidders and the price of the contract must fall within market parameters. The reasons for selecting the supplier must be given and the selection must be consistent with the
legal and constitutional principles of impartiality and good conduct.

In the case of state-owned enterprises, bidding processes are not required for contracts for engineering works and services worth BRL 100,000 or less, or for contracts for supply of other services and goods worth BRL 50,000 or less.

5. **For the procurement of complex contracts*, how are contracts publicised? What publication or journal is used for these purposes?**

Taking complex contracts to be those that require Open Competition processes (i.e. contracts for supply of goods and services in general worth more than BRL 1.43 million, and contracts for supply of engineering works and services worth more than BRL 3.3 million), the law requires that the government publish a notice of public bidding process containing a summary of the bid documents both in the Official Gazette (*Imprensa Oficial*) and in at least one widely-circulated newspaper.

Recently, however, in September 2019, the President of Brazil issued Provisional Measure 896, amending the **General Government Contracting Law** (Law 8.666/93), the **Open Bidding Sessions Law** (Law 10.520/02), the **Public-Private Partnerships Law** (Law 11.079/04) and the **Differentiated Contracting Regime Law** (Law 12.462/11) to allow government authorities to publish notices of public bidding processes on their official websites instead of widely-circulated newspapers. The matter was brought before Brazil’s constitutional court, the Supreme Federal Tribunal (STF – *Supremo Tribunal Federal*) and the court issued a preliminary order in October 2019 to suspend the effects of new rules allowing government authorities to dispense with publication of notices of public bidding processes in widely-circulated newspapers.

For state-owned enterprises, there is no requirement to publish notices in the press, and they disclose their bidding processes through the internet only.

6. **For the procurement of complex contracts, where there is an initial selection stage before invitation to tender documents are issued, what are typical grounds for the selection of bidders?**

As noted in topic 5, a notice of Open Competition processes must be published. The bidding process itself is divided in two phases.

In the first or qualifications phase, bidders must prove that they meet the requirements set out in the bid documents. Article 27 of Law 8.666/93 sets out five different types of requirements: legal qualifications, technical qualifications, economic/financial qualifications, compliance with tax and labour obligations, and prohibition against night work or work in
hazardous conditions for persons under the age of 18, and against work of any kind for persons under the age of 16.

According to the Law, proof of technical qualifications must be restricted to (i) proof of registration with the relevant professional entity; (ii) a demonstration of the bidder’s capacity to carry out the activities required to perform the contract, indicating sufficient and appropriate facilities, equipment, and technical personnel, and the qualifications of each member of the technical team who will be responsible for the work; (iii) proof issued by the contracting government authority that the bidder has received the bid documents and, when required, has knowledge of the local conditions and other information relevant to performance of the contract under bid; and (iv) proof that the bidder meets requirements under special legislation, if any.

After the qualifications of the bidders have been judged, the process moves on to the second phase, in which the bidders’ proposals are presented and judged.

In bidding processes conducted by state-owned enterprises, as a rule the qualifications phase occurs after the bidding phase, although the order can be inverted.

The General Government Contracting Law (Law 8.666/93) and the State-Owned Enterprises Law (Law 13.303/16) provide that there may be a pre-qualifying phase instead of the ordinary qualifications phase, and in that case, only bidders that pass the qualifying phase can submit bids.

7. **Does your jurisdiction mandate that certain bidders are excluded from tendering procedures (e.g. those with convictions for bribery)? If so what are those grounds of mandatory exclusion?**

Yes. A number of laws provide for sanctions that exclude companies from participating in public bidding processes, such as the General Government Contracting Law (Law 8.666/93), the Open Bidding Sessions Law (Law 10.520/02), the Federal Public Accounts Tribunal Law (Law 8.443/93), the Administrative Improbity Law (Law 8.429/92), and the State-Owned Enterprises Law (Law 13.303/16). Essentially, penalties under these laws include temporary suspension and declaration of unfitness, which bar offenders from participating in public bidding processes and contracting with the government.

The National Register of Unfit and Suspended Businesses – CEIS (Cadastro Nacional de Empresas Inidôneas e Suspensas), maintained by the Federal Comptroller General’s Office (CGU – Controladoria-Geral da União), consolidates all businesses and individuals that have been barred from participating in public bidding processes or entering into government contracts. ([http://www.portaltransparencia.gov.br/pagina-interna/603245-ceis](http://www.portaltransparencia.gov.br/pagina-interna/603245-ceis)).

Law 12.846/13, the Anti-Corruption Law, requires government authorities to keep the CEIS
up to date. Thus, the CEIS data bank is maintained by the CGU, but fed directly by government authorities and agencies at the federal, state, and municipal levels.

Generally speaking, Brazilian law encourages broad participation in bidding processes, and candidates cannot be excluded on discretionary grounds. In other words, unless a party is subject to a penalty such as “temporary suspension” or “declaration of unfitness”, there is no bar to bidding on, or entering into, contracts with the government.

Petrobras has created a procedure in which registered businesses must undergo compliance due diligence, and Petrobras will contract businesses classified as “high risk” only if they are the sole supplier of the relevant good or service. Even so, Petrobras’s contracting practices cannot be said to be discretionary, since the company’s manual sets out criteria for classifying potential suppliers.

8. Please described a typical procurement procedure for a complex contract. Please summarise the rules that are applicable in such procedures.

The stages of the Open Competition process used for complex contracts (see topic 5) can be divided into two phases, one internal and one external.

The internal phase is preparatory in nature and involves initiating the administrative proceeding within the government entity that will conduct the bidding process. During the internal phase, the bid documents are prepared and the funds associated with the contract to be put up for bidding are allocated for expenditure.

The external phase begins with publication of the notice of Open Competition. By law, there must be at least 30 consecutive days between the date on which the notice was published and the deadline for receipt of bids or the date on which the bidding session is held; the minimum period is 45 days for “best technical proposal” or “technical proposal and price” competitions, as explained in topic 2.

After notice is published, there is a period of time in which interested parties may ask for further information or challenge the notice through administrative proceedings. The bidding process then moves into the qualifications phase, which consists of checking the bidders’ documentation and ensuring bidders meet the requirements set out in the bid documents. The objective in this phase is to ensure that bidders have the capacity to perform the contract under bid. Decisions as to bidders’ qualification or disqualification are subject to appeal. The requirements for qualification under Law 8.666/93 are described briefly in topic 6.

The bids are then opened and judged according to the criteria set out in the bid documents, and the successful bidder is announced. Here again, any decision to declassify a bid, and the
decision on the order of classification of the bids, is subject to appeal. The successful bidder is then given notice to appear for the formal award of the contract.

Although the procedure described above is the rule under the General Government Contracting Law, it has become increasingly common to invert the order of proceedings, with the bid-opening or bidding session phase preceding the qualifications phase. The bids-first procedure is found in the Open Bidding Session process, the Differentiated Contracting Regime (Law 12.462/11), and the system under the State-Owned Enterprises Law (Law 13.303/16). In fact, Bill 1.292/95, which is currently before Congress and is intended to establish a New General Government Contracting Law, would make the bids-first procedure the rule, unless there is good reason: first the bids are judged and only then is the successful bidder required to provide proof of its qualifications.

9. If different from the approach for a complex contract, please describe how a relatively low value contract would be procured?

The Invitation bidding process is less complex and less strict, when compared to Requests for Quotation and Open Competitions. Invitations can be used for contracts in the smaller amounts contemplated in Law 8.666/93.

Under the Invitation process, the contracting government authority choses at least three interested parties in the relevant economic sector, which may be previously registered or not, and sends them letters of invitation to present their proposals.

While Open Competitions are used for the supply of general goods and services worth more than BRL 1.43 million, and engineering works and services worth more than BRL 3.3 million, Invitations are used for the same type of contracts, where the value does not exceed BRL 176,000 and BRL 330,000 respectively.

Furthermore, while the minimum period for presentation of bids in Open Competitions ranges from 30 to 45 consecutive days, under the Invitation process, the deadline for presentation of proposals can be as short as 5 business days. A table summarising the differences in values and time periods under the two bidding processes can be found in topic 3.

10. What is seen as current best practice in terms of the processes to be adopted over and above ensuring compliance with the relevant regime, taking into account the nature of the procurement concerned?

Since the Anti-Corruption Law (Law 12.846/2013) and related regulations (Decree 8.420/2015) were adopted, various states have passed legislation in recent years requiring that companies contracted by the respective state government have an effective compliance
program, as part of the fight against corruption and fraud in government bidding processes and contracts. Thus, even when the existence of a compliance program is not required for a given government contract, an effective compliance program will be considered good practice in public procurement processes.

11. **Please explain any rules which are specifically applicable to the evaluation of bids.**

Two aspects are judged in the evaluation of bids: (i) whether the proposed price is reasonable, and (ii) whether the proposal is compatible with the requirements set out in the bid documents. Bidders’ proposals are thus classified or declassified according to objective criteria.

Law 8.666/93 contemplates three types of criteria: “best price”, “best technical proposal” or “technical proposal and price”. In the case of Auctions, the criterion for selection is “best bid or offer”.

Under the “best price” selection criterion, the successful bid will be the one that both meets the requirements set out in the bid documents and offers the lowest price. The “best technical proposal” criterion involves two steps: one in which the submitted bids are evaluated on their technical merits, and a second in which the bidder presenting the best technical proposal is invited to adjust the offered price in light of the prices offered by other bidders.

According to Law 8.666/93, the “best technical proposal” and “technical proposal and price” criteria are used when the services to be contracted are predominantly intellectual in nature. The distinction between the criteria is that while under the “best technical proposal”, the techniques and technology offered in the submitted bids are evaluated objectively against the rules set out in the bid documents, in “technical proposal and price” bidding processes, the winning bid is selected on the basis of the weighted average of the technical evaluation and the price, according to a scoring system set out in the bid documents.

The Open Bidding Session Law adopts the lowest price (or highest price, as applicable) as the selection criterion, while the State-Owned Enterprises Law contemplates five criteria for selection of bids: “largest discount”, “best artistic content”, “highest offered price”, “greatest economic return”, and “best use of the assets to be awarded”.

12. **Please describe any rights that unsuccessful bidders have that enable them to receive the reasons for their score and (where applicable in your jurisdiction) the reasons for the score of the winning bidder.**

Bids are scored only in “best technical proposal” and “technical proposal and price” bidding
processes. The bids must be evaluated according to criteria set out in the bid documents, and the criteria must be objective (Law 8.666/93, art. 46§2). The decision of the selection commission must be reasoned, and dissatisfied bidders can challenge the results through an administrative proceeding. Bidders can challenge both their own scores and the score given to the successful bidder.

13. **What remedies are available to unsuccessful bidders in your jurisdiction?**

One remedy available to unsuccessful bidders is to bring an administrative appeal against the selection commission’s decision. In addition, Law 8.666/93 provides that any bidder, party to an awarded contract, individual or legal entity may submit a complaint to the Public Accounts Tribunal (**Tribunal de Contas**) and to supervisory bodies against irregularities in public bidding processes.

Government authorities may annul acts that they consider illegal, in the exercise of their powers of self-supervision and control, and therefore can unilaterally terminate contracts for irregularity in the bidding process. The courts also have the power to terminate government contracts that have been awarded illegally, if they are called upon to do so in the course of proceedings for judicial review of administrative acts.

There is no bar to the suspension of government contracts, even if they are already being carried out.

14. **Are public procurement law challenges common in your jurisdiction?**

Yes, public procurement law challenges are common in Brazil.

At the administrative level, which includes the contracting government authority, internal supervisory bodies, and the Public Accounts Tribunal, which is responsible for external control of government contracts, there is no charge for filing a complaint or appeal.

At the judicial level, however, unsuccessful parties are liable for court costs and court-awarded attorneys’ fees (which may be as much as 20% of value of the claim), in addition to their own legal counsel’s fees and expenses. For example, the current limit on filing fees in the federal courts in Rio de Janeiro and São Paulo is 1% of the value of the claim. In all Brazilian courts, there are limits on filing fees, intended to facilitate access to the courts. In principle, there is no significant distinction between claimants and defendants when it comes to costs, since the unsuccessful party is liable for both costs and court-awarded attorneys’ fees.

Court proceedings are quite common and there is no expectation that bidders who challenge
decisions by the contracting authority will suffer reputational harm or disadvantage in future public bidding processes.

15. **Typically, assuming a dispute concerns a complex contract, how long would it take for a procurement dispute to be resolved in your jurisdiction (assuming neither party is willing to settle its case)?**

In general, at the administrative level, disputes are decided quickly. At the judicial level however, proceedings usually take more time, sometimes lasting a number of years before a final decision is reached. Requests for preliminary relief, however, are usually decided within a few days or weeks, even in the appeal courts.

In the courts, there are no fixed time periods within which a decision must be issued. In an ordinary proceeding, a case will usually go through the pleading phase, production of evidence, decision at first instance, and an appeal phase.

16. **What rights/remedies are given to bidders that are based outside your jurisdiction?**

Public bidding processes in Brazil can be national or international.

In national bidding processes, foreign companies operating in Brazil that wish to participate must possess a decree of authorisation. They must also be registered or hold an operating authorisation, if required for their business activities (Law 8.666/93, art. 28(V)).

In international bidding processes that allow foreign bidders to participate, the bid documents must comply with Brazil’s monetary and foreign trade policies (Law 8.666/93, art. 42). Foreign participants must appoint a representative in Brazil, to whom all formal communications will be directed.

All bidders have the same rights, regardless of nationality, and their home state is indifferent, except in cases where bidding processes are governed by the rules of international organisations, as explained in topic 1.

According to the rules under Brazil’s Code of Civil Procedure, foreign bidders that do not own immovable property in Brazil will be required to provide security for court costs and court-awarded attorneys’ fees if they wish to challenge bidding processes in the courts.

17. **Where an overseas-based bidder has a subsidiary in your territory, what are the applicable rules which determine whether a bid from that bidder would be given guaranteed access to bid for the contract?**
A Brazilian subsidiary is considered to be a Brazilian entity and as such has the same rights as any other potential bidder. If the bidder is the Brazilian subsidiary, it will have the same rights and remedies as a nationally-owned company.

The only distinction allowed under Law 8.666/93 is a margin of preference in favour of national products in government bidding processes. The Law allows a margin of preference of up to 25% over the price of foreign products, and the Executive Branch is empowered to determine which products that margin will apply to.

18. **In your jurisdiction is there a specialist court or tribunal with responsibility for dealing with public procurement issues?**

No. Brazil does not have specialist courts or tribunals to deal with government contracting and bidding processes. Such issues are dealt with by the ordinary courts – either state or federal, depending on the case.

19. **Are post-award contract amendments/variations to publically procured, regulation contracts subject to regulation in your jurisdiction?**

Yes. Post-award changes can be made to government contracts by unilateral decision of the contracting authority, within the limits established by law.

Law 8.666/93 imposes restrictions on changes to government contracts with respect both to price and contract term. The contracting authority may alter a contract unilaterally to modify plans or specifications to ensure that they are technically better designed to achieve the contract’s objectives, and when a change in the contract price is required because of a quantitative increase or decrease in the contract’s scope. By agreement between the parties, the contract may be amended to replace security for performance; to change the regime for execution of works or supply of goods or services when the original terms are shown to be technically impossible; to alter the form of payment by reason of supervening events, as long as the original price is maintained; and to adjust the responsibilities of the supplier or contractor and the amount paid by the contracting authority so as to re-establish the economic and financial balance originally agreed between the parties.

In such cases, the supplier or contractor must accept an increase or decrease of up to 25% of the original price of the contract, adjusted for inflation, or up to 50%, where the contract is for refurbishment of buildings or equipment.

Changes in the identity of the supplier are permitted, as long as the change is provided for in the bid documents and the contract itself, and made in accordance with specific requirements. Unauthorised changes of supplier are subject to unilateral termination of the contract by the contracting authority (Law 8.666/93, art. 78(VI)).
20. **How common are direct awards for complex contracts (contract awards without any prior publication or competition)?**

Under Law 8.666/93, public bidding processes are not required, and contracts may be directly awarded, in three types of circumstances: where a public bidding process is **excused** (*licitação dispensada*, art. 17), **unnecessary** (*licitação dispensável*, art. 24), or **impracticable** (*licitação inexigível*, art. 25). The Law sets out an exhaustive list of circumstances in which public bidding processes are excused or unnecessary; the list of circumstances in which a bidding process is impracticable is illustrative only.

When a public bidding process is **excused**, the Law provides that no bidding process will be conducted and requires that the contract be made directly. Such a situation arises, for example, when the government wishes to settle a debt to a private party by transferring property rather than paying money.

When a public bidding process is **unnecessary**, the Law **authorises** the contract to be made without a public bidding process. These are cases where a bidding process would be possible in principle, but the Law gives the contracting authority the discretion to conduct a public bid or not.

Public bidding processes are unnecessary in cases of emergency, where there was a lack of interested parties in prior bidding processes, and for small-value purchases. Under Law 8.666/93, a “small value” purchase is one that does not exceed 10% of the limit for procurement by Invitation. As mentioned in topic 3, Invitation is the simplest bidding process and the amounts involved range from BRL 176,000 to BRL 330,000, depending on the goods or services to be supplied. The “small value” limit is thus BRL 17,600 or BRL 33,000.

Because the list of cases in which a public bidding process is **impracticable** is not exhaustive, a contracting authority that decides to not hold a bidding process because it is impractical must give the reasons for its decision. Examples of situations where a bidding process would be impracticable include a contract for products that have only one supplier, or a contract for the professional services of someone who has an established reputation in an artistic sector or other highly-specialised area.

The State-Owned Enterprises Law (Law 13.303/16) provides for various circumstances in which a public bidding process is unnecessary.