THEMATIC COMPILATION OF RELEVANT INFORMATION SUBMITTED BY BRAZIL

ARTICLE 9, PARAGRAPH 1 UNCAC

PUBLIC PROCUREMENT

BRAZIL (SIXTH MEETING)

In 2014, the Brazilian Federal Government procured over R$ 62 billion of goods and services. During this period, almost 170 thousand administrative proceedings of acquisition were concluded. In that respect and in order to better regulate and control those proceedings and the great amount of resources applied, Brazil has developed a complete legal framework on the matter.

According to the Brazilian Constitution, the governmental entities and entities owned by the Government in any of the powers of the union, the states, the federal district and the Municipalities shall obey the principles of lawfulness, impersonality, morality, publicity, and efficiency, and, with the exception of the cases specified in law, public works, services, purchases and disposals shall be contracted by public bidding proceedings that ensure equal conditions to all bidders, with clauses that establish payment obligations. The law shall only allow the requirements of technical and economic qualifications indispensable to guarantee the fulfilling of the obligations (Art. 37, XXI).

In that sense, law n. 8,666, of June 1993, establishes the public procurement procedures, regulating the Brazilian procurement system. Article 3 of this Law provides that the bidding is intended to ensure compliance with the constitutional principle of equality, with the selection of the most advantageous proposal for the administration, aiming at the promotion of a sustainable national development. The procurement procedure must also be prosecuted and judged in strict accordance with the basic principle of linkage to the bid announcement, so that the tendering rules must be clear and objective and respected in the context of an administrative contract.

The Law also defines the conditions for participating in public bidding procedures, establishing the modalities, exemption limits and qualification requirements, which are exclusively related to legal documentation, technical skills, economic and financial qualification and compliance with tax and labor regulations.
Law 8,666 establishes the obligatory publication of a bid announcement containing a full description of the object of the procurement procedure, the conditions for participating and the selection criteria, which are linked to the Law. The Administration cannot disobey the rules and conditions of the announcement, to which it is strictly bound. The notice containing summaries of the announcement of the bid must be published in the official media in advance, so that there is sufficient time for potential bidders to prepare and submit their tenders. According to Article 21, III, § 2, the minimum period until receipt of tenders will vary from 5 to 45 days, depending on the modality of tendering. In addition, the Access to Information Law, in force since May 2012, states that public bodies and entities shall ensure that information concerning the administration of public property, the use of public resources, government bidding and contracting is made available.

The bidding procedure will be started with the opening of an administrative proceeding, considering the objective criteria defined in the announcement or invitation, which should not violate the rules and principles established by the Law. There is a committee created by the Administration with the function to receive, examine and evaluate all documents and procedures concerning the registration of bids and bidders. This committee will be responsible for conducting the proceeding and, during the decision-making process, it is forbidden to consider any confidential, secret, subjective or reserved element or criteria which can influence on the principle of equality among bidders. According to Article 45, the evaluation of bids will be objective, and the Commission shall proceed to it in accordance with the modality of tender, the criteria previously established in the bid announcement and in accordance with the factors mentioned therein exclusively, so as to allow its assessment by bidders and oversight bodies.

With regard to the selection of personnel responsible for procurement, it is worth noting the entry into force of Law n. 12,813/2013, which regulates the conflict of interests within the Federal Executive Branch. The law defines conflict of interests and privileged information, defining situations that are not compatible with the exercise of the public function. According to the Law, there are situations that constitute conflict of interests during the performance of the activities in the public service and also situations that constitute this kind of conflict after the exercise of public functions, which shall be supervised by the corresponding oversight bodies, which include the Office of the Comptroller General and the Public Ethics Commission. The public servants dealing with public procurement are subject to this law.

Law 8,666 also provides for a system of appeal in relation to the decisions regarding the public procurement procedures. Article 109 states that, within five days, an appeal can be placed in relation to the qualification or disqualification of the bidder; the evaluation of the proposals; the cancellation or withdrawal of tenders; the refusal of the application for insertion in a registry, including any amendment or cancellation; the termination of the contract; and the application of penalties of warning, temporary suspension or fine.
The Brazilian public procurement system also establishes a debarment period. Article 87 of Law 8,666 lists the applicable sanctions in case of total or partial breach of contract: warning; fine, as set forth in the invitation or contract; temporary suspension from participating in bidding and debarment from contracting with the Administration, for a term not exceeding 2 (two) years; and declaration of unfitness to tender or contract with the Public Administration as long as the motives for punishment remain or until the rehabilitation before the very authority that imposed the fine, which shall be granted when the contractor indemnifies the Administration for the losses arising and after the penalty imposed based on the previous item expires. A list of the debarred companies is made publicly available in the Transparency Portal of the Federal Government, including not only information concerning the Federal Government, but also companies debarred in the context of States and Municipalities.

Furthermore, in relation to the use of technologies in the management of public procurement procedures, an important instrument is noteworthy: the Comprasnet Portal.

The www.comprasnet.gov.br address is the Federal Government procurement system which provides ready access to tender notices, completed procurement transactions, the execution of procurement processes using the pregão method, and other information relating to negotiations by the federal direct public administration, autonomous agencies and foundations. ComprasNet operationalizes electronic processes of acquisitions and also provides access to the legislation governing general services and procurement, in addition to various publications on this topic. At the website, suppliers have access to various services, such as applying for registration in the federal government suppliers' registry, obtaining bidding documents, participating in electronic procurement processes, among others.
2. Please outline actions required to strengthen or improve the measures described above and any specific challenges you might be facing in this respect.

Examples of the types of challenges States parties and signatories may have faced include:

- Challenges in developing the proper legislative framework;
- Coordination challenges between government agencies responsible for integrity in procurement and management of public finances and other bodies;
- Communication challenges between government bodies, agencies responsible for integrity in procurement and management of public finances, and business community representatives;
- Other implementation challenges; and
- Financial challenges with respect to maintaining sufficient and consistent funding for government bodies and other government agencies responsible for integrity in procurement and management of public finances.

At the moment, Brazil faces two main challenges we should highlight in regard to public procurement. The first one is disseminating to States and Municipalities the good practices and consolidated work done by the Federal Government. Since Brazil is composed of several municipalities, it is not easy to spread the successful experiences across the country. Brazil still has some ground to cover when it comes to ensuring the effective social participation and control over the budget cycle and to publicizing the budget reports and the supervisory process in the subnational entities.

The other challenge Brazil is working to overcome is related to the dialogue with the private sector, especially small companies, in order to enhance integrity within the companies that contract with the public sector. In that sense, the Office of the Comptroller General has been working in the development of booklets and learning materials, besides participating in meetings and seminars. Nevertheless, strategies must be traced to better approach the different companies.