

**THE BRAZILIAN EXPERIENCE OF USING PUBLIC
PROCUREMENT POLICIES TO PROMOTE THE
DEVELOPMENT OF MICRO AND SMALL ENTERPRISES
FROM THE LEGAL POINT OF VIEW**

Daniel Pezzutti Ribeiro Teixeira

*Daniel Pezzutti Ribeiro Teixeira, Ph.D in International Law -
University of Sao Paulo School of Law, is attorney in Brazil and
Portugal, rendering legal services related to foreign investment and
public procurement*

ABSTRACT

Despite the provisions of the Brazilian new Constitution's enacted on October 5, 1988, there had been little efforts to increase Micro and Small Enterprises (MSEs) participation in bids and contracts performed by the Public Administration, including rules set out to discipline this market.

After a new legislation in 2006 providing special treatment for MSEs, the Brazilian Government faced a new paradigm: to buy of prominent and strategic segments in order to promote the sustainable social and economic development.

This paper analyses the new legislation and provides the legal strategies of targeting the demand of the Brazilian Government in favor of MSEs. It demonstrates how the new legislation was capable of increasing the MSEs participation in public procurement to 30% of the total government's purchases and in 500% in value in a four-year period.

INTRODUCTION¹

Brazil is one of the largest economies in the world by almost any standard and hosts diversified activities, but it is still a developing country. As a growing country it naturally faces some difficulties, which do not reduce its market attractiveness. With Gross Domestic Product (GDP) of over US\$1.7 trillion, Brazil represents more than half of the South American economy. When Brazil's production is measured by PPP (Purchasing Power Parity) - that reflects the purchasing power of the same currency in different countries, the

Brazilian economy is within the ten largest worldwide. The economic stability, the strengthening of political institutions and the potential consumer market place Brazil, among the emerging countries, as one of the principal focus to attract foreign capital.

This is why foreign investment has played an important role in the country's development since the beginning of last century. Initially, it was concentrated in the infrastructure sector, mainly in the fuel and transport areas and, from mid-century onwards, it directed itself to manufacturing, helping to energize Brazil's sprouting industrialization process. In the last years, the service sector has absorbed the largest slice of those investments, encouraged to a great extent by privatization programs, mostly in 1998, in the telecommunications, energy and transport areas. There is still considerable State and semi State participation in various strategic sectors, such as transport and utilities.

In fact, the State activities can be sorted into two large groups: the core activities - which justify the State existence - and the ancillary activities (or non-core activities), which serve only to provide the former with the necessary items, thereby enabling the performance thereof.

Public procurement in Brazil, since its very beginning, with the Philippine Ordinances as of 1575, has always been deemed an ancillary activity, for it is aimed solely and exclusively at meeting a given secondary interest of the State. Nonetheless, as the Federal Constitution of 1988 took effect, its legal character underwent dramatic changes. This is because the idea of social mission is of the cornerstones the Brazilian constitutional and legal system is founded upon.

When seeking a social mission, the State realizes that by benefiting from the bid when planning a work, purchase or service, in view of the amount spent, it is put forward as a sustainable economic development activity, creating jobs and income for a great portion of the society and putting an end to poverty. Therefore, the procurement becomes one of the State's core-activities. And such new mission assigned has been referred to as the use of the State's purchasing power, by the Federal Government.

By manifesting the purchasing power through the customers' right to define its requirements and needs (thereby becoming a quality, productivity and technological innovation inducing agent), the State, being a major purchaser, could benefit from such "power" to foster the productive activity of small businesspeople, thus creating jobs, occupations and income, what would also contribute to the competitiveness and development of Brazil. On the other hand, by knowing better the existing rules and modalities, small

businesspeople may become major suppliers of the State, thereby causing the public purchases prices to lower.

This paper demonstrates, from the legal point of view, how the new legislation (Supplementary Law number 123 of 14 December 2006) and its regulations have changed the Brazilian public procurement market.

THE PUBLIC PROCUREMENT REGULATIONS IN BRAZIL

Overview of the Legal System

Brazil is organized in three separate branches: executive, legislative and judiciary. The Brazilian legal system is based on codes and legislation enacted by the appropriate legislative power at the federal, state and municipal levels. Legislative authority at federal level is entrusted to Congress (the Senate and the House of Representatives), at state level is exercised by the State Assembly and at municipal level by the City Council. The members of the legislative authority are also elected by direct vote.

The basic law of the country is the Brazilian Constitution, which establishes: the system of government; the attribution of powers to the three branches of government; and the legislative competence of the federal, state and municipal administrations. The Constitution currently in force was enacted on October 5, 1988, and is committed towards the progress and development of Brazil.

The legal rules governing all major activities in Brazil are basically laid down in federal legislation. However, the Constitution allows the Federal Government and the States to concurrently legislate on certain matters related to local issues. In this case, the Federal Government's power is limited to enacting general rules on such issues and the States have authority to legislate on a supplementary basis, in line with the federal legislation, for example regarding public procurement and administrative contracts. According to Federal Constitution of 1988, The Brazilian legislation follows this hierarchic scale, from most to least importance rules: 1) Federal Constitution; 2) Supplementary Laws; 3) Laws and International Treaties or Agreements applicable in the country; 4) Decrees; 5) Other Regulations.

Brazilian Judiciary is organized by the Federal Constitution, which divides the judicial structure into federal and state courts: the first ones have exclusive jurisdiction over lawsuits where the government

and its agencies are parties of or have interested in, as well as over cases involving foreign states and international agencies; the last ones decide every other lawsuit. The federal system is comprised by five Circuit Courts of Appeals, and in the state system every State has its own State Court of Appeals. There are also two superior courts that have jurisdiction over any case decided by State or Federal Court of Appeals, depending if the decision violates Federal Law or Federal Constitution.

Brazil has civil law jurisdiction and decisions are based on the application of statutory laws. Where there is no specific statutory provision, the courts may decide on the basis of analogy and general uses and practices, or by applying general principles of law. In general, precedents are not binding but tend to be respected by Lower Courts. All decisions are made by judges and Jury trials are only permitted in cases of murder in the first degree.

The rules of civil procedure are federal and applicable throughout Brazil which permits attorneys to practice all over the country. In one hand, the Brazilian system grants much power for judges to control the proceedings and to obtain evidence, but, in the other, permits an enormous multiplicity of appeals (particularly interlocutory appeals) that can delay proceedings for long periods.

Regarding arbitration, Brazil has specific legislation since 1996 (Law number 9,307 of September 23, 1996). According to Brazilian law, arbitration is only permitted in case of negotiable rights, which comprise most of commercial transactions. Foreign arbitration awards are also enforceable in Brazil but must still be ratified by the Superior Court of Justice, despite the fact the country has ratified the New York Convention on Enforcement of Foreign Arbitral Awards.

Most government procurement processes are open to international competition, either through direct bidding, consortia or imports. However many of the larger bids (e.g. military purchases) become very political and are done through sole sourcing or national security arrangements that exclude competition. This kind of purchasing often requires an act of Congress.

Brazil is not a signatory of the World Trade Organization (WTO) Agreement on Government Procurement (GPA), and as such does not necessarily use the same procedures as other signatories: often the Brazilian Government cites emergencies in procurement actions that would make the open bidding process time-prohibitive. International bidding is required for all procurement with international development bank funding, i.e. the Inter-American Development Bank (IDB) and the World Bank. The Brazilian executing agencies of IDB loans require international bidding above specific ceilings, according to IDB procurement guidelines. For

example, consultant contracts require international bidding above US\$200,000 and civil works above US\$5 million. However, portions of major projects financed by IDB may not require bidding where local Brazilian counterpart funding is involved.

Government procurement of telecommunications and informatics equipment is exempt from the above requirements. Special requirements were established in 1993 and 1994 allowing locally manufactured telecommunications and informatics products to receive preferential treatment in government procurement, and to be eligible for tax and other fiscal benefits based on local content and other requirements.

General Provisions on Public Procurement

As general rule enshrined in the country's Federal Constitution, bidding prior to administrative contracting is compulsory in Brazil. However, the Brazilian Procurement Law (Law number 8,666 of June 21, 1993), article 24, contemplates over thirty events under which bidding is either not required or exempted, e.g., purchase of material and contracting of services to be used by the Army in peace missions abroad, provided that the contracted price is compatible with market prices and the contract is approved by the Army's authority.

The Federal Constitution, article 22, subparagraph XXVII, establishes the power of the federal government to legislate on all methods of bidding and contracting; the article 37, subparagraph XXI, establishes the rules and principles of the conditions, and the article 175 states that the government must always use a public bidding process to grant public service concessions.

The Procurement Law, which regulates the article 37 of the Federal Constitution, is a result of a historical evolution that has consolidated rules and principles originating from doctrines, case law, administrative practices and previous legislation. This law is based on safeguarding the principles of supremacy and public interest and it guides the activities of the public administration under the concept that purpose overrides will as well as establishes the rules for bidding processes and contracts with the public administration.

Over ten different laws altered provisions of the Procurement Law in the last fifteen years. In addition, the Law of Concessions (Law number 8,987 of February 13, 1995) provides the regime of concession and permission in the rendering of public services and

Law number 9,784 of 29 January 1999 governs administrative procedures which may arise out of the bidding process.

Inspired in similar initiatives successfully conducted throughout the world (especially in the United Kingdom), Brazil enacted Law number 11,079 of 30 December 2004, the Federal Public-Private Partnership Law (Federal PPP Law), which establishes general rules for the public-private partnership bidding process and contracts within the competence of the Public Administration. This happened after several State Governments issued - within their parallel legislative powers with respect to bidding, contracting and public procurement in general - their State PPP Law, including the State of Sao Paulo, the most industrialized state of Brazil (Sao Paulo State Law number 11,688 of May 19, 2004). The PPPs allow novel forms of collaboration between the public sector and private initiatives, aiming at the development, construction, financing, operation and maintenance of projects requiring substantial capital investment, especially in the infrastructure sector, e.g., roads, trains, subways, airports, power plants, oil fields, sanitation, prisons, public hospitals and schools (OPICE & ENEI, 2009).

One of the Federal PPP Law's innovative aspects with respect to bidding is the possibility of inversion of phases of the procedure. The common bidding procedure, established in the Procurement Law, determines that the analysis of bidder's qualification documents² always precedes the opening of their financial proposals. This mechanism should make bidding procedures more efficient and expedite, since only the qualification documents of the bidder will be analyzed. If it meets all the requirements of the request for bid, a bidder will be declared the winner of the procedure; if not, the bidder with the second most advantageous financial proposal will be called on to present qualification documents and so on until a winner is declared.

After long discussion, Law number 11,196 of 21 November 2005 introduced important and innovative changes to the Law of Concessions, which aimed at enhancing private investments in public services infrastructure by means of guaranteeing an adequate legal environment for sponsors and financing parties. The main changes regarded: i) step-in rights for the agents providing financing to the concessionaire allowed by the granting authority; ii) the inversion of phases of qualification and judgment of financial proposals determined by the request for bid, in the exact same manner as provided for bidding procedures according the Federal PPP Law; iii) arbitration clause in concession agreements, if carried out in Brazil in the Portuguese language, and; iv) the assignment of credit rights by the concessionaries, emerging from the concession agreements, to guarantee long term financing (OPICE & ENEI, 2009).

The Supplementary Law number 123 of 14 December 2006 set forth general rules in connection with the differentiated and favorable treatment the micro and small enterprises (MSEs) shall be provided within the scope of Federal Government, the States and Municipalities powers, especially regarding purchases of goods and services by Public Authorities, technology and inclusion rules.

In Brazil, the requirement of a bidding procedure is the fundamental rule when contracting with the Public Administration. The Brazilian Procurement Law establishes general rules on bidding and administrative contracts regarding works and services within the scope of the Federal Government, the States and Municipalities. The works, services, purchases, disposals, concessions, permissions and leases of the public administration must, whenever contracted with third parties, be necessarily preceded by bidding, except for specific events provided by law that will allow a simplified procedure or direct contracting or that will exempt or not require the bidding procedure. Article 24 of the Procurement Law lists some of the events that are exempted from a bidding procedure, mainly related to the cost (bidding is higher than the benefit it may generate), timing (the delay for bidding may result in ineffective contracting), inefficiency (the potential benefit arising from the bidding tends to be null) and disadvantage (the economic advantage is not the criterion sought by the government) (OPICE & ENEI, 2009).

The methods of procurement in Brazil are bid, price solicitation, procurement by letter of invitation, contest, auction, and, most recently, proclamation (onsite and electronic). Bid is performed amongst any interested parties who, in the initial preliminary stage of application, are required to meet the minimum qualification requirements laid down in the Requests for Bids. Price Solicitation occurs amongst interested parties who are either duly registered or who have met registration conditions prior to the date the proposals are delivered. Procurement by Letter of Invitation, by the way, is used for parties of a specific sector, registered or not, selected or invited, but there must be a minimum number of three. Contest is the method of procurement of selecting a technical, scientific or artistic work. Auction is used amongst any interested parties for the purpose of selling movable goods which are of no use to the public administration, selling products legally seized or pledged, or disposing of real estate, to the highest bidder, equal or higher than the appraisal value. At last, instituted by Law number 10,520 of 17 July 2002, proclamation is the method of procurement used among any interested parties of the purpose of selling common goods and services to the public administration, the performance and quality of which may be objectively defined in the requests for bids by means of usual market specifications. Decree number 5,450 of 21 May 2005,

which regulates the Law, has created the electronic proclamation. The Procurement Law prohibits the creation of other methods of procurement or the combination of the methods provided herein (OPICE & ENEI, 2009).

In general, bidding in Brazil shall follow this procedure: a) publishing of the Notices of Requests for Bids; b) qualifying of tenderers, who are required to submit documentation referring to legal capacity, technical ability, economic or financial ability and regular tax status; c) processing of tenders, when the interested parties submit the proposals to be opened and examined by the authority; d) evaluating of tenders according the criteria laid down in the Requests for Bids (except in the case of contest method, there are four modes of bidding – lowest price, best technique, technique and price and highest call or offer); e) awarding of the bidding object.

THE RULES REGARDING THE PARTICIPATION OF MICRO AND SMALL ENTERPRISES ON PUBLIC PROCUREMENT IN BRAZIL

The Evolution of Differentiated Treatment for Micro and Small Enterprises in Brazil

The Federal Constitution, in its article 146, subparagraph III, item “d”, article 170, subparagraph IX and article 179, sets forth:

“Article 146 - A Supplementary Law shall:

III - Set forth general rules concerning tax legislation, especially in connection with:

d) definition of differentiated and favorable treatment for micro and small enterprises; (...)”

“Article 170 - The economic order, founded upon the appreciation of the human work and upon free enterprise, is aimed at ensuring everyone a life with dignity, pursuant to the dictates of social justice, complying with the following principles:

IX - preferential treatment for small enterprises incorporated under the Brazilian laws and headquartered and managed in Brazil.”

“Article 179 - The Union, the states, the Federal District and the municipalities shall provide small and micro enterprises, as defined by law, with differentiated legal

treatment, aiming at fostering them through simplification of their administration, tax, social security and credit obligations or through elimination or reduction thereof by means of law.”

Since the Constitution’s enactment on October 5, 1988, there have been little efforts to increase MSEs participation in bids and contracts performed by the Public Administration. This also applies to the rules set out to discipline MSEs.

The Law number 7,256 of 27 November 1984 sets forth rules included in the “Statute of Microenterprises”, in connection with the differentiated, simplified and favorable treatment in the administrative, tax, social security, labor, credit and enterprise development fields. Although such law expressly refers to the administrative field, it does not set forth differentiated treatment to MSEs in bidding procedures.

The Law number 8,864 of 28 March 1994 sets out rules for microenterprises (ME) and small-sized enterprises (SSE), in connection with the differentiated and simplified treatment in the administrative, tax, social security, labor, credit and enterprise development fields (article 179 of the Federal Constitution). Such law has nothing new in connection with MSEs participation in bidding procedures.

The Law 9,317 of 12 May 1996 provides for in connection with the MSEs’ tax system, sets forth the Integrated System for the Payment of Taxes and Contributions by Micro and Small Enterprises – “SIMPLES”, besides other provisions. This law approaches the tax system exclusively.

The Law 9,841 of 10 May 1999 sets forth the “Statute of Micro and Small Enterprises”, providing for in connection with the differentiated, simplified and favorable legal treatment under the articles 170 and 179 of the Federal Constitution. The article 24 thereof sets forth that the governmental purchases policy should give priority to the micro and small enterprises³. Unfortunately, such right has never been effectively enforced.

And, the article 970 of the Civil Code of 2002 sets forth that “*the Law shall ensure a favorable, differentiated and simplified treatment to the rural entrepreneur and the small businessperson in connection with the enrollment and the effects arising therefrom*”.

But, according to statistics published by the Brazil Department of Logistics and Information Technology of the Ministry of Planning, Budgeting and Management, of about 10 million companies existing in Brazil, only half is legally formalized. And more than 99% thereof are MSEs, employing 60% of formal workers. Information from

Boards of Trade shows that 50% of MSEs that started their operations in 2004 closed in 2006. Even considering the prominent social role played by them, they took part, before the enactment of Supplementary Law number 123 of 14 December 2006, in lesser than 18% of the governmental purchase volume and produce only 20% of Brazil's GDP, corresponding to about one-fourth of the total payroll in Brazil.

The Provisions of Supplementary Law 123 of 14 December 2006 and Decree number 6,204 of 5 September 2007

According to Supplementary Law number 123 of 14 December 2006, the articles 42, 43, 44 and 45 should be enforced immediately thereafter in bids placed after the enactment date thereof. Other provisions, except for the article 46, were regulated through the Decree number 6,204 of 5 September 2007 and are already fully enforced. The Public Administration shall be careful of identifying the MSEs when carrying out bidding procedures, by adopting the treatment set forth by the Supplementary Law.

In Brazil, micro and small enterprise shall mean the business company, non-business company and the businessperson referred to by the article 966 of the Civil Code, duly enrolled with the Registry of Trading Companies or with the Registry of Legal Entities, as the case may be, provided that, for microenterprises, the businessperson, legal entity or equivalent earns a gross revenue not greater than R\$240,000 (equivalent to US\$140,000) per calendar year; and for small-sized enterprises, the businessperson, legal entity or equivalent earns a gross revenue not lesser than R\$240,000 and not greater than R\$2,400,000 (equivalent to US\$1.4 million) per calendar year (article 3, subparagraphs I and II of the Supplementary Law).

In addition, pursuant to the article 72 of the Supplementary Law, the condition of micro and small enterprise shall be mandatorily included in its corporate name. Therefore, a simple check by the public agent should be able to settle the doubt regarding the legal character of the enterprise taking part in the bidding procedures.

However, in view of the countless concrete situations that may arise when effectively enforcing this Supplementary Law - considering the exception contained in the article 3, section 4 -, it would be important that the Administration had other ways to verify such MSEs condition. To that end, the Decree number 6,204/07 of 5 September 2007, article 11, sets forth that the classification as MSE shall be made through a statement, in order to enjoy the benefits set forth in articles 42 to 49 of the Supplementary Law. The following are the

main provisions of Supplementary Law regarding the participation of MSEs in government procurement.

Articles 42 and 43 authorize MSEs having tax and social security debts to take part in bids: after winning the bid, they shall have a deadline to rectify the situation in order to enter into the supply contract.

Article 42 sets forth that the fiscal regularity, under the article 29 of Law number 8,666⁴, is a condition to enter into the contract or to formalize a legal relationship, in the event there is no contract. In turn, the article 43 sets forth that MSEs shall comply with the provisions of article 29 of Law number 8,666 presenting the whole documentation proving the fiscal regularity, even though the certificate is liable. MSEs shall not be ineligible (excluded from the bidding procedure) if they present the liability certificate⁵.

To the extent that MSEs may participate of the bidding procedure regardless of owing debts to the Administration, the enterprise shall have two business days to remedy such issue, rectifying the debt and presenting the new documentation (paragraph 1). Such deadline shall correspond to the moment when the bidder is declared winner⁶ of the bidding procedure. This deadline may be extended for the same period thereof, and such extension shall be granted by the Administration upon the bidder's request, except in the event of urgency in contracting or insufficient deadline to the commitment (article 4, paragraph 3, of Decree number 6,204).

It must be clear that the fiscal regularity analysis was not excluded from the qualification stage. In the event the MSEs present documentation with constraints, the Public Administration may proceed to a qualification with condition. This is because only after being declared winner, having supplied the constraint, the Administration may issue a curative act of the qualification stage. In the event the MSE does not correct the documentation or the documentation delivered is not accepted, the Administration shall issue an administrative act disqualifying that MSE. The Administration may also base the performance of the right of pleading upon this administrative act (SANTANA, J. E., & GUIMARAES, E., 2007).

The express provision of the acceptance of liability certificate with clearance effects in view of the debt installment program is another significant point. Article 43, paragraph 2, sets forth that the documentation non-correction shall result in the loss of right to the contracting with Public Administration, i.e., it should be understood that MSE shall have no right to be claimed before the agency/bidding entity, especially in connection with the award (expectation of right to be hired and subjective public right to be hired, in the event the

Administration needs the subject matter awarded to the winner). This also applies to the provisions contained in the article 4, paragraph 4, of Decree number 6,204.

Since there was a condition to be fulfilled, the MSE's inaction characterizes its refusal to rectify the documentation, thereby justifying the qualifying act discontinuance. Furthermore, the MSE may be subject to the penalty set forth in article 81 of Law number 8,666, which shall be preceded by an adversary proceeding and full defense, in addition to arise out of a situation that cannot be justified by the MSE (JUSTEN FILHO, 2007).

In the event the Administration uses the rights set forth in Article 43, paragraph 2, it shall note that, should the bid be made in the proclamation modality, a negotiation with the remaining bidder shall take place in connection with the amount of its proposal. In the event it chooses to revoke, it shall be aware of the provisions set forth in the article 49, paragraph 3, of Law number 8,666, whereby an oral testimony from other bidders is required prior to the decision of revoking the bidding procedures.

Articles 44 and 45 create the "notional tie": the MSE presenting a proposal with an amount equal or higher up to 10% versus other companies' proposal amounts (or up to 5%, for the proclamation modality), provided that the bid type is "lowest price" (article 5, main section, Decree number 6,204), is entitled to submit a new proposal outbidding the lowest amount.

Article 44 clearly sets forth another tie-breaking criterion, in addition to those already provided for by Law number 8,666, in articles 3, paragraph 2 (preferences for companies) and 45, paragraph 2 (raffle). In bids having MSEs taking part, they shall receive preference over others in the event of a tie. The curious thing is that "tie" implies the numerical equality of proposals, as well as that the proposal submitted by MSEs is higher up to 10% versus the top-ranked company in the modalities listed in article 22 of Law number 8,666 (competition, price solicitation, letter of invitation and bid) or up to 5% in the proclamation modality (JUSTEN FILHO, 2008).

Article 45 sets forth the procedure to be employed in the event of proposals tie. The top-ranked MSE shall be entitled to submit a new proposal, provided that it has an amount lower than the one deemed winner. What happens next is:

- 1) In the event MSE submits the new proposal, the subject matter shall be awarded to the MSE. In the proclamation modality, the MSE shall have the maximum deadline of five minutes after the bids finished to enforce such right, under penalty of estoppel. In other bid

modalities, the deadline shall be set forth by the contracting agency or entity and provided for in the call notice.

2) In the event the MSE does not submit a new proposal, the remaining MSEs shall be called, provided that their proposals are within the percentages set forth in article 44. Thereupon, they shall have the right to submit a new proposal, according to the rank order sequentially as if it had started another auction. In the event of tie between proposals offered by MSEs, there shall be a raffle in order to determine the first one to submit a best offer.

If any MSE does not submit a counter proposal having a price lower than the top-ranked company's one, the bidding object shall be awarded to the bidder who has originally presented the lowest price proposal (which tied with MSE's proposal).

It should be pointed out that the enforcement of right set forth in paragraphs of article 45 of the Supplementary Law results in the need of the MSE to attend the bidding procedure session in person, on bid, price solicitation, letter of invitation, auction and face-to-face proclamation modalities.

Article 46 sets forth that the Administration may issue a credit certificate in the event of non-payment of settled commitments. Aiming at correcting the problems arising from the non-payment of contracts performed, the General Law has decided to transform such credits, for being clearly legal, into securities that may be negotiated. Thus, after being duly regulated, it shall enable the issuing of a microenterprise credit certificate, currently governed by Law number 6,840 of 03 March 1980 and by the Decree-Law⁷ number 413 of 09 January 1969.

In order to clearly understand this new kind of security, it is important to know that it may be used by individuals or legal entities engaged in commercial activity and provision of services for loan operations granted by financial institutions. Thus, only financial institutions may work with such securities, and a warranty shall be provided. Whereas the trade credit certificate has a highly complex system, it is rarely used by individuals and legal entities; therefore, its use for MSEs as a security subject to be used for the deposit release shall depend solely upon the regulation set forth in the Supplementary Law. Only upon settlement of the expenses the Administration deems the debt clearly legal, and the payment liability arises therefrom, provided that the provisions agreed upon have been fulfilled (JUSTEN FILHO, 2007).

Article 47 issues that States and Municipalities may drive purchases that privilege the local development. Even though the Supplementary Law employed the expression "may", the article 1 of the Decree

number 6,204 adopted the term “shall”, meaning that the Administration must mandatorily apply the differentiated and simplified treatment set forth in this article. The Supplementary Law set forth that the Administrative Authority would not be in charge of choosing whether to adopt its rights.

To become possible to federation entities foster the social and economic development, as well as increasing the efficiency of public policies, it is necessary to define (i) which public policies shall be sought and established by the Administration concerning the process of choosing the means in order to accomplish the government objectives, with the participation of public and private agents and (ii), pursuant to the law, the plan to set forth the policy objectives, institutional instruments to the achievement thereof and other establishment conditions. This means that the Administration shall have skilled public agents in its staff in order to identify which regions may undergo development. They are referred to as “Business Manager”. It is also necessary to amend the bids and contracts legislation in order to allow the effective enforcement of the differentiated and simplified treatment to MSEs.

Article 48 creates bids exclusively for MSEs participation, not greater than R\$ 80,000 (equivalent to US\$ 45,000). Once again, the expression “may” was employed by the Supplementary Law in connection with the list of situations provided for in this article, so that each Administration could, at its own discretion, adopt them aiming at effectively enforcing the differentiated and simplified treatment. Regarding the federal domain, in view of the Decree number 6,204, the term “may” was used for events set forth in subparagraphs II and III, articles 7 and 8, respectively. On the other hand, agencies and entities shall carry out bidding procedures exclusively for MSEs for amounts not greater than R\$80,000 (article 48, subparagraph I of the Supplementary Law, coupled with article 6 of Decree number 6,204).

Such benefit shall be made considering the total estimated amount for the bid when the bidding procedure is connected with the purchase of items of the same “kind”. In the event the estimate is lower than R\$80,000 (equivalent to US\$45,000), the benefit of exclusivity for the MSEs shall be provided.

It is clear that the law has not distinguished between the bidding object, modality or judgment type, since the criterion is solely and exclusively the contract amount. Nevertheless, States and Municipalities may place new constraints in connection with the bidding object and/or modality and/or judgment criterion when adjusting their legislations.

In subparagraph II and paragraph 2 of the same article, the law encourages subcontracting of MSEs: the Administration may adopt criteria encouraging subcontracting by medium and large enterprises in contracts greater than R\$80,000 (equivalent to US\$ 45,000). The article 72 of Law number 8,666 sets forth that such subcontracting is always dependent upon the authorization in advance by the Administration. In the event at issue, the Decree number 6,204 sets forth that in bids for supplying goods, providing services and carrying out works, the contracting agencies and entities may require, in the requests for bids, that MSEs be subcontracted, under penalty of disqualification. The subcontracting requirement percentage is not greater than 30% of the total amount bid, and subcontracting in caps is optional to the company, as set forth in the request for bid.

The subcontracting forecast arises from the possibility of the contractor assign, without bid, a part of the bidding object to another company, which shall perform it at its own risk, being paid directly by the Administration therefor. Subcontracted MSEs shall be indicated and described by the bidders upon the acceptance, where the bid modality is proclamation; or upon the qualification, for other modalities (article 7, subparagraph II, coupled with section 2 of the Decree number 6,204). In addition, upon the qualification, the MSEs' fiscal and labor regularity documentation shall be presented, as well as during the contract term, under penalty of termination. The fiscal documentation may be rectified under articles 42 and 43 of the Supplementary Law and article 4 of Decree number 6,204.

The contracted company, besides undertaking the subcontractor replacement, shall also be in charge of the standardization, compatibility, centralized management and the quality of subcontracting work. Notwithstanding the foregoing, under the article 7, section 6 of Decree number 6,204, commitments and payments in connection with subcontracted portions shall be made directly to MSEs.

Subparagraph III of the same article sets forth a quota of not more than 25% of the bidding object for contracting MSEs in procedures for purchasing divisible goods, services and works. It is a new attempt to enable MSEs to supply goods, provide services, and carry out works to the Administration in a smaller scale than those bids, since they would not have conditions to meet the whole demand at first. This is because it enables the bidding object division into several batches within a single procedure.

At last, article 49, subparagraphs I to IV, sets forth prohibitions to the differentiated and simplified treatment to MSEs granted by articles 47 and 48. The prohibitions contained in the subparagraphs I, II and III shall be previously and expressly demonstrated and justified by

Administration, under penalty of voiding the bid carried out without giving the differentiated and simplified treatment (JUSTEN FILHO, 2007).

The requirement of information about the differentiated and favorable treatment to MSEs is mandatory in the requests for bids (subparagraph I). The political character is evidenced. In addition, in view of the principle of binding to the request for bid, in the event the treatment is given, the criteria shall be expressly set forth therein (article 10 of Decree number 6,204).

The requirement of a minimal number of three competitive MSEs results in seeking an effective contracting (subparagraph II). Thus, they may be headquartered in the Municipality (locally) or in the State (regionally), according to the bidding object amount, as well as the bidder entity legal character. The law also requires MSEs to be able to perform the contractual obligations. Therefore, it may be stated that the minimum parameter to verify the possibility of adopting the differentiated and favorable treatment shall be: not less than three MSEs, provided that they are able to perform what is contained in the call notice.

It is allowed the non-enforcement of the differentiated and favorable treatment in the event the Administration is able to demonstrate its disadvantage for the bidding object, in whole or in part (subparagraph III). The contracting is deemed disadvantageous when it results in a price superior to the amount set forth as reference (article 9 of the Decree number 6,204).

In processes of bidding exemption (waiver and unenforceability), at first, it is not necessary to adopt the preference for MSEs, especially because the character of such processes would make difficult the enforcement of such benefit in a few events (subparagraph IV). Nonetheless, there shall be pointed out that the preference for MSEs may be adopted in the bidding exemption, whenever possible.

In addition to the prohibitions expressed in article 49, it is noted that the 25% limit of the budget available for contracting in every calendar year set forth in paragraph 1 of article 48 and explicitly expressed in subparagraph IV of article 9 of the Decree number 6,204 also places a constraint to the enforcement of rights provided for in articles 47 and 48. The subparagraph V of the same article added another event of prohibition to the differentiated and favorable treatment: the events where the MSE is not able to achieve the objectives set forth in article 1, which are: promotion of the economic and social development locally and regionally; increasing the efficiency of public policies and encouragement to technological innovation.

In summary, the main features of the rules introduced by Supplementary Law number 123 of 14 December 2006 and its provisions are as follows:

- Authorize MSEs having tax and social security debts to take part in bids (articles 42 and 43);
- Create the “notional tie” (articles 44 and 45);
- Allow issuing of a Microenterprise Credit Certificate (article 46);
- Foster the local development (article 47);
- Create bids exclusively for MSEs (article 48, main section);
- Encourages subcontracting of MSEs (article 48, subparagraph II);
- Establish quota of not more than 25% for divisible assets (article 48, subparagraph III);
- Except the situations when differentiated and simplified treatment to MSEs are prohibited (article 49).

The Practice of the New Legislation Providing Differentiated Treatment for Micro and Small Enterprises on Government Procurement in Brazil

By acknowledging the differentiated situation of MSEs and enforcing privileged public policies, the two public bid purposes shall be met: equal opportunity and better proposal. These purposes are described in the article 3, main section, first part of Law number 8,666.

The Brazilian Department of Logistics and Information Technology of the Ministry of Planning, Budgeting and Management has produced a booklet – “*What to do in order to purchase more from Micro and Small Enterprises (MSEs)*” - aimed at teaching State’s purchasing agents best practices of how to enforce the new legislation in the daily routines of public bids. The following are the main “best practices” mentioned in this paper:

- To Assure the Same Opportunities to All Parties of Interest: depicts, indeed, the constitutional principle of equal opportunity (article 5, main section, Federal Constitution). However, equality does not mean that any and all discriminatory treatments are void. The discrimination between situations might be an essential requirement in order to achieve equality. In such case, the equal treatment should be void, since it breaches the equal opportunity.

In addition, the extent of the equal opportunity principle is not restricted to equalize the citizens before the legal rule set forth, but

the law itself shall not be edited without complying with the equal opportunity. Thus, the equal opportunity among the bidders of a bidding procedure accepts the differentiated treatment between unequals in order to determine the actual extension of its domain.

Thus, the question lies at the criteria for identifying equal opportunities, according to which on the one hand, what is adopted as a discriminatory criterion must be investigated; on the other hand, it should be pointed out whether there is a rational reason, i.e., logical foundations so that the legal treatment created due to the proclaimed inequality is assigned, in view of the equalizer line accepted. Finally, it should be analyzed whether the correlation or abstractly existing rational reason is aligned with the values appreciated in the constitutional normative system.

This means that there should be more than an abstract logical correlation between the differential factor and the resulting differentiation. Furthermore, a concrete logical correlation is required, i.e., aimed at the interests under the positive constitutional Statutory Law. Converting it to the differentiated treatment given to MSEs, it is verified that every criterion is present, i.e., there is a logical correlation between the privileges granted and the reason (transforming the bid into a sustainable economic development activity, creating jobs and income, and putting an end to poverty); in addition, such correlation is aligned with the constitutional principles.

■ To choose the Most Favorable Proposal:

Choosing the best proposal is directly related to the judgment criterion elected by the Public Administration, which shall be driven by the following factors: quality, efficiency, price, payment conditions, deadline and other factors pertinent to the bid subject matter.

It is intended the best proposal in the market and not in the bid procedures. Thus, if there are flaws in the market, the State intervention in the economy is justified. In special situations, the article 173 of the Federal Constitution allows the State to intervene in the economic domain when needed to the national security imperatives or upon relevant collective interest.

In conclusion: giving a differentiated treatment to MSEs is included in the notion of relevant social interest, thereby justifying the use of the bid institute as an instrument for intervening in the market.

■ Standardize, Simplify and Disseminate the Requests for Bid: the more objective, clear and simplified the requests for bid and letters of invitation, the better the understanding of their requirements and the participation of MSEs (which often do not have a specialized advisory board). The broader the dissemination of the requests for

bid and letters of invitation, the greater the participation of MSEs in bidding procedures.

- Allow the Establishment of Partnerships Among MSEs: by allowing MSEs partnerships, their ability to supply to the government is increased.

- Plan Government Purchases: the performance of bidding procedures in predetermined periods shall enable that MSEs have the documentation required and valid, as well as having the bidding object to be provided within the deadlines set forth.

- Make the payment within the deadline set forth by Law number 8,666 (article 40, subparagraph XIV) and agreed upon between the parties (article 55, subparagraph III): this would increase the MSEs participation, for there would not be any risks of loss whatsoever regarding a potential non-payment or even a relevant delay.

- Increase the MSEs participation in Bids for Engineering Works and Services: this would include the participation increase in competition and price solicitation modalities, as well as best technique and technique and price types of bids.

- Simplify the Qualifying Documentation: the required documentation shall be less restrictive and fostering more competition, thereby making the MSEs participation easier.

- Verify Documentation Available on the Internet: thereby not requiring the presentation of such documentation, making the MSEs qualification easier.

- Avoid Excessive Formality: correct merely formal errors in proposals and in the participants' documentation, and introduce a corrective process (Law number 8,666, article 43, section 3).

- Do Not Require Documents for Spot Goods: a few documents might not be required, thereby allowing a greater participation of MSEs in purchases of goods with a delivery time not longer than 30 days as from the date set forth to present the proposal, except for the certificates of good standing with the Brazilian Social Security Institute (INSS) and Unemployment Guarantee Fund (FGTS) (Law number 8,666, article 32, section 1).

- Use the Direct Contracting: in the event of waive of the bid, set forth in the article 24 of Law number 8,666, hire MSEs whenever possible.

- Bidding Object Specification: carry out a detailed research on the specifications that shall be included in the bidding object description. This shall avoid irrelevant requirements and those which cannot be met, especially by MSEs.

- **Market Knowledge:** it shall enable government needs to be met by what can be offered in the existing MSEs market.
- **Ongoing In-House Information Exchange:** it shall enable the existing difficulties to be identified and solved in connection with the MSEs inclusion.
- **Have Complete Knowledge of Bid Procedures:** by mastering the bidding procedures stages, the existing flaws may be fixed, and MSEs may be effectively included.

USING THE GOVERNMENT'S PURCHASING POWER TO STRENGTHEN MICRO AND SMALL ENTERPRISES ⁸

According to statistics of the Department of Logistics and Information Technology of the Ministry of Planning, Budgeting and Management, MSEs, in 2005, accounted for 14% of the Government's total purchases. Of such amount, R\$2.5 billion (equivalent to US\$1.4 billion) accounted for purchases of goods and common services - 19% of the total thereof purchased by the Government. The most used methods and modalities by MSEs for purchases by the Federal Government are proclamation, letter of invitation and price solicitation, especially by electronic means.

In that year, the most used method by MSEs was price solicitation, accounting for R\$661 million (equivalent to US\$170 million), followed by onsite proclamation, accounting for R\$615 million (equivalent to US\$340 million). And then, the electronic proclamation, accounting for R\$525 million (equivalent to US\$ 290 million). In the aggregate, the Federal Government has purchased around R\$2.6 billion (equivalent to US\$1.4 billion) from MSEs.

In 2006, MSEs sold to the Federal Government R\$2.3 billion (equivalent to US\$1.3 billion). This means a reduction to 10% of the Government's total purchases, estimated in R\$23 billion (equivalent to US\$12.7 billion).

In 2007 (first year after the enactment of the Supplementary Law number 123 of 14 December 2006), the Federal Government purchased R\$9.5 billion (equivalent to US\$5.2 billion) from MSEs, which represents 35% of the total, estimated in R\$25 billion (equivalent to US\$13.8 billion).

In 2008, the Federal Government purchased R\$8 billion (equivalent to US\$4.4 billion) in goods and services of MSEs, an amount constituting 27% of a total of R\$30 billion (equivalent to US\$16 billion) in purchases made in such period. The reduction, if compared

to 2007, was due to the global economic crisis. Even though, around 80% of Federal Government purchases were made through electronic proclamation, which was the most used method by MSEs to supply to the Government in that year. In 2008, the MSEs accounted for 46% of electronic purchases.

In 2009, the Federal Government purchased a total of R\$50 billion (equivalent to US\$27.7 billion) in goods and services. Around R\$14.6 billion (equivalent to US\$8.1 billion) of MSEs, an amount constituting around 30% of the total. While large companies fired many employees during the first semester of that year, Brazilian MSEs hired 450,000. In that year, the MSEs sold 73% of the total items purchased by the Federal Government and accounted for 55% of electronic purchases.

Among the majority of goods sold to the Federal Government by MSEs in 2009, through every purchase method, are equipments for automatic data processing, software, accessories and support equipment (14%). Among the majority of services are special construction services (24%).

Moreover, the Secretary of Brazil Department of Logistics and Information Technology of the Ministry of Planning, Budgeting and Management has announced that it is estimated that around 790,000 jobs/year are created due to the growth of such participation, attended the necessary promotion of the sustainable social and economic development.

CONCLUSION

As result of the union between regulation and ordinance of the economic activity, the State needs to foster the MSEs' activities, so that they are included in the social and economic development process. At first, it does this by making the Supplementary Law number 123 of 14 December 2006. Immediately thereafter, there shall be tangible administrative measures for the effective enforcement of the differentiated treatment, as well as the issuing of specific legislation of each federative entity, thereby enabling the validation of changes introduced by the Supplementary Law. In Federal Government scope, the Decree number 6,204 has been issued on September 5th, 2007.

The initiative of enforcing the State's purchasing power under the Supplementary Law number 123 of 14 December 2006 and its regulations has more than doubled in the same period: from 14% in 2005, the participation of MSEs achieved 30% in 2009 and it is still

rising. In 2005 the MSEs sold to Federal Government around R\$2.6 billion (equivalent to US\$1.4 billion) and in 2009 this number reached R\$14.6 billion (equivalent to US\$8.1 billion). This means there has been an increase of 500% in value in a four-year period. And there is still a lot to be accomplished to meet the expectations of hosting the FIFA World Cup in 2014 and the Olympics two years later, especially in the infrastructure area to cover the needs of a continental country with a great deal of deprivation.

The current paradigm of government procurement – which turns purchases into State’s core activities –, in addition to the Federal Constitution, “Statute of Microenterprises” and the Supplementary Law number 123 of 14 December 2006, sets forth that public procurement shall definitely be aimed at promoting and developing micro and small enterprises now more than ever. Brazil is definitely one of the best examples worldwide.

NOTES

¹ All the numbers and general information referred in this chapter are published by the Brazilian Institute of Geography and Statistics. Available at www.ibge.gov.br (only in Portuguese language).

² To qualify for bidding, the interested parties will be required to submit documentation referring to legal capacity, technical ability, economic or financial ability, regular tax status, and in respect to article 7, indent XXXIII, of Federal Constitution (prohibition of night, dangerous or unhealthy work for persons below 18 years of age and of any work of persons below 16 years of age, except as an apprentice from the age of 14 years).

³ “*Article 24 - The governmental purchases policy shall give priority to micro and small enterprises, whether severally or jointly, with special and simplified proceedings under this Law regulations.*”

⁴ Tax regularity means effective enforcement of the Tax Administration requirements (settlement, installment program or discussion of taxes by the taxpayer).

⁵ If an interested party is deemed ineligible, under the article 41, section 4 of Law number 8,666, they should be estopped from taking part in the subsequent stages, in the event of letter of invitation, price solicitation and competition modalities.

⁶ According to article 4, paragraph 2, of Decree number 6,204, “winner’s statement” shall mean, for the proclamation modality, the moment immediately after the qualification stage; for other bid

modalities - the moment after the judgment of proposals, awaiting the deadlines of fiscal regularization to open the appellate stage.

⁷ The Decree-Laws existed upon former Federal Constitutions and the ones still enforceable are considered as Laws on the hierarchic legislation scale.

⁸ All the statistics referred in this chapter are published by the Brazil Department of Logistics and Information Technology of the Ministry of Planning, Budgeting and Management. Available at www.planejamento.gov.br (only in Portuguese language).

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