

## *Chapter 5*

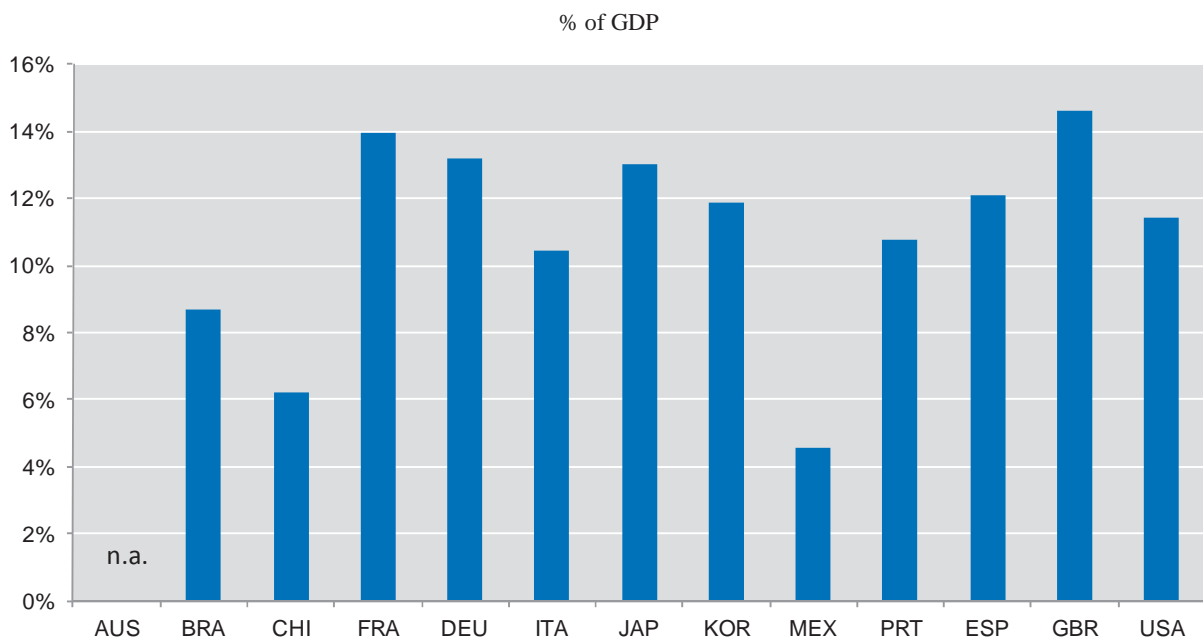
### **Enhancing integrity in public procurement**

Public procurement is recognised as a strategic instrument for public service delivery – but also as an activity vulnerable to misconduct and (active and passive) waste. This chapter examines actions by the federal government of Brazil to utilise information technologies to improve transparency, control and efficiency in procurement. The proposals for action focus on *i*) introducing performance indicators and internal assessments to guide improvements within the procurement function; *ii*) introducing clear and concise “how to” manuals to support the capability of the procurement workforce; and *iii*) delegating responsibility to management to conduct due diligence during tender evaluation and prior to contract award. These can serve to transform the procurement into a strategic function, strengthening evidence-based learning and improvements within the procurement system.

## Introduction

Public procurement is recognised as a strategic instrument for public service delivery – but also an activity vulnerable to misconduct and (active and passive) waste (see *e.g.* OECD, 2005; OECD, 2007a; OECD, 2007b, OECD, 2009a).<sup>1</sup> Its prominence as a policy instrument relates to its total value: general government procurement accounts for between 4-14% of GDP in OECD member countries (see Figure 5.1). In Brazil, conservative estimates suggest that general government procurement accounts for approximately 8.7% of GDP. Of this, 1.6% is attributed to the federal government, 1.5% to state governments, 2.1% to local governments and 3.2% is attributed to state-owned and mixed capital enterprises.<sup>2</sup> Given the substantial financial flows and direct linkage with service delivery, many governments in OECD member countries are taking steps to enhance integrity within their procurement systems. The role of integrity in public procurement as a measure to prevent corruption within the government is recognised in the OECD “Principles for Enhancing Integrity in Public Procurement” (OECD, 2008a, 2009a; see also Annex 5A1) and international conventions against corruption.<sup>3</sup>

Figure 5.1. **Size of public procurement markets in Brazil and select countries, 2008**



Note: Brazil data for 2004.

Source: OECD System of National Accounts; Federal Ministry of Planning, Budget and Management.

Enhancing integrity in public procurement is not simply about increasing transparency and limiting management discretion in decision-making processes. Measured discretion in procurement decision making is needed to achieve value for money, often defined as the most economically advantageous tender. Rather, enhancing integrity necessitates recognising the risks inherent throughout the entire procurement cycle, developing appropriate management responses to these risks and monitoring the impact of risk mitigating actions. Moreover, it requires transforming procurement into a strategic and capable profession rather than a simple administrative process. This transformation necessitates developing knowledge and creating tools to support improved

procurement management decision making and assessment. Enhancing integrity in public procurement must also be placed within the broader management systems and reform of the public administration.

This chapter examines efforts within Brazil's federal public administration to enhance integrity in public procurement. While the focus is the federal public administration, the national legislature and federal judiciary increasingly use the same procurement management information systems. In 2009, approximately 9% of contract volume (27 600 contracts) and 15% of their value (BRL 8.7 billion; USD 5.2 billion; EUR 3.7 billion)<sup>4</sup> was attributed to public organisations outside the federal executive branch. Approximately 80% of procurement by the federal judiciary is conducted using the same systems as the federal public administration: the Integrated General Service Administration System (*Sistema Integrado de Administração de Serviços Gerais*). The Federal Senate and Chamber of Deputies plan to commence using this same system in the near future. A formal memorandum of agreement was already signed, but no explicit date has been set for its implementation.

The drive for enhancing integrity in public procurement in Brazil has been led by the Federal Ministry of Planning, Budget and Management (*Ministério do Planejamento, Orçamento e Gestão*), the Office of the Comptroller General of the Union (*Controladoria-Geral da União*) and the Federal Ministry of Justice (*Ministério da Justiça*).

- The Federal Ministry of Planning, Budget and Management, through the Secretariat for Logistics and Information Technology (*Secretaria de Logística e Tecnologia da Informação*), is responsible for formulating and promoting the implementation of policies and guidelines regarding public procurement and administrative contracts. While in the past the secretariat has focused on the procurement of goods and services, during the last few years its responsibilities have extended to include public works. This was previously the responsibility of the Secretariat of Planning and Strategic Investment (*Secretaria de Planejamento e Investimentos Estratégicos*) in the same ministry. The Secretariat for Logistics and Information Technology also manages the Integrated General Service Administration System and federal procurement portal (ComprasNet) used to manage procurement activities by organisations of the direct and agencies and foundations within the indirect public administration.
- The Office of the Comptroller General of the Union, through the Secretariats of Federal Internal Control (*Secretaria Federal de Controle Interno*) and Corruption Prevention and Strategic Information (*Secretaria de Prevenção da Corrupção e Informações Estratégicas*), focuses on preventing and detecting waste in public procurement. These secretariats use computer-assisted audit techniques to identify procurement irregularities and may audit procurement. It is also responsible for managing the Transparency Portal of the Federal Public Administration, which provides real-time information on government spending incurred through public procurement. In addition, through the Inspectorate General of Administrative Discipline (*Corregedoria-Geral da União*), the Office of the Comptroller General of the Union maintains a National Registry of Ineligible and Suspended Suppliers (*Cadastro Nacional de Empresas Inidôneas e Suspensas*). The Inspectorate General of Administrative Discipline also has the power to investigate allegations of misconduct conducted by public officials involved in public procurement.

- The Federal Ministry of Justice, through the Secretariat of Economic Law (*Secretaria de Direito Econômico*), investigates cases of suspected bid rigging and develops capacity to assist procurement authorities in identifying and preventing cartel activities in public procurement.<sup>5</sup> This has been supported by establishing, in May 2007, a dedicated Public Procurement Unit. This unit works in close co-operation with the Office of the Comptroller General of the Union, Federal Court of Accounts, the Office of the Federal Public Prosecutor (*Ministério Público Federal*) and the Department of the Federal Police (*Departamento de Polícia Federal*).

The remainder of this chapter is structured in four sections. The first section examines procurement developments in Brazil, including renewed dynamism in public investments and the introduction of complementary policy goals. These goals include supporting the development of micro- and small enterprises, sustainable or “green” procurement and innovation. The second section examines transparency in public procurement throughout the procurement cycle. It includes a discussion of the preference by the federal government to use unrestricted competition and reverse auctions as a means to increase efficiency, control and transparency in public procurement – although the high use of exemptions and waivers to competition warrants attention by the government. The third section examines efforts to prevent waste and misconduct in public procurement, including efforts to address collusion in procurement and bid rigging in the private sector. It includes the adoption of new audit techniques and plans to introduce risk management, as well as efforts to fight bid rigging and sanction suppliers for poor performance. The fourth section focuses on the need to strengthen the capability of the procurement system in Brazil. It includes the development of the procurement workforce and the introduction of performance reviews as a basis for strengthening evidence-based learning and improvements within the procurement system.

## Public procurement developments in Brazil

Two developments prompt a review of integrity in public procurement in Brazil. First, there has been renewed dynamism in public investment in recent years, a trend that is expected to continue in coming years as the country prepares to host the 2014 FIFA World Cup and the 2016 Olympic Games. Second, the federal government is increasingly becoming oriented towards the inclusion of complementary goals in public procurement. These include using public procurement to target micro- and small companies, sustainability (*i.e.* green) and innovation.

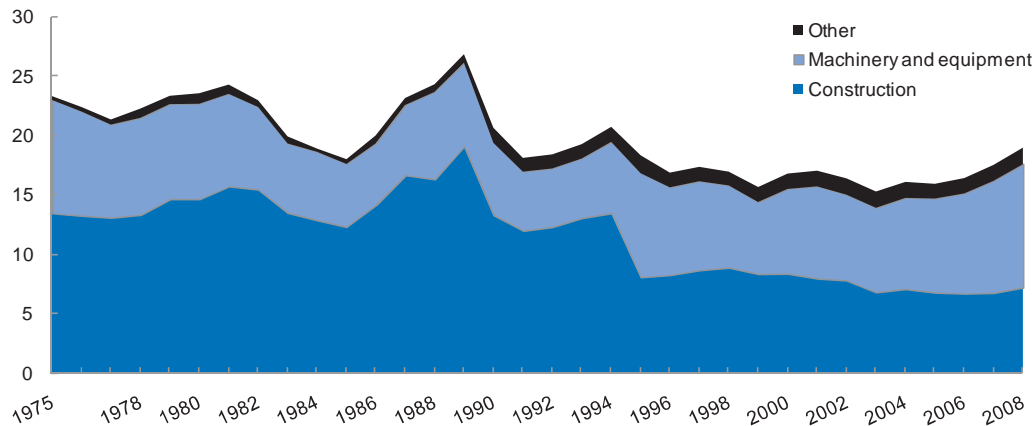
### ***Renewed dynamism in public investment attributed to the Accelerated Growth Programme, economic stimulus and mega-sporting events***

Renewed dynamism in public investment is essential for raising Brazil’s growth potential. The Accelerated Growth Programme (*Programa de Aceleração do Crescimento*) allocate approximately BRL 800 billion (USD 478 billion; EUR 344 billion) to infrastructure between 2008 and 2013. This programme prioritises transport, energy, sanitation, housing and water resources. More recently, in February 2009, the federal government announced that spending on infrastructure would increase by a further 29% as a means of offsetting the economic impact of the financial crisis. This increase comes after particularly low levels of public infrastructure spending during the 1990s (see Figure 5.2) and raises concern over the capability of federal public organisations to effectively manage the rapid increase in the number and value of

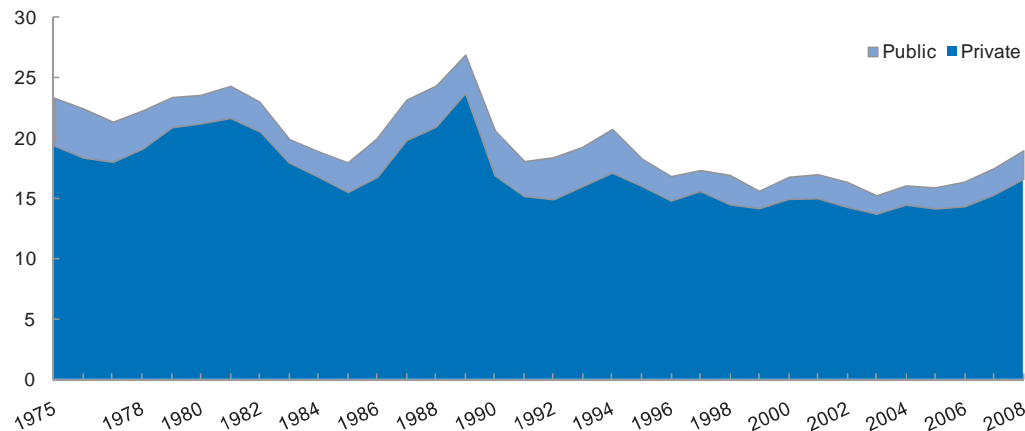
contracts. The reduction in public infrastructure procurement during the 1990s was most notable in the electricity and transport sectors.<sup>6</sup> To support the on-time delivery of the Accelerated Growth Programme, accountability for the delivery of a project has been raised to the level of federal minister instead of the usual project committee, and there is greater flexibility for the reallocation of resources between projects to reward better performing projects.<sup>7</sup>

Figure 5.2. Trends in Brazil's general government investment

A. Gross fixed capital formation as a % of GDP



B. Public and private investment as a % of GDP

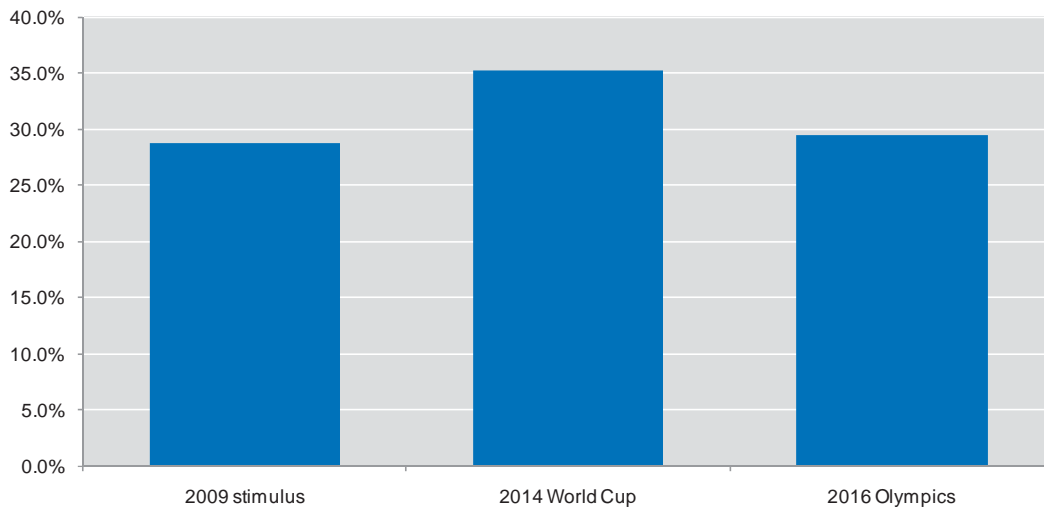


Source: OECD (2009), *OECD Economic Surveys: Brazil 2009*, OECD Publishing, Paris, doi: 10.1787/eco\_surveys-bra-2009-en.

In the coming years, public procurement of infrastructure will again increase due to the 2014 FIFA World Cup and the 2016 Olympic Games. The federal government will spend BRL 10.4 billion (USD 6.2 billion; EUR 4.5 billion) on the World Cup, along with BRL 5.5 billion (USD 3.3 billion; EUR 2.4 billion) by state and municipal governments. This will be followed by BRL 12.5 billion (USD 7.5 billion; EUR 5.4 billion) in investments for the 2016 Olympic Games. Each event alone equates to approximately 30% of current procurement spending of the general government sector

(i.e. federal, state and municipal, see Figure 5.3). A number of actions have already been taken to emphasise transparency, control and accountability for these mega-sporting events. These actions include the establishment of oversight bodies within the government and an explicit commitment to proactive real-time transparency (see Annex 5.A2). There have been parallel actions within the non-governmental sector such as, for example, formalising corporate self-regulation through a series of sector agreements and developing local administration transparency indicators for event host cities.

Figure 5.3. **Increase in Brazil’s general government investment relative to 2009 levels**



Source: For 2009 stimulus: Schwartz et al. (2009), “Crisis in Latin America: Infrastructure, Employment and the Expectations of Stimulus”, *Policy Research Working Paper*, No. 5009, World Bank, Washington, D.C.; Transparency Portal of the federal public administration for World Cup and Olympics investment estimates, Brazilian Institute of Geography and Statistics (IBGE) for GDP.

Whereas some OECD member countries have sought to increase infrastructure investment through public-private partnerships (see OECD, 2008b; OECD, 2010a), their use in Brazil has been limited to date. This has been despite the promulgation of Federal Law no. 11 079/2004 on Public-Private Partnerships and the creation, in 2004, of a dedicated Public-Private Partnership Unit within the Federal Ministry of Planning, Budget and Management.<sup>8</sup> A substantial number of OECD member countries have established, or are establishing, a dedicated public-private partnership unit with sector specialists and professionals experienced in public-private partnerships (see Table 5.1). A dedicated public-private partnership unit is defined as any organisation set up with full or partial aid of the government to ensure that necessary capacity to create, support and evaluate multiple public-private partnership agreements is available and clustered together within government (OECD, 2010a).<sup>9</sup>

Table 5.1. **Dedicated public-private partnership units in Brazil and select countries**

Central government	
Has a dedicated unit	Does not have a dedicated unit
Brazil (2004), <sup>1</sup> France (2005), Germany (2003), <sup>2</sup> Italy (1999), Japan (2000), Korea (1999), Portugal (2003), United Kingdom (1997)	Australia, <sup>3</sup> Canada, <sup>4</sup> Mexico, Spain, United States

Notes:

1. Brazil: dedicated public-private partnership units exist at the level of individual states, including Minas Gerais.
2. Germany: dedicated public-private partnership units also exist at the level of individual states, including Baden-Württemberg, Bavaria, Brandenburg, Bremen, Hamburg, Hessen, Mecklenburg-Western Pomerania, Lower Saxony, North-Rhine Westphalia, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein and Thuringia.
3. Australia: dedicated public-private partnership units exist at the level of individual states, including New South Wales, Victoria.
4. Canada: dedicated public-private partnership units exist at the level of individual states, including Alberta, British Columbia, Ontario and Quebec.

Source: Adapted from OECD (2010), *Dedicated Public-Private Partnership Units: A Survey of Institutional and Governance Structures*, OECD Publishing, Paris, doi: 10.1787/9789264064843-en.

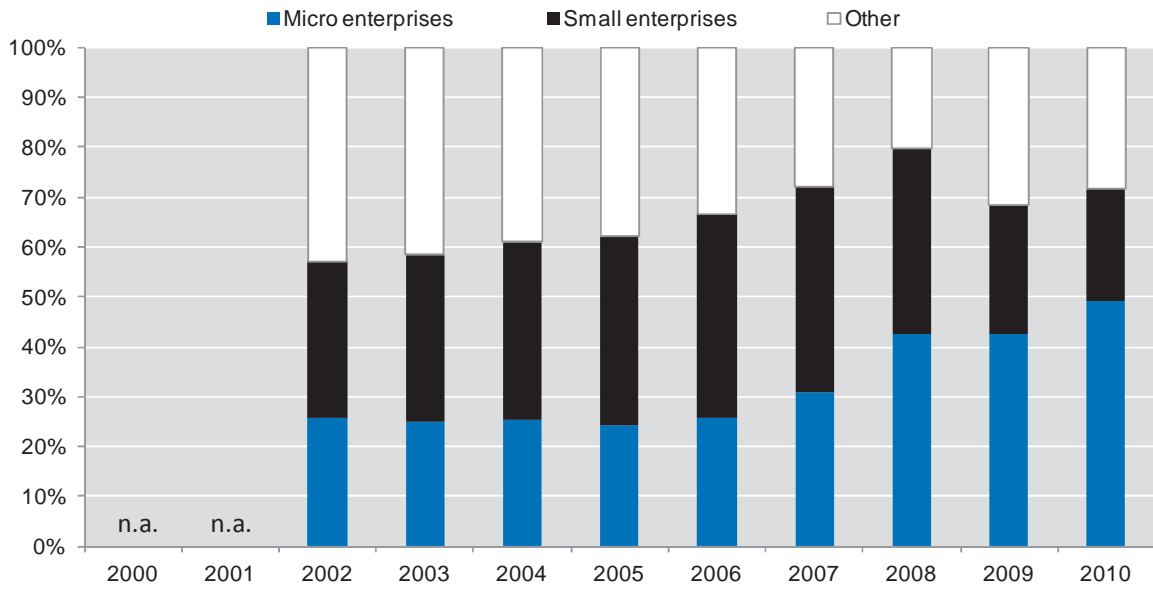
### ***Growing attention to the inclusion of complementary policy goals – social, green and innovation – in public procurement***

Brazil's federal public administration has established goals for targeting micro- and small enterprises using public procurement, drawing inspiration from the United States among other countries.<sup>10</sup> Complementary Law no. 123/2006 establishes the right for the public administration to give different treatment to micro- and small enterprises in the design and award of public contracts. The underlying goal is to promote economic and social development, increase efficiency and promote innovation. Micro-enterprises are defined in Brazil as having annual gross revenue of below BRL 240 000 (USD 143 500; EUR 103 000) and small enterprises as having annual gross revenue of between BRL 240 000 and BRL 2 400 000 (USD 1 435 000; EUR 1 030 000). Under this law micro- and small enterprises may become the sole recipient of administrative contracts of less than BRL 80 000 (USD 48 000; EUR 34 500). The public administration may additionally require larger suppliers to sub-contract up to 30% of a total contact to micro- and small enterprises. A quota may be, however, established for micro- and small enterprises of up to 25% of a public organisation's total contracts including sub-contracts.

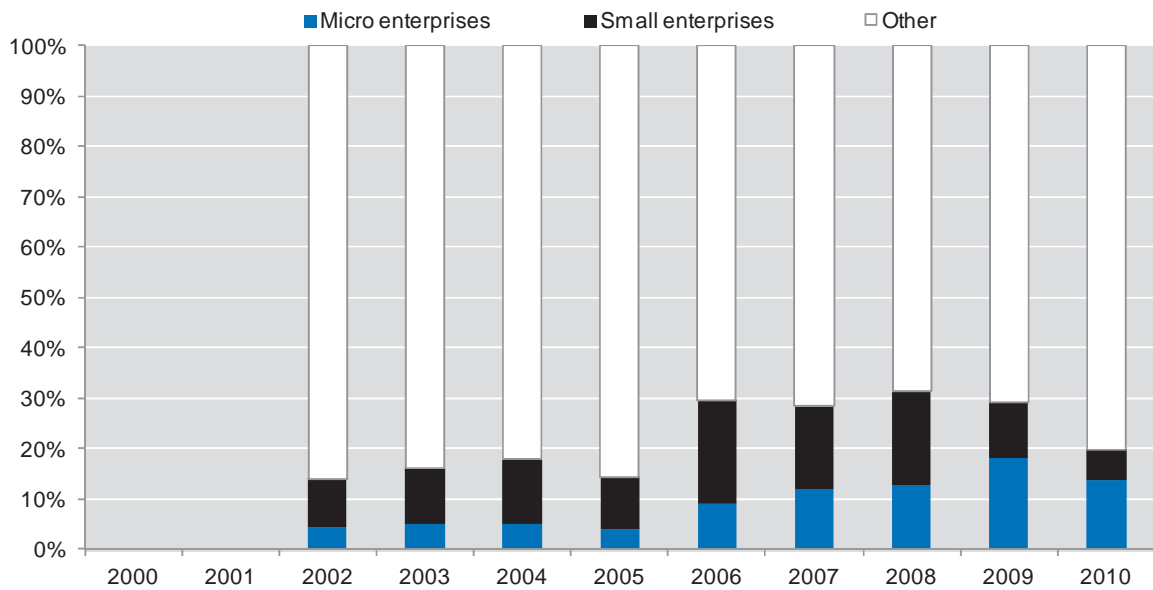
In 2009, approximately 70% of federal contracts were issued to micro- and small enterprises: 43% to micro- and 26% to small enterprises. In terms of contract value, approximately 30% of contracts were issued to micro- and small enterprises: 18% to micro- and 11% to small enterprises. These figures have grown steadily since 2002, both in terms of the total number of contracts and total contract value, coinciding with the introduction of Complementary Law no. 123/2006.

Figure 5.4. **Brazil’s federal public administration contracts by supplier size**

A. Number of contracts as a % of total



B. Value of contracts as a % of total



Notes: Data for 2000 and 2001 unavailable.

Source: Secretariat for Logistics and Information Technology, Federal Ministry of Planning, Budget and Management.

In 2010, the federal government set norms establishing priorities and rules for public administration regarding the environment and launched a portal on sustainable public



contracting (<http://cpsustentaveis.planejamento.gov.br>).<sup>11</sup> Normative Instruction no. 1/2010 proposes to institutionalise green procurement, defined as including a criteria of environmental sustainability, as a federal policy instrument. The Federal Ministry of Planning, Budget and Management has subsequently issued practical guidance (*i.e.* manuals, guides) and developed training materials to support the inclusion of green criteria in the procurement process. Green procurement is a relatively new development in many OECD member countries. Prior to 2003, only a handful of OECD member countries, including Japan, Norway and Sweden, reported systematically considering “green” in their public procurement policies. In 2010, 19 OECD member countries reported providing non-legislative guidance to central government procurement officials regarding green procurement (OECD, 2007c; 2011).<sup>12</sup> The emphasis on tools reflects a realisation by governments that a lack of tools or incentives, rather than the legal framework, has hampered the success of green objectives (see Table 5.2). The share of green procurement is a difficult and contested measure in OECD member countries, as quantitative information is often unreliable or unavailable.

Table 5.2. **Non-legislative guidance on green procurement practices in Brazil and select countries, 2010**

Central government				
Country	Manuals, guides, etc.	Code of practice	Training materials	<i>Ad hoc</i> advice
Australia	●	0	0	0
Brazil	●	0	●	0
Canada	●	0	●	●
Chile	●	0	●	0
France	●	●	●	●
Germany	●	0	0	0
Italy	●	0	●	●
Japan	●	0	0	0
Korea	●	0	0	0
Mexico	0	0	0	0
United Kingdom	●	0	●	0
United States	●	0	●	●

Notes: ● = yes; 0 = no.

Source: Adapted from OECD (2011), *Government at a Glance 2011*, OECD, Paris, doi: 10.1787/22214399.

More recently, public procurement of innovation has received increasing attention, as part of the push for greater government investment in innovation. A common definition of public procurement of innovation is the purchase of goods or services that have yet to appear on the market, *i.e.* pre-commercial procurement. It has been proposed as a key element of a demand-oriented innovation policy, together with regulation, universities and public research institutions and public research and development subsidies (see *e.g.* Aschhoff and Sofka, 2008). A number of OECD member countries, including Ireland, Korea and the United Kingdom, have moved to articulate policies on public procurement of innovation.<sup>13</sup>

An ongoing debate exists about the inclusion of complementary objectives in public procurement.<sup>14</sup> The arguments for complementary objectives include the importance of government in demonstrating leadership and the aggregate size of government’s purchasing power for the development and diffusion of new goods and services. On the other hand, concern exists over the real impact of policy instruments targeting complementary objectives. Governments may not always be a lead actor in a single product market especially as public procurement is often fragmented across different

public organisations and geographic markets. The introduction of complementary objectives into procurement decision making can also give rise to increased integrity risks in contract design and planning, award and contract management.

## Transparency throughout the public procurement cycle

Transparency is one of the main means to enhance integrity in public procurement. It supports a level playing field for suppliers and contributes to achieving value for money in government operations. In addition, it empowers non-governmental organisations, the media and citizens to scrutinise public procurement as a means of complementing traditional accountability and control mechanisms. In Brazil, legislation supports the disclosure of information on contract opportunities as widely as possible in a consistent and timely manner. New technologies also play an important role in providing easy and real-time access to information for potential suppliers, track information and facilitate monitoring of procurement processes. A number of challenges exist to further promoting transparency in procurement. Electronic systems, while enhancing transparency and accountability throughout the procurement cycle, do not provide a “one-stop shop” for information. Transparency could also be enhanced in the pre-tender phase of the procurement cycle through the preparation and publication of procurement plans by federal public organisations. Although the introduction of electronic reverse auctions has increased transparency and access to public procurement, exemptions and below-threshold procurements warrant examination.<sup>15</sup>

### *The federal government gives preference to competition and reverse auctions as a means of efficiency, control and transparency*

Federal Laws no. 8 666/1993 on Procurement and Administrative Contracts and no. 10 520/2002 on Reverse Auctions define the modalities for public procurement in Brazil. This framework establishes preference for unrestricted competition (*concorrência*) in general and for reverse auctions (*pregão*) – and electronic reverse auctions (*pregão eletrônico*), in particular – for off-the-shelf goods and standardised services. This also applies to state-owned and mixed-capital enterprises in which the government has a controlling share. Three objectives underline the preference for electronic reverse auctions: *i*) efficiency, by promoting more streamlined procedures and standardising goods and services procured; *ii*) control, by making information available to audit authorities; and *iii*) transparency, by providing online real-time information to stakeholders and opening participation to a larger pool of suppliers.

Unrestricted competition is required for procurement above BRL 650 000 (USD 390 000; EUR 280 000) for goods and services, and BRL 1 500 000 (USD 890 000; EUR 645 000) for works and engineering services (see Table 5.3). These thresholds are not indexed to price levels and have remained unchanged since 1998. Brazil’s threshold for unrestricted competition for works is relatively low compared with European OECD member countries, yet relatively high compared to the same threshold for goods and services. In European OECD member countries, the (unrestricted) competition threshold is EUR 4 845 000 for works and EUR 125 000 for goods and services. A bill in Brazil’s National Congress (*Projeto de Lei da Câmara* no. 32/2007) proposes to increase these figures. Experience from OECD member countries highlights that increasing the thresholds for competition in public procurement is challenging, and indexing thresholds can be a solution.

The requirement for publishing procurement notices is established by law. The minimum publicity time for procurement notices is counted from the last publication of the tender notice or the actual availability of tender documents, whichever date is later. Procurement notices are required to be published at least once in the *Official Gazette of the Union*, as well as a daily newspaper of wide circulation and a daily newspaper in the city or region where the work will be performed or the service provided. Procurement committees may also use other media to increase competition. Federal Law no. 8 666/1993 on Procurement and Administrative Contracts establishes that procurement notices must indicate where interested suppliers and citizens can read the full text of the announcement and all information about the tender. Any amendments must also be disclosed in the same media and for the same period of time as the original notice, except where the change does not affect the formulation of proposals.

In addition, a prior public hearing must be held for tenders or a series of simultaneous or successive tenders with an estimated value exceeding 100 times the competition threshold of works and engineering services (*i.e.* BRL 1.5 million). The hearing must be convened at least 15 working days before the planned date of publication of the call for tenders, with a notice published at least 10 working days before the hearing through the same channels as those for publishing the tender notice.

Table 5.3. **Thresholds and minimum publicity time for public procurement notices in Brazil**

A. Procurement thresholds (in BRL)		
Procurement modality	Goods and services	Works and engineering services
Unrestricted competition ( <i>concorrência</i> ) <sup>1</sup>	More than 650 000	More than 1 500 000
Price comparison ( <i>tomada de preços</i> ) <sup>2</sup>	Less than 650 000; More than 80 000	Less than 1 500 000; More than 150 000
Invitation ( <i>convite</i> ) <sup>3</sup>	Less than 80 000	Less than 150 000
Bid contest ( <i>concurso</i> )	For the procurement of objects of technical, scientific or artistic nature.	
Reverse auction ( <i>pregão</i> )	For the procurement of off-the-shelf goods and standardised services.	

B. Minimum publicity time for procurement notices	
Method	Minimum time
Unrestricted competition when the contract to be signed is a “turnkey” contract or when the bidding criterion is “best technical offer” or “technical offer and price” <sup>4</sup>	45 days
Unrestricted competition, in the case not specified above	30 days
Price comparison, when the bidding criterion is “best technical offer” or “technical offer and price”	15 days
Price comparison, in the case not specified above	15 days
Invitation	5 days

Notes:

1. Unrestricted competition: involving any interested parties that fulfil, in the preliminary eligibility stage, the minimum qualifications for the successful delivery of a bid object, as outlined in the bid notice.
2. Price comparison: involving parties either already duly registered or those meeting the registration requirements up to three days prior to submission of the bid proposals, subject to the applicable eligibility criteria.
3. Invitation: involving at least three interested parties, whether registered or not, engaged in the relevant business segment invited by the contracting unit, as well as any registered parties engaged in the same business segment that express an interest in taking part in the bidding procedure at least 24 hours prior to submission of the bid proposals.
4. The Federal Ministry of Planning, Budget and Management notes that “turnkey” is in practice not used in Brazil because goods, services and works must be procured by component.

*Source:* Adapted from Federal Law no. 8 666/1993 on Procurement and Administrative Contracts as amended by Federal Law no. 9 648/1998.

There are several key differences between reverse auctions and other procurement modalities in Brazil. First, reverse auctions are conducted by a single auctioneer and a supporting committee of up to three officials rather than a larger tender committee, reducing the human resources need for procurement processes. Second, the minimum time for publication of the procurement notice is 8 working days for reverse auctions rather than 15 for restricted competition (*i.e.* price comparison) and up to 45 working days for unrestricted competition. Third, reverse auctions use post- rather than pre-qualification of suppliers, premising selection first and foremost on best price before evaluating other qualification requirements (*e.g.* financial resources, technical capacity, legal requirements, etc.). The latter is seen as particularly important, as pre-qualification is seen as a major source of administration and judicial procurement appeals.

There are no minimum or maximum thresholds guiding the use of reverse auctions. This modality is obligated for all procurement of off-the-shelf goods and standardised services. In the case of reverse auctions, procurement notices must be made available on Comprasnet and in the *Official Gazette of the Union* regardless of the estimated value. In addition, reverse auctions above BRL 160 000 (USD 95 000; EUR 70 000), and electronic reverse auctions above BRL 650 000 (USD 390 000; EUR 280 000), must be published in newspapers with predefined circulation (see Table 5.4). The notice should be published at least eight working days ahead of the auction to allow potential suppliers to prepare their tenders. The federal government publishes the extract of concluded contracts in the *Official Gazette* within 20 days from the date of signature, indicating the type of bid and reference number. Non-compliance with publication requirements of procurement notices gives rise to possible administrative sanctions against the responsible public official.

Table 5.4. **Thresholds for publicity for presentational and electronic reverse auctions in Brazil**

Means of publication	Estimated value of the goods or services using presentational reverse auctions	Estimated value of the goods or services using electronic reverse auctions
<i>Official Gazette of the Union</i> and electronically via the Internet	< BRL 160 000	< BRL 650 000
<i>Official Gazette of the Union</i> ; electronically via the Internet; and a newspaper of wide local circulation	BRL 160 000 > X > BRL 650 000	650 000 > X > BRL 1 300 000
<i>Official Gazette of the Union</i> ; electronically via the Internet; and a newspaper of wide regional or national circulation	> BRL 650 000	> BRL 1 300 000

Source: Federal Law no. 10 520/2002, Article 4; Federal Decree no. 3 555/2000, Article 11; Federal Decree 5 450/2005, Article 17.

The use of electronic reverse auctions within the federal public administration has grown substantially since FY 2003. They accounted for approximately 85% of the volume of procured off-the-shelf goods and standardised services in FY 2007, compared to less than 1% in FY 2003 (the year following the promulgation of Federal Law no. 10 520/2002 on Reverse Auctions introducing presentational and electronic reverse auctions as a procurement modality). The Secretariat for Logistics and Information Technology estimates that in FY 2009 alone the use of reverse auctions yielded savings of approximately BRL 6 billion (USD 3.6 billion; EUR 2.6 billion), 93% of which was achieved through the electronic reverse auctions. Using the same method of calculation, annual cost savings from electronic reverse auctions was approximately 23% between FY 2002 and FY 2009, and 12% for presentational reverse auctions. This methodology – used by the Secretariat for Logistics and Information Technology to calculate cost

savings – focuses on the difference between the procuring authority’s market estimates and the final reverse auction price. Thus, poor price estimates by procuring units can inflate estimated cost savings. A more appropriate measure of cost savings is the difference between the pre-auction price proposals and the final auction price.

#### **Box 5.1. The introduction of reverse auctions as a procurement modality in Brazil**

Reverse auctions were first introduced in Brazil in the General Telecommunications Law (Federal Law no. 9 472/1997), which granted the National Telecommunications Agency (Agência Nacional de Telecomunicações) the right to use this modality if it is more advantageous to the administration. Between 1997 and 2000, the National Telecommunications Agency was the sole public organisation allowed to use reverse auctions.

In 2000, as part of preparation for the 2001/2003 Pluri-Annual Plan (*Plano Plurianual*), the federal government conducted a study to examine means to reduce costs in the procurement of goods, services and works under the Investment Plan’s Management Improvement Programme. The Pluri-Annual Plan establishes a clear multi-year output orientation, setting out government priorities for the medium term, explicit targets and indicative budgetary appropriations for each programme.

The study included, among other things, an assessment of the impact of reverse auctions in the National Telecommunications Agency. Although the benefits to the National Telecommunications Agency of using reverse auctions were clear (*i.e.* price reductions), the take-up of this procurement modality was low. The study stated that low take up was influenced by a number of factors including:

- lack of guidance materials and the need to train procurement officials in the use of reverse auctions;
- resistance on the part of procurement officials to use something different from the *status quo*; and
- lack of definition of the goods and services that could be procured using reverse auctions.

The results of the study were used as input into formulating a proposal for establishing reverse auctions as a standard procurement modality within the federal public administration. It resulted in Provisional Measure no. 2 182-18/2001 and converted into Federal Law no. 10 520/2002 on Reverse Auctions and substantiated by Federal Decree no. 5 450/2005 on Electronic Reverse Auctions.

*Source:* de Almeida (2006), “Role of ICT in Diminishing Collusion in Procurement”, International Public Procurement Conference Proceedings 21-23 September, [www.unpcdc.org/focus-areas/e-government-procurement.aspx](http://www.unpcdc.org/focus-areas/e-government-procurement.aspx).

While reverse auctions provide a number of benefits to procuring authorities, it is important not to overstate their role as a procurement modality for governments. Reverse auctions restrict suppliers to compete on price alone at the expense of quality, much to the dismay of public officials that are the users of goods and recipients of services. Competition on price alone can also lead to reduced supplier innovation, as anything above the minimum specifications is not recognised by procurement officials. In addition, reverse auctions ignore past supplier performance other than gross examples of bad performance that warrant blacklisting of suppliers. Thus, while well suited to well-specified and simple off-the-shelf goods and standardised services, caution is required in expanding the use of reverse auctions to as many procurement transactions as possible.

*Transparency is supported by new technologies as a means to both support a level playing field for suppliers and encourage direct social control*

Brazil's federal public administration makes publicly available information on its procurement laws and policies, general and specific information related to bid submission and contract award (see Table 5.5). In addition, Brazil allows public tracking of procurement spending, something that is achieved in approximately one-quarter of OECD member countries. The federal government could, however, enhance transparency in both the pre-tender and post-award phases of the public procurement cycle. For example, in the pre-tender phase, federal public organisations could publish annual procurement plans to allow suppliers to better understand and meet the government's needs. Such information could also help public organisations to strategically source goods, services and works while enhancing control and monitoring of procurement actions. Procurement plans are, however, not routinely prepared at present by federal public organisations. At the other end of the procurement cycle, federal public organisations could publish information on contract amendments above a certain threshold on the federal procurement portal. Such information can deter suppliers from submitting unrealistic prices and encourage more accountable contract management within public organisations.

Table 5.5. Public availability of procurement information in Brazil and select countries, 2010

Country	Laws and policies	General information for potential bidders	Specific guidance on application procedures	Procurement plan	Tender documents	Selection and evaluation criteria	Contract award	Justification for awarding contract to selected contractor	Contract modifications	Tracking procurement spending
Australia	●	□	□	●	□	□	●	■	□	○
Brazil	●	■	□	○	□	□	●	●	○	●
Canada	●	●	●	○	□	□	□	■	○	○
Chile	●	●	●	●	●	□	●	●	□	●
France	●	●	●	□	□	●	□	■	●	■
Germany	●	●	○	○	■	■	○	○	○	○
Italy	●	●	●	●	●	●	●	■	●	■
Japan	●	●	●	●	●	●	●	●	●	■
Korea	●	●	●	●	●	●	●	●	●	●
Mexico	●	●	●	●	●	●	●	●	□	●
United Kingdom	●	●	●	●	○	○	●	□	○	○
United States	●	●	□	□	□	□	□	○	■	□

Notes: ● = always; ■ = upon request; □ = sometimes; ○ = never

Source: Adapted from OECD (2011), *Government at a Glance 2011*, OECD Publishing, Paris, doi: 10.1787/22214399.

In Brazil, information on procurement by the federal public administration is made available through the federal procurement portal ([www.comprasnet.gov.br](http://www.comprasnet.gov.br)), the *Official Gazette of the Union* ([www.redegoverno.gov.br](http://www.redegoverno.gov.br)), the transparency pages of individual public organisations, the Transparency Portal of the Federal Public Administration ([www.portaldatransparencia.gov.br](http://www.portaldatransparencia.gov.br)) and the federal public works portal ([www.obrasnet.gov.br](http://www.obrasnet.gov.br)). Figure 5.5 provides a summary of the information available through each portal by phase of the procurement cycle. None of these portals, however,

provides a one-stop shop for information needed by suppliers or citizens. As such, the federal government could integrate procurement information into one portal as a one-stop shop for suppliers and citizens. As part of this process, attention could focus on understanding the use of the various procurement portals as a basis for evaluating the appropriateness of information and means in which it is made available.

Figure 5.5. Comparison of procurement information provided by Brazil's various

	Pre-tendering	Tendering	Post award
Comprasnet	<ul style="list-style-type: none"> <li>- Procurement legislation</li> <li>- Unified Register of Suppliers</li> <li>- Catalogues of Registered Goods and Services</li> </ul>	<ul style="list-style-type: none"> <li>- Tender and reverse auction notices</li> <li>- Current (live) electronic reverse auctions</li> <li>- Minutes of completed electronic reverse auctions</li> </ul>	
Transparency pages		<ul style="list-style-type: none"> <li>- Tender and reverse auction notices</li> </ul>	<ul style="list-style-type: none"> <li>- Budget disbursement data</li> </ul>
Transparency Portal			<ul style="list-style-type: none"> <li>- Budget disbursement data</li> </ul>
Obrasnet			<ul style="list-style-type: none"> <li>- Monitoring of delivery of select works</li> <li>- <i>Ex post</i> cost measures</li> </ul>

Comprasnet is both Brazil's central procurement website and electronic procurement portal. As the central procurement website, it provides ready access to all procurement laws (*i.e.* federal laws, provisional measures, decrees, regulatory instruments, ordinances and resolutions) and other general information for suppliers and citizens. The portal also includes contract award information, including those conducted outside Comprasnet, extracted from the Integrated General Service Administration System. Information on atypical goods, non-standardised services and engineering services are made available through the *Official Gazette of the Union*, in both its paper and electronic versions. Comprasnet does not provide information on procurement plans of individual public organisations, contract modifications or amendments of procurements conducted using restricted and unrestricted competition modalities.

As Brazil's electronic procurement portal, Comprasnet provides suppliers access to information on scheduled and past electronic reverse auctions, and also allows them to participate in live electronic reverse auctions. Information is also available through Comprasnet on suppliers registered in the Catalogues of Registered Goods and Services (*Catálogo de Materiais* and *Catálogo de Serviços* respectively). The catalogues define specifications, quality standards and common classification for 45 000 off-the-shelf goods and common services purchased by administrative units within individual federal public organisations. Suppliers registered in the Unified Registration System for Suppliers of the Federal Public Administration may also opt to receive automatic alerts on tenders and quotations by type of goods and service and geographic area.<sup>16</sup> Finally, Comprasnet is used to publish information on procurement statistics. This data is, however, available only in pre-generate tables and figures preventing citizens from generating their own analysis.

Tracking of contract disbursement is available on an annual basis through the Transparency Portal of the Federal Public Administration and the transparency pages of federal public organisations (see Chapter 2). Created in November 2004, the Transparency Portal provides free real-time access to budget execution data, without

registration or passwords, in order to support monitoring by citizens of federal government operations. Through the Transparency Portal citizens may search payments associated with contracts by public organisation, not-for-profit organisation or recipient. Federal public organisations must also maintain a transparency page for the dissemination of data and information on budget execution including, among other things, procurement and administrative contracts. Information on the transparency pages includes updates on ongoing and completed bidding procedures: the names of contractors, the object of the respective contracts, the value of contracts, the corresponding contractual terms and the bidding modality employed. While the Transparency Portal and transparency pages let citizens search contract disbursements by supplier name, they cannot search by identification number, limiting the utility of the search functions.<sup>17</sup>

In parallel, the Public Works Portal of the Federal Public Administration (Obrasnet) provides information on all projects financed by federal funds operated by the Federal Savings Bank of Brazil (*Caixa Economica Federal*), a major provider of government housing. The portal facilitates monitoring of projects executed by the Federal Savings Bank including works progress reports, often accompanied with photographs, and information on the civil works inputs cost through the National Index on Civil Construction (*Custo Nacional da Construção Civil*). Queries may be searched by year, federal unit, municipality and programme. In addition, Obrasnet provides citizens with a channel to give their opinions about the performance and benefits of individual public works projects for their respective communities.

Table 5.6. Services offered by centralised e-procurement portal in Brazil and select countries, 2010

Country	Applications that facilitate the interface with potential bidders							Contract management tools			
	Searching for tender announcements	Downloading all documents related to tenders	Prequalification systems	2-way communication with citizens, bidders	Electronic submission of bids	Electronic reverse auction	E-catalogue	Tracking record of outcomes of contracts	Electronic payment schemes (e.g. e-invoicing)	Statistics, data related to past procurement	Contract management plan templates
Australia	●	●	●	●	●	○	○	○	○	●	○
Brazil	● <sup>1)</sup>	● <sup>1)</sup>	● <sup>1)</sup>	○	○	●	●	○	○	●	○
Canada	●	●	○	○	○	○	○	○	○	○	○
Chile	●	●	○	●	●	○	●	○	●	●	●
France	●	●	○	●	●	●	●	●	●	●	●
Germany	●	●	●	●	●	●	●	●	○	●	○
Italy	●	●	●	●	●	●	●	●	○	●	○
Japan <sup>1</sup>	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Korea	●	●	●	●	●	●	●	●	●	●	●
Mexico	●	●	○	●	●	●	●	●	○	○	○
United Kingdom <sup>1</sup>	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
United States	●	●	○	○	○	○	○	○	○	●	○

Notes: ● = yes; ○ = no; N/A = not applicable.

1. Japan; United Kingdom: no centralised e-procurement website.

2. Brazil: Unified Registration System for Suppliers of the federal public administration allows for a minimum pre-qualification of suppliers, ensuring that suppliers are not included in the National Registry of Ineligible and Suspended Contractors, that their tax liabilities are paid, etc. Registration in the Unified Registration System for Suppliers of the federal public administration is not mandatory for suppliers that wish to participate in tenders.



Source: Adapted from OECD (2011), *Government at a Glance 2011*, OECD, Paris, doi: 10.1787/22214399.

### Box 5.2. Content of electronic reverse auctions proceedings published on Comprasnet

All the proceedings of the electronic reverse auctions are published on Comprasnet. This includes:

- the name and detailed information on the bidders and the procuring organisation;
- the object of procurement and the budgeted unit price for each;
- the initial price proposal of all bids;
- the initial and closing time of the reverse auction session and eventual suspensions;
- all decisions taken by the reverse auctioneer;
- the communications exchanged between bidders and the reverse auctioneer in the “chat”;
- the complaints files, if any, and decisions taken on them;
- clarifications requested and given; and
- complete information on the adjudication procedure and any procedure that would be dealt with in the real world, such as the testing of samples, etc.

All this information, automatically generated by the system, is electronically signed by the reverse auctioneer and is published on Comprasnet at the end of the e-reverse auction session. An extract is also generated and automatically sent to the Official Gazette of the Union for publication the following working day in both paper and virtual editions. The procuring authority also publishes an extract of the results on their respective organisation’s transparency page.

Source: Secretariat for Logistics and Information Technology, Federal Ministry of Planning, Budget and Management.

### ***Competitive tenders and electronic reverse auctions are the default, but large use of exemptions warrants examination***

Federal Law no. 8 666/1993 on Procurement and Administrative Contracts sets forth the specific cases in which competitive bidding procedures are not required for purposes of public procurement. There are 28 legislated exemptions to competitive procedures that allow the use of direct contracting (see Annex 5.A3). The obligation for federal public organisations to hold competitive tenders may also be waived where there is no competitive market, precluding effective competition. The law provides three examples of a no-bid situation as a means of illustration, but notes that other situations could also give rise to direct contracting: *i*) where there is only one possible supplier (*i.e.* an exclusive producer, firm or commercial representative); *ii*) where the procurement requires specialised technical services from professionals or suppliers with recognised expertise; and *iii*) where a supplier has obtained the recognition and acclaim of the specialised media and public opinion. In each case the decision must be documented and

justified. For example, stating that there is only one possible supplier may be substantiated through a certificate issued by the local business association or equivalent.

In FY 2009, exemptions and waivers to competition accounted for 23% of total contracts and 86% of total contract values, down from 51% and 93% respectively in FY 2002 (see Figure 5.6). A large share of exemptions and waivers (93% of total contracts and 10% of total contract values) are for goods and services below invitation thresholds. An additional 2% of total contracts and 33% of total contract values use emergency procedures (see Table 5.7). This picture appears to be attributable to weak incentives for procurement planning, but requires further examination by the federal government. Public officials' concern over the effectiveness of the procurement review and remedies system also contributes to the high use of exemptions to competitive procurement procedures. The procurement review and remedies system is described as slow and many believe that suppliers misuse it to disrupt procurement procedures. There is no clear explanation for the high use of exemptions and waivers. In response to this concern the federal government may benefit from conducting a review of below-competition threshold and emergency procurement. Such a review could also help shed light on whether a lack of incentives for procurement planning exists, and how planning could generate an additional efficiency dividend.

In the case of exemptions and waivers from competitive tendering, Federal Law no. 8 666/1993 on Procurement and Administrative Contracts obliges public officials to receive formal approval from a senior official within their organisation. A written statement must be submitted to the senior official containing: *i*) a description of the situation giving rise to the tender exemption; *ii*) the reasons for selecting the specific supplier or service provider; *iii*) a justification of the price; and *iv*) any documentation approving the project or activity for which the goods or services will be used. To ensure the validity of the act, the statement regarding the exemption must be published in the *Official Gazette of the Union*, including its online version, within five days of its approval. Box 5.3 provides an illustration of a good practice within the federal public administration in the use of exemptions or waivers from competitive tenders: the internal procedures of the Office of the Comptroller General of the Union. Publishing of this information is supported by the Electronic Posting of Purchases and Contracts module of the Integrated General Service Administration System, allowing for timely publication of information.

Figure 5.6. Use of various procurement modalities in Brazil’s federal public administration

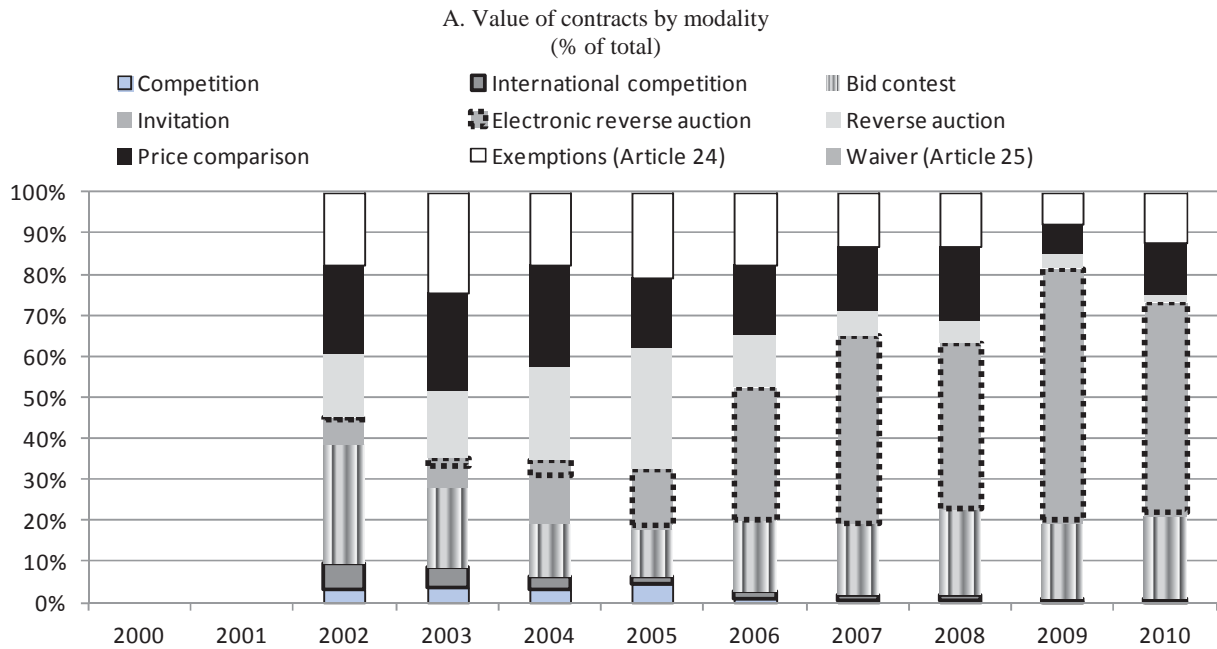
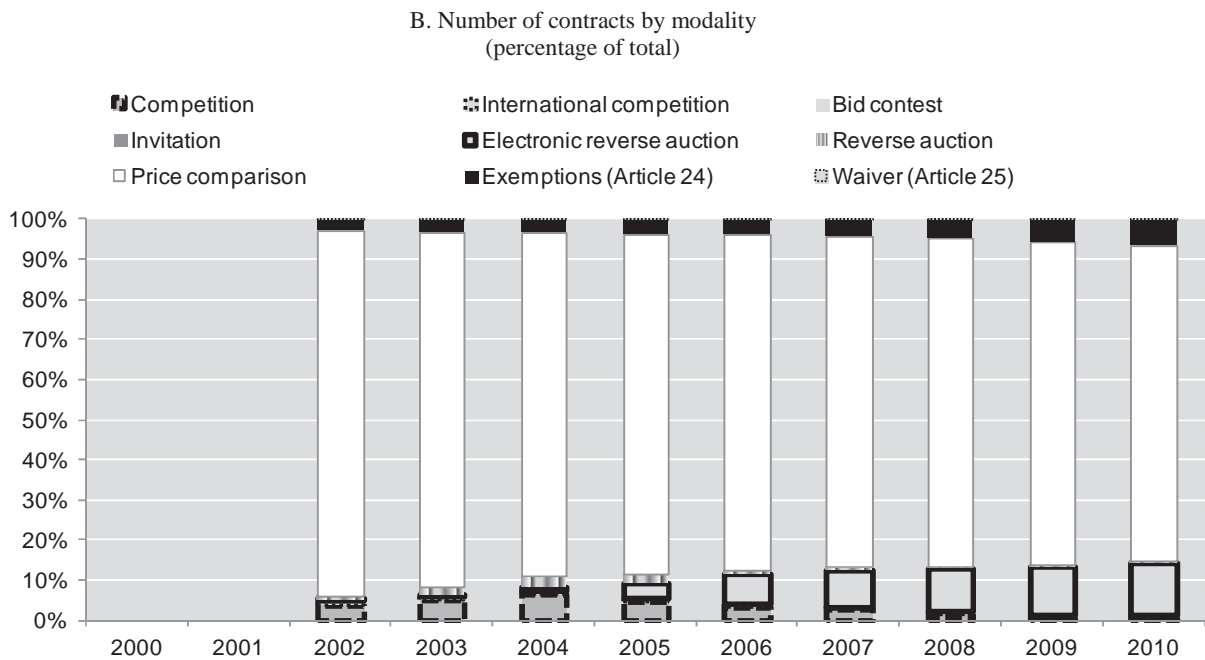


Figure 5.6. Use of various procurement modalities in Brazil’s federal public administration (cont’d)



Notes: Data for 2000 and 2001 unavailable.

Source: Secretariat for Logistics and Information Technology, Federal Ministry of Planning, Budget and Management.

**Table 5.7. Most frequently used exemptions to competitive procedures in Brazil's federal public administration, 2009**

% of total value of contracts		% of total number of contracts	
In cases of emergency or public calamity, that may cause injury or endanger the safety of people, works, services, equipment and other property, public or private. This applies only for goods necessary to meet emergency situations and portions of works and services that can be completed within a maximum of 180 consecutive calendar days after an emergency or disaster. It prohibits contract extension. (Exemption type 4)	33.4	For other goods and services worth up to 10% of competition threshold, each step or series of stages of work, service or purchase, there are separate bids to match, preserved the appropriate modality for the implementation of the object in bid. (Exemption type 2)	92.7
In contracting a Brazilian research, educational or institutional development organisation recognised by the regulation or statute, or an organisation devoted to the social rehabilitation of prisoners, provided the organisation maintains a sound integrity and professional reputation and is not for profit. (Exemption type 13)	20.4	In cases of emergency or public calamity, that may cause injury or endanger the safety of people, works, services, equipment and other property, public or private. This applies only for goods necessary to meet the emergency situation and portions of works and services that can be completed within a maximum of 180 consecutive calendar days after an emergency or disaster. It prohibits contract extension. (Exemption type 4)	1.9
For other goods and services worth up to 10% of the invitation threshold, each step or series of stages of work, service or purchase, there are separate bid to match, preserved the appropriate modality for the implementation of the object in bid. (Exemption type 2)	9.8	For the procurement of goods intended exclusively for scientific and technological research with funding from the Co-ordination of Improvement of Higher Education Personnel ( <i>Coordenação de Aperfeiçoamento de Pessoal de Nível</i> ), the Brazilian Innovation Agency ( <i>Financiadora de Estudos e Projetos</i> ), the National Council for Scientific and Technological Development ( <i>Conselho Nacional de Desenvolvimento Científico e Tecnológico</i> ) or other research institutions accredited by the National Council for Scientific and Technological Development for this specific purpose. (Exemption type 21)	1.6
For the contracting of supply or delivery of electric energy and natural gas with a concessionaire, permit holder or other licensed organisation, in accordance with existing legislation. (Exemption type 22)	8.4	For works and engineering services worth up to 10% of the competition threshold, provided they refer to parts of the same work or service or for works and services of the same nature and at the same place that they can be held jointly and simultaneously. (Exemption type 1)	1.1
For the purchase or lease of buildings or property to meet the essential needs of the administration, where the choice is conditioned by installation and location, provided the price is compatible with market value, as previously appraised. (Exemption type 10)	5.9	In contracting a Brazilian research, educational or institutional development organisation recognised by regulation or statute, or an organisation devoted to the social rehabilitation of prisoners, provided the organisation maintains a sound integrity and professional reputation and is not for profit. (Exemption type 13)	0.7

Notes: See Annex 5.A4 for a full list of exemptions to competitive tendering.

Source: Secretariat for Logistics and Information Technology, Federal Ministry of Planning, Budget and Management.

### Box 5.3. Process for granting exemption to competitive procurement modalities: the case of the Office of the Comptroller General of the Union

To illustrate the process for bid exemption or waiver (*i.e.* direct contracting), the following highlights the procedures adopted within the Office of the Comptroller General of the Union.

- The administrative unit requiring a particular good or service submits a request to the Directorate of Internal Management including the technical specifications of the object to be procured.
- Justification and corresponding documentation must be provided for the reasons underlying an exemption or waiver, together with information that the contracted price is consistent with current market values.
  - Where the legal framework is sufficiently clear regarding exemptions and waivers, responsibility falls upon the administrative units requesting the procurement to provide sufficient justification. For example, when there is only one supplier for a certain product or service and therefore no possibility for competition.
  - In other cases, responsibility falls upon the procuring authority to provide sufficient justification. For example, when procuring products worth up to 10% of the invitation threshold, the procurement authority must check and decide whether an exemption can be used.
- The Directorate of Internal Management prepares the procurement documentation, including information on available budget resources and the grounds for the suitability of the exemption or waiver.
- The request is forwarded to the Office of Legal Affairs for a technical opinion on the suitability for the use of an exemption and waivers. In cases where *ex ante* opinions may be waived for immediate delivery, the Office of Legal Affairs is required to render an *ex post* opinion as to the legality of the contractual clauses.
- Following receipt of a favourable legal opinion, the administrative process is referred back to the Directorate of Internal Management. Notices of exemptions and waivers must be subsequently published in the *Official Gazette of the Union*.

*Source:* Office of the Comptroller General of the Union.

## Measures to prevent waste and corruption by officials and suppliers

There is increasing recognition that specific measures are needed in the public and private sectors to identify and address risks of waste and corruption in public procurement. In Brazil, efforts have been made by the federal public administration to strengthen internal control and standards of conduct within the federal public administration. Measures include the adoption of new audit techniques and risk management. As in the case of measures to support transparency, these have been supported by new technologies. The federal government has also sought to raise awareness of bid rigging and has introduced mandatory certificates of independent bid determination as a means of preventing procurement cartels.

***Internal control is supported by common back-office systems and is being strengthened by the introduction of new audit techniques and risk management***

The 2001 “Handbook of the Internal Control” issued by the Secretariat of Federal Internal Control lays out the guidelines, principles, concepts and technical rules governing the activities within the federal public administration (see Chapter 3). For example, it notes that the structure of individual organisations and administrative units should provide for the separation of duties related to the authorisation and approval of operations, control and accountability so as to ensure that no single individual performs competencies and duties in a manner inconsistent with this principle. There are no formal rules establishing specific requirements regarding the level of authority needed for approval of procurement procedures and signing contracts. Organisations of the direct and indirect administration establish internal rules defining the departments and authorities responsible for procurement and the award of contracts. As a general observation, more strategic and higher value procurement and contracts are approved by more senior authorities, sometimes even secretary or director. For example, Secretariat of Federal Revenue internal rules establish procedures, both for the central and regional offices, for the completion, approval and authorisation of procurement and formalisation of contracts.

Internal control is supported by the Integrated General Service Administration System, including a number of modules specific to procurement and administrative contracts. For example, the Unified Registration System for Suppliers of the federal public administration facilitates a common streamlined process for the pre-registration of suppliers that wish to provide goods or services to federal public organisations. The Electronic Posting of Purchases and Contracts System (*Sistema de Divulgação Eletrônica de Compras*) forwards procurement notices for publication in the *Official Gazette of the Union* and automatically publishes reverse auction information on Comprasnet. The Integrated Price Posting System (*Sistema de Preços Praticados*) registers and stores the prices of previous contracts awarded by federal public organisations, serving as a price reference for procurement officials. The Commitment Registration System (*Sistema de Minuta de Empenho*) automatically records information on scheduled payment commitments associated with awarded contracts in the Federal Government Integrated Financial Administration System. The Contract Management System (*Sistema de Contratações*) facilitates the registration and financial monitoring of contracts for procurement officials within federal public organisations.

Federal Law no. 8 666/1993 on Procurement and Administrative Contracts obliges procurement officials to document the procurement procedures with a view to gauging their regular agents of control. It enumerates that every procurement procedure should record: *i*) justification of hiring; *ii*) a detailed description of the object, budget estimate of costs, and physical and financial schedule of disbursements, if any; *iii*) cost spreadsheets; *iv*) guarantee of budgetary reserve, with an indication of the respective items; *v*) authorisation to open the bidding; *vi*) designation of the tender committee or auctioneer and support staff; *vii*) legal advice; *viii*) tender and its annexes, if applicable; *ix*) the draft of the termination of employment or equivalent, as appropriate; *x*) original of the written proposals and supporting documents; *xi*) the minutes of the trading session, the registration of bidders approved, the submitted written and verbal proposals in order of ranking and the analysis supporting the decision, and *xii*) proof of publication of notice of the announcement of the outcome of the bidding, the extract of the contract and other actions relating to advertising of the event, as appropriate. Each procurement procedure is given a file (a physical portfolio) in which the documents are put in chronological order

and receive a sequential number. The files are uploaded on Comprasnet with hardcopies stored in the procurement unit's office.

*Modern audit techniques are increasingly used for the detection and monitoring of possible irregularities in procurement and administrative contracts*

In 2006 the Office of the Comptroller General of the Union launched a pilot to identify potential conflicts of interest between public officials and suppliers in public procurement and administrative contracts. The Office of the Comptroller General of the Union sampled 13 million suppliers and 588 000 public officials and found that some 2 500 federal public officials were owners or shareholders of approximately 2 000 companies which had supplied over BRL 400 million (USD 239 million; EUR 172 million) in goods and services to the federal public administration between 2004 and 2006. Moreover, there were cases in which 313 of the 2 000 companies had supplied goods and services to the public organisation in which its owner or shareholder was employed. While these results did not immediately imply misconduct, they resulted in investigations by the Secretariat of Federal Internal Control. No information was available on the results of further investigations into these cases.

Following this exercise, the Office of the Comptroller General of the Union launched the Public Spending Observatory (*Observatório da Despesa Pública*) in 2008 as the basis for continuous detection and sanctioning of misconduct and corruption. Through the Public Spending Observatory, expenditure data is crossed with other government databases as a means of identifying atypical situations that, while not *a priori* evidence of irregularities, warrant further examination. As discussed in Chapter 3, the Public Spending Observatory is a horizontal project within the Office of the Comptroller General of the Union. It is operated by the Secretariat of Corruption Prevention and Strategic Information but draws upon the expertise of the Secretariat of Federal Internal Control and the Inspectorate General of Administrative Discipline.

Based on experience over the past several years, a number of routine cross checks related to procurement and administrative contracts have been created by automatically crossing data on a daily basis. This exercise generates “orange” or “red” flags that can be followed up and investigated by officials within the Office of the Comptroller General of the Union. In many cases, follow-up activities are conducted together with the special advisors on internal control within each organisation of the direct federal public administration (*i.e.* federal ministries) and internal audit units within organisations of the indirect federal public administration (*i.e.* agencies and foundations). Examples of these cross checks related to procurement and administrative contracts include possible conflict of interest, inappropriate use of exemptions and waivers and substantial contract amendments. A number of cross checks also relate to suspicious patterns of bid-rotation and market division among competitors by sector, geographic area or time, which might indicate that bidders are acting in a collusive scheme (see Box 5.4). Finally, cross checks also exist regarding the use of Federal Government Payment Cards and administrative agreements (*convenios*) (see Chapter 3).

#### Box 5.4. Computer-assisted audit tracks used by the Office of the Comptroller General of the Union to identify possible procurement irregularities

1. Business relations between suppliers participating in the same procurement procedure.
2. Personal relations between suppliers and public officials in procurement procedures.
3. Fractioning of contracts in order to use exemptions to the competitive procurement modality.
4. Use of bid waiver when more than one “exclusive” supplier exists.
5. Non-compliance by suppliers with tender submission deadlines.
6. Bid submission received prior to publication of a procurement notice.
7. Registration of bid submissions on non-working days.
8. Possibility of competition in exemptions.
9. Supplier’s bid submissions or company records with the same registered address.
10. Participation of newly established suppliers in procurement procedures.
11. Contract amounts above the legally prescribed ceiling for the procurement modality used.
12. Contract amendments above an established limit, in violation of the specific tender modality.
13. Contract amendments within a month of contract award, in violation of the specific tender modality.
14. Commitments issued prior to the original proposal date in the commitment registration system.
15. Evidence of bidder rotation in procurement procedures.
16. Bidding procedures involving suppliers registered in the Information Registry of Unpaid Federal Public Sector Credits (*Cadastro Informativo de Créditos Não Quitados do Setor Público Federal*).<sup>\*</sup>
17. Use of reverse auctions for engineering services.
18. Micro- and small enterprises linked to other enterprises.
19. Micro- and small enterprises with shareholders in other micro- and small enterprises.
20. Micro- and small enterprises with earnings greater than BRL 0.24 million or BRL 2.40 million, respectively.

Note: Information Registry of Unpaid Federal Public Sector Credits includes information on: *i*) individuals and companies with financial obligations due and not paid for federal public organisations; and *ii*) individuals who are inscribed in the Register of Individual Taxpayers (*Cadastro de Pessoas Físicas*) and legal persons who are declared unfit for the National Registry of Legal Entities (*Cadastro Nacional de Pessoa Jurídica*).

Source: Office of the Comptroller General of the Union.



While computer-assisted audit techniques have been successful at crossing procurement data with other government databases to identify orange and red flags, it serves more as an *ex post* control by the Office of the Comptroller General of the Union. Its application, together with responsibility for vetting orange and red flags, could be devolved to become a means of *ex ante* due diligence by public managers. This could strengthen internal control and emphasise the accountability of procurement officials and public managers. Care, however, is necessary to ensure that red flags are properly vetted and employed.

*Procurement and administrative contracts are among the first areas to receive attention in pilots to introduce operational risk management*

The Office of the Comptroller General of the Union is currently in the process of developing a generic risk management methodology to guide public managers in self-assessing vulnerabilities in their programmes and areas of operations. In 2006, the first methodology was applied to 3 public organisations as a pilot: the Federal Ministries of Culture, Transport and Social Development and the Fight Against Hunger.<sup>18</sup> Attention focused on developing an understanding of risks in various decision nodes in the procurement activities of public organisations. The pilot of the methodology addressed off-the-shelf goods and standardised services procured using electronic reverse auctions; it did not include risks related to other procurement modalities or more complex procurement procedures, which may be exposed to different vulnerabilities. Teams from each of pilot ministry first mapped all the decision points associated with electronic reverse auctions. Annex 5.A4 provides an example of a process map for the Federal Ministry of Social Development and the Fight Against Hunger. Second, the teams examined a series of questions relating to: *i*) the information used in or required for each decision point; *ii*) the scope of internal control at each decision point; and *iii*) the interim and final outcomes associated with each decision point.

The application of the pilot uncovered a number of difficulties and also provided some unique insights into each federal ministry's internal operations. Foremost among the difficulties identified in the application of the methodology was the complexity of the process. The methodology was developed in an academic fashion, and used too many forms. In the Federal Ministry of Culture, officials identified a lack of understanding of stock controls resulting from an absence of procurement planning and internal communications between procurement and other officials. (The process of developing these methodologies and the differences in their approach is discussed in Chapter 3.) Based on the pilot experience, the Office of the Comptroller General of the Union is revising the methodology and proposes to launch a second version in the future. A number of adjustments have been made to the second risk management methodology, namely: *i*) focusing on activities rather than processes; *ii*) developing actionable indicators rather than open-ended questions; and *iii*) shifting from risk identification to risk management.

*Private interest disclosures are being used to facilitate investigation of illicit enrichment by procurement officials*

Establishing and maintaining systems for procurement officials to disclose their private interests supports both monitoring of illicit enrichment and prevention of potential conflicts of interest. The vast majority of OECD member countries require procurement officials to disclose, rather than altogether prohibit, private interests. Disclosures support

monitoring of illicit enrichment by allowing verification of legitimate income and wealth held by procurement officials as input into administrative disciplinary investigations and criminal proceedings. In Brazil, procurement officials are required – like all public officials – to submit to private interest disclosures annually and before they change position or function or leave office.<sup>19</sup> Disclosures are submitted to the human resource unit of the public organisation where the official works or is employed. The law also allows public officials the possibility of giving access to their tax declarations through the Secretariat of Federal Revenue. Failure to file a private interest disclosure or delaying its submission constitutes a disciplinary breach. The penalty for intentionally submitting an inaccurate disclosure includes administrative discipline with the possibility of dismissal and ineligibility for any position within the public administration for a period of up to five years (see Chapter 4.)

In Brazil, verification of the information contained with the private interest declarations for procurement and other public officials is the responsibility of the Office of the Comptroller General of the Union and the Federal Court of Accounts. Within the Office of the Comptroller General of the Union, the Secretariat for Corruption Prevention and Strategic Information verifies the disclosures based on a risk assessment and sampling of both public organisations and grade of officials. Organisations are selected based on materiality (both of expenditure and revenue) and number of issues raised in annual audit. Individuals are selected based on their decision-making powers (*i.e.* levels 3-6 supervisory and management officials) or if the official occupies a vulnerable position (*i.e.* officials in charge of procuring goods and services, overseeing the private sector or granting licenses). The current data-crossing has evolved since 2006 when the Office of the Comptroller General of the Union began examination of private interest disclosures. It has only been in the last year, however, that the Office of the Comptroller General of the Union has developed a more systematised search method.

***In parallel, the federal government has taken action to prevent bid rigging and promote private sector standards***

Since 2007, the Secretariat of Economic Law within the Federal Ministry of Justice has prioritised fighting bid rigging (OECD, 2010b). A special unit was established within the Secretariat with the aim of investigating bid rigging in public procurement and developing knowledge to help procurement authorities identify and avoid cartels in tenders. Bid rigging (or collusive tendering) occurs when suppliers that would otherwise be expected to compete secretly conspire to raise prices or lower the quality of goods, services or works for procurement authorities. These practices can take many forms, such as cover bidding, bid suppression, bid rotation and market allocation, all of which impede the procurement authorities. Often competitors agree in advance who will submit the winning bid on a contract to be awarded through a competitive process. This so-called bid rigging is an illegal practice in all OECD member countries and can be investigated and sanctioned under competition law and rules. In a number of OECD member countries, bid rigging is also a criminal offence.

Table 5.8. Private interest disclosures for procurement officials in Brazil and select countries, 2010

Country	Income		Assets	Liabilities	Gift	Outside positions		Previous employment
	Source	Amount				Paid	Unpaid	
Australia	o	o	o	o	o	o	o	o
Brazil	●	●	●	●	o	●	●	●
Canada	o	o	●	●	●	●	●	o
Chile	●	o	●	●	Prohibited	●	●	o
France	o	o	o	o	o	o	o	o
Germany	●	●	Prohibited	Prohibited	Prohibited	●	Prohibited	Prohibited
Japan	●	●	o	o	● <sup>2</sup>	●	●	o
Korea	●	●	● <sup>3</sup>	●	● <sup>4</sup>	●	●	●
Mexico	●	●	●	●	Prohibited <sup>5</sup>	●	o	●
Spain	o	o	o	o	o	●	●	o
United Kingdom	o	o	o	o	o	Prohibited	o	o
United States	●	●	● <sup>6</sup>	● <sup>7</sup>	●	●	●	●

Notes: ● = yes, o = no

1. Brazil: gifts above BRL 100.
2. Japan: gifts above JPY 5 000.
3. Korea: assets/liabilities above KRW 10 million.
4. Korea: gifts above KRW 0.1 million.
5. Mexico: gifts above MXN 10.
6. United States: assets above USD 1 000 or USD 200.
7. United States: liabilities above USD 10 000.

Source: Adapted from OECD (2011), *Government at a Glance 2011*, OECD, Paris, doi: 10.1787/22214399.

The Secretariat of Economic Law Procurement Unit co-operates on actions to detect and sanction bid rigging with the Federal Ministry of Planning, Budget and Management, Office of the Comptroller General of the Union and Federal Court of Accounts. In 2009, co-operation between these organisations was institutionalised by the signing of an agreement for co-operation. This builds on previous agreements of co-operation with the Office of the Federal Public Prosecutor (2008), Department of Federal Police (2007) and public prosecutors in 23 Brazilian states and the Federal District. Together with the Federal Ministry of Planning, Budget and Management, the Secretariat of Economic Law has created a mechanism for online reporting of suspicious behaviour through Comprasnet (“click here to report a violation”) by suppliers and citizens. The Secretariat of Economic Law, Office of the Comptroller General of the Union and Federal Court of Accounts have developed a typology concerning suspicious patterns applied to contracts that will be disseminated to public bodies to better detect and prosecute bid rigging in public procurement. The Secretariat of Economic Law uses the Public Spending Observatory, a data-matching and tracking system, to support investigations. Among OECD member countries, only Korea has developed such an approach to address bid rigging (OECD, 2010c).

The Secretariat of Economic Law has also established a Leniency Programme for suppliers participating in bid rigging. The Leniency Programme allows the Secretariat of Economic Law to enter into agreements with suppliers participating in bid rigging that

can, depending on the circumstances, either completely excuse the applicant from sanctions or reduce them by one- to two-thirds. In order to be considered for the leniency programme, suppliers must satisfy a number of conditions, including: *i*) be the first to denounce participation in a bid rigging cartel and not already be under investigation by the Secretariat of Economic Law; *ii*) not have been the leader of a bid rigging cartel, have ceased involvement in bid rigging and agree to fully co-operate with the investigation; and *iii*) provide evidence that identifies other participants in the bid rigging cartel. The degree to which a supplier is excused from sanctions for bid-rigging activities depends on whether Secretariat of Economic Law was previously aware of the alleged procurement cartel. Full immunity is available if the Secretariat of Economic Law had no knowledge of the illegal activity; partial leniency of up to two-thirds of the possible fine is available if the Secretariat of Economic Law did have such knowledge. If a fine is imposed, however, it may not be greater than the lowest fine imposed on any other cartel participant in the case.

Since 2007, there have been major efforts by the Secretariat of Economic Law to raise awareness of bid rigging and its illegality among public officials. The major objective of these outreach events has been to increase awareness about the harm from bid rigging as well as how to detect it. For example, in August 2008 approximately 200 public procurement officials from more than 40 federal public organisations participated in a major event in Brasília. Other events have targeted specific public organisations such as the Federal Ministry of Health and the National Agency for Terrestrial Transport. Specific training on bid rigging for procurement officials has also been developed in preparation for the 2014 World Cup and 2016 Olympic Games. In total, over 1 500 public officials participated in bid-rigging awareness raising events in 2009 and 2010 alone, although there is no structured data maintained by the Secretariat of Economic Law concerning participants in bid-rigging training activities (see Table 5.9).

Table 5.9. **Bid rigging training for public officials conducted by Secretariat of Economic Law, 2009-10**

Year	Location/event	Estimated participants
2009	OECD-Secretariat of Economic Law Road Show	450 procurement officials 150 investigators
2009	State of Rio de Janeiro	50 public prosecutors
2009	State of Espírito Santo	100 procurement officials
2009	N/A	35 heads of courts of accounts from all Brazilian states
2009	National Strategy for Cartel Prosecution ( <i>Estratégia Nacional de Combate a Cartéis</i> )	200 investigators
2010	State of Minas Gerais	100 public prosecutors
2010	State of Rio Grande do Norte	70 public prosecutors
2010	N/A	30 heads of public prosecutors from all Brazilian states
2010	N/A	40 public prosecutors specialised in fighting criminal organisations
2010	N/A	35 representatives of the Brazilian “Control Network” ( <i>Rede de Controle</i> ) co-ordinated by the Federal Court of Auditors
2010	National Strategy for Cartel Prosecution ( <i>Estratégia Nacional de Combate a Cartéis</i> )	200 investigators and auditors

Note: N/A = not available

Thousands of brochures, folders and other materials have also been distributed to procurement officials in order to increase awareness. In 2008, the Secretariat of Economic Law launched a brochure on preventing and fighting bid rigging designed especially for procurement authorities. It defines bid rigging, presents the main content of Brazil’s anti-trust laws, explains what constitutes suspicious bidding patterns and how to contact the competition authority (including through the Secretariat of Economic Law e-tool “click here to report a violation”). It also presents some relevant tips on how to design procurement processes in order to enhance competition and minimise the risks of bid rigging. The training activities, brochure, folder and posters about fighting bid rigging draw extensively on the “OECD Guidelines for Fighting Bid Rigging in Public Procurement”, including the Checklists for Detecting Bid Rigging in Public Procurement and for Designing the Public Procurement Process to Reduce the Risks of Bid Rigging. These materials are circulated to procurement authorities, the business community, courts, prosecutors, consumers and schools.

An increased number of bid-rigging cases has been observed by the Secretariat of Economic Law following its awareness-raising activities targeting procurement officials. Through the Secretariat of Economic Law’s “click here to report” link on its website, the number of reports increased from 322 to 543 between 2008 and 2009. In 2008, 8% of reports concerned fraud in public procurement (*infrações em licitações*), including bid rigging. In 2009, the figures increased to 20% of reports concerning fraud in public procurement (*infrações em licitações*) and an additional 2% of reports specifically related to bid rigging (*carteis em licitações*). According to the Secretariat of Economic Law, the increase in reports was also accompanied by more consistent and better quality information.

### Box 5.5. Examples of big rigging in Brazil

In October 2003, one of the members of a bid-rigging cartel involving security service provider companies with activities in Rio Grande do Sul applied to the Brazilian Leniency Programme. The target of the cartel was a number of public tenders organised primarily by the Secretariat of Federal Revenue's Regional Superintendent in Rio Grande do Sul and Porto Alegre health municipal secretariat. In order to obtain full immunity from administrative fines and criminal sanctions, the leniency applicant submitted direct evidence of the bid rigging, including employees' testimonies and audio records of telephone conversations held between the leniency applicant's employees and the other cartel participants. The leniency applicant provided sufficient information to enable the Secretariat of Economic Law and the Office of Federal Public Prosecutor to run simultaneous dawn raids in four companies and two trade associations allegedly involved in the bid rigging. Approximately 80 people were involved in the dawn raids, including officials from the Department of Federal Police. Seized evidence showed that the defendants held weekly meetings to organise the outcomes of bids for public tenders.

After reviewing the Secretariat of Economic Law investigation and conclusion for the existence of a hard-core cartel, the Council for Economic Defence issued its decision in 2007. It imposed fines on 16 companies ranging from 15-20% of their 2002 gross turnover for bid rigging. Executives of the condemned companies and three industry associations were also found guilty of cartel offense and fined by the Council for Economic Defence. The total amount of fines imposed is in excess of BRL 40 million. In addition, the companies were prohibited from taking part in public procurement and engaging in contracts with financial institutions for a period of five years. Information on the case was published in a major newspaper in the state of Rio Grande do Sul at the expense of the convicted trade associations and labour union. At the same occasion, Council for Economic Defence recognised that the beneficiary of the leniency agreement fulfilled all the conditions imposed in the agreement with the Secretariat of Economic Law and, therefore, no sanctions were imposed.

*Source:* OECD (2010), "Collusion and Corruption in Public Procurement, Contribution from Brazil", DAF/COMP/GF/WD(2010)13, OECD, Paris.

#### *Mandatory certificates of independent bid determination have been introduced to draw attention to the illegality of bid rigging and to support investigations*

In 2009 the Secretariat of Economic Law issued Guidelines for the Analysis of Complaints Involving Public Procurement, together with a model certificate of independent bid determination.<sup>20</sup> The guidelines clarify Brazil's competition law with respect to public procurement, and also indicate the responsibility of the Secretariat to analyse cases of anti-competitive conduct by bidders, such as bid rigging. A certificate of independent bid determination requires bidders to provide written confirmation that their respective bids have been developed independently from their competitors and that no consultation, communication, contract, arrangement or understanding with any competitor has occurred.<sup>21</sup> These certificates are increasingly considered to play a critical role not only in facilitating investigation and prosecution of bid-rigging cases but also in raising awareness among bidders about the illegality of bid rigging.

Based on this Secretariat of Economic Law initiative, in September 2009 the Federal Ministry of Planning, Budget and Management published the Regulatory Instruction no. 2/2009 obliging bidders in federal public tenders to present a certificate of independent bid determination. Brazil's certificate of independent bid determination requires every bidder (or consortium) to sign a statement that it has not agreed with its

competitors about bids, disclosed bid prices or attempted to rig a public tender with a competitor (see Box 5.6). Certificates of independent bid determination, or equivalent legal clauses in bid submissions, are used in Australia, Canada, the United Kingdom and the United States.<sup>22</sup> While all of these countries allow procurement authorities to use certificates of independent bid determination, none of them make it mandatory. There have been select cases in which OECD member countries have made the use of these certificates mandatory. In the case of Canada, for example, the Vancouver Organising Committee for the 2010 Olympic Games included a “no collusion requirement”, a variant of a certificate of independent bid determination, in all of its tenders. In 2009, a member of Brazil’s National Congress presented Bill no. 5 506/2009 to amend Federal Law no. 8 666/1993 on Procurement and Administrative Contracts and make the signature of a certificate of independent bid determination mandatory at all levels of government (*i.e.* state, Federal District and municipalities). At the time of the finalisation of this chapter, the bill was still under analysis before the National Congress.

#### **Box 5.6. Brazil’s certificate of independent bid determination template**

[Bid number]

Full identification of a representative of bidder as a duly constituted representative of the full identity of the bidder or the consortium, hereinafter bidder/consortium, for the purposes provided in item [complete] of file [complete] with identification of the procurement notice declare, under penalty of law, especially the Brazilian Criminal Code, Article 299, that:

- the proposal to join the bid ID was developed independently by the bidder/consortium, and the contents of the proposal were not, in whole or in part, directly or indirectly informed, discussed or received any other potential participant of bid ID, or by any means by any person;
- the intention to submit the proposal prepared to participate in the bid ID has not been informed, discussed or received from any potential or actual participant’s bid ID, or by any means by any person;
- did not attempt by any means or by any person, to influence the decision of any potential or actual participant’s bid ID whether part of that bid or not;
- the content of the proposal to join the bid ID will not, in whole or in part, directly or indirectly communicated or discussed with any potential or actual participant’s bid ID before the award of the object of that bid;
- the contents of the proposal to join the bid ID was not, in whole or in part, directly or indirectly informed, discussed or received from any member of another bidder/consortium before the official opening of tenders; and
- that is fully aware of the contents and scope of this declaration and who has full power and information to steady it.

Legal representative of the bidder/consortium in the bidding, with full identification.

*Source:* Normative Instruction no. 2/2009.

### ***Broad administrative and criminal sanctions exist to enforce poor performance and corruption by contractors***

Federal Law no. 8 666/1993 on Procurement and Administrative Contracts provides for a number of administrative and criminal sanctions aimed at enhancing integrity and compliance of contractors with contracts.<sup>23</sup> The law establishes two types of conduct punishable by the imposition of administrative sanctions: *i*) unjustified delay in contract execution; and *ii*) total or partial lack of contract execution. The specifics of administrative sanctions are spelled out in tender documents or contracts. Primary responsibility for imposing administrative sanctions lies with the procurement authority. In addition, both the Office of the Comptroller General of the Union and the Federal Court of Accounts, as government audit authorities, may debar contractors. There are no statistics available on the number of sanctions by procurement authorities, nor for analysis of fines by public organisation or type of contract.

Unjustified delay in the execution of a contract may be sanctioned by periodic fines (*multa de mora*). Fines may also be deducted from the guarantee provided by contractors prior to commencing their work. Fines are paid directly to the Secretariat of the National Treasury. If the total amount due as periodic fines exceeds the amount of the guarantee, public organisations may deduct the outstanding value from other credits that the contractor may have with the federal public administration or, if necessary, initiate a judicial procedure to recover the amount of the fines. The imposition of periodic fines does not prevent federal public organisations from acting unilaterally to terminate a contract or from applying any other sanctions contemplated in law. There are no statistics on the amount of fines collected, nor for analysis of fines by public organisation or type of contract.

Total or partial lack of contract execution may be sanctioned by: *i*) written warnings; *ii*) fines (as a final sanction, not a periodic sanction); *iii*) temporary suspension from participation in tenders and ineligibility for administrative contracts for a period of up to two years; and *iv*) full debarment (*declaração de inidoneidade*) from tenders or ineligibility to compete for administrative contracts. Temporary suspension and debarment may also be applied to contractors who have: *i*) been found liable for tax fraud; *ii*) engaged in unlawful conduct aimed at thwarting the objectives of a tender procedure; or *iii*) demonstrated that they are unsuitable for administrative contracts with the public administration due to a prior offense. Temporary suspension and debarment may continue until the original reasons for the original sanctions no longer exist or until the contractor is re-instated by the procurement authority that issued the original sanctions.

Federal Law no. 8 666/1993 on Procurement and Administrative Contracts provides broad discretion to individual procurement authorities over the imposition of administrative sanctions. This is attributed to: *i*) a loose definition of administrative sanctions (*i.e.* the “total or partial lack of execution of the contract”); and *ii*) the absence of defining how different administrative sanctions are to be applied in practice (*e.g.* when will a certain breach of the contract obligations trigger a warning as opposed to a fine). Debarment may, however, only be adopted by a federal minister or state secretary following an administrative procedure where the contractor is entitled to present a defence. Debarred contractors may apply for re-instatement two years after the initial debarment decision. There are no statistics on the amount of fines collected, nor for analysis of fines by public organisation or type of contract.



Temporarily suspended and debarred contractors are entered into the National Registry of Ineligible and Suspended Contractors. Created in 2008 by the Office of the Comptroller General of the Union, this registry consolidates and disseminates information on sanctioned contractors from the various management systems of individual federal public organisations and states into a single, continuously updated database. Using the National Registry of Ineligible and Suspended Firms, public officials and citizens can search for suppliers online, by name, National Register of Legal Persons (*Cadastro Nacional Pessoa Jurídica*) or National Registry of Persons (*Cadastro de Pessoas Físicas*) numbers, or type of sanction. There are currently 1 343 sanctioned suppliers in the registry: 263 ineligible and 1 080 suspended. In addition to information from federal public organisations, the list also includes data from eight Brazilian states that have voluntarily provided this information to the Office of the Comptroller General of the Union.<sup>24</sup> The information remains the sole responsibility of the persons who supplied the information. As such, the Office of the Comptroller General of the Union places a disclaimer on the information noting that it is not liable for the accuracy or authenticity of information or for any direct or indirect damages resulting from them caused to third parties.

Table 5.10. **Data template of Brazil's National Registry of Ineligible and Suspended Contractors**

Company data			Information source		Penalty data		Information source	
Sanctioning organisation			Company data		Sanctioning organisation		Company data	
National Register of Legal Persons/ National Registry of Persons number	Company name	Type	Start date	National Register of Legal Persons/ National Registry of Persons number	Company name	Type	Start date	National Register of Legal Persons/ National Registry of Persons number

Source: Transparency Portal (n.d.), [www.portaldatransparencia.gov.br/ceis/index.asp](http://www.portaldatransparencia.gov.br/ceis/index.asp).

The effectiveness of the debarment system could be improved to include all suppliers and contractors debarred at various levels of government (*i.e.* federal, states and municipalities). At present and given the lack of publicity of most debarment decisions, the effect of debarment in a given state or municipality has limited effects beyond the borders of that state or municipality. Moreover, the current registry could be broadened to include not only contractors subject to administrative sanctions but also those found guilty of criminal conduct by a court.

In addition to administrative sanctions, Federal Law no. 8 666/1993 on Procurement and Administrative Contracts enumerates criminal sanctions for breaches in procurement procedures, often involving imprisonment. The criminal provisions of the law are broad in scope, covering both the procurement process and the management of administrative contracts. They apply to all public organisations and all levels of government (*i.e.* federal, state and municipal). Table 5.11 provides an overview of these criminal sanctions. Criminal sanctions may be coupled with the removal from office of an infringing public official. These penalties are increased by one-third where the infringing public official holds a position and functions of trust and gratifications (*cargos e funções de confiança e gratificações*). Fines are calculated as between 2-5% of the value of the tendered contract. The enforcement of the crimes listed in Federal Law no. 8 666/1993 is the responsibility of Office of the Federal Public Prosecutor. Anyone may trigger the intervention of the prosecutors by providing evidence in writing or orally (in the latter case with the

signature and support of two witnesses). Similarly, the Federal Court of Accounts and internal control authorities are required to forward any evidence of criminal behavior they may encounter in the exercise of their controlling functions to public prosecutors for further investigation.

Table 5.11. **Criminal sanctions in Brazil for breaches in procurement procedures**

Criminal sanction	Maximum penalty
1. Waiving or foregoing procurement in the cases laid down in the law or inobservance of requirements regarding exemptions; participating in this illegality and benefiting from the waiver or inobservance.	3 to 5 years imprisonment and fine
2. Preventing or defrauding through agreement, collusion or any other instrument the competitive nature of the bidding procedure in order to obtain, for themselves or for others, benefit from the award of the object of the bidding.	2 to 4 imprisonment years and fine
3. Sponsoring, directly or indirectly, a private interest before the administration, leading to the opening of a bid or the award of a contract which are subsequently annulled by the judiciary.	6 months to 2 years imprisonment and fine
4. Permitting, facilitating or creating any modification or advantage, including the extension of a contract in favor of the contractor, during the execution of a government contract, in the absence of authorisation by law, or in the bidding and contractual instruments; or paying bills in breach of the chronological order for payments; participating in these illegalities and benefiting from the contractual modification or extension.	2 to 4 years imprisonment and fine
5. Preventing, hindering or defrauding the performance of any action in the course of the bidding process.	6 months to 2 years imprisonment and fine
6. Breaching the confidentiality of a bidding proposal or giving others the possibility to do so.	2 to 3 years imprisonment and fine
7. Removing or attempting to remove a bidder from the process through violence, serious threat, fraud, or offering any kind of advantage.	2 to 4 years imprisonment and fine in addition to the penalty corresponding to violence
8. Defrauding, at the expense of the state Treasury, a procurement for the purchase or sale of goods or merchandise, or a resulting contract through the following actions: <i>i)</i> raising prices arbitrarily; <i>ii)</i> selling as legitimate counterfeited or damaged merchandise; <i>iii)</i> replacing agreed goods with a substitute; <i>iv)</i> altering the substance, quality or quantity of the delivered goods; and <i>v)</i> raising, by any means and in an unfair way, the costs associated with the proposal or execution of the contract.	3 to 6 years imprisonment and fine
9. Accepting the bid or entering into a contract with an ineligible firm; participating in a bid or contract while being ineligible.	6 months to 2 years imprisonment and fine
10. Unfairly impeding, obstructing or hindering the entry of any person in the procurement registries or unduly promoting the amendment, suspension or cancellation of an existing registration.	6 months to 2 years imprisonment and fine

Source: Federal Law no. 8 666/1993 on Procurement and Administrative Contracts.

## Strengthening capability of the procurement system

Developing procurement managerial capability will be particularly important as Brazil advances in its pursuit of complementary procurement objectives. Experience from OECD member countries suggests that most waste in the procurement process, particularly of off-the-shelf goods and standardised services, is attributable to passive – rather than active – waste (*e.g.* Bandiera, Prat and Valletti, 2009). In other words, waste can be attributed to little knowledge and capability or incentives to minimise costs and maximise quality. Moreover, the most common barrier to implementing policies supporting complementary procurement objectives is recognised as a lack of know-how among procurement officials. The legal framework and political support are not considered serious barriers (OECD, 2007a; Weber, 2009).

***Developing the procurement workforce through the development of core competencies and the provision of appropriate “how-to” practical tools***

Empirical data on the size of Brazil’s federal procurement workforce is limited. The Federal Ministry of Planning, Budget and Management – which has responsibility for both public procurement and human resource management policies – does not have information on the demographics of the current procurement workforce. This is in part because the procurement function is not guided by a dedicated career stream within the federal public administration. The 2004 World Bank Country Procurement Assessment Report of Brazil estimated that there were approximately 30 000 public officials working on public procurement on a full- or part-time basis among a total federal public administration workforce of approximately 300 000 (World Bank, 2004). The same report expressed concern over high staff turnover within the procurement function, citing virtually no attention to attracting and retaining qualified procurement officials within the federal public administration.

There is no comprehensive strategy for recruitment, development and retention of the procurement workforce in Brazil. Human resource management practices within Brazil’s federal government tend to focus on compliance, with little room for competencies and performance. Attention centres on the responsibilities of a procurement committee, or an auctioneer in the case of reverse auctions, and their supporting staff. These challenges need to be taken into consideration in terms of an ageing workforce. Like many other OECD member countries, Brazil’s federal public administration is ageing rapidly and much more rapidly than the wider labour market. The 2010 OECD Reviews of Human Resource Management in Government of Brazil noted that the federal government has not addressed the issues raised by an ageing workforce, such as levels of future recruitment and workforce planning (OECD, 2010g).

In order to improve capacity in public works procurement, in 2007 the federal government created the career group for infrastructure analyst and senior infrastructure specialist.<sup>25</sup> These positions are managed by the Federal Ministry of Planning, Budget and Management and distributed across federal ministries such as Transport, Energy and Mines, National Integration, Cities and Communications, etc. Initially, 216 infrastructure analyst and 84 senior infrastructure specialist positions were created. The number of positions for infrastructure analyst was subsequently increased to 8 000 in 2008. Prior to the establishment of this career, there were virtually no engineers in federal ministries. The decision continues the government’s efforts since 2003 to develop capacity in infrastructure to support the Accelerated Growth Programme. Policies of the Cardoso administration in the area of infrastructure between 1996 and 2002 reduced the federal government capacity to perform activities related to infrastructure (*i.e.* planning, management, control and supervision). During this period, the number of active infrastructure officials fell from 7 048 to 4 510, a reduction of 36% of the total infrastructure workforce. By 2009, there were already 7 862 active public officials, a real growth of approximately 60% compared with 2002. This is combined with better-qualified public officials with the introduction of a minimum entry requirement of a bachelor’s degree. About 65% of infrastructure officials currently have this educational level compared to only 27% in 2002 (OECD, 2010g).

In general, training and certification is narrowly focused on the functioning of the operating systems rather than the core technical and non-technical competencies procurement officials need to procure strategically and achieve value for money. Efforts are also being undertaken by the Secretariat for Logistics and Information

Technology to certify users of the Integrated General Service Administration System/Comprasnet. In 2008, 8 000 auctioneers and an additional 2 000 accounting staff were certified to use the system. A plan was to train a further 35 500 officials to use the systems in 2009, although less than one-third of this number (11 000 officials) was trained in 2009 by the Federal Ministry of Planning, Budget and Management. Competency management (*gestão por competências*) is in its infancy in Brazil and is being positioned as a core part of a strategy to strengthen the capability of the public service. It is being used as a way of re-orienting and strengthening training and development to upskill the public service and to instil a culture of ongoing development (OECD, 2010d). In developing a procurement competency framework, the Federal Ministry of Planning, Budget and Management is working to identify the abilities and behaviours procurement officials need to do their jobs well and linking a number of key human resource management activities (*e.g.* workforce planning and job design, training and professional development, progression and remuneration, etc.).

Examples of procurement competencies may include: strategy development and market analysis, risk management and contingency planning, measuring procurement performance, advanced project management, effective negotiation, communications and relationship management among others. In addition, the government may consider whether to define stand-alone competencies in order to support the government's pursuit of complementary procurement objectives or whether to consider them as integrated into general procurement competencies.

In the United Kingdom, the government of Scotland has developed a procurement competency framework to identify the skills and competency levels required by all officials involved in the procurement process. It also helps officials to take ownership of their personal development through skills assessment, identification of training and development needs and career planning. The framework consists of 13 competencies (8 technical and 5 non-technical), which form a broad set of vocational, operational and managerial skills required to perform successfully. Each competency is broken down into a number of component skills, of which there are 74 in total. These are set out in the form of a matrix that maps a range of skill levels from Level 0 (no knowledge or competence) through to Level 4 (highly skilled, thoroughly knowledgeable, total familiarity or highly experienced). In parallel, the professional association has mapped its professional qualifications in purchasing and supply. Table 5.12 provides an example of how this is done for procurement strategy development and market analysis.

*Procurement officials need to be equipped with “how to” guidance materials and information to support the discretionary aspects of their work*

The Secretariat for Logistics and Information Technology produces manuals focusing on how to operate the electronic systems to ensure that data is captured within the operating systems (and its supporting modules) as a means for supporting transparency and control; and on standard specifications for works. These manuals are all available on the Comprasnet website for procurement officials and the public alike. Federal Ministry of Planning, Budget and Management officials noted that where officials cannot find the answer to their queries in the various manuals available on Comprasnet, an additional two channels exist: *i)* frequently asked questions; and, if insufficient, *ii)* an email and telephone help desk operated by Secretariat for Logistics and Information Technology officials. As mentioned, in 2010, the Office of the Comptroller General of the Union issued a frequently asked questions publication to draw the attention of procurement officials to the relevant articles within Brazil's procurement legal framework.

**Table 5.12. Procurement Competency Framework – example of the Scottish Government Strategy Development and Market Analysis Competencies**

Goal: Has the strategy development and market analysis skills necessary to carry out duties associated with role.					
Skill	Level 0	Level 1	Level 2	Level 3	Level 4
Commodity-specific knowledge	Not required to have detailed and specific commodity knowledge. May have basic, limited experiential tactical/operational knowledge of some specific commodities.	Aware of specific commodity features. Completes market research (or an element of), although still applies generic solutions.	Understands the specific nature of the commodity, either technically or commercially within their job remit. Carries out relevant market research. Adjusts strategy to relevant market conditions.	Knowledgeable of the specific aspects of a range of commodities/services/estate works, both technically and commercially. Assesses appropriate strategies and tailors actions accordingly. Understands industry cost structures and pricing mechanisms.	Fully knowledgeable in a range of commodities/services/estate works with past experience both technically and commercially. Develops robust strategies based on this knowledge, targeted to exploit market conditions. Fully cognisant of industry cost model, funding structure and corporate development, using information proactively. Recognised internally or externally as a source of market expertise.
Procurement-related strategy development	Not required to develop a procurement strategy, but may be involved in some tactical aspects.	Does not develop strategies, but may provide some input to others developing such strategies.	Understands the importance and principles of a strategic approach. May influence the development of strategies, for example may be a member of user intelligence groups. Able to identify the aim and objectives of lower value/less complex contracts.	Fully understands, can articulate and enact the principles of a strategic procurement approach. Can lead a User Intelligence Group in the development and implementation of strategies.	Extensive knowledge and experience of the processes relating to procurement strategy. Able to mentor and manage others.
Market analysis	Not required to understand markets or the concept of market analysis.	Aware of specific types of markets. Will initiate analysis when aware of market activity or when directed.	Understands how types of market and market activity affect supply and demand. Adjusts strategies according to market activity.	Knowledgeable about a range of markets and how they affect price, availability or supply chain logistics. Within their remit, will use specific market analysis to predict behaviour and supply risks to the organisation. Will adjust strategy to minimise effect of market change. May provide market analysis to customers and advice to others within procurement.	Fully knowledgeable regarding types of markets and a range of market activity. Will monitor key supply base to predict impact on organisation. Regularly displays sound judgement and minimises risk by prediction. Recognised internally or externally as a source of market expertise.

Source: Scottish Government (n.d.), “The Procurement Competency Framework”, [www.scotland.gov.uk/Topics/Government/Procurement/Capability#a5](http://www.scotland.gov.uk/Topics/Government/Procurement/Capability#a5).

Existing procurement manuals are structured in relation to the procurement method rather than the competencies that procurement officials require. For example, manuals address the core operating systems (*e.g.* Integrated General Service Administration System), their supporting modules (*e.g.* Unified Registration System for Suppliers of the federal public administration) and application of the system for specific tender methods (*e.g.* reverse auctions). Neither the Secretariat for Logistics and Information Technology nor the Office of the Comptroller General of the Union provide “how to” guidance materials on the discretionary, more qualitative dimensions of procurement decision making. For example, how to conduct a procurement plan guiding procurement officials through what information could be collected, what sources could be used, how this could be verified to assess the needs of the organisation, along with templates to present the information in a user-friendly format. Other manuals could guide procurement officials as to how to conduct a market survey to understand the capabilities of suppliers and markets that they purchase from.

A procurement plan is a key management instrument in achieving organisational objectives and strategic goals. It supports identification of: *i*) the best way to approach the procurement of specific goods or services through information gathering and analysis; *ii*) possible risks associated with the purchase of goods or services at an early stage to allow optimum management (*e.g.* possibility of non-delivery or identifying wider range of suppliers); and *iii*) ways of achieving the objectives defined in the significant purchases plan, in line with the organisation’s procurement plan. Plans are generally prepared on an annual basis and may include related budget planning, formulated on an annual or multi-annual basis (often as part of an organisation’s investment plan), with a detailed and realistic description of financial and human resource requirements. Making procurement plans publicly available, such as through a central or procuring authority’s website (see Figure 5.7) can also help to increase transparency, competition and value for money in public procurement.

At present the Secretariat for Logistics and Information Technology reports that procurement planning is done through the planning and budget cycle. While it is commonly recognised that procurement is part of public financial management, key differences exist between budget planning and procurement planning, especially for non-capital expenditure. For example, planning and budgeting establishes a resource envelope for a public organisation over the fiscal year but is not synonymous with planning the size of procurement packages and timing to approach the market. Significant time can pass between planning and formulation of the budget and its execution. Moreover, incremental budgeting (preparing the budget based on the previous year’s budget) can further break down the relationship between budget planning and procurement planning. In this case, procurement planning will not reflect the changing circumstances in which the organisation or the supply market operates – nor any organisational learning from the previous year’s contracts.

Figure 5.7. Content and structure of a generic procurement plan

<b>Basic information:</b>				
<b>Stakeholders</b>				
<i>Name</i>	<i>Secretariat/Department</i>		<i>Sign-off</i>	
<b>Plan prepared by:</b>				
<i>Name</i>	<i>Secretariat/Department</i>		<i>Sign-off</i>	
<b>Names of others consulted</b>				
<i>Name</i>	<i>Secretariat/Department</i>			
<b>Requirement summary</b>				
<b>Areas of impact by this requirement</b>				
<b>Constraints</b>				
<b>Market analysis</b>				
<b>SWOT analysis: Procurement authorities perspective</b>				
<i>Strengths</i>		<i>Weaknesses</i>		
<i>Opportunities</i>		<i>Threats</i>		
<b>SWOT analysis: Suppliers perspective</b>				
<i>Strengths</i>		<i>Weaknesses</i>		
<i>Opportunities</i>		<i>Threats</i>		
<b>Knowledge gaps</b>				
<i>No.</i>	<i>Knowledge gap</i>	<i>Information to fill the gap</i>		
1				
2				
...				
<b>Risk management</b>				
<i>No.</i>	<i>Risk description</i>	<i>Mitigating action:</i>	<i>Action by:</i>	<i>Timeframe:</i>
1				
2				
...				
<b>Deliverables</b>				
<b>Strategy</b>				
<b>Action plan</b>				
<i>No.</i>	<i>Action</i>	<i>Action by:</i>	<i>Timeframe:</i>	
1.				
2.				
..				

### ***Introducing performance assessment can help to evaluate value for money and integrity as a basis for evidence-based learning and improvement***

In Brazil, a substantial pool of data is generated through procurement processes and collated in the Federal Ministry of Planning, Budget and Management's Integrated General Service Administration System "data warehouse". This information includes not only procurement conducted through the Comprasnet, i.e. electronic reverse auctions, but all procurement procedures conducted "offline". In the case of the latter, procurement officials must enter procedural and contract data into the Integrated General Service Administration System as a basis for contract management. This information is subsequently used by the Secretariat for Logistics and Information Technology to generate monthly and annual reports on public procurement. These reports are made publicly available on Comprasnet for suppliers and citizens to access. Reports include measures such as the number and value of contracts by modality (including bid waivers and exemptions), geographic region; supplier (i.e. micro, small and other; companies and individuals); and goods and services purchased (i.e. sector, economic classification of goods/services, common or specific goods/services).

The use of this information is largely confined to the Federal Ministry of Planning, Budget and Management. Senior officials from the Secretariat for Logistics and Information Technology note that decision makers and procurement officials from federal public organisations can be trained to use the Integrated General Service Administration System data warehouse in order to generate their own reports. However, discussions between the OECD Secretariat and procurement officials within the Secretariat of Federal Revenue, Federal Ministry of Health and Federal Ministry of Social Development and the Fight Against Hunger suggest that the take up, and even knowledge about this information, is low. Moreover, the current procurement measures focus solely on quantifying the number and value of procurement activities. The government does not have any indicators to monitor and evaluate the performance and quality of procurement procedures.

An increased interest in positioning public procurement more strategically within the operations of public organisations as a means of achieving value for money has led to a rise in evidence-based decision making in OECD member countries. Performance measurement is key for meeting these objectives. To be effective, the methodology and approach for performance monitoring must: *i*) be simple and practical; *ii*) take into account the realities of country systems and reflect the operational concerns of both the central procurement authorities and procurement officials; *iii*) be structured around key features and good practices of public sector procurement; and *iv*) use concepts, techniques and tools that are widely available and part of current practice in public sector management and quality management. Performance measurement should include attention to measuring processes and capability as a key component of understanding the functioning of the procurement system. Measurement should extend to all procurement modalities and all procuring authorities. OECD member countries have taken different approaches to assessing the state of their public procurement systems. These have included using key procurement indicators of processes (e.g. Chile), comprehensive procurement reviews (e.g. United Kingdom) and internal audit. Another emerging practice in countries is the use of applied procurement research as input for improving the performance of procurement systems (e.g. Australia and Canada).



In Chile, the Public Management Improvement Programme (*Programa de Mejoramiento de Gestión*) uses indicators to encourage improvement and establish rewards in procurement and other areas. Run by the Directorate of Budget within the Ministry of Finance, the programme measures, among other things, the rate of contracts made using emergency procedures, the value of contracts executed using competitive modalities, and the difference between annual plan and actual contracts made during the year.<sup>26</sup> By the end of 2003 some 131 public organisations had included procurement in their Public Management Improvement Programme plans and nearly all of them had achieved a higher quality level in the procurement function. These results can be partly explained by the efforts devoted to training for procurement officials, in which about 7 900 individuals were included until 2004, and by investments in information services.

Table 5.13. **Examples of procurement process performance indicators**

Indicator	Example of performance measure
Bid processing lead time	Average number of days from bid opening to the issuance of a contract award
Cancellation of tenders	Percentage of tenders declared null before contract signature
Resolution of reviews	Percentage of appeals resulting in modification in tender process
Contract amendment	Average increase per contract awarded
Contract dispute resolution	Percentage of contracts with unresolved disputes
Completion rate	Percentage of contracts resulting in full and acceptable performance
Late payment	Percentage of payments made late (e.g. exceeding contractually specified payment schedule)

*Source:* Adapted from OECD/World Bank (2005), “Methodology for Assessing Procurement Systems”, OECD, Paris.

In the United Kingdom, the Office of Government Commerce launched in 2007 a series of Procurement Capability Reviews to support improvements in public procurement and service delivery. The reviews focus solely on commercial activity in central departments and examine three main elements of a department’s procurement capability: *i)* leadership; *ii)* skills development and deployment; and *iii)* systems and processes. It includes an assessment of procurement activities across the whole lifecycle, from policy and strategy to delivery and disposal; the department’s delivery chains are explored, from central departmental functions, through to agencies, non-departmental public bodies, partners and end users. The focus is on high-impact, large expenditure areas. Reviews combine both desk-based research and interviews with officials at various levels and in various functions from the organisation under review. Through the process, the review team identifies priority areas for improvement and provides feedback directly to the organisation’s highest executive secretary. Each department develops and subsequently implements an Improvement Plan that is periodically monitored over a period of 6-24 months (see Box 5.7).

Drawing upon these examples, Brazil’s Federal Ministry of Planning, Budget and Management may explore developing systems to measure the functioning and performance of its procurement systems. Procurement performance indicators at the level of individual public organisations might help public procurement officials and public managers to improve procurement performance over time. Indicators should be supported by a clear rationale, definition, methodology and data source. In parallel, it may conduct, together with federal public organisations, procurement capability assessments. These assessments can draw upon the results of key performance indicators and help identify good practices as input into operational procurement guidelines. Attention should

particularly focus on identifying concrete actions for improvement and periodically monitoring performance against these actions.

### Box 5.7. Procurement Capability Reviews in the United Kingdom

The Procurement Capability Reviews were first announced in the Transforming Government Procurement in January 2007. It aims to ensure that procurement drives public service improvements supporting the Government's Smarter Government Agenda and Operational Efficiency Programme through the publication of transparent commercial performance data. The reviews focus solely on commercial activity in central departments and look in detail at three main elements of a department's procurement capability: leadership, skills development and deployment, and systems and processes. They include an assessment of procurement activities across the whole life cycle, from policy and strategy to delivery and disposal; the department's delivery chains are explored, from central departmental functions, through to agencies, non-departmental public bodies, partners and end users. The focus is on high-impact, large expenditure areas.

The reviews have been conducted in two waves each with several tranches. Sixteen departments were included in the first wave: the Department for Education and Skills, the Department for Communities and Local Government; the Department for Work and Pensions (Tranche 1); the Department for Transport; the Department for the Environment, Food and Rural Affairs; the Department for International Development (Tranche 2); the Department of Health; the Home Office; HM Revenue and Customs and the Ministry of Justice (Tranche 3); the Department of Defence; the Department for Culture, Media and Sport; the Foreign and Commonwealth Office; the Department for Business Enterprise and Regulatory Reform; HM Treasury and the Cabinet Office (Tranches 4 and 5). A second wave of reviews was conducted between September 2009 and September 2010. It is intended to review key procurement performance data and performance benchmarking on an annual basis to ensure momentum is maintained.

During several months' preparation, information about the department is gathered from a variety of sources. An intensive forensic stage follows, lasting three to four weeks. During this time members of the review team meet senior officials, officials in the central department, agencies and non-departmental public bodies involved in commercial activity, suppliers, and regulators – typically between 50 and 80 individuals. The review team members work on a number of lines of enquiry, "following the money" through the delivery chains. The results of departments' self assessments are published online. Each review team comprises an executive director of the Office of Government Commerce, an expert in public sector procurement and an experienced leader from the private sector. The depth and breadth of experience in each team ensures that it is able to reach a deep understanding of the commercial issues faced by the department, and that the department's board and procurement director have full confidence in the report and recommendations.

The review team identifies the priority areas for improvement and provides feedback directly to the Permanent Secretary. Their report sets out the general context within which commercial matters are addressed in the department, the performance against the nine indicators in the review model, and recommendations for action. The nine indicators reflect a number of smaller key performance indicators measuring procurement performance, including operational efficiency as well as wider procurement policy objectives such as sustainability. Based on the results of these key performance indicators, a score card is assembled against the nine indicators using a five-point red/amber/green scale. These scores are subsequently subject to a rigorous cross-tranche moderation process by an independent panel comprising representatives from the National Audit Office, Confederation of British Industry, HM Treasury and Cabinet Office Departmental Capability Review Programme.

### Box 5.7. Procurement Capability Reviews in the United Kingdom (*cont'd*)

Each department is expected to develop and implement an Improvement Plan in response to the review, with support from the Office of Government Commerce. The Office of Government Commerce and the department will agree on an Engagement Plan, based on assessed risk to delivery against the approved Improvement Plan. Follow-up plans will include self-assessment by the department 6 months after the approval of the Improvement Plan; a stocktaking around 12 months after the first review to measure progress against the Improvement Plan; leading eventually to a follow-up full review within 24 months.

*Source:* Office of Government Commerce (n.d.), [www.ogc.gov.uk/ogc\\_-\\_transforming\\_government\\_procurement\\_procurement\\_capability\\_reviews.asp](http://www.ogc.gov.uk/ogc_-_transforming_government_procurement_procurement_capability_reviews.asp).

*Action is needed, in particular, to assess the functioning of Brazil's procurement review and remedies system as a tool for good procurement management*

A procurement review and remedies system allow unsuccessful suppliers/bidders and, in certain instances, the general public, to challenge decisions taken by public authorities. The establishment of effective mechanisms to seek redress in cases where suppliers/bidders deem that contracts have been unfairly awarded or that other substantive or procedural rules have not been respected are essential to establishing trust with both the private sector and the general public. In addition, those mechanisms fulfil a number of objectives, including: *i*) ensuring compliance with procurement rules by serving as a deterrent to unlawful or irregular practices and correcting violations of the law and genuine mistakes by procurement officials; *ii*) identifying opportunities for management improvement in key areas of public procurement; and *iii*) fulfilling some of the substantive principles of public procurement, such as transparency, non-discrimination and equal treatment, and value for money (OECD, 2007d). Review and remedies systems vary significantly across OECD member countries some with specialised procurement review bodies (*e.g.* Canada, Germany and Korea) and alternative dispute settlement mechanisms (*e.g.* Australia, Canada, France, Italy, Mexico and the United Kingdom).

The procurement review and remedy system in Brazil is characterised by numerous administrative appeals and the frequent use of judicial review, which sometimes puts the entire process on hold for years. Appeals are reportedly often used by suppliers for the sole purpose of gaining advantage during the period of delay (*i.e.* providing sub-contracting arrangements for dismissing a complaint). This same issue was raised in the 2004 World Bank Country Procurement Assessment Report. Despite concerns about the high level of appeals and their impact on the procurement process, there is no structured data on the review and remedies within the federal public administration (*e.g.* caseload by channel of appeal, average time to resolve appeal, percentage of appeals unresolved, etc.) (World Bank, 2004). This is in part because of the multiple channels available to appeal procurement decision-making processes. Capturing information on procurement appeals and complaints is a first step to conducting a systemic audit of the review and remedies system. Such an audit is necessary to understand how the review and remedies system is used by suppliers and its impact on procurement processes. It is critical that the government better understand the issues facing the procurement review and remedies system to inform possible reforms in this area.

The main instrument to review procurement decisions and offer suppliers and citizens the possibility to contest such decisions set forth in Federal Law no. 8 666/1993 on

Procurement and Administrative Contracts is the formulation of administrative appeals and claims. It contemplates two main remedies against administrative decisions: *i*) a complaint (*impugnação*) alleging an irregularity in the procurement notice released by the procuring authority; and *ii*) an appeal (*recurso*) against subsequent administrative decisions available to bidders and contractors. Any citizen has the right to formulate a complaint (*impugnação*) by formalising a petition up to five working days prior to the date set for the opening of the qualification envelopes (*envelopes de habilitação*). The procuring authority must render a decision on the complaint within three working days. If the complaint is accepted, the procurement is suspended and may be published again with the necessary corrections. In the case of reverse auctions, a complaint must be brought to the procuring authority up to two days before the date set for the reception of the proposals. The complaint must be decided upon within 24 hours.

All administrative acts during the procurement process are subject to administrative review through appeal (*recurso*) to the respective procuring authority. The list of challengeable acts in Federal Law no. 8 666/1993 on Procurement and Administrative Contracts includes: *i*) the disqualification or qualification of bidders (*habilitação*, the most popular cause of administrative appeals); *ii*) the evaluation of proposals; *iii*) the cancellation of a bidding process; *iv*) the dismissal of a request for inclusion in a registry of contractors, as well as the modification or termination of such registration; *v*) the cancellation or suspension of the contract; and *vi*) the imposition of sanctions (warning, temporary suspension, or fine). All administrative appeals against the qualification or disqualification of bidders and the evaluation of proposals automatically suspend the procurement process until they are resolved. Other appeals only result in the procurement process being suspended if the competent authority invokes and substantiates a public interest (*razões de interesse público*) to take that decision.

Administrative appeals must be filed within five working days from the notification of the challenged act. They must be addressed to the procurement authority that took the decision being challenged, often the head of the procuring committee, who is obliged to notify all other bidders. All other bidders subsequently have five working days after their notification to challenge the appeal.<sup>27</sup> After five working days the head of the procuring committee may either reconsider the initial decision or transform the complaint into a fully fledged administrative appeal to be forwarded to a superior administrative authority (often the organisation's executive secretariat). This superior authority has another period of five working days to adopt a decision on the appeal, thereby putting an end to the administrative procedure.

In addition to appeals, dissatisfied bidders have two further review mechanisms: *i*) representation (*representação*); and *ii*) request for reconsideration (*pedido de reconsideração*). Representation is intended for situations where a regular appeal is unavailable. Request for reconsideration can be made against the decision of a federal minister or state secretary to blacklist a supplier from participating in a procurement procedure. Respective time limits of five working days and ten working days exist from the notification of the challenged decision (or two working days in both cases when using an invitation method).

Any disgruntled party can also contest a procurement decision with: *i*) the internal control authority of the federal public administration (*i.e.* the Office of the Comptroller General of the Union or an internal audit unit in the case of organisations of the indirect federal public administration such as agencies and foundations); *ii*) the Federal Court of Accounts (*i.e.* Brazil's supreme audit institution); *iii*) the Office of the Federal Public

Prosecutor; and/or *iv*) a federal court. In Brazil there is no obligation to have exhausted a prior administrative complaint or appeal directly with the relevant procuring authority before lodging a complaint with other federal authorities. Submitting a complaint or appeal to the procurement authority may offer clear advantages, especially in cases where a genuine and honest mistake, rather than a deliberate breach of procurement law is the reason for the dispute. This gives the procuring authority the chance to correct a genuine mistake. The supplier can also avoid confrontation with the procuring authority that can occur through judicial review. The effectiveness of a prior administrative appeal is ultimately dependent on the review culture of the procuring authority.

Procuring authorities are obliged to adopt the corrective measures that, based on their review of the case, may be proposed by internal audit authorities or the Federal Court of Accounts. In contrast with internal administrative appeals, the law does not set forth a timeframe for the review and resolution of complaints to the Federal Court of Accounts or internal audit authorities. In choosing between appealing to internal audit authorities and the Federal Court of Accounts, most complainants resort to the latter because of its broader powers. The Federal Court of Accounts has the possibility of adopting interim measures and suspending the procurement procedure or contract, as recognised by Federal Supreme Court case law. The Organic Law and Internal Regulation of the Federal Court of Accounts gives it the power to issue a deadline to the competent procuring authority to adopt certain measures (*e.g.* the annulment or modification of the procurement process, for instance). If the authority in question does not comply with these instructions, the Federal Court of Accounts may suspend the decision or inform the National Congress about the lack of compliance. In FY 2009 the Federal Court of Accounts ordered the suspension of 70 procurement procedures or contracts with an aggregate estimated value of BRL 830 million (USD 496 million; EUR 356 million) (TCU, 2009). In FY 2009, the Federal Court of Accounts ordered the annulment, suspension or modification of 31 bidding processes, compared to 45 in FY 2008 (TCU, 2010).

Federal Law no. 8 666/1993 on Procurement and Administrative Contracts also offers any supplier or citizen the possibility of filing a request with the Office of the Federal Public Prosecutor for the investigation of any crime committed in the course of the procurement process. Needless to say, the Office of the Public Prosecutor may also start a procedure on its own motion, *ex officio*, if it has indications that a crime has been committed. Finally, all disputes arising from a government contract, both during the procurement procedure and in the contract implementation, are subject to judicial review. A lawsuit may be brought in a court at any time in order to complain about a decision or act taken by a procurement official, public authority, etc; even at the same time as the administrative process. It is not necessary to wait for the end of the administrative process. In some instances, due to a judicial decision or injunction, an administrative procurement process must be suspended or terminated without reaching its end. As part of a brief to court, a complainant can request (and often obtain) an injunction (*medida liminar*) to suspend the procurement process until a final decision has been made. The limitations period for bringing a lawsuit against the federal public administration is five years.

### Box 5.8. Examples of recent Federal Court of Accounts instructions on public procurement procedures

Decision no. 3046/Plenary/2008: in connection with a contract for the supply of administrative support, catering services and drivers for the Federal Ministry of Foreign Affairs, a bidder complained to the Federal Court of Accounts regarding the elimination of all proposals formulated in Excel format (as opposed to a Word document, which was required in the call for tenders) as well as the shortening of the period to bring an administrative appeal. The first decision had excluded many competitors who had presented lower bids. The Federal Court of Accounts asked the Federal Ministry of Foreign Affairs to initiate a new procurement process and imposed fines on the two officials responsible for the challenged decisions.

Decision no. 2816/Plenary/2009: in response to a complaint submitted by a bidder, the Federal Court of Accounts requested São Paulo's publicly-owned storage company (CEAGESP) to amend a bidding process due to irregularities in the call for tenders regarding the cleaning and maintenance of a storage facility. In particular, the Federal Court of Accounts concluded that the qualification criterion requiring bidders to be registered with a chemistry professional/industrial organisation was "abusive" and requested CEAGESP to check with the said organisation on the minimum requirements needed to perform the contract. The Federal Court of Accounts had already decided to temporarily suspend the tender process.

## Conclusions and proposals for action

Brazil has recognised the role of procurement as a strategic instrument of public service delivery and an activity vulnerable to misconduct and waste. The federal public administration has taken steps to support development and to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision making in order to support value for money, prevent waste in the allocation of resources and safeguard integrity. The federal procurement portal (Comprasnet), the electronic *Official Gazette of the Union*, the Transparency Portal of the Federal Public Administration, the Public Works Portal (Obrasnet) and approximately 400 transparency pages of individual public organisations provide access to information. In order to further enhance transparency in procurement, federal government of Brazil could consider the following proposals for action by the Federal Ministry of Planning, Budget and Management:

- Transparency could also be introduced in the pre-tender phase of the procurement cycle, for example through the preparation and publication of procurement plans by individual federal public organisations. Such information would help public organisations to leverage their buying power while allowing control and monitoring.
- Publish information on contract amendments above a certain amendment threshold on the federal Procurement Portal in order to further enhance transparency and direct social control. Such information can deter suppliers from submitting unrealistic prices and encourage more accountable contract management within public organisations.
- Integrate procurement information into one portal as a one-stop shop for suppliers and citizens. As part of this process, attention could focus on understanding the

use of the various procurement portals as a basis for evaluating the appropriateness of information and means in which it is made available.

Electronic reverse auctions have been promoted as a means to improve transparency, control and efficiency in procurement. Approximately 85% of off-the-shelf goods and common services are procured using electronic reverse auctions, yielding annual cost savings of approximately 23% for the federal government since FY 2002. Although contributing to a reduction in the number of exemptions to competitive procurement, exemptions and waivers remain high: 23% of contracts and 86% of contract values in FY 2009. In order to better understand the factors contributing to the use of exemptions, federal government of Brazil could consider the following proposal for action by the Federal Ministry of Planning, Budget and Management and the Office of the Comptroller General of the Union:

- Conduct a review of below-competition-threshold and emergency procurement as a basis for reviewing procurement guidelines and improving procurement practices. Such a review could also help shed light on whether use of exemptions stems from a lack of incentives for procurement planning and how planning could generate an additional efficiency dividend.

Automated back-office management systems support internal control activities, including separating procurement duties, embedding multi-level reviews and ensuring documentation of decision-making processes. New audit techniques and risk management are being introduced to create reasonable assurance of integrity in the procurement process. In order to strengthen internal control in procurement, federal government of Brazil could consider the following proposals for joint action for the Federal Ministry of Planning, Budget and Management and the Office of the Comptroller General of the Union:

- Devolve access to “red flags” identified by crossing procurement data with other government databases in order to place responsibility upon public procurement officials to conduct due diligence before contract award. Care, however, is necessary to ensure that red flags are properly vetted and employed. The flags identify atypical situations but are not a priori evidence of irregularities.
- Take forward plans to introduce risk management in federal public organisations, prioritising public organisations with a large share of the public administration’s procurement spending and contracts. Introducing risk management in public procurement could serve as a critical entry point for introducing risk management more generally in some federal public organisations.
- Amend Federal Law no. 8 666/1993 on Public Procurement and Administrative Contracts to reduce discretion with regard to the imposition of administrative procurement sanctions. Procurement legislation does not determine how different administrative sanctions are to be applied in practice (*e.g.* when will a certain breach of the contract obligations trigger a warning as opposed to a fine) or standardised amounts for administrative fines.

While much has been achieved in terms of promoting transparency throughout the procurement cycle and introducing risk-based internal control, attention needs to focus on developing capability among procurement officials to support public organisations’ service delivery and the government’s strategic objectives. It will require transforming procurement into a strategic function rather than a simple administrative activity. In order to develop good procurement management practices in public organisations, federal

government of Brazil could consider the following proposals for joint action for the Federal Ministry of Planning, Budget and Management and the Office of the Comptroller General of the Union:

- Develop good practice manuals to enhance professionalism among public procurement officials. Good practices need not only originate from federal public organisations but also state and municipal public organisations as well as private organisations, in Brazil or overseas. Examples of issues that good practice guides may address include procurement planning, supplier engagement, etc.
- Develop procurement performance indicators at the level of individual public organisations to help public procurement officials and public managers improve procurement performance over time. Indicators should be supported by a clear rationale, definition, methodology and data source. Examples of key performance indicators may include number of appeals, time between bid opening and award, number of contract amendments, price increase, etc.
- Conduct, together with federal public organisations, procurement capability assessments. These assessments can draw upon the results of key performance indicators and help identify good practices as input into operational procurement guidelines. Attention should particularly focus on identifying concrete actions for improvement and periodically monitoring performance against these actions.
- Expand recording of information on procurement appeals and complaints as a first step to conducting a systemic audit of the review and remedies system. Such an audit is necessary to understand how the review and remedies system is used by suppliers and its impact on procurement processes. It is critical that the government better understand the issues facing the procurement review and remedies system to inform possible reforms in this area.



## Notes

1. Active waste entails direct or indirect benefit for the public decision maker, i.e. reducing waste would reduce the utility of the decision maker. Passive waste, in contrast, does not benefit the decision maker. Passive waste can derive from a variety of sources: the public official does not possess the skills to minimise costs; the public official has no incentive to minimise costs; excessive regulatory burden may make public procurement cumbersome and increase the average price that a public organisation pays.
2. Public procurement is measured as intermediate consumption plus gross fixed capital formation. Gross fixed capital formation is the sum of investments made by government (acquisition of assets) less any fixed assets sold and thus, may slightly understate the size of investment-related procurements. It includes defence procurement. Figures differ from Eurostat estimates which include social transfers in kind. Social transfers in kind have been excluded because they represent only funded government expenditure and not public procurement.
3. See United Nations Convention Against Corruption, Article 9.1:
 

“Each state party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision making, that are effective, *inter alia*, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, *inter alia*: *i*) the public distribution of information relating to procurement procedures and contracts (e.g. information on invitations to tender and relevant or pertinent information on the award of contracts, allowing suppliers sufficient time to prepare and submit their tenders); *ii*) the establishment, in advance, of conditions for participation (e.g. selection and award criteria and tendering rules) and their publication; *iii*) the use of objective and pre-determined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures; *iv*) an effective system of appeal to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed; and *v*) measures to regulate matters regarding officials responsible for procurement (e.g. private interest declaration in particular public procurements, screening procedures and training requirements).

See Inter-American Convention Against Corruption, Article 3:

“For the purposes set forth in Article II of this Convention [i.e. *i*) to promote and strengthen the development by each of the states parties of the mechanisms needed to prevent, detect, punish and eradicate corruption; and *ii*) to promote, facilitate and regulate co-operation among the states parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in the performance of public functions and acts of corruption specifically related to such performance], the states parties agree to consider the applicability of measures within their own

institutional systems to create, maintain and strengthen...v) systems of government hiring and procurement of goods and services that assure the openness, equity and efficiency of such systems.

4. Conversion has been done using the exchange rate from 8/10/2010: BRL 1 = USD 0.5979; and BRL 1 = EUR 0.4294.
5. The Secretariat of Economic Law, more generally, is responsible for opening and conducting investigations related to anti-trust cases, as well as monitoring the market for anti-competitive practices within Brazil's Competition Policy System.
6. The contraction of public infrastructure procurement has been attributed to various causes including worsening conditions in international financial markets and decreasing real value of tariffs. This was reinforced by the deteriorating economic performance, and centralisation of state-owned enterprises operations and investment decisions, of state-owned enterprises attributed to a growing politicisation of the public administration. In addition, it has been noted that the 1988 Federal Constitution replaced infrastructure-specific federal taxes – on energy, transport and telecommunications – with non-specific state taxes without compensating with other sources; and reduced infrastructure spending by earmarking expenditure for education and health. Over time, federal public investment has been crowded out by rising current expenditure (World Bank, 2007; OECD, 2009b).
7. Reallocation for Accelerated Growth Programme projects may be up to 30% of budget appropriation compared to 12% for regular budget appropriations.
8. A public-private partnership in Brazil must have a contract value of more than BRL 20 million (USD 12.0 million; EUR 8.6 million), and provide a service for more than 5 years but not more than 35 years (including any extensions), for the design, construction, financing, operation and management of a capital asset and the delivery of a service using that asset to the government or citizens. It is distinguished from a public service concession (a “sponsored concession”), regulated by Federal Law no. 8 987/1995, by the absence of remuneration from the public to the private organisation. Federal Law no. 8 987/1995 defines a public service concession (*concessão de serviço público*) as a delegation of the provision of a public service made by a public entity, through a procurement carried out through the competition method, to a legal person or a firm consortium showing the capacity to perform on its own account and for a limited period of time. Federal Law no. 11 079/2004 defines a public-private partnership (*parcerias público-privadas*) as a contract regarding the provision of a service when the public administration is the direct or indirect user of the service, including those cases involving the execution of works or the supply and installation of goods.
9. The reference to “multiple” PPP projects is an important distinction to differentiate a dedicated PPP unit for government from a dedicated PPP project unit that may be located in government organisations to support the management of an individual project.
10. The legal basis for the differentiated treatment of micro- and small enterprises can be found in the 1988 Federal Constitution, Articles 146, 170, Item IX and 179. In order to implement these constitutional provisions, Federal Laws no. 9 841/1999 regarding Micro- and Small Enterprise). Federal Law no. 9 841/1999, Article 24, is limited to establishing guidelines for the differentiated treatment for micro- and small enterprises in public procurement, awaiting the regulation of the law. Nevertheless,

the regulation of the statute did not contain any provision in regard to this matter, causing the legal provision not to enter into force.

11. See Normative Instruction no. 1/2010; Federal Ministry of Planning, Budget and Management Decree no. 2/2010-SLTI/MP providing standard specifications for information technology goods within the direct federal public administration, autonomous agencies and foundations and other measures.
12. No data for the Czech Republic, Denmark, Iceland, Portugal, the Slovak Republic, Slovenia, Spain or the United States.
13. For example, Department of Enterprise, Trade and Employment (Ireland) 2009; OGC/Department for Innovation, Universities and Skills, 2006.
14. In relation to green public procurement see, e.g., OECD (2003a); OECD (2003b); OECD (2007c); and public procurement of innovation see for example, EC (2005); Elder and Georghiou (2007); Hommen and Rolfstam (2007); Uyarra and Flanagan (2010).
15. In 2006, 15 of Brazil's 26 states and the Federal District had their own e-procurement platforms, in addition to many large capitals and municipalities (de Almeida, 2006) – though their experiences vary considerably. Brazil's success has resulted in co-operation with a number of countries in Latin America, including Bolivia, Colombia, Nicaragua and Peru among others. Some Brazilian states have gone further, publishing information on public works such as Ceará (<http://cameras.gabgov.ce.gov.br/cameras>), Espírito Santo ([www.siges.es.gov.br/transparencia/projetos.aspx](http://www.siges.es.gov.br/transparencia/projetos.aspx)) and Santa Catarina ([www.sicop.sc.gov.br/sicop](http://www.sicop.sc.gov.br/sicop)). In Santa Catarina, citizens can search using spatial maps each work performed in their state since 2000, including emergency works responding to the 2008 floods. More recent figures are not available.
16. The Unified Registry of Suppliers for the federal public administration is an electronic registry of suppliers that wishes to provide goods or services to administrative units with federal public organisations using a common streamlined registration process. While information on the Unified Register of Suppliers for the federal public administration is available online, applications must be submitted in person for verification that suppliers are current with their obligations to the Secretariat of Federal Revenue, the State Treasury, the National Social Security Institute and the Statutory Employee Pension Fund.
17. National Register of Legal Persons (*Cadastro Nacional Pessoa Jurídica*) or National Registry of Persons (*Cadastro de Pessoas Físicas*).
18. The Methodology for Mapping the Risks of Corruption (*Metodologia de Mapeamento de Riscos de Corrupção*) in partnership with Transparência Brasil (2006) can be accessed at [www.transparencia.org.br/docs/maparisco.pdf](http://www.transparencia.org.br/docs/maparisco.pdf).
19. See Federal Law no. 8 730/1993, establishing mandatory annual income and asset disclosures for positions and functions in the executive, legislative and judicial branches.
20. See Secretariat of Economic Law Ordinance no. 51/2009.
21. A certificate of independent bid determination is the more common term used. Some countries, such as the United States, use certificate of independent price determination. Some countries, such as Australia, use an access to contractor information contract clause rather than a certificate of independent bid determination.

Such clauses provide procuring and audit authorities with additional scope for their respective accountability and control functions that can be used in exceptional circumstances.

22. See also OECD (2010e) for Canada; OECD (2010f) for the United Kingdom; OECD (2010g) for the United States. In the United States many procurement officials use certificates of independent bid determination of their own accord.
23. In fact Federal Law no. 8 666/1993 on Public Procurement and Administrative Contracts, devotes an entire chapter to administrative sanctions, see Articles 81-108.
24. These states are Bahia, Espírito Santo, Goiás, Minas Gerais, Pernambuco, Sergipe, São Paulo and Tocantins.
25. See Provisional Measure no. 389/2007, transformed into Federal Law no. 11 539/2007 creating a career for infrastructure analysts and specialist infrastructure specialists.
26. Public procurement is identified as one issue in the programme in addition to human resources, customer assistance, planning and implementation, internal audit, financial management and quality of service. See OECD (2007b).
27. This five-day period for contesting appeals and rendering a decision by the procurement authority becomes three and two days, respectively, in the case of reverse auction and invitation methods.

## *Annex 5.A1*

### **OECD Principles for Integrity in Public Procurement**

The *OECD Principles for Integrity in Public Procurement* aim to guide policy makers, at both central and sub-central levels of government, in instilling a culture of integrity throughout the entire procurement cycle: from needs assessment to contract management and payment. They emphasise: *i*) promoting transparency throughout the procurement cycle to ensure a level playing field and promote direct social control; *ii*) developing procurement capabilities to improve the quality of public services (more value) and efficiency (less money); *iii*) preventing misconduct and waste in order to safeguard public funds and protect it from undue influence; and *iv*) establishing mechanisms for accountability and control to ensure compliance and deter unlawful and irregular conduct.

The principles reflect the multi-disciplinary work of the OECD in analysing public procurement from the public governance, aid effectiveness, anti-bribery and competition perspective. They build on the OECD methodology such as the Development Assistance Committee's Methodology for assessment of national procurement systems and the Working Group on Bribery's typology of bribery in public procurement.

#### **Transparency**

1. Provide an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment for suppliers/bidders.
2. Maximise transparency in competitive tendering and take precautionary measures to enhance integrity, in particular for exceptions to competitive tendering.

#### **Good management**

3. Ensure that public funds are used in procurement according to the purposes intended.
4. Ensure that procurement practitioners meet high professional standards of knowledge, skills and integrity.

#### **Prevention of misconduct**

5. Put mechanisms in place to prevent risks to integrity in public procurement.
6. Encourage close co-operation between government and the private sector to maintain high standards of integrity, particularly in contract management.
7. Provide specific mechanisms to monitor public procurement as well as detect misconduct and apply sanctions accordingly.

### **Accountability and control**

8. Establish a clear chain of responsibility together with effective control mechanisms.
9. Handle complaints from suppliers/bidders in a fair and timely manner.
10. Empower civil society organisations, media and the wider public to scrutinise public procurement.

## *Annex 5.A2*

### **Efforts to enhance integrity for the Brazil's 2014 World Cup and 2016 Olympic Games**

Brazil is host of the 2014 FIFA World Cup and the 2016 Olympic Games. Both events involve significant amounts of public and private resources. More than BRL 17.0 billion (USD 12.2 billion; EUR 7.3 billion) in investments has already been allocated for the 2014 World Cup, of which BRL 11.4 billion (USD 6.4 billion; EUR 4.9 billion) will be earmarked for urban mobility and BRL 5.7 billion (USD 3.4 billion; EUR 2.4 billion) for stadiums. According to the Rio 2016 Bid Dossier, a total of over BRL 12.5 billion (USD 7.5 billion; EUR 5.4 billion) will be spent on investments relating to the Olympic Games, with public funds covering 95% of that amount.

#### **Transparency, control and accountability are being reinforced...**

The federal government of Brazil has set up governance structures for both mega-sporting events. In January 2010, a steering committee was established to define, approve and supervise the Strategic Plan of Actions for the 2014 FIFA World Cup (see Federal Decree no. 14/2010). It includes representatives from 21 federal public organisations and is headed by an Executive Group comprising of the Civil House of the Office of the President of the Republic and the Federal Ministries of Sport, Finance, Planning, Budget and Management and Tourism. Similarly, in May 2010, the federal government, and the state and governments of Rio de Janeiro created the Olympic Public Authority (*Autoridade Pública Olímpica*) to co-ordinate all actions and works required for the 2016 Olympic Games. The head of the authority is appointed by the President of the Republic with confirmation by the Federal Senate.

In May 2010, the Federal Minister for Transparency and Control established obligations for federal public organisations to provide detailed information on their activities relating to the two mega-sporting events. This also applies to the National Bank for Economic and Social Development and the Federal Saving Bank that are expected to finance some of the projects. Commencing in 2011, the Office of the Comptroller General of the Union's audit planning matrix includes specific attention on activities related to the 2014 FIFA World Cup and the 2016 Olympic Games. It also currently publishes expenditure estimates, and will provide real-time information on expenditure disbursements, through dedicated transparency portals for 2014 World Cup and 2016 Olympic Games (see [www.portaldatransparencia.gov.br/copa2014](http://www.portaldatransparencia.gov.br/copa2014) and [www.portaldatransparencia.gov.br/rio2016](http://www.portaldatransparencia.gov.br/rio2016), respectively).

In May 2010, the Federal Court of Accounts presented its audit model to oversee expenditures related to the 2014 FIFA World Cup. It has also signed a protocol with state and municipal courts of audit in areas that will host cup matches defining their respective roles and provides for information sharing. To promote transparency and accountability, the Federal Court of Accounts has created a website to monitor the preparations for this

international event as well as to publish the Federal Court of Accounts audits of the different projects involved ([www.fiscalizacopa2014.gov.br](http://www.fiscalizacopa2014.gov.br)). These activities are closely co-ordinated with the National Congress Permanent Subcommittee on Monitoring of Federal Public Funding for the 2014 FIFA World Cup.

### **...but the government must remain vigilant in managing operational risks**

In July 2010, a Federal Court of Accounts report identified a number of major risks associated with the 2014 World Cup. Its findings include: *i*) significant problems regarding co-ordination by the Federal Ministry of Sports related to the construction or refurbishing of stadia and airport infrastructure; *ii*) insufficient human capacity to analyse the different projects from a technical and engineering standpoint within the financing organisation (*e.g.* the National Bank for Economic and Social Development); and *iii*) unrealistic deadlines raising the risk that projects will be procured before each is clearly defined and using emergency procurement procedures and increasing costs. The Federal Court of Accounts also identified a stadium where a random sample of materials used in the construction showed a 46% price premium.

In view of significant delays in the construction of key infrastructure for both mega-sporting events, the 2011 Budget Guidelines Law approved by the National Congress in July 2010 (Federal Law no. 12 309/2010) exempts works relating to the 2014 FIFA World Cup and 2016 summer Olympic Games from the use of public procurement rules (*i.e.* Federal Law no. 8 666/1993).



### *Annex 5.A3*

## **Exemptions to competitive procedures under the Federal Law no. 8 666/1993 on Procurement and Administrative Contracts**

Federal Law no. 8 666/1993 outlines the exemptions to competitive tender. The list has been amended 6 times since 1993 (see Federal Laws no. 8 883/1994; no. 9 648/1998; no. 10 973/2004; no. 11 107/2005; no. 11 445/2007; and no. 11 484/2007). In total there are 28 provisions outlining exemptions to competitive procedures including

- For works and engineering services worth up to 10% of invitation threshold, provided they refer to parts of the same work or service or for works and services of the same nature and at the same place that they can be held jointly and simultaneously (as amended by Federal Law no. 8 883/1994). This percentage is increased to 20% for state-owned enterprises, mixed-capital enterprises and foundations (as amended by Federal Law no. 11 107/2005).
- For other goods and services worth up to 10% of invitation threshold, each step or series of stages of work, service or purchase, there are separate bids to match, preserved the appropriate modality for the implementation of the object in bid (as amended by Federal Law no. 8 883/1994). This percentage is increased to 20% for state-owned enterprises, mixed-capital enterprises and foundations (as amended by Federal Law no. 11 107/2005).
- In case of war or serious civil disturbance.
- In cases of emergency or public calamity, that may cause injury or endanger the safety of people, works, services, equipment and other property, public or private. This applies only for goods necessary to meet the emergency situation and portions of works and services that can be completed within a maximum of 180 consecutive calendar days after an emergency or disaster. It prohibits contract extension.
- When no bids have been submitted previously and the tendering cannot be repeated without prejudice to the administration: in this case all the pre-established conditions must be maintained.
- When the federal government must intervene in the economy to regulate prices or normalise supply.
- When the bids that have been submitted carry prices manifestly higher than those prevailing on the national market, or are incompatible with those fixed by the competent official authorities, in which cases and if the situation persists, the goods or services may be awarded directly, for a value not exceeding that in the price or services registry
- For procurement, by legal persons under domestic public law, of goods produced or services provided by public organisation that has been created for this specific

purpose at a time prior to the enactment of the Federal Law of Public Procurement and Administrative Contract, provided that the price contract is consistent with the market price (as amended by Federal Law no. 8 883/1994).

- When there is a risk that national security may be compromised, in cases established by presidential decree, after consultation with the National Defence Council.
- For the purchase or lease of buildings or property to meet the essential needs of the administration, where the choice is conditioned by installation and location, provided the price is compatible with market value, as previously appraised (as amended by Federal Law no. 8 883/1994).
- In the procurement of remaining works, services or supply as a result of as contractual termination, observing the order of the previous bidding and accepting the same conditions offered by the winning bidder, including as to price, due corrected.
- In the procurement of fresh produce, bread and other perishable commodities, in the time necessary to conduct the corresponding bidding process, carried out at the base of the day (as amended by Federal Law no. 8 883/1994).
- In contracting a Brazilian research, educational or institutional development organisation recognised by the regulation or statute, or an organisation devoted to the social rehabilitation of prisoners, provided the organisation maintains a sound integrity and professional reputation and is not for profit (as amended by Federal Law no. 8 883/1994).
- For the procurement of goods or services under a specific international agreement approved by the National Congress, when the conditions offered are clearly advantageous to the government (as amended by Federal Law no. 8 883/1994).
- For the procurement or restoration of works of art and historical objects of certified authenticity, provided they are compatible or inherent to the purpose of the public organisation.
- For printing the official *Gazettes*, standardised administrative forms and official technical publications, and for the provision of computer services to a legal person under public law, by public organisations of the public administration created specifically for purpose (introduced by Federal Law no. 8 883/1994).
- For the procurement of domestic or foreign components or parts of for maintenance of equipment during a technical warranty period, from the original supplier of the equipment, when such exclusivity is essential for maintaining the warranty (introduced by Federal Law no. 8 883/1994).
- In the procurement or contracting of services for the supply of ships, aircraft or troops and their means of transportation, on short-term layover in ports, airports or other locations of their headquarters, for reasons of operational movement or training, and when the observance of legal time limits could compromise the functioning and purpose of the operations, and provided its value does not exceed the limit provided by the invitation threshold for goods and services.(introduced by Federal Law no. 8 883/1994).
- For purchasing material for use in armed forces, with the exception of materials for personal and administrative matters, when there is a need to maintain the standardisation required by the logistical support structures of naval, air and land

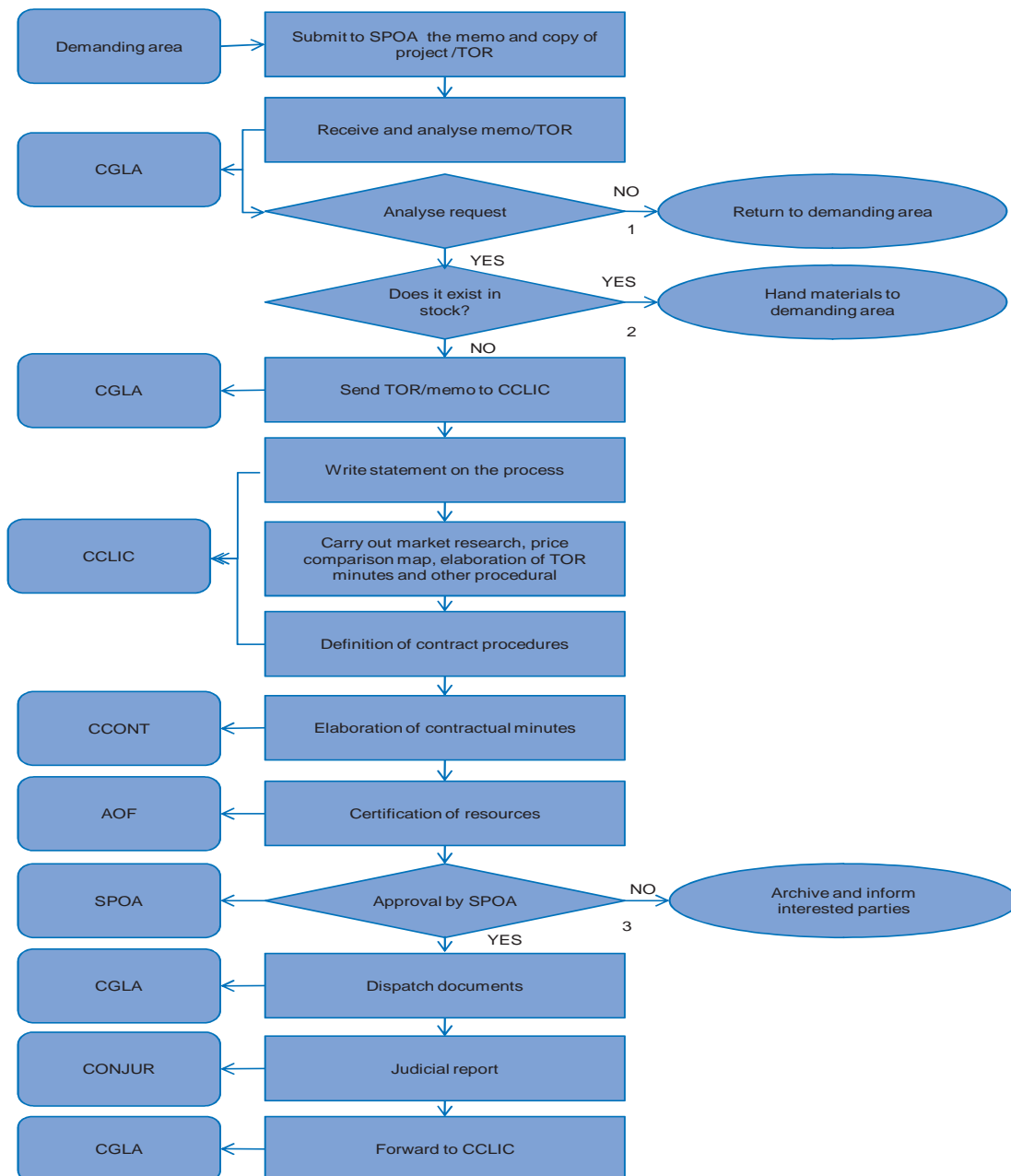
facilities, consistent with the opinion of a commission instituted by decree (introduced by Federal Law no. 8 883/1994).

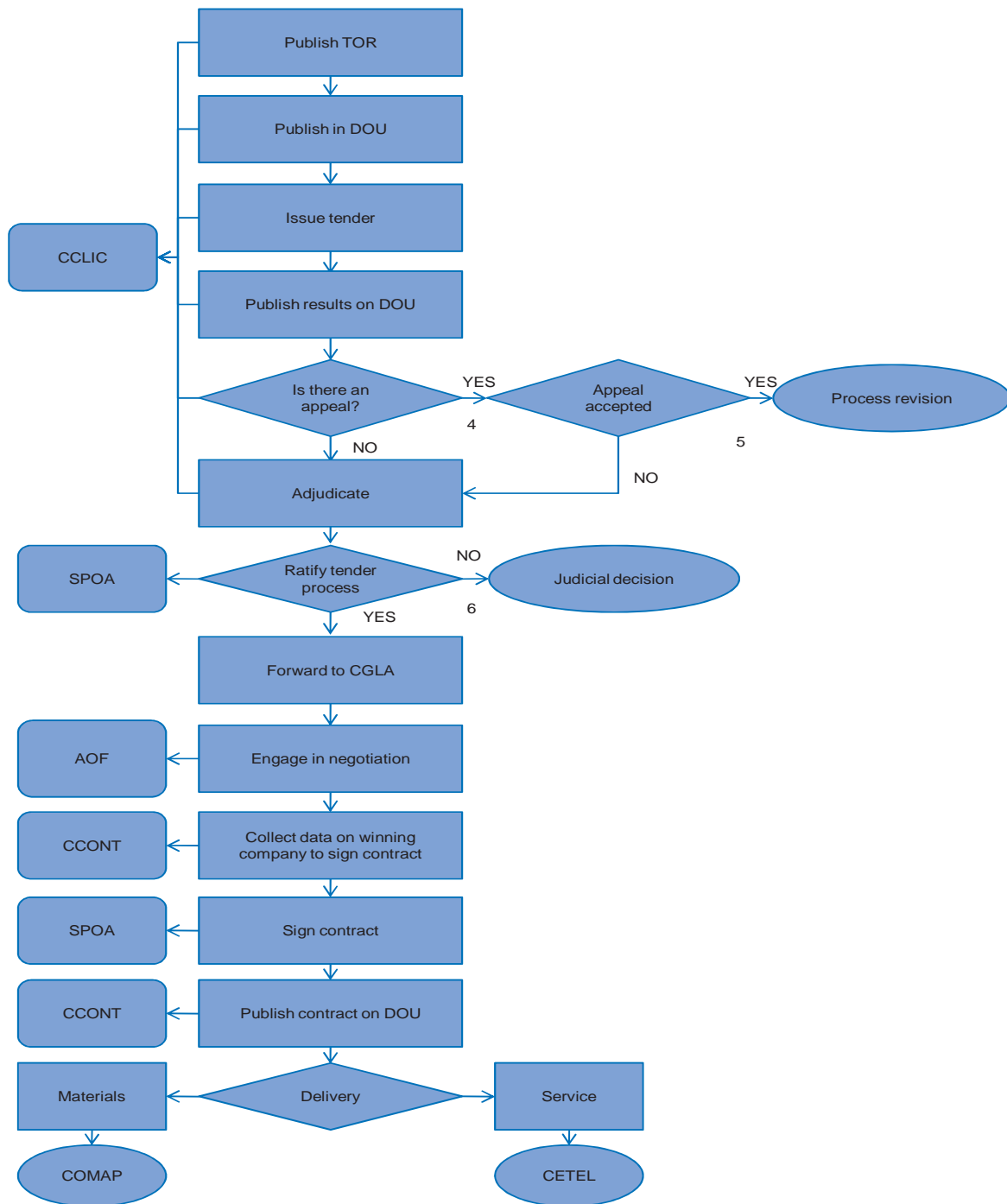
- In contracting with a non-profit and demonstrably suitable association of disabled persons by public organisations to provide services or supply of manpower, provided that the contracted price is consistent with the market prices (introduced by Federal Law no. 8 883/1994).
- For the procurement of goods intended exclusively for scientific and technological research with funding from the Co-ordination of Improvement of Higher Education Personnel (*Coordenação de Aperfeiçoamento de Pessoal de Nível*), the Brazilian Innovation Agency (*Financiadora de Estudos e Projetos*), the National Council for Scientific and Technological Development (*Conselho Nacional de Desenvolvimento Científico e Tecnológico*) or other research institutions accredited by the National Council for Scientific and Technological Development for this specific purpose (introduced by Federal Law no. 9 648/1998).
- For the contracting of supply or delivery of electric energy and natural gas with a concessionaire, permit holder or other licensed organisation, in accordance with existing legislation (introduced by Federal Law no. 9 648/1998).
- For procurement done by a public or mixed-capital enterprise with their controlled subsidiaries, for the purchase or disposal of goods or services, provided that the contract price is compatible with market prices (introduced by Federal Law no. 9 648/1998).
- For the procurement of services with social organisations, qualified in their respective spheres of government, for activities covered by management contract (introduced by Federal Law no. 9 648/1998).
- For contracts involving research organisations fostering technology transfer or licensing of the intellectual property (introduced by Federal Law no. 10 973/2004).
- In the negotiation of programme contracts with a public organisation at a federal, state or municipal level for the joint provision of public services under terms authorised in a public consortium contract or co-operation agreement (introduced by Federal Law no. 11 107/2005).
- In contracting the collection, processing and marketing of recyclable or reusable urban solid waste, in areas with a garbage collection system arranged by associations or co-operatives formed exclusively by low-income individuals recognised by government, with the use of equipment compatible with technical, environmental and public health standards (amended by Federal Law no. 11 445/2007).
- For the supply of goods and services produced or rendered in the country that involve, cumulatively, high technological complexity and national defence aspects, on the advice of a committee appointed by the highest authority of the court (introduced by Federal Law no. 11 484/2007).



*Annex 5.A4*

**Procurement risk map of the Federal Ministry of Social Development and the Fight against Hunger (2006)**





Notes:

AOF: Sub-secretariat of Planning and Budget (*Subsecretaria de Planejamento e Orçamento*); CCLIC: Co-ordination of Procurement and Tendering (*Coordenação de Compras e Licitações*); CETEL: Co-ordination of Engineering and Telecommunications (*Coordenação de Engenharia e Telecomunicações*); CGLA: General Co-ordination on Logistics and Administration (*Coordenação-Geral de Logística e Administração*); COMAP: Co-ordination of Material and Assets (*Coordenação de Material e Patrimônio*); SPOA: Sub-secretariat of Planning, Organisation and Administration (*Subsecretaria de Planejamento, Orçamento e Administração*).

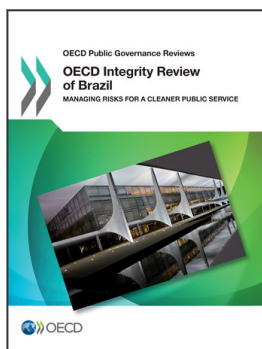
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