

WORLD TRADE ORGANIZATION

RESTRICTED

S/WPGR/W/11/Add.3

2 September 1996

(96-3432)

Working Party on GATS Rules

COMMUNICATION FROM BRAZIL

Response to the questionnaire on government procurement of services

The following communication is being circulated at the request of Brazil to Members of the Working Party on GATS Rules.

I. EXISTING PROCUREMENT REGIMES

Where a Member's procurement regime is different for central government entities, sub-central government entities, and other entities, such as public undertakings (e.g. public utilities), it would be useful if these differences were specified under each of the headings indicated below.

Definition

1. *What is the definition of government procurement employed in completing this questionnaire?*

Bidding on Governmental Contracts is a formal administrative act, practised in any sphere of the Public Administration. Its objective is to guarantee the observance of the Constitutional principal of isonomy or equality before the law to permit the selection of the most advantageous proposal for the Administration (Sole Paragraph of Article 4 combined with Article 3 of Law No. 8666 dated 21 June 1993).

Administrative Structure

2. *How are government procurement activities administered? To what extent are procurement activities centralized? Please specify the identity of any central procurement agencies and their respective responsibilities.*

The bidding process is administered directly by the public Institutions interested, obeying the legislation in force established by the Union, in accordance with that provided for in the Federal Constitution, dated 5 October 1988, which says: "It falls to the Union exclusively to legislate on: General Norms for Bidding and Contracting, in all its forms for the Public Administration, direct and indirect, including the Foundations instituted and maintained by public authority, in the various spheres of the Government and enterprises under its control". The Ministry of the Federal Administration and State Reform - MARE, is in charge of the elaboration of the Norms and Regulations about this material.

Laws and Regulations in Force

- 3.(a) *Please specify the laws, regulations, rules, guidelines, decrees, decisions and other measures governing government procurement. What is the scope of their application? In particular, please describe any exemptions that exist. Please provide a brief summary of the content of each of these measures.*

Oriented by the principles of legality, impersonality, morality, equality and publicity, defined by Article 37 of the Federal Constitution, Law No 8666 dated 21 June 1993, with the modifications made by Law No. 8883, dated 8 June 1994 establishes the general norms concerning this material in the context of the Federal Authority, the States, the Federal District and the Municipalities. Also subordinated to this law, besides the Organs of Direct Administration, are the Special Funds, the Autocracies, the Public Foundations, Public Enterprises, the Societies of Mixed Economy and other entities directly or indirectly controlled by the Union, States, Federal District, and Municipalities. The invitational instrument is defined and instructed by the institution interested in the bidding, serving as the public agent, constituting the normative division fundamental to the process, within the force of the law, hierarchically subordinated.

- (b) *Does the procurement regime distinguish between the procurement of goods and services? If so, then how is the application of rules determined in cases of joint procurement involving both goods and services?*

The same legislation applies to the acquisition of goods and services, without distinction.

Procedures applying to Governmental Bidding

- 4.(a) *What procedures are followed in the procurement process?*

First of all, it should be underscored that the bidding process is a constitutional requirement, which aims to assure equal conditions to all competitors with explicit clauses regarding payments, and with requirements for technical and economic qualification indispensable to guarantee the fulfilling of obligations (Clause XXI of Article 37 of the Federal Constitution). The bidding process is subordinated to the completion of stages with the following sequence:

1. basic project;
2. executive project;
3. execution of services.

In accordance with the first paragraph of Article 7 of Law No. 8666/93: "The execution of each stage shall be obligatorily preceded by the conclusion of the evaluation, by competent authority, of the work relative to the previous stages, the accomplishment of the executive project, which may be developed concomitantly with the execution of the works and services, whenever this is also authorized by the Administration."

"Paragraph 2 - Works and Services may only be bid upon whenever:

I - there is a basic project approved by competent authority and available for examination by the parties interested in participating in the bidding;

II - there is a detailed budget in spreadsheet that express the composition of all the unitary costs;

III - there is provision of budget resources that assure the payment of the obligations arising from the works and services to be executed in the fiscal year in course, according to the respective chronograph;

IV - the product hoped for by the bidding is contemplated in the objectives established in the Multi-year Plan as treated in the Article 165 of the Federal Constitution, whenever this is the case.

Paragraph 3 of the same Article: "The inclusion in the object of the bidding, the obtainment of financial resources from whatsoever origin for its execution, is forbidden..."

Paragraph 4: "It is moreover forbidden, to include in the object of the bidding, the provision of materials and services without specifying quantities or when such quantities do not correspond to the actual projections of the basic or executive plan."

Paragraph 5: The realization of competitive bidding whose object includes goods and services whose trademarks are not similar in characteristics and exclusive specifications is forbidden, except in the case in which it is technically justifiable, or whenever the provision of such materials and services was made under a regime of contracted administration, foreseen and discriminated at the time of the invitational act.

The procedures for bidding on governmental services may differ in accordance with the degree of openness of the invitations:

- public: all interested parties may submit bids;
- selective: selected bidders may participate to present their offers; and
- private contract (one sole bidder); by which the authority contracts individual suppliers, and sometimes one sole supplier.

(b) *Under what circumstances are different procedures used? For instance, if the method used depends on the value of the procurement, the thresholds should be given.*

Public bids may take place in 5 (five) different forms.

1. Competition
2. Estimate taking
3. Invitation
4. Contest and
5. Auction (does not apply to services)

In accordance with Article 22 of Law No. 8666/93, these modalities are defined in the following way:

"Competition is the modality of bidding among any interested parties, which in the initial phase of qualification, prove that they have the minimum necessary requirements to meet those called for in the call for bids."

"Estimate taking is the modality of competition among interested parties duly registered or who have qualifications to be registered by the third day before the proposals are received, observing the necessary qualifications.

"Invitation is the modality of bidding among interested parties of the branch pertinent to its object, registered or not, chosen and invited with a minimum number of three by the administrative unit, which shall fix in an appropriate place a copy of the call for bids and shall extend to all other registered parties in the corresponding specialty who manifest interest within 24 hours preceding the presentation of the proposals.

"Contest is the modality of competition between any interested parties for the selection of technical scientific, or artistic services, through the establishment of prizes or remuneration of the winners, according to the criteria in the published call for contestants in the Official Gazette with a minimum antecedence of 45 (forty-five) days."

The present modalities are determined in function of the estimated value of the contract, discriminated in the following way:

- for works and engineering services:

invitation - up to R\$ 126,658.40 (one hundred twenty-six thousand, six hundred fifty-eight reais and forty centavos);

estimate taking - up to R\$ 1,266,584.03 (one million, two hundred sixty-six thousand five hundred eighty-four reais and three centavos); and

competition - above R\$ 1,266,584.03 (one million, two hundred sixty-six thousand five hundred eighty-four reais and three centavos).

- for purchases and other services:

invitation - up to R\$ 31,664.60 (thirty-one thousand, six hundred sixty-four reais and sixty centavos);

estimate taking - up to R\$ 506,633.61 (five hundred six thousand six hundred thirty-three reais and sixty-one centavos);

competition - above R\$ 506,633.61 (five hundred six thousand six hundred thirty-three reais and sixty-one centavos).

These values are corrected automatically by the General Index of Prices of the Market ("IGPM"), with the same periodicity and proportion as this, taking as the base point the month of December 1991. The new values are published by the Executive Powers in the Federal Gazette of the Union, without considering fractions smaller than R\$ 1.00 (One Real).

For some cases, the Law dispenses the bidding process, as described in the diverse paragraphs of Article 24 of the Law No. 8666/93.

By Article 25 of the same law: "It is not necessary to require the bidding process when competition is unfeasible, especially:

I-...

II - to contract the technical services enumerated in Article 13 of this law, of a singular nature, with professionals or businesses of well known specialization, ineligibility is forbidden for services of publicity and divulgation;

III - for contracting professionals of whatever artistic sector, directly or through an exclusive agent, as long as they are consecrated by specialized critics or by public opinion.

Paragraph 1 - The professional or business of well know specialization, is considered to be such in his or her field of specialization, depending on previous performance, studies, experiences, publications, organisation, equipment, technical staff, or other requirements related to such activities, permitting inference that his/her work is essential and unquestionably the most adequate for the full satisfaction of the object of the contract.

Paragraph 2 - in the case of this Article and in any event in which there is dispensation of the call for bids, if overpricing is proved, the provider of goods or services will respond jointly for damages caused to the Federal Treasury with the public agent responsible, without prejudice to other applicable legal sanctions."

(c) *What are the time limits for submission of bids?*

The second paragraph of Article 21 of Law No. 8666 defines these limits, which vary from 5 to 45 days, in accordance with the modality of the bidding.

Publication of the Call for Bids

5.(a) *How are intended procurements publicised? Are invitations to tender published? If so, where, and in what languages?*

The proposed calls for bidding are made public by means of proclamations, instruments of invitation, published in the Official Gazette of the Union, of the State, or of the Federal District, and in a daily newspaper of wide circulation in the State or Municipality where there are interested parties.

Whenever the call for bids is of international ambit, the invitation is presented also in the language of the country where divulgation occurs.

(b) *Do the extent and form of publicity differ according to tendering procedures applied and/or on the value of procurement?*

For all modalities of bidding - except invitation - a resume of the proclamation should be published. The Law does not specify the content that should make up the resume of the proclamation which is to be circulated. Nevertheless, there are six elements that should be included: (I) The modality of the call for bids (competition, estimate taking, contests or auction); (II) a synthesis of its object, defining the nucleus; (III) the regime of execution: (IV) type of bid: (lowest price, best technique, technique and price, or highest offer) (V) date and hour of the judgement session: and (VI) the location where the interested parties may obtain the entire text of the invitation and other information regarding the competition.

- (c) *What details of the intended procurement are normally published? Is there a minimum set of information that is required to be published? If so, please specify.*

The details referred to may include a description of services, initial and final dates of the offer, conditions for participation, identification of the acquiring organs, enquiry point, plans for the call for bids, with notices regarding contracts, etc.

See the reply contained in the previous item 5(b).

- (d) *Are there any charges for obtaining the full set of tender documents? If so, please specify and describe how these charges are set?*

For the qualification of bidders, there are no costs, except relative to the provision of the Proclamation, when requested, and other documents which accompany it, limited to the value of the effective cost of graphic reproduction (Paragraph 5 of Article 32).

- (e) *Are electronic means used to advertise procurement opportunities? What is the nature of systems that are in place? Are different tendering provisions applied to contracts advertised in this manner? If so, please describe.*

The present system of divulcation does not use these electronic means. Nevertheless, there is a project being elaborated by the Ministry of Federal Administration and Reform - MARE, that foresees the implantation of a System of Electronic Divulcation of calls for bids - SIDECA.

Requirements for Potential Bidders

- 6.(a) *Are there registration, residence or other requirements for potential suppliers?*

As per Article 34 of Law No. 8666/93, the organs and entities of the Public Administration should maintain organized registers of qualified potential bidders and providers of services, according to regulations, which register shall have a maximum validity of one year. Articles 34 to 37 and their paragraphs, of the cited law treat exclusively of organized registers.

Previous registry, however is required only for the "estimate taking modality". In an effort to improve the present system of registry, the Government, through the Ministry of Federal Administration and Reform - MARE, is implanting the Unified Registry of Suppliers ("SICAF")

- (b) *What is the nature of any conditions for participation required from suppliers - such as financial guarantees, commercial standing and technical qualifications? Do the conditions of participation vary according to the nature of the tender process and/or the value of the intended procurement?*

For a candidate to qualify for the bidding it is necessary: (Article 27)

- juridical qualification;
- technical qualification;
- economic and financial qualification; and
- to be up to date fiscally.

- (c) ***Do there exist lists of approved suppliers? If so, what are the procedures for checking the capability of firms applying for inclusion on tenderers' mailing lists? Are lists of approved suppliers, if any, regularly reviewed/updated?***

This question has already been partially answered by 6(a). In addition it should be observed that the qualification of new potential candidates is always possible, as long as the legal requirements of Law No. 8666/93 are met, some of which have already been mentioned in this questionnaire.

Criteria for assessing bids and awarding contracts

- 7.(a) ***What criteria are taken into account in the award of tenders? Are criteria for award of contracts made available in advance to potential suppliers?***

The criteria utilized in the evaluation of proposals are established and divulged beforehand, observing the types of bidding, constituted according to the Law No. 8666/93, which are:

1. that of the lowest price - the bidder who presents the lowest price will be the winner, if all the specifications of the proclamation of the invitation are followed;
2. that of the best technique;
3. that of best technique and price; and
4. that of the best bid, or offer (only applies to cases of transfer of goods or concession of legal right to use).

- (b) ***Is procurement subject to any offset provisions, such as local content, technology transfer or countertrade requirements?***

With respect to this, the law does not establish mechanisms with a view to obtaining compensation/correspondence between the government and third parties.

- (c) ***Is preference given to any particular enterprises or group of enterprises? If so, please specify.***

No.

- (d) ***Do the procurement criteria differ according to sector or region of the economy?***

There is no differentiation in the criteria of government bids, in function of geographic location.

- (e) ***What is the margin of choice or discretion allowed to the purchasing authority? What does the extent, if any, of discretion allowed depend upon?***

The margin of choice or free will may be related as such:

- (i) the importance given to each criterion;
- (ii) the margin of preference or specific criteria; and
- (iii) "value of scope", above which higher authority must intervene.

The free will of the authority may vary if:

- (i) there are automatic bids, within which the contract is signed on the basis of predetermined criteria instead of simply price or price and another criterion;
- (ii) discretionary procedures that involve the acceptance of that offer most advantageous to the approval of the contract based on numerous criteria, some of which are predetermined, but which in general, leave the authority a certain degree of choice; and
- (iii) negotiated offers, in which the authority freely negotiates the conditions of the contract.

With reference to the margin of choice in the process of judging the proposals, the Law No. 8666/93 establishes that such should be objective, carried out in conformity to the pre-established criteria in the invitation proclamation, and in accordance with factors referred to exclusively in the proclamation, in order to permit transparency and the possibility of verification, on the part of the bidders and the organs of control (Article 45 of the Law cited).

Registration of Proposals and Approved Contracts

8.(a) *How are tenders received, registered and opened?*

The opening of the proposals of the qualified competitors in the bidding is done by public act, previously established, the minutes of which are registered with circumstances and is signed by members of the commission and by the competitors who are present. These proposals may only be revealed after the opening of the envelopes containing the documentation relative to the qualification of the competitors and its consideration has been made. In case of disqualification, the respective proposals are returned to the interested parties in closed envelopes.

(b) *Are entities required to publish details of the contracts awarded and/or notify unsuccessful tenderers?*

The contracts are published in summary form in the official press, a condition indispensable for its efficiency, by the fifth day of the subsequent month after signing, no matter what its value.

(c) *Are entities required to publish, or provide to unsuccessful bidders, pertinent reasons why their bid was rejected?*

The actual judgement itself is a public act, accompanied by the interested parties without restrictions of access by the general public, without prejudice toward the formal explanations owed the competitors who were passed by.

Treatment conceded to National and Foreign Bidders for Rendering Services

9. *What laws, regulations, procedures or practices accord domestic services and/or suppliers treatment more favourable than that accorded to foreign services and/or suppliers, or accord services and/or suppliers of a Member more favourable treatment than those of another Member? Please specify how, if at all, more favourable treatment is accorded. Please also specify the working definition of "domestic" in relation to domestic services and suppliers.*

In that which refers to the treatment dispensed to foreign competitors, Law 8666/93 in Article 42 Paragraph 4 establishes that for purposes of judgement of proposals presented by foreign competitors, the proposals will be increased by the amount of tribute which would fall only on national competitors in the final stage sale operation.

Law No 8666/93 establishes yet, that in the case of equal conditions, as criteria for giving the tie breaking vote, preference will be given to goods and services produced in the country.

Procedures for Audiences and Consideration of Appeals and Complaints

10. *What, if any, are the procedures available for parties, domestic and foreign, to lodge complaints against the award of a contract? Please provide details.*

- institutional status: whether challenges are heard by an administrative tribunal, a court or any other review body;
- time limits for complaints or appeal;
- type of remedy, if any, that may be granted.

The Law No. 8666/93 foresees the possibility of administrative appeals against acts within the process of evaluating bids. Besides "appeals" there are also "representations", and "solicitation for reconsideration".

Article 109 of the cited law defines it in the following way:

"I- Appeals, within a limit of 5 (five) days counting from the summons of the act or the drafting of the act, in cases of:

- a) qualification or disqualification of the bidder;
- b) judgement of proposals;
- c) annulment or cancelation of the bidding;
- d) rejection of a request for enrolment in a registry, its alteration or cancelation;
- e) cancelation of contract, that which is referred to in Clause I of Article 79 of this law;
- f) application of the penalty of notification, temporary suspension, or fine;

II - representation, within the limit of 5 (five) working days from the citation of the decision related to the object of bidding or of the contract, of which there is no hierarchical appeal possible;

III - Request for reconsideration, a decision of the Minister of State, or State or Municipal Secretary, depending on the case, when Paragraph 4 of Article 87 of this Law applies, within ten working days of the summons of the act.

Paragraph 1 - The summons for the acts referred to in clause I, lines a, b, c, and e, of this Article, excluding those of notification and penalty for delay, and in Clause 111 shall be made by publication in the Official Gazette, except for the cases foreseen in lines a and b of Clause I,

if the proposals of the bidders are present at the act in which the decision was adopted, when it could be made by direct communication to the interested parties and drafted in the act.

Paragraph 2 - The appeal foreseen in lines a and b of Clause I of this Article shall have effect of suspension, the competent authority being able to suspend further appeal, if there is present sufficient motive and if in the public interest to interpose such.

Paragraph 3 - Interposed, the appeal shall be communicated to the other bidders, who can contest it within 5 (five) working days.

Paragraph 4 - The appeal shall be directed to superior authority, through the one who practised the appealed act, and which may be reconsidered within 5 (five) days, or within this same time, cause it to be sent up, duly instructed, which decision shall be made within 5 (five) working days under penalty of responsibility.

Paragraph 5 - No appeal, representation, or request for consideration shall be initiated or take its course unless the documents of the process are available for viewing by the interested parties.

Paragraph 6 - When referring to bid effected in the modality of invitation, the time limits established in Clauses I and II and in Paragraph 3 of this Article shall be 2 (two) working days."

Beyond the administrative forum, any bidder, or contracted individual, or business may represent themselves before the Accounts Tribune or before the organs who make up the System of Internal Control, against any possible irregularities arising during the case in process. (Paragraph 1 of Article 113 of the cited Law.)

Besides this, the Law provides that any citizen is a legitimate party to oppose a proclamation for a bid which is irregular, and that this should occur at least five days before the date marked for the opening of the qualifying envelopes, and that the administration should judge this and respond within 3 (three) working days.

II. ADHESION TO MULTILATERAL, REGIONAL AND/OR BILATERAL TREATIES

11. *Is the Member party to any plurilateral, regional and/or bilateral agreements with provisions on government procurement? If so, please describe the relevant provisions.*

No, they do not participate.

III. ECONOMIC IMPORTANCE OF THE ACQUISITION OF SERVICES

12.(a) *Please provide statistics (if available) on the number and value of services procurements*

- *on both an aggregate and sectoral basis;*
- *by origin of services and suppliers.*

In order to enhance the comparability of the data, use the classifications of service sectors utilized in the following document: MTN.GNS/W/120 (10.7.91) in an appropriate aggregation level.

No information available.

(b) *Please provide statistics (if available) on the*

- *share of services procurement in total procurement;*
- *share of procurement of each service in total domestic output of the service;*
- *share of procurement of each service in total domestic consumption of the service.*

No information available.