

FIGHTING BID RIGGING IN PUBLIC PROCUREMENT



Fighting bid rigging in Brazil: A review of federal public procurement 2021



Fighting Bid Rigging in Brazil: A Review of Federal Public Procurement

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Foreword

Public procurement plays a strategic role in the economy of countries, and the quality and efficiency of services that the governments provide to citizens. In 2020, Brazil spent around BRL 35.5 billion in the procurement of goods, services and works. Robust public procurement policies that aim at combating bid rigging can generate important savings and help government in achieving value for money.

Governments across the OECD are determined to design public procurement procedures that promote competition and reduce the risk of rigging bids. The Recommendation of the Council on Fighting Bid Rigging in Public Procurement and the Guidelines that this Recommendation includes are pioneering instruments that help countries in achieving those goals.

The OECD has been working closely with governments and public bodies to encourage and facilitate the implementation of the Recommendation and Guidelines. It is against this background that Brazil sought the OECD's support to improve the federal procurement practices and step up its fight against bid rigging in public procurement.

The report contains recommendations on the federal public procurement legal framework and practices on, first, the design of tenders, and, second, actions to improve detection of bid rigging. The first set of recommendations aim at preventing bid rigging through an optimal design of tender processes. The second set of recommendations aim at detecting bid rigging during and after the tender process, and alerting the competition authority on possible manipulations of the procurement process.

The implementation of the recommendations and the increased awareness of the negative impact of bid rigging, together with the effective enforcement of the competition law by Brazil's competition authority, will help Brazil fight bid rigging in public procurement and achieve better procurement outcomes. The benefits generated will profit Brazil taxpayers and the overall economy in the form of savings and better delivery of goods and services.

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Abbreviations and acronyms

AGU	Office of the General Counsel of the Federal Government (<i>Advocacia-Geral da União</i>)
Alice	Analysis of bids and tender programme (<i>Análise de Licitações e Editais</i>)
ALT	Abnormally low tender
IADB	Inter-American Development Bank
CADE	Administrative Council for Economic Defence (<i>Conselho Administrativo de Defesa Econômica</i>)
CREA	Regional Council of Engineering and Agriculture (<i>Conselho Regional de Engenharia e Agronomia</i>)
GDP	Gross domestic product
CGU	Comptroller General (<i>Controladoria-Geral da União</i>)
DOU	Federal Official Gazette of Brazil (<i>Diário Oficial da União</i>)
DNIT	National Department of Transport Infrastructure (<i>Departamento Nacional de Infraestrutura de Transporte</i>)
ENAP	National School of Public Administration (<i>Escola Nacional de Administração Pública</i>)
ETP	Preliminary technical study (<i>estudo técnico preliminar</i>)
FNDE	National Fund for the Development of Education (<i>Fundo Nacional de Desenvolvimento da Educação</i>)
GPA	World Trade Organization Agreement on Government Procurement
IMSS	Mexican Institute of Social Security (<i>Instituto Mexicano del Seguro Social</i>)
PAC	Annual contracting plan (<i>Plano Anual de Contratações</i>)
SEAE	Secretariat for the Promotion of Competition and Competitiveness (<i>Secretaria de Advocacia da Concorrência e Competitividade</i>)
SEGES	Secretariat of Management (<i>Secretaria de Gestão</i>) at Ministry of the Economy
SICAF	Unified Enrolment System of Suppliers (<i>Sistema de Cadastramento Unificado de Fornecedores</i>)
SEPRAC	Secretariat for the Promotion of Productivity and Competition Advocacy (<i>Secretaria de Promoção da Produtividade e Advocacia da Concorrência</i>)
TCU	Federal Court of Accounts (<i>Tribunal de Contas da União</i>)

Executive summary

This report was prepared as part of a co-operation agreement between the Brazilian competition authority, Conselho Administrativo de Defesa Econômica (CADE, Administrative Council for Economic Defence) and the OECD. The report assesses Brazilian federal public-procurement rules and practices in light of the OECD Recommendation and Guidelines on Fighting Bid Rigging in Public Procurement.

The report focuses on the federal procurement legal framework that was applicable at the time of drafting. A new federal procurement law was adopted in April 2021, when the report was being finalised. Although the new law will not be fully applicable until 1 April 2023, the report takes into consideration the new legal provisions that are pertinent to the recommendations that this report provides.

Public procurement plays a strategic role in the economy, and the quality and efficiency of services that the government provides to citizens. In 2020, Brazil spent around BRL 35.5 billion in the procurement of goods, services and works. In 2017, public procurement represented around 13.5% of Brazil's total government expenditures and approximately 6.5% of the GDP. (OECD, 2019^[1]) Due to the size of the financial flows involved in public procurement, it is the government activity that may most attract collusion (or bid rigging) as well as fraud and corruption.

This report makes recommendations to Brazil on how to further prevent and detect bid rigging in public procurement in line with the OECD Recommendation and Guidelines on Fighting Bid Rigging in Public Procurement.

Key recommendations include:

Recognise and enhance the essential role of public-procurement officials in the fight against bid rigging by:

- Improving employment conditions and incentives for the public-procurement workforce and developing a professionalisation and certification strategy, including training on fighting bid rigging.
- Improving and correcting systemic practices within the procurement workforce rather than imposing individual sanctions upon public officials.
- Standardising the interpretation of procurement rules.

Design procurement procedures based upon appropriate information by:

- Making the market survey step of the preliminary technical study mandatory for all procurement processes (possibly with the exception of low value repetitive tenders, for which market research has recently been conducted) and adopting guidelines on how to conduct it.
- Creating specialised market-research departments inside the contracting entities, or ensuring that public procurers have sufficient resources and support to conduct thorough market analysis through existing structures.
- Making mandatory the use of all sources of information mentioned in Regulatory Instruction No. 5/2014 on price research and Regulatory Instruction No. 40/2020 on market surveys, including early engagement with suppliers. Other sources of information, such as international experiences or local supply and demand conditions, should also be considered.

Maximise participation of genuine competing bidders by:

- Tightening the conditions under which direct awards can be used.
- Developing standard and mandatory templates for all types of procurement and all stages of the process.
- Considering options to relax rules on tendering by international companies and allowing for increased independent participation – rather than as part of a consortium – of foreign companies in tenders.
- Being vigilant about the competitive or anti-competitive nature of joint bidding and subcontracting. CADE should engage in advocacy initiatives to inform public-procurement officials of the effects that joint bidding and subcontracting may have on the competitive conditions of tenders.
- Brazil should make e-procurement mandatory and limit the exceptions to its use to cases where submission of physical samples or mock-ups are necessary.

Improve tender terms and contract-award criteria by:

- Limiting the tendering out of contracts that are not fully defined to projects that can clearly benefit from the private sector's innovation and know-how.
- Encouraging public bodies to define functional - performance-based - tender requirements, so that they focus on the objective of the tender rather than the method of its implementation.
- Encouraging the use of non-price award criteria, such as technique, when quality is a relevant dimension of the procured goods, services and works.

Pay attention to transparency, disclosure and integrity in submitting bids by:

- Avoiding making the complete version of the procurement annual plan (PAC) automatically available to the public and limiting publication to the simplified version as required by law.
- Considering protecting all information contained in ETP (preliminary technical study) at least until the procurement process is over.
- Not disclosing information regarding the list of prequalified candidates, bids and bidders at least during the procurement procedure.

Raise awareness of the risks of bid rigging by:

- Encouraging CADE and SEAE (the government Secretariat for the Promotion of Competition and Competitiveness) to co-ordinate their advocacy efforts and adopt a more active role advising on public-procurement legislation and strategic, complex or high-value procurement procedures.
- Setting up a comprehensive, long-term programme of capacity building on fighting bid rigging for public-procurement officials and officials otherwise involved in fighting bid rigging, such as public prosecutors.

Detect and punish collusive agreements by:

- Providing clarity about which behaviours CADE, public prosecutors, CGU (Comptroller General) and TCU (Federal Court of Accounts) each investigate; this could be done, for instance, by issuing written guidance documents.
- Encouraging public-procurement officials to report any bid rigging indication to CADE before annulling the procurement process and before the procurement entity starts an inquiry on the tender.
- Developing the technical skills and competences of civil courts and judges dealing with competition damage claims.

Part I. Introduction and overview

1. Introduction and scope of the project

1.1. OECD's work on fighting bid rigging

Bid rigging, which is a form of collusion, involves companies that should be genuinely competing to win a contract secretly conspiring to raise prices or lower the quality of offered goods or services during a bidding process.

Public procurement is a key economic activity of governments, accounting for a large proportion of gross domestic product (GDP).

A large amount of taxpayers' money is spent on public procurement in order to deliver services of general public interest and fulfil the government's mandate. Governments are expected to implement procurement in line with principles of integrity, transparency, accountability, efficiency and effectiveness, and competition.

Bid rigging in public procurement damages the outcomes and integrity of public-procurement procedures, and has a negative impact on public services and national economies. Studies show that bid rigging in public procurement can increase prices by 20% (Smuda, 2015^[2]). This percentage can be even higher in certain cases. For example, a study by the Department of Economic Studies of the Brazilian competition authority, *Conselho Administrativo de Defesa Econômica* (CADE, Administrative Council for Economic Defence), estimated that a bid-rigging scheme investigated and sanctioned by the authority had increased the price of the product (revolving security doors) by 25%¹.

Bid rigging is illegal in all OECD jurisdictions, and a criminal offence in 29 out of 37 members². In Brazil, it is an administrative and a criminal offence and has long been an enforcement priority for CADE. Its unit dedicated to investigating bid-rigging cases has been extremely active over the last 10 years (OECD, 2019^[3]).

The prevention and detection of bid rigging in public procurement are crucial to ensuring that procedures are genuinely competitive, and that the public sector has opportunities to achieve value for money.

The importance of fighting bid rigging in public procurement is such that in 2009, the OECD developed Guidelines for Fighting Bid Rigging in Public Procurement ("Guidelines") (OECD, 2009^[4]), and then, in 2012, a Recommendation ("Recommendation") (OECD, 2012^[5]), which calls on governments to assess their public-procurement laws and practices – at all levels of government – in order to promote more competitive procurement and reduce the risk of bid rigging in public tenders.

Based on good international practices, the Guidelines offer advice to public institutions on how to reduce the risk of bid rigging through effective tender design, as well as how to detect collusive practices during the tender process. They identify a number of market characteristics that can facilitate bid-rigging schemes, and include two checklists. The first, whose main objective is prevention, deals with the optimal design of tender processes to reduce the risk of bid rigging. The second includes advice on how to detect bid rigging

during and after the tender process by identifying suspicious pricing patterns and bidder behaviour, as well as statements that should alert procurement officials to possible manipulation of the procurement process.

The Recommendation and Guidelines have become global references, and have helped countries assess the pro-competitiveness of their procurement laws and implement improvements and reforms. They have served as the basis of many national strategies to fight bid rigging, and guided pro-competitive tender design, as well as structured advocacy and training programmes for public procurers on bid-rigging risks and tenders. They have also been used to develop bid-rigging detection tools (OECD, 2016^[6]).

The OECD has supported public entities in Mexico, Colombia, Argentina and, currently, in Brazil, Ukraine and Peru in the process of reviewing their public-procurement regimes and practices and bringing them more in line with its Guidelines and Recommendation³.

1.2. Scope of the project

In 2019, CADE requested the OECD's support in evaluating Brazilian federal public-procurement rules and practices in light of the Recommendation and Guidelines. This was formalised through a co-operation agreement signed on 17 July 2019.

This report, a response to that request, analyses Brazil's federal public-procurement regulatory framework and practices. It makes recommendations on how to prevent bid rigging by designing competitive and effective procurement processes and how to improve detection of collusive schemes when they occur. These recommendations are based on *the OECD Recommendation and Guidelines* and other international good practices. As part of the project, the OECD has also trained senior public-procurement officials on the risks of bid rigging, the forms it can take and OECD good practices in the design of competitive tenders. The OECD has also organised workshops for senior officials from various public entities, including the Federal Court of Accounts (TCU), the Federal Prosecutor's Office (MPF) and São Paulo's Public Prosecutor's Office, on actions for damages caused by anticompetitive conduct.

The report focuses on procurement enacted under the **General Procurement Act** (Federal Law No. 8.666/1993), the **Reverse Auction Act** (Federal Law No. 10.520/2002), and the **Differentiated Procurement Regime Act** (Federal Law No. 12.462/2011). At the time of finalising this report, a new procurement Law 14.133/2021 replacing and harmonising all these legal acts was approved.⁴ Most of the previous procurement framework will continue to apply until 1 April 2023. The report analyses, whenever relevant, whether the new law covers the OECD recommendations.

This report also addresses general procurement practices at federal level with a particular focus on some of major purchasing entities in terms of volume of procurement. These include the **Ministry of Education** and the **Ministry of Infrastructure** (in particular, the **National Department of Transport Infrastructure**).

Concessions,⁵ public-private partnerships,⁶ and contracts entered into by state-owned companies⁷ are not analysed by this review.

2. Overview of public procurement in Brazil

2.1. Legal framework of public procurement in Brazil

Brazil has a significant public-procurement market. In 2020, federal agencies' public expenditure for the procurement of goods, services and works was around BRL 35.5billion⁸. In 2017, Brazil's government procurement spending represented around 13.5% of total government expenditures or approximately 6.5% of the GDP.

Procurement at federal level in Brazil is regulated by the General Procurement Act, the Reverse Auction Act and the Differentiated Procurement Act, as well as secondary legislation (*Instruções Normativas* or Regulatory Instructions) that is adopted mostly by the Ministry of the Economy.⁹

Federal Law No. 8.666/1993 (**General Procurement Act**), adopted in 1993, regulates the general regime of public procurement of services, goods and works at the national level, covering federal, state and municipal entities. States and municipalities can, however, adapt the provisions of the General Procurement Act to local specificities.

Stakeholders interviewed by the OECD indicated that the General Procurement Act is no longer adapted to current international practices in procurement and requires updating. For example: 1) procurement under the act is not conducted electronically; 2) the opening and review of economic and technical offers is always preceded by a qualification phase of participants, which is relevant for complex projects, such as engineering works, but less when procuring commodities; and 3) the act's current appeal system suspends the procurement process and allows decisions to be challenged at various intermediate phases, which, according to stakeholders, if used abusively, significantly slows down the purchasing process.

There have been several attempts to modify the General Procurement Act. Indeed, a draft bill from 1995 was being discussed at the Federal Senate at the time of drafting and finally resulted in the adoption of the new law 14.133/2021, which will be fully applicable from 1 April 2023.¹⁰ In the meantime, legislation that aimed to fill the gaps left by the act and which regulated specific procurement processes was adopted in 2002 and 2011; it remains limited in scope, however. This includes Federal Law No. 10.520/2002 (**Reverse Auction Act**), regulating reverse auctions, which was adopted to apply to common goods and services (though in practice it was a wider application),¹¹ and Federal Law No. 12.462/2011 (**Differentiated Procurement Act**) that was originally designed for specific engineering projects.

Unlike the General Procurement Act, the Reverse Auction Act allows procurement to be conducted online through *Comprasnet*, the Brazilian e-procurement platform. The award criterion used in reverse auctions is always the lowest price and the qualification of bidders takes place after the bidding has ended. Despite having been designed specifically for the procurement of common goods and services, reverse auctions are more widely used in Brazil. Public-procurement entities interpret broadly the scope of the Reverse Auction Act and consider as common all goods and services that can be awarded using the lowest-price criterion.

Likewise, the Differentiated Procurement Act's scope of application has expanded since its adoption in 2011. Originally conceived for the procurement of works for the 2014 World Cup, the 2016 Olympic Games, and airport infrastructure services and works, it is now applied more widely to engineering works and services in different sectors, including public health, penitentiaries, public security and urban mobility.¹² Recently, the act has been authorised for urgent purchases related to the COVID-19 pandemic.¹³

The Differentiated Procurement Act provides for the possibility of using electronic procedures. The opening and assessment of economic and technical offers may be done before or after the qualification of bidders and offers may be submitted in sealed envelopes (or encrypted electronic means) or using the reverse-auction system.

The Ministry of the Economy has adopted regulations to upscale processes and make them more efficient and effective. The procurement community, however, believes that this method of regulation has its limits and adopting a new law that harmonises existing laws and regulations would be a better solution. The new law 14.133/2021 which was adopted at the time of finalising the drafting of this report has been presented as a reasonable compromise. The draft bill's two main innovations are: 1) a chapter dedicated to public-procurement officials (Title I, Chapter IV); and 2) a particular focus on the preparatory phase of tenders, with the express requirement to prepare a preliminary technical study (*estudo técnico preliminar*, ETP; Title II, Chapter II).

The General Procurement Act applies to the conclusion and execution of all public contracts independently of how they have been tendered.

2.2. Public institutions involved in public procurement

The **Federal Court of Accounts** (*Tribunal de Contas da União*, TCU)¹⁴ is the external control institution in Brazil. ¹⁵ TCU acts as a federal auditing body and an investigatory and adjudication body for complaints from third parties, such as tender participants, citizens or civil society organizations about irregularities of federal procurement processes or procurement processes involving federal resources.

Audits are carried out *ex officio* or at the request of the National Congress (Brazil's bicameral parliament, composed of the Federal Senate – the upper house – and the Chamber of Deputies – the lower house). When investigating irregularities of the procurement process, TCU may impose disciplinary measures – such as fines – upon public officials; sanctions on companies, such as debarment (prohibition to participate in tenders) for a maximum period of five years;¹⁶ and the suspension of tender processes (see Section 4.2). The majority of TCU's resources are devoted to investigating complaints as it receives a large number and is required to respond to them all within tight deadlines.

The **Comptroller General** (*Controladoria-Geral da União*, CGU) is the internal control body of the Brazilian government and audits and oversees federal spending.¹⁷ It manages the *Portal de Transparência* (Transparency Portal),¹⁸ which registers the federal government's spending, and the Electronic System of the Citizen Information Service (e-SIC)¹⁹ that handles citizen electronic requests for public information.

Under the Anti-Corruption Law (Federal Law No. 12.846/2013),²⁰ CGU prevents, detects and punishes cases of corruption and mismanagement of federal public resources. It may impose disciplinary sanctions to public officials and administrative fines – of up to 20% of gross sales – and debarment (prohibition to participate in tenders) of private companies for acts of corruption. The body may enter into leniency agreements with companies involved in corruption (see Section 4.2).

CGU is also in charge of managing the National Register of Suspended and Debarred Companies (*Cadastro de Empresas Inidôneas e Suspensas*, CEIS), which lists individuals and legal entities that have been debarred from participating in tenders and contracting with the federal government. This list includes companies that have been debarred by CADE.

The **Office of the General Counsel of the Federal Government (AGU)** acts as the legal representative of the federal government in court proceedings and advises the executive branch on legal matters. AGU is present at all levels of federal government through staff assigned to the different ministries and sectoral institutions of the federal administration. For public procurement, AGU controls the legality of the purchasing process and public contracting. Tender notices need the approval of AGU before their publication,²¹ while public contracts must be signed off as lawful by AGU before their signature.²² In its assessments of tender notices, terms of reference and contracts, AGU ensures that documents comply with formal legal requirements but does not review whether tender processes are competitive or strategic. To facilitate these legal checks, AGU has created standardised documents for certain procedures (see Section 7.2).²³

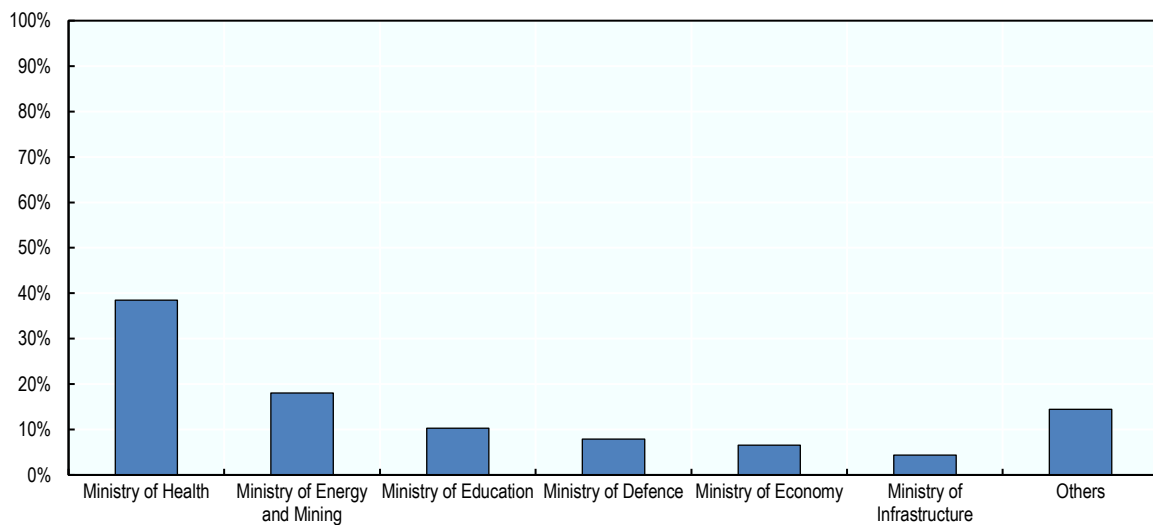
The **Secretariat of Management (Secretaria de Gestão, SEGES)** at the Ministry of the Economy was created in April 2019 and charged with the development and implementation of strategic plans and initiatives for innovative public management.²⁴ Under this mandate, SEGES proposes legislation or adopts secondary regulation on public procurement, develops the centralisation of purchases at federal level, and manages the Integrated System for the Administration of General Services (*Sistema Integrado de Administração de Serviços Gerais, SIASG*) also known as Comprasnet, Brazil's e-procurement platform for federal entities. Comprasnet supports all steps of the reverse-auction process and the differentiated procurement (RDC) process when it is conducted electronically. Comprasnet also includes modules, such as: 1) catalogues for goods and services (Catálogo de material/Catálogo de serviço, CATMAT/CATSER); 2) price panel (painel de preços), which registers the price per unit paid by the administration for goods and services and helps public officials estimate the cost of future purchases; 3) suppliers' registry (Sistema de Cadastramento Unificado de Fornecedores, SICAF), which facilitates the assessment of bidders' legal and financial and tax compliance; and 4) purchasing panel (painel de compras), which provides information about the annual procurement plan, procurement procedures and contracts.

The **National School of Public Administration (Escola Nacional de Administração Pública, ENAP)** is a public foundation linked to the Ministry of the Economy. It promotes, elaborates and executes capacity-building programmes for officials of the federal public administration. ENAP includes short, medium and long-term courses, and face-to-face, distance and mixed mode learning. In collaboration with CADE, ENAP has designed an online course on fighting bid rigging for public-procurement officials (see Section 10.2)

2.3. Major procurers in Brazil

Figure 2.1 shows the major procurers in Brazil by contract value. For the preparation of this report, the OECD interviewed a range of stakeholders, including certain of the major procurers including the National Department of Transport Infrastructure (*Departamento Nacional de Infraestrutura de Transporte, DNIT*), and the National Fund for the Development of Education (*Fundo Nacional de Desenvolvimento da Educação, FNDE*). The report refers to procurement practices adopted by these entities.

Figure 2.1. Contract values for each procurement entity in Brazil in relation to total contracted value, percentage, 2017-2019



Source: Portal de Transparência (www.portaltransparencia.gov.br).

DNIT is an autonomous entity attached to the Ministry of Infrastructure. It is in charge of the maintenance, development and monitoring of the federal transport system, including roads, railways and waterways. DNIT spends around BRL 8 billion annually in procuring services and goods.

The **FNDE** is an autonomous entity attached to the Ministry of Education. It centralises the procurement of goods and services needed for Brazil's education system, in particular, basic education in public schools.

3. Tender procedure

In general, all procurement processes can be broken down into three distinct stages: 1) pre-tender; 2) tender, including the publication of the notice, the bidding and the contract award; and 3) post-award.

3.1. The pre-tender phase

The pre-tender phase is used to define the characteristics and parameters of the procurement process: from establishing an entity's needs and assessing possible supply markets to deciding the most appropriate tender methods.

Since 2019, federal entities are required to create an **annual contracting plan** (*Plano Anual de Contratações*, PAC),²⁵ which must contain the contracts planned for the following financial year. It should be based on the needs and the budget allocated to the federal entity and entered into a form containing predefined fields on Comprasnet.

The requesting entity or unit (i.e. the part of federal administration that needs the goods or services) initiates the procurement process based on PAC information. Subsequently, the procurement entity (which may be separate from the requesting entity) creates a **contract-planning team** including staff from the requesting, technical and administrative units.

Since 1 July 2020, all federal entities must create a **preliminary technical study** (*estudo técnico preliminar*, ETP) for the procurement of goods, services or public works.²⁶ This requirement was previously restricted to the procurement of services²⁷ and information and communications technology (ITC).²⁸ The preliminary study allows the requesting unit to better understand its needs and seek appropriate market solutions.

Public entities must also conduct **price research** to determine the figure above which an offer would become unacceptable.²⁹

For high-value contracts (currently, above BRL 150 million), a public entity must organise a **public hearing** 15 working days before the publication of the tender notice. These hearings are open to all and aim to make procurement more transparent, while establishing a dialogue on the legality and the suitability of the procurement process to the administration's need.³⁰

All information gathered during the above procedures is then used to define the **terms of reference** for goods and services or the **basic project** (the project's main terms) for public works and engineering services. At this stage, a public purchaser will define the procurement method, object of the contract, quantities, technical specifications, deadline for delivery, and guarantee fees. In procurement for public works, the tender notice will also include detailed specifications.

3.2. The tender phase

The tender phase starts with **the publication of the call for tender or the tender notice** in Comprasnet and in the Federal Official Gazette of Brazil (*Diário Oficial da União*, DOU).

The tendering process differs depending on the procurement method. As explained below, for procurement carried out in accordance with the General Procurement Act the process is run in person. Reverse auctions are always run electronically, while the differentiated-procurement regime allows for both in-person and electronic processes. The **presentation of offers** can be done in person at a specific address or by post. In line with OECD guidelines, bidders are required to sign a **certificate of independent bid determination** (see Annex A).³¹

The **opening and assessment of offers** also differs depending on the procurement method. The legal and technical qualification of suppliers takes place before the assessment of any financial offer in procedures run under the General Procurement Act. In reverse auctions, the financial offers are assessed before bidder qualification. Under the differentiated procurement regime, both options are accepted. After the qualification assessment, the bidder may not withdraw its bid.³²

SICAF, the electronic registry of suppliers, facilitates the assessment of bidders' legal, tax, economic and financial eligibility.³³ To participate in a tender, suppliers registered in SICAF need only to present an electronic registration certificate instead of submitting all eligibility documents. SICAF registration is valid for one year and is easily updated.³⁴

Types of procurement procedures

Federal Law No. 8.666/1993 (General Procurement Act) provides for **four different procurement proceedings**:

- **Open competitive tenders** (*concorrência*)³⁵ are open to all bidders. Participants are required to submit two sealed envelopes: one containing documents proving the company's compliance with eligibility requirements and its ability to contract with the government;³⁶ and another containing the financial offer. The procuring body assesses eligibility first and subsequently opens the financial offers of eligible bidders. Participants can appeal the eligibility assessment phase, as well as the award decision; appeals suspend the procurement process.
- **Price requests** (*tomada de preços*)³⁷ are similar to open competitive tenders but they are reserved for bidders registered with SICAF or bidders who meet the registration requirements by the third day before bid submission. Bidder registration facilitates and speeds up the qualification phase. The main differences between open competitive tenders and price requests are that in price requests the minimum period between the publication of the notice and the date set for the submission of the tenders is shorter (15 days, instead of 30) and that contract values cannot exceed certain thresholds (see Table 3.1).
- **Invitation to bid** (*convite*) sees the procuring entity inviting at least three potential suppliers from the relevant industry. The invitation to bid is made public and any parties registered with SICAF and who express interest in participating at least 24 hours before the submission deadline are deemed to be invited as well and can submit offers.³⁸ During the fact-finding, stakeholders and market participants frequently questioned the impartiality of contract awards that use this method. TCU decisions have established that invitations to bid are only acceptable if the three invited suppliers made valid offers and genuinely compete.
- **Contests** are used for contracting technical, scientific or artistic work. The process is organised as a competition with a reward or payment (the prize) to the winner. The rules and requirements of the contest are indicated in the contest notice.

Besides the contest, which is used for projects demanding high technical, scientific or artistic knowledge, the other procurement methods are chosen based on contract value (see Table 3.1).

Table 3.1. Contract values for using the different procurement modalities

	Invitation to bid	Price request	Open competitive tender
Public works and engineering services	Up to BRL 330 000	Up to BRL 3.3 million	Above BRL 3.3 million
Goods and services (except engineering services)	Up to BRL 176 000	Up to BRL 1.43 million	Above BRL 1.43 million

Source: Decree No. 9412/2018, www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/decreto/D9412.htm.

In addition to the procedures established by the General Procurement Act, public entities may also use reverse auctions when procuring common goods and services (see Section 2.1). In that case, contracts are awarded to the lowest bid or the bid offering the highest discount, provided that the bidder meets eligibility requirements. Competitive bidding takes place before the qualification phase and reverse auctions can be conducted electronically.³⁹ Electronic reverse auctions can follow the “open method” or the “open-closed method”. Under the open method, bidders submit offers during the first 10 minutes of the auction, then they have further two minutes to make supplementary offers. If no offer is submitted, the auction is closed. If a bidder makes a new offer, another period of two minutes will start and so forth. The “open-closed method” is conducted in three phases: 1) bidders have a 15 minutes to submit bids; 2) the time limit for submitting bids is then randomly set – at 10 seconds to 15 minutes – but bidders are not told its exact length; and 3) the participant with the lowest bid and those with offers up to 10% higher than the lowest bid (or the three lowest offers independently of the difference among them) are given a 5-minute slot to make a final closed bid. Among the different competitive bidding processes, reverse auction is the most frequently used procurement method (see Figure 7.1).

In the case of specific engineering works and constructions, public entities may also use the differentiated-procurement regime (see Section 2.1), which allows for different procurement options. Under this regime, procurement can be conducted in person or electronically through Comprasnet, the assessment of economic offers can be done before or after qualifying bidders, and procurement entities can use the open competitive tender (with the sealed-envelope procedure) or reverse auctions for assessing economic offers.

Under the differentiated procurement regime, public entities may use the integrated contracting method. In this, the public entity procures engineering works and services without issuing a basic project. Under the General Procurement Act, the basic project containing all the technical specifications is issued by the procuring entity and is one of the requirements to the procurement of engineering works and services meaning that the responsibility for technical specifications relies on the government. Under the integrated contracting, the procuring entity just publishes a preliminary engineering project including the main technical elements of the work or service and participating companies assume the responsibility of designing the complete project and the technical specifications.

Almost all procurement in Brazil must be carried out through competitive bidding. **Direct contracting** can only be used under specific circumstances, such as war, emergency situations, natural disasters, low-value contracts,⁴⁰ single-source suppliers, specialised technical services, and when hiring renowned professionals.⁴¹ Public-procurement entities must explain their reasons for using direct awards and justify the choice of supplier and the price paid to AGU, which controls the legality of public contracting. Direct awards have to be authorised by the highest authority of the procuring entity (for example, the Minister if the procuring entity is a Ministry).

Contract award criteria

The award criteria for procurement contracts are the:

1. **lowest price.**
2. **best technique or method.** This is used for services of a predominantly intellectual nature, in particular in the elaboration of projects, calculations, audits and management and engineering consulting. Tendering under this criteria includes a negotiation of the price with the bidder that has submitted the best technical offer.
3. **best combination of technique or method and price.**⁴²

Under the differentiated-procurement regime, contracts can also be awarded on the basis of the **highest economic return**, i.e. when the execution of the project creates the greatest savings for the public administration in the long run.

Post-award

The public entity may request that a successful candidate makes a **performance guarantee** in the form of a cash bond, public-debt securities, insurance or bank guarantee of up to 5% of the value of the contract. The contracting entity holds the performance guarantee until the works have been delivered.⁴³

The administration may modify the contract unilaterally under certain circumstances. It is also possible to change the contract if both parties agree. The contracting entity may also impose sanctions if any delays are attributable to the supplier⁴⁴ and terminate the contract under certain circumstances, such as its incomplete execution.⁴⁵

Appeals system

All interested parties can challenge the tender notice and request changes to it if they consider that the General Procurement Act has not been adequately applied. The appeal must be introduced up to five working days before the qualification phase starts.⁴⁶

For procurement under the General Procurement Act, bidders may also introduce an administrative appeal before the contracting authority against the public entity's decision on participants' qualification and the award decision in case of alleged irregularities. Appeals are common and have suspensive effects. In reverse auctions, bidders may only appeal the award decision.

On top of administrative appeals, bidders can introduce judicial appeals. In Brazil, it is not necessary to file an administrative appeal before challenging a procurement decision in court.

4. Anti-cartel enforcement and advocacy in Brazil

Competition law plays a major role in the prevention, detection and punishment of bid-rigging schemes. Cartel enforcement, and bid rigging in particular, has been a priority for CADE, especially since the adoption of the 2011 Competition Act. As a result of the agency's focus on cartel prosecution and the use of aggressive investigation tools, numerous cartel investigations, including for bid rigging, have been launched.

4.1. The legal framework applicable to bid rigging

In Brazil, bid rigging can constitute an administrative and a criminal offence. The regulatory framework is composed of at least five laws applicable by at least four public bodies. The same conduct may be caught simultaneously by more than one law. Furthermore, infringers may be open to civil liability, which is regulated by at least three laws. Table 4.1 outlines the laws that may be involved in bid-rigging cases.

Table 4.1. Bid-rigging legal framework and relevant institutions

Law	Regime	Type of conduct	Sanction	Institution
Administrative or criminal liability				
Competition Act (Law No. 12.529/2011)	Administrative	Anticompetitive agreements between competitors	Fines, debarment, divestitures, publication of decision, inclusion in a registry, personal sanctions	CADE
Economic Crimes Act (Law No. 8.137/1990)	Criminal	Agreements between competitors to distort the market	Prison, fines	Public prosecutors
Criminal Code (Decree-Law No. 2.848/1940)	Criminal	Preventing, disturbing or defrauding a public auction	Prison, fine, others	Public prosecutors
General Procurement Act (Law No. 8.666/1993)	Criminal	Frustrating or defrauding the competitive nature of a procurement process by reaching an agreement with competitors,	Prison, fine, debarment	Public prosecutors, TCU
Anti-corruption Act (Law No. 12.846/2013)	Administrative, civil	Causing losses to national or foreign governments, including through bid rigging	Fine, publication of decision, damages	Public body suffering damage or CGU
Civil liability				
Competition Act (Law No. 12.529/2011) and Civil Code (Law No. 10.406/2002)	Civil	Damages resulting from anticompetitive conducts	Compensation	Harmed party
Law No. 7.347/1985	Civil	Damages caused, among others, to the public treasury	Compensation	Certain public bodies
Law No. 4.717/1965	Civil	Damages caused to the public treasury	Compensation	Citizens

Source: OECD

Under Federal Law No. 12.529/2011 (**Competition Act**)⁴⁷, cartels, including bid rigging, constitute an extremely serious administrative infringement. Infringements to the Competition Act are investigated by CADE. CADE may impose fines for bid rigging of up to 20% of a company's gross turnover in the economic activity in which the infringement took place, for the year before the investigation. The amount of the fine must not be lower than the advantage that the company derived from the infringement, whenever it is possible to calculate that benefit. When the turnover of a company in the economic sector in which the infringement took place is unavailable, CADE may take into account the total turnover of the relevant company or group of companies. In case of recidivism, the fine is doubled (OECD, 2019^[3]).

CADE may impose other sanctions, including:

- debarring companies from participation in public procurement or working with the public administration for a minimum of five years;
- divestitures, transfer of corporate control, sale of assets or partial interruption of activity;
- Publication, at the wrongdoer's expense, in newspapers of sanctions;
- the registration of the offending company with the National Registry for Consumer Protection⁴⁸; and
- individual fines that range from BRL 50 000 to BRL 2 million or 1% to 20% of the penalty applied to the company.

Federal Law No. 8.137/1990 (**Economic Crimes Act**)⁴⁹ considers bid rigging as a criminal offence.⁵⁰ Offenders may be fined and sentenced to two to five year imprisonment. Sanctions are more severe if the conduct harms society, was carried out by a public servant or is related to goods or services that are essential for life or health.⁵¹

In addition, Decree-Law No. 2.848/1940 (**Criminal Code**)⁵² prohibits conducts similar to bid rigging, such as companies preventing, distorting or defrauding a public auction.⁵³ Possible sanctions for this infringement are prison terms of six months to two years, or a fine. The sanctions may also be applied to anyone who refrains from participating in procurement in exchange for compensation.

Finally, Federal Law No. 8.666/1993 (**General Procurement Act**) imposes criminal penalties (such as two to four year prison terms) upon individuals and fines upon companies conspiring to frustrate or defraud the competitive nature of the public procurement process in order to obtain an advantage from the award.⁵⁴

In addition, bid rigging may involve corruption and so infringe Federal Law No. 12.846/2013 (**Anti-corruption Act**).⁵⁵ Fines for legal entities infringing this law range from 0.1% to 20% of the gross turnover. Sanctions may also include the publication of the decision in a large-circulation newspaper and on the infringing company's website, as well as posting it on a prominent place in its offices.⁵⁶ At a federal level, CGU is responsible for investigating and imposing sanctions for corruption offences.

Cartel members can be held liable for damage caused to public purchasers and third parties. Competition damages may be claimed individually or collectively, regardless of whether an investigation is open into the conduct or not.⁵⁷ The general rules on civil liability established by Federal Law No. 10.406/2002 (**Civil Code**)⁵⁸ also apply to competition damage claims.

Furthermore, Federal Law No. 7.347/1985⁵⁹ regulates the so-called "civil public actions" that can be filed by institutions, including public bodies, public prosecutors, and associations, to reclaim the harm caused to the public treasury. The claimant may file the action even if it has not been directly affected. For instance, this may be the case of non-profit organisations that claim damages on behalf of consumers.

Finally, any citizen is entitled to bring a popular action, pursuant to Federal Law No. 4.717/1965,⁶⁰ for any damages caused to public assets in a procurement process.

4.2. Bodies involved in bid-rigging enforcement and advocacy

CADE

CADE is the only competent authority to investigate and punish bid rigging under Federal Law No. 12.529/2011 (**Competition Act**).

CADE may obtain information about possible bid-rigging infringements from leniency applicants, complaints, inter-institutional co-operation, internal intelligence tools and investigative techniques.

First created in 2000 and reinforced in 2011 by the current Competition Act, the leniency programme offers immunity from administrative and criminal penalties⁶¹ to the first applicant to confess to participation in an antitrust violation and co-operate with CADE during the investigation. No reductions of fines are offered to subsequent applicants. In this, Brazilian law diverges from the law of most jurisdictions that responded to a 2017-2018 International Competition Network (“ICN”) survey: 31 out of 34 respondents provide for reduction of fines or other benefits to subsequent (i.e. not the first in) leniency applicants.⁶²

A successful leniency applicant remains liable for any damages caused. The leniency programme also contains a “leniency plus” provision, whereby any co-participant who comes forward with evidence regarding another collusive conduct still unknown to CADE will be granted a reduction of one-third on the penalties imposed in the original investigation. Additionally, the co-participant will enjoy leniency for the practice it revealed. Leniency applicants are exempted from criminal penalties and debarment from participating in government procurement.

Third parties, including public buyers, may report suspicions of bid-rigging schemes through complaints filed with CADE. Public bodies may formally request CADE to initiate an investigation. Private companies may submit a complaint anonymously by filing in an electronic form on CADE’s website. In this case, CADE can open an investigation ex-officio if the complaint has merits.

The reporting of wrongdoing does not need to meet any specific formalities or include a minimum number of elements, as it is the case in some other jurisdictions, like the European Commission, where complaints against anticompetitive conduct need to be done by filling up a form with mandatory fields. Complaints do not require CADE to initiate proceedings (i.e. the opening of investigations remains at CADE’s discretion) and there are no rewards for third parties reporting bid-rigging practices. CADE needs to inform the (public or private) complainant if the complaint has led to the opening of an investigation.

Further, public prosecutors report to CADE any indication of cartel-like or anticompetitive conduct that they find in their investigations; this is typically done through an official letter. Federal and state public prosecutors were plaintiffs to 25 CADE proceedings from 2015 to 2019, or approximately 17% of the total administrative proceedings decided during that period.

CADE has also developed internal detection tools that use artificial intelligence to monitor and process procurement data, namely the *Cérebro* project – a data-mining tool that uses screens to detect cartels. This is one of the agency’s major achievements in the fight against bid rigging. The *Cérebro* project uses the databases of Comprasnet and other public bodies to which CADE has access. With around 60 000 procurement processes organised every year, CADE gives priority to screening procurement data of traditionally problematic markets or markets where cartel conduct has been reported.

Box 4.1. Project *Cérebro*

Project *Cérebro* allows for the automation of analyses formerly conducted by investigators and case handlers. The tool employs data mining and statistical tests to identify suspicious patterns such as bid suppression, cover bidding, bid rotation, superfluous losing bids, stable market shares, pricing patterns, textual similarities in bids, and submitted files' metadata. The tool helps the authority to detect bid rigging, open ex officio investigations, and collect evidence in ongoing investigations.

In 2018, CADE conducted its first investigation based on the information obtained from *Cérebro*: a check of tenders to employ firefighters. *Cérebro* identified suspicious behaviour by 14 companies in more than 500 public tenders, and obtained evidence that allowed CADE to obtain judicial authorisation to search 13 of the companies.

Source: CADE (2018), "Screening and data mining to detect cartels: Brazilian experience", presentation to the 2018 OECD Workshop on Cartel Screening in the Digital Era, www.slideshare.net/OECD-DAF/cartel-screening-in-the-digital-era-cade-brazil-january-2018-oecd-workshop; "OECD Latin American and Caribbean Competition Forum session III: Promoting Effective Competition in Public Procurement – Contribution from Brazil", DAF/COMP/LACF(2016)19, [https://one.oecd.org/document/DAF/COMP/LACF\(2016\)19/en/pdf](https://one.oecd.org/document/DAF/COMP/LACF(2016)19/en/pdf).

CADE's investigation powers include the ability to conduct dawn raids with a legal warrant and make mandatory requests for information.

CADE may impose fines and other penalties including debarment (see Section 4.1). As illustrated in Box 4.2, CADE has debarred companies as a result of antitrust investigation, including the Metro Cartel and "Dirty Laundry" cases. In its decisions, CADE has applied this sanction to the cartel leader and allowed other cartel members to participate in future tenders, with the aim of preserving competition in the market. This is in line with recommendations in projects carried out by the OECD in other countries (OECD, 2016^[7]).

Box 4.2. Prohibition to contract with public bodies and participate in public tenders

The **Metro cartel case** (Administrative Proceeding No. 08700.004617/2013-41) involved a bid rigging scheme affecting train and subway procurements carried out from 1998 to 2013 in the Federal District and in the states of São Paulo, Minas Gerais, Rio Grande do Sul, and Rio de Janeiro. The seriousness of this bid-rigging scheme and the relevant damages caused was considered such that debarment was applicable. The judgement nevertheless considered that applying that sanction to the majority or even all of the companies would generate the opposite effect from the one intended, which was to obtain best value for money. To avoid the undesired effect of an overly extensive application of the debarment sanction, the reporting commissioner proposed to debar only Alstom, the leader of the cartel and a recidivist, while allowing other cartel members to participate in future tenders.

In the **Dirty Laundry case** (Administrative Proceedings No. 08012.008850/2008-94), sanctioning a bid-rigging conspiracy affecting procurement for laundry services for hospitals in Rio de Janeiro, the commissioner indicated that the application of the debarment should not create a shortage of supply and so disrupt the correct functioning of a market. The application of this sanction to all members of a cartel is only possible in a market in which a large number of suppliers remain unaffected by the sanction or in a market with very low barriers to entry. This requires a careful assessment of the market in question. In “Dirty Laundry” case, the judgement presents three possible outcomes:

1. Apply the debarment to Prolav, Brasil Sul and Ferlim, all members of the cartel and representing two fifths of the market, which will generate a shortage of supply.
2. Do not apply the debarment penalty, which would be an insufficient response of the state in view of the seriousness of the infringements and the damages caused.
3. Impose the debarment sanction to the leader of the cartel, Brasil Sul, only; this was judged the solution that best protected the public interest.

Source: Vote of Reporting Commissioner João Paulo de Resende in the Metro Cartel case and Review-vote of the Commissioner Alexandre Cordeiro Macedo in the Dirty Laundry case.

https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQAh8mpB9yP7fBJ8TKXiAj64uRZfulL5o-Z_AOogkHiscpZ4wVvK0YAivoX2c4mRJJXQ2QPPdGXijXOGTg6gZvAsRpdXu2DT4;
https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQAh8mpB9yO6yEROhfyyoMa7o15UvZkOQKX2R0kvIH-ELix7augmE9VeukEG8XIOt46kkqeOK4wNtyseGkGtbFdnJMfhJAeP

Settlements known as cease-and-desist agreements are used extensively in OECD Members to resolve cartel cases. In Brazil, settlements provide for discounts of up to 50% for parties that recognise participation in cartel agreements and co-operate with CADE during the investigation. Settlements do not exclude civil liability for the damages caused. CADE considers they constitute an important complement to its leniency programme, which provides amnesty only for the initial applicant (OECD, 2019^[3]).

Enforcement action

Since 2015, much of CADE’s bid-rigging enforcement has focused on what is known as Operation Car Wash, the investigation into the largest corruption and cartel scheme in Brazilian history. Around 20 bid-rigging investigations were launched and are currently running as a result of this operation. Initially, the investigations targeted construction companies involved in bid rigging linked to state-owned petroleum company Petrobras and various contracts in the oil and gas markets. The Petrobras investigation unearthed further alleged bid-rigging practices in other construction projects, notably the construction of football stadiums in relation to the 2014 FIFA World Cup in Brazil and the 2016 Olympic Games in Rio de Janeiro, and railroads (OECD, 2019^[3]).

In addition to the Car Wash investigations, CADE has investigated and sanctioned a number of bid-rigging cases, such as those in Box 4.3.

Box 4.3. Selection of bid rigging cases sanctioned by CADE

Bid rigging of tenders for the provision of IT services in Distrito Federal (Administrative Proceeding No. 08012.004280/2012-40)

This investigation was initiated following a report from the Third Prosecution Office for the Defence of Public and Social Patrimony of the Distrito Federal Public Prosecution Services (MPDFT) of bid-rigging suspicions in the procurement of IT services conducted by government bodies and companies based in Distrito Federal. After judicial authorisation, the MPDFT shared documents with CADE that had been collected during the criminal investigation.

CADE's investigation concluded that the conduct aimed at fixing prices, allocating customers and settling advantages in procurements for the contracting of IT services conducted by government bodies and companies based in Distrito Federal. Cartel members used strategies such as cover bids and withdrawing proposals. Furthermore, in at least one case they tried to manipulate the different rounds of the bidding process. The cartel affected at least 12 contracting processes.

In October 2019, CADE sanctioned four companies and six individuals. The fines amounted BRL 2.1 million.

Antiretroviral medicines cartel (Administrative Proceeding No. 08012.008821/2008-22)

During an investigation run into an alleged bid-rigging conspiracy concerning procurement laundry services for public hospitals in Rio de Janeiro (the so-called Dirty Laundry case), Federal Police uncovered evidence of a second cartel to rig procurement by public laboratories for the acquisition of the supplies necessary to produce antiretroviral drugs used to treat AIDS.

CADE's investigation unit, the General Superintendence, discovered that the cartel had existed from 2003 to 2005 and had attempted to fix prices and maintain each member's market share. The bid-rigging scheme consisted of allocating among conspirators tenders and bidding lots by presenting cover bids, withdrawing proposals, rotating the submission of proposals and compensating losing bidders. Moreover, the cartel included mechanisms to punish and retaliate deviations from agreed terms.

Two companies and four individuals were found guilty. In addition to the fines, two individuals were debarred from participating in government procurement.

Source: <http://antigo.cade.gov.br/noticias/cade-condena-cartel-no-mercado-de-insumos-para-medicamentos-antirretrovirais> and https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_processo_exibir.php?2pXoYgv29q86Rn-fAe4ZUaXIR3v7-gVxEWL1JeB-RtUggQwvvr6ZlwydI0IhRNSr2Q22lByVKByYDYwsa13_Jxv8yGltF44OPAHbv3B31w1EZSEQ9Fbue6tJZtRKyodH6; https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQAh8mpB9yPQrNhNIQY1fJWMMVS2O-glW3joeZbU0Nyma6gJX3oKl8AbgwPSHL7nptANhIYGfzV1BRCCjgS16VBHYZZV3A0ky

Advocacy initiatives

CADE conducts capacity-building events on the prevention of bid rigging for government procurement officials. In October 2019, CADE, in partnership with the National School of Public Administration (ENAP), launched an online course about cartel prevention and detection in public procurement and a second about its leniency programme.⁶³ At the time of writing (March 2021) around 2,500 people have taken the ENAP

course.⁶⁴ Moreover, over 1 500 public officials participated in bid-rigging awareness raising events in 2009 and 2010 organised by, at the time, the Secretariat of Economic Defence (OECD, 2012_[8]).

In 2017, CADE trained 50 officials of Petrobras on how to prevent and detect bid rigging. In 2018 and 2019, CADE carried out capacity building for 1,100 officials from the public prosecution services and control bodies. Issues addressed during these events were competition law, investigation techniques and Project Cérebro. This initiative was aimed not only at raising awareness, but also at building partnership with other bodies involved in bid-rigging investigations. In 2019, CADE conducted training events for the prosecution services of the states of Amapá, Amazonas, Bahia, Ceará, Mato Grosso do Sul, Pará, Paraná, Roraima, and São Paulo.

Further, in December 2019, CADE issued Guidelines on Fighting Cartels in Government Procurements.⁶⁵ These guidelines contain recommendations regarding detection of bid rigging and measures to prevent such conduct; they replace Fighting Cartels in Procurement, published in 2008.⁶⁶ Moreover, in 2016, CADE issued Measures to Stimulate the Competitive Environment of Procurement Processes.⁶⁷

CADE's bid-rigging advocacy actions have been complemented by those adopted by the former Secretariat for the Promotion of Productivity and Competition Advocacy (Secretaria de Promoção da Produtividade e Advocacia da Concorrência, SEPRAC). This is a government department within the Ministry of Finance which in 2018 became the Secretariat for the Promotion of Competition and Competitiveness (Secretaria de Advocacia da Concorrência e Competitividade, SEAE). In 2014, SEPRAC published two documents to raise awareness about anticompetitive practices in government procurement: Application of Competition Law to Public Tenders: Cartels⁶⁸ and Practical-Operational Issues of Public Tenders for Civil Servants.⁶⁹

Government bodies are not required to consult CADE on the design and approval of public procurement regulation⁷⁰ and CADE has rarely intervened unilaterally. SEAE's mandate includes issuing non-binding opinions on bills under review in the National Congress, and on propositions by regulatory agencies. The OECD review has shown that SEAE may benefit from additional resources to undertake this task consistently. Notably, SEAE has not commented on the public procurement draft bill that was under discussion in Congress at the time of drafting.⁷¹

Neither does CADE often issue opinions on specific procurement procedures. The agency claims that advocacy initiatives in this field are still being developed.

Other relevant institutions

Public prosecutors

Federal and state prosecutors are in charge of investigating potential bid rigging criminal offences. Public prosecutors are also entitled to bring actions to claim compensatory damages.

In addition, Federal Public Prosecution Services may issue opinions in the context of CADE's investigations, ex officio or at the request of the reporting commissioner.⁷²

Prosecutors initiate investigations pursuant to complaints or ex officio. The police may start investigations of cartel conduct and report the results to the prosecutors, who have the discretion to file criminal charges against reported individuals. When CADE initiates a cartel investigation it regularly requests that prosecutors begin a parallel criminal investigation. Similarly, when public prosecutors identify signs of cartel conduct during their investigations they generally file a complaint to CADE.

Public prosecutors may also obtain information concerning investigations through plea bargains or the compensated-co-operation mechanism (colaboração premiada), which provides immunity from criminal penalties (or a reduction of up to two thirds of jail time) to individuals submitting relevant evidence about a crime.⁷³ Co-operating individuals remain liable for any damage caused, however.

Criminal prosecutions for cartel cases appear to be on the increase, although many cases involve corruption or other economic crimes, rather than being “pure” cartel cases.⁷⁴ Some of these cases have resulted in criminal convictions and jail sentences (OECD, 2019^[3]).

TCU

TCU's role in bid-rigging investigations is relatively minor. It can investigate and debar companies in cases of bid rigging as established in the General Procurement Act.⁷⁵

CGU

CGU's role is limited to prosecuting acts of corruption in cases where bid-rigging conduct involves corruption causing harm to the federal executive branch or a foreign government.

In 2008, CGU launched the Public Spending Observatory (*Observatório da Despesa Pública*) for continuous detection of misconduct and corruption. The Observatory cross-checks procurement expenditure data with other government databases to identify suspicious situations that merit further examination. As illustrated in Box 4.4, in 2014 CGU developed Alice, a screening tool that detects flaws in procurement processes.

Box 4.4. The Alice project

Created in 2014, the Análise de Licitações e Editais (*Alice*) tool uses artificial intelligence to process those procurement notices and price registrations (*atas de registro de preços*) issued by the federal government, and certain regional government bodies and state-owned companies that are available in the Official Journal and on Comprasnet. The screening methods used by Alice can identify infringements of the General Procurement Act in the planning and design of procurement processes.

CGU auditors receive a daily e-mail from Alice summarising the around 250 tender notices published every day and indicating possible irregularities. On the basis of this information, CGU auditors make a selection of the most problematic cases, carry out an in-depth analysis and propose amendments to the tender notices or the terms of reference if necessary.

A new version of Alice with more sophisticated audit trails was released in 2020.

Source: <https://portal.tce.go.gov.br/-/robo-alice-automatiza-analise-de-licitacoes> and <https://app.oxfordabstracts.com/events/1016/program-app/submission/147161>

CGU may sign leniency agreements with companies that are first in reporting a corruption act and co-operating during the investigation. Successful leniency applicants get a reduction by up to two thirds of the fine. Leniency also provides exemptions from the publication of an infringement decision and debarment,⁷⁶ but cannot exempt the applicant from liability for damages caused.

4.3. Institutional co-operation

Where bid rigging can involve a variety of regimes and enforcement bodies, such as in Brazil, co-operation among agencies helps co-ordinate investigations, allows for the sharing of important information, reduces procedural costs, and provides companies with legal certainty.

In recent years, CADE has increased the number of its technical co-operation agreements with different institutions to fight cartels, including bid rigging in public procurement. CADE has concluded 39 technical

co-operation agreements. The majority of these agreements have been signed with other Brazilian public authorities – public prosecutor offices, TCU and CGU – and focus on information exchange and technical co-operation for the prevention and prosecution of cartels (see Box 4.5). A list of all agreements adopted by 31 December 2020 is included as Annex B.

Box 4.5. Co-operation agreements related to bid rigging signed by CADE

Technical co-operation agreement with the Federal Prosecution Service

Signed in February 2020, this agreement commits CADE and the Federal Prosecution Service to the establishment of mechanisms that allow for greater communication between the institutions and improved co-ordination and effectiveness of their actions.

The Federal Prosecution Service commits to sending CADE any information and evidence obtained during civil and criminal investigations in cases related to cartel conduct and other infringements of Federal Law No. 12.529/2011 (Competition Act). Despite the agreement, sharing this information still requires judicial authorisation. In return, CADE commits to sending information and evidence obtained in its investigations to federal prosecutors and allowing them to access its databases.

Technical co-operation agreement with TCU

In 2018, TCU and CADE signed a technical co-operation agreement to detect anticompetitive practices in procurement. The agreement establishes that the agencies will:

- exchange information, knowledge, technological tools, and professional and technical experiences, including improving and/or adapting systems and databases to allow the exchange of information;
- co-ordinate their efforts to plan, guide, co-operate, evaluate and promote activities related to the investigation, prevention and detection of anticompetitive practices in government procurements and other related activities;
- implement joint actions, within the area of competence of each agency, to conduct studies and research in areas of mutual interest;
- promote joint staff training through courses, seminars or other related activities; and
- share relevant studies, opinions, technical notes and other documents with public procurement bodies.

Technical co-operation agreement with CGU

CADE signed an agreement with CGU in 2014 in order to promote technical and operational co-operation to prosecute corruption in procurement. CADE and CGU committed to share information and evidence obtained in the context of their investigations. Furthermore, both agencies committed to provide operational technical support when requested.

CADE may conduct joint dawn raids with other entities. Since 2003, 34 out of 50 dawn raids were conducted jointly with public prosecutors or other entities, such as TCU and CGU. In these cases, it is common practice to ask the judge in advance for permission to share any seized evidence among the agencies participating in the joint inspection.

Co-operation with other enforcers may allow CADE to gain access to information that it cannot seize itself, such as confidential tax information or information from wiretaps. This is particularly the case when the judge provides CADE with access to evidence obtained by public prosecutors during a criminal

investigation. Also, public bodies have a duty to provide CADE with the information concerning competition infringements of which they become aware.

Conversely, CADE also has a duty to share information concerning infringements on issues other than competition law with the relevant authority. The conditions for sharing the information depend on how it has been obtained. If obtained through a leniency application or a cease-and-desist agreement, the information is only disclosed if the information provider signs a waiver. In practice, most providers sign. To share information with other enforcers, CADE requires leniency applicants not to be put in a worse position than companies that have not co-operated.

If CADE has obtained information through dawn raids conducted with other entities, it is common practice to ask the judge in advance for permission to share the evidence seized among entities. If the information has been obtained in a dawn raid carried autonomously by CADE but is relevant for another public entity, CADE must request the judge that authorised the dawn raid to allow the information to be transferred to that entity.

In the case of information obtained pursuant to a judicial order, including dawn raids, if CADE has not previously shared the information, other authorities must request access from the judge. If the judge grants access, CADE must provide it.

In other cases, such as information obtained pursuant to an information request, CADE can decide to share the information, as long as it does not harm its own investigation.

Despite the increasing number of co-operation arrangements, the OECD fact-finding mission has shown that co-operation between CADE and other agencies varies from case to case and largely depends on individual officials dealing with each case.

Part II. How to align public-procurement rules and practices in Brazil with the OECD Recommendation and Guidelines on fighting bid rigging

5. The essential role of public-procurement officials

Public-procurement departments in Brazil have a high staff turnover: between January 2015 to December 2018, 73.98% against 53.11% in other areas of public administration.⁷⁷ The profession is not popular among public officials, partly due the severity of penalties for employees who wrongly apply procurement rules and the lack of clarity regarding their interpretation. Moreover, there is no dedicated civil-service career path for procurement officials, capacity building is underdeveloped, and salaries are seen as too low. The current system may be preventing the development of strategic procurement and be reducing innovation.

TCU can impose penalties of up to BRL 67,854 upon public officials for wrongly applying procurement rules,⁷⁸ including for non-intentional acts that do not involve private gain. The lowest fine TCU can apply is BRL 5 000, despite the monthly salaries of some public-procurement officials not exceeding BRL 9 000. For example, public-procurement officials may be sanctioned for not complying with a formality such as failing to submit a document within a specific deadline. This is widely perceived as excessive. The new law 14.133/2021 introduces some measures that aim at lessening the excessive exposure that individual procurement officials may feel when applying procurement rules. The new law provides that a support team will accompany the procurement official and he or she will not be held liable for actions suggested by the support team. Also, a contracting commission made up of at least 3 members will take care of special goods and works procurement. These provisions, however, had not yet been implemented and tested at the time of drafting. It is unclear how the support team will be created, how it will interact with the procurement officials and what the new law means by special goods and works.

Fines are designed to have a punitive, rather than a corrective, effect. At the institutional level, public entities do not focus on systemic reform that might rectify employee wrongdoings, avoid individual penalties and prevent further errors; for example, by improving and standardising procedures or training staff.

The OECD's fact-finding mission also uncovered the existence of conflicting decisions by TCU. In general, TCU's judges must follow TCU case law, but they do have some discretion and can decide differently depending on the perceived impact of their decisions. This way of interpreting the law and the case law is known under Brazilian law as "consequentialism". Differing interpretations of the same procurement rules increase legal uncertainty for both the private and the public sector. As public-procurement officials do not have clear guidelines on how to act, they adopt conservative solutions rather than innovate and take the risk of been sanctioned.

The problem has been highlighted by groups such as Unidos Contra A Corrupcao, a coalition of NGOs, non-political movements and institutions representing civil society, academia and local governments, which has made a proposal to standardise procedures and end the uncertainty around the interpretation of procurement and other administrative rules. In its report, *Novas Medidas Contra a Corrupção*, it suggests the creation of a National State Council (Conselho Nacional de Estado, CNE); this permanent body would be linked to the National Congress but retain functional autonomy to adopt administrative regulation and harmonise rules at national level.⁷⁹ The CNE's jurisdiction would be limited to preventing corruption, promoting publicity and transparency, removing red tape and improving tax policy, public tenders and other forms of contracting. Regulation adopted by the CNE would be binding for the public administration, the

executive and legislative branch at federal, state, federal district, and municipal level. This proposal has not, so far, been taken up.

The role of public-procurement officials in the fight against bid rigging is key. Many bid-rigging cases are initiated following complaints from public-procurement officials, who are in the front line of the procurement process and are the best placed to detect suspicious conduct. Public officials in Brazil are obliged to report any suspicions of bid rigging; otherwise, they can be exposed to administrative, civil and criminal liability. However, no system has been put in place to reward those officials who successfully prevent and detect bid rigging in procurement. In fact, stakeholders have pointed out that civil servants may be reluctant to report suspicions of potential collusion by competitors, as they fear that this can make them subject to an investigation. It is important to create an environment that incentivises officials to co-operate with enforcers.

Also, strategic design of procurement can help prevent collusion among bidders and can promote competitive processes. Public-procurement officials with the capacity and flexibility to strategically plan and design contracting procedures are more likely to adopt initiatives that reduce the risks of bid rigging and create value for money.

In many jurisdictions, public procurement is increasingly recognised as a strategic profession – rather than a simple administrative function – that plays a central role in preventing mismanagement, waste, and potential corruption and bid rigging. Adequate employment conditions and incentives – in terms of remuneration, bonuses and career prospects – help attract and retain highly skilled professionals. Capacity building should also be sufficient to ensure that procurement officials are able to fulfil their various tasks. Mobility in the administration should also be encouraged to the greatest extent possible and supported by adequate training (OECD, 2019^[9]).

International examples could be followed. For example, the Canadian government has developed a certification program for federal procurement officials (see Box 5.1).

Box 5.1. The Canadian Certification Program for the Federal Government Procurement and Materiel Management Communities

The Canadian Federal Government's Procurement Community - in charge of planning and acquiring goods and services - and Materiel Management Community- in charge of the management of the government's movable and tangible assets (vehicles, equipment, furniture, furnishings, etc.) throughout their life cycle - have become a more knowledge-based profession, with an emphasis on a strategic advisory role. Officials working in these units should show they possess the advanced skills and knowledge required to function effectively and efficiently. In 2006, a certification program was launched and it received national and international recognition as the Federal Government's first ever Certification Programme for Procurement and Materiel Management specialists.

This program recognises the joint responsibility of the procurement and materiel management communities for the lifecycle management of assets, from assessment and planning of requirements throughout acquisition until disposal.

The certification provides professional recognition for the procurement and materiel management professions and formally acknowledges official's level of achievement. Procurement specialists can acquire the certification as a Certified Federal Specialist in Procurement, Level I and II, and those in materiel management can acquire certification as a Certified Federal Specialist in Materiel Management Level I. The certification is awarded to officials that have the required years of experience. It evaluates the core and functional competencies of officials. Candidates must attend all the trainings and knowledge is assessed by a final exam.

Source: (OECD, 2016^[10]) and <https://www.tpsgc-pwgsc.gc.ca/ongc-cqsb/certification/index-eng.html>

Also, in October 2017 the EU made a recommendation on the professionalisation of public-procurement employees as a part of its public-procurement package (European Union, 2017^[11]). The document, "Making Public Procurement work in and for Europe" recommended that member states develop and implement long-term professionalisation strategies for public procurement, tailored to staff needs, resources and administrative structure; these could be standalone or as part of wider professionalisation policies of public administration. The document identified three initiatives:

- **policy architecture** to create an overall strategy to increase the professionalism of public procurement
- **human resources** to provide training and a career path for public procurers
- **systems** to supply structured tools, methodologies and processes to support the professionalisation of public procurement.

As one of the most important global standard setters for public procurement, the EU system illustrates the importance of building procurers' capacities. Around the world, other institutions are following a global trend by pushing for greater professionalisation of public procurement. The World Bank, for example, has organised co-ordinated professionalisation activities for interested countries, ranging from training to guidance (OECD, 2019^[11]). The OECD has also helped countries develop strategies to build-up the capacities of the procurement workforce. Box 5.2 shows an example in Lithuania of this type of co-operation.

Box 5.2. Support for the improvement of the Lithuanian public-procurement system through professionalisation of the national workforce

Lithuania has been actively implementing public-sector and public-procurement reforms to achieve sustainable and inclusive growth, while ensuring an efficient utilisation of public funds.

Despite a relatively sound procurement system, the system to build capacity among the public-procurement workforce was fragmented and lacked any professionalisation strategy and certification framework.

After a request from Lithuania to its Structural Reform Support Service (SRSS), the European Commission agreed to provide technical support – through financial support to the OECD – to assist Lithuania in improving its public-procurement system. These initiatives included establishing a professionalisation strategy and certification framework for the public-procurement workforce. During its mission, which lasted from March 2018 to March 2019, the OECD:

- assessed the capacity of the national public-procurement workforce to identify challenges and training priorities,
- developed a two-level certification framework that consisted of 60-hour training courses, a professionalisation strategy, training materials for 14 courses (31 hours of the required 60, and examinations held in English and Lithuanian,
- carried out “training of trainers” workshops (5 days) and pilot sessions (4 days) for 14 procurement courses that trained 29 future instructors in the certification framework.

Source: www.oecd.org/gov/public-procurement/country-projects/lithuania-professionalisation-innovation.

5.1. Recommendations for action

The under-professionalisation of public-procurement officials, the excessive penalties imposed on officials for procedural mistakes, and the lack of clear guidelines on the interpretation of procurement rules are preventing the development of more efficient and competitive procurement.

The OECD recommends that Brazil should:

1. improve employment conditions and incentives for the public-procurement workforce and develop a professionalisation strategy and certification framework, including training on fighting bid rigging (see Section 10.2 for specific recommendations)
2. emphasise improving and correcting systemic practices within the procurement workforce rather than imposing individual sanctions upon public officials
3. standardise the interpretation of procurement rules, and so consider involving the proposals of actors within civil society as part of the debate.

Brazil may also consider establishing incentives for procurement officials to effectively prevent and detect bid rigging (for example by designing procurement that maximises participation and reporting suspicions of anticompetitive behaviour) by including the successful detection of anticompetitive practices in career-path assessments and consider introducing rewards.

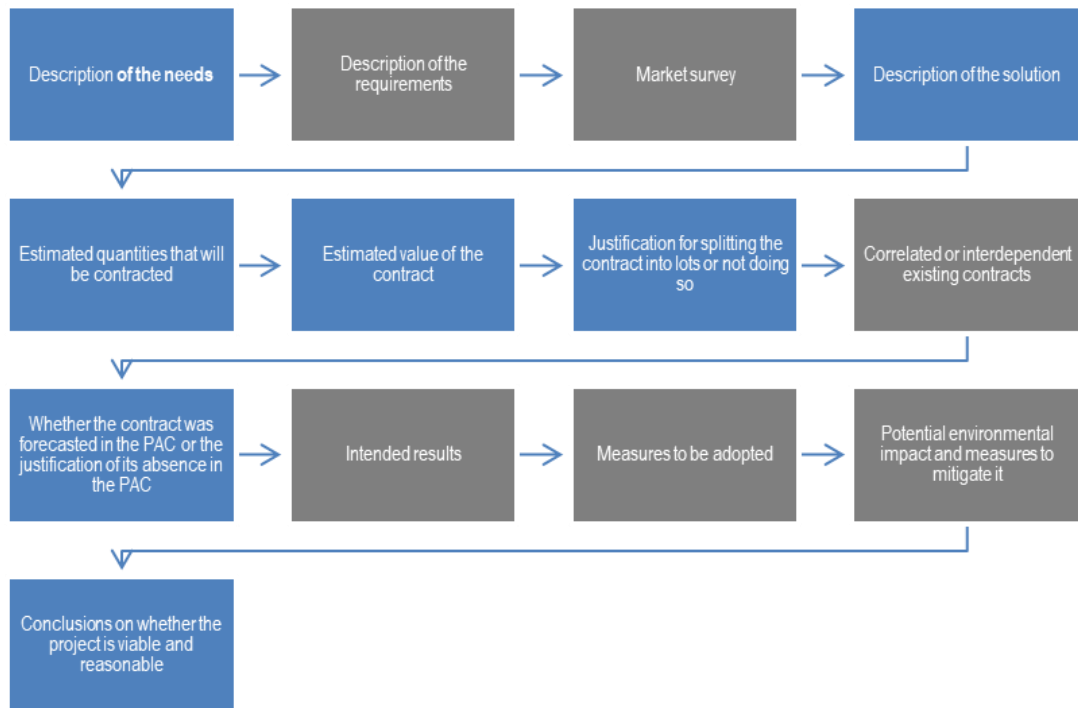
6. Designing procurement procedures based upon appropriate information

6.1. Public-procurement planning in Brazil

Since 2019, Brazil has considerably improved procurement planning at federal level. For example, federal entities must now create an annual contracting plan (*Plano Anual de Contratações*, PAC), which includes the projected contracts for the following financial year. The PAC is created electronically in the national electronic procurement system Comprasnet; an aggregated version is then made available in the *painel de compras*, a Comprasnet module. The PAC helps a public entity match its allocated budget to its identified needs. It is also useful for adopting strategic decisions, such as aggregating demand and scheduling procurement throughout the financial year. Moreover, the publication of the PAC allows potential contractors to plan ahead and make the necessary arrangements and investments to participate in tenders. The information contained in the public version of PAC should, however, be as broad as possible as detailed information can facilitate bid rigging (see Section 9.1).

Since 2020, federal entities are also required to conduct a preliminary technical study (*estudo técnico preliminar*, ETP) when planning procurement of goods, services and works (see Section 3.1). An ETP allows entities to identify needs and find solutions consistent with the public interest, their strategic objectives, and options available in the market. Comprasnet includes a tool allowing public entities to create electronic ETPs. Figure 6.1 shows the elements that an ETP should contain. Boxes in blue include mandatory fields.

Figure 6.1. Necessary elements of an ETP



Source: Based upon Article 7 of Regulatory Instruction No. 40/2020.

The technical department and the requesting unit (i.e. the unit that needs the goods or services) and, when it exists, the contracting planning team are in charge of carrying out the technical preliminary study. The **market survey phase**, which allows identifying and analysing possible alternative solutions in the market, is not mandatory.

The Regulatory Instruction No. 40/2020 about the ETP indicates the information sources that must be used to complete the market-survey phase: 1) similar contracts of other entities to identify new methodologies, technologies or innovations that better meet the administration's needs; and 2) public consultations, public hearings or transparent dialogue with potential bidders. The regulation is silent about the information sources necessary to complete the remaining steps of the ETP, such as the description of the needs or the estimated value of the contract.

The **price research** that public entities must carry out to estimate the price above which an offer will be considered unacceptable is also part of the procurement planning. Regulation No 73/2020 sets out the parameters and the methodology to carry out this research. The research should be based on the following sources of information:

- the Comprasnet price panel, containing information on prices already paid by the administration up to one year prior to the date of disclosure of the invitation to tender;
- similar contracts concluded by other public entities that are still in force or expired within one year prior to the date of disclosure of the invitation to tender;
- research published in specialised media and on specialised or general websites up to one year prior to the date of disclosure of the invitation to tender;
- surveys among suppliers conducted no more than 180 days before the price research.

Public entities should give priority to information coming from the Comprasnet price panel and similar contracts. Estimations of the reference price should be based on an average, the median or the lowest price

of at least three prices obtained from the above sources. A competent authority can use also other methodologies if justified, and may also disregard excessively low or high prices, but must state its reasons. Additionally, the price research will be put in a document that must contain, at least the (a) identification of the agent responsible for the quotation, (b) the sources consulted, (c) series of prices collected, (d) mathematical method applied to calculate the estimated value; and (e) justifications for the methodology used.

The **public hearings** organised before the publication of a tender notice for high-value contracts (above BRL 300 million)⁸⁰ can also be used for procurement planning. This dialogue between the procurement entity and the private sector can serve as a forum for exchanging information about innovative and alternative solutions. This is not, however, currently the case. OECD fact-finding showed that public hearings are generally used for transparency purposes when social aspects of major projects are discussed. Discussion during public hearings remains general and technical aspects of the projects are rarely considered. Moreover, private companies are understandably generally reluctant to talk publicly about proprietary or secret technical solutions.

Despite the recent reforms introducing the PAC and the extension of the ETP to all procurement processes, procurement planning in Brazil remains underdeveloped. The reforms and their effectiveness have yet to be assessed. In the past, procurement rules and practices in Brazil have traditionally focused on the bidding process and disregarded the planning and the execution phase. For example, OECD fact-finding showed that, in most cases, procurement officials consider the ETP as a mere formality and simply fill in the form without conducting any thorough research. While some federal agencies have the maturity, the budget, the staff and the internal procedures in place to plan procurement properly, most lack the time and the staff with the capacity and knowledge to conduct fully-fledged market research. In general, ETPs lack specific elements – such as those goods and services available in the market and the prices – which are important to designing competitive procurement.

6.2. Building market intelligence

Market intelligence is information on the characteristics of specific goods or services or sectors of economic activity. In procurement, that information helps identify cost-effective purchasing opportunities, develop strategies that meet buying needs, and design competitive tenders. Market intelligence has two aspects:

1. **internal:** understanding contracting needs
2. **external:** understanding supply solutions and capacity, and identifying market trends, also known as market research or analysis (OECD, 2016^[13]).

This section focuses on external market research, which helps a procuring entity understand supply solutions and capacity, and, on this basis, design tenders that are technically accurate, take into account alternative and innovative solutions, and foster competitive bidding, while reducing the likelihood of collusion among the bidders (OECD, 2018^[14]).

The types of decisions that benefit from internal and external market intelligence include technical specifications of tenders; budgets or reference prices; grouping contracts into a single or multiple lots; whether demand should be aggregated; and specific tender procedures, such as open competitive tender, price request, invitation to bid, reverse auction, or differentiated procurement regime (OECD, 2018^[14]).

External market research should identify, at least:

- suppliers present in the market, new entrants or new potential entrants and their location, size, capabilities, available capacity, and previous performance;
- available goods and services, including the latest innovative solutions and international developments, prices, discount policies, delivery conditions and other terms and conditions of sale;

- local conditions of supply and demand that might inform the tender design, including the composition of lots or contract awards by geographical zones; and
- market characteristics that could make bid rigging more or less likely, such as levels of transparency in the bidding market, supplier numbers, and barriers to new entry.

The elements of external market analysis are detailed in Box 6.1.

Box 6.1. Elements of supply-market analysis

Supply market analysis provides a **strategic understanding** of:

- how a market works;
- a market's direction, including technological developments;
- a market's competitiveness;
- a market's capability, capacity and performance;
- information on key suppliers, market shares and risks of collusion;
- how a market can be developed better to meet customer requirements;
- how pricing works in a market, such as its cost structures and recent price trends;
- a market's risks and how to mitigate them; and
- the probability of market failure.

The **outputs** of market analysis for tender procedures include:

- planning and budgeting the procurement activity;
- designing tender documents that match public entities' needs with suppliers' available solutions, including relevant and correct specifications, and evaluation and award criteria;
- choosing the correct procurement procedure and strategy, both in terms of how the market currently operates and its future, in relation to new entrants or innovative technology;
- structuring public tenders to obtain healthy competitive bids; and
- procuring without negatively affecting the supply base.

Key outcomes are:

- improved value for money;
- identification and management of supply-related risks; and
- increased and fairer opportunities for suppliers.

The benefits of supply-market analysis increase in proportion to the degree of business risk and expenditure on goods or services.

Source: (OECD, 2016^[9]).

Undertaking external market intelligence is not mandatory in Brazil. Public entities do have the obligation to conduct an ETP for all procurement processes, but the market survey step, which allows available solutions to be identified and analysed, is not a requirement. It is not clear how some of the mandatory elements of the ETP (such as the description of the solution, estimation of quantities needed and justification for splitting the contract into lots) can be determined without a proper assessment of the available suppliers and solutions in the market, actual or potential suppliers, and their capacity to deliver.

Brazil should make the market survey step mandatory for all procurement processes (possibly with the exception of low value repetitive tenders, for which market research has recently been conducted) and adopt guidelines on how to conduct them. Section 6.2 contains some recommendations on what elements these guidelines may include.

Allocating appropriate time and resources to market surveys

The importance of market surveys in the planning and design of procurement processes requires their being allocated sufficient time and resources. Market surveys should be carried out by teams of public officials with suitable professional backgrounds and experience, who – individually or as a team – understand both procuring units' requirements and market conditions.

A growing trend in OECD countries is to entrust market research to category managers who are familiar with specific products and certain sectors of economic activity (OECD, 2016^[12]).

In Brazil, the law does not identify the area responsible for market analysis. It is generally carried out by civil servants working at the contracting entities who often have received no specific training. Regulatory Instruction No. 40/2020 provides that both the requesting and the technical unit (which is the unit with the specific technical expertise and understanding of the market) are responsible for elaborating the ETP.

The OECD recommends either creating specialised market-research departments inside the contracting entities or ensuring that public procurers have sufficient resources and support to conduct thorough market analysis through existing structures. Teams in charge of market research should be allocated the necessary budget, IT capabilities, and staff knowledgeable about market developments and innovations in the corresponding sector.

Box 6.2 shows how the Mexican Institute of Social Security (*Instituto Mexicano del Seguro Social*, IMSS) set up a market-research unit following a recommendation from the OECD.

Box 6.2. Market-research unit at Instituto Mexicano del Seguro Social (IMSS)

In 2011, the OECD recommended that IMSS overhaul its market studies by allocating them sufficient time, collecting the necessary information from good-quality sources, and keeping information contained in them secret from bidders. IMSS then took significant steps to strengthen its market-research capabilities, particularly at the central procurement level.

From 2012 onwards, in anticipation of more extensive consolidation of procurement, market research became more institutionalised, moving from ad hoc work to systemic research undertaken by a specialised unit.

In June 2016, the market-research unit split from the contracting unit and became independent. As a result of these changes, the central market-research team was composed of 27 employees, was completely autonomous, and was charged with carrying out market research for all consolidated and central tenders; in consolidated tenders, IMSS was the procurement lead for tenders which intended to cover its own buying needs as well as those of other public entities that join the tender (and therefore the tender consolidates needs across public bodies); in central tenders, a central department within IMSS was in charge of buying on behalf of IMSS' central and regional offices (and therefore the running of the procurement was centralised). Members of the team received training from the National Institute of Public Administration (*Instituto Nacional de Administración Pública*, INAP) in topics including market research for public procurement. The team also attended on-site training courses at the Ministry of Public Affairs (*Secretaría de la Función Pública*, SFP) about conducting market research and sharing best practice among public bodies.

By 2018, market research was embedded in IMSS procurement processes, at least for consolidated and central tenders. As the procurement cycle was standardised and was relatively stable allowed sufficient time for market research to be carried out.

Since 2019, IMSS is no longer leading the consolidation of the procurement of medicines. This is carried out by the Mexican Ministry of Finance.

Source: (OECD, 2018_[10]).

Procurement entities in Brazil may also hire external consultants to carry out market research. This is a common practice, in particular for specific parts of market analysis, when public buyers lack the relevant expertise (OECD, 2016_[13]). External consultants should be recruited competitively and required to sign confidentiality agreements and to report any conflicts of interest (see Box 6.3 for the Mexican experience).

Box 6.3. Use of external consultants at IMSS

IMSS always used external advisors at the market-analysis stage. Initially, external consultants took a prominent role in the performance of market research. As IMSS improved its market-analysis expertise and built a specialised in-house market-analysis unit, external consultants' tasks were reduced to an advisory and support role during the process of auction design, such as the products and services that should be included in each auction and the composition of lots.

Source: (OECD, 2018_[10])

Sources of information

Regulatory Instruction No. 40/2020 provides for the sources of information that may be used for elaborating market surveys as a non-mandatory part of technical preliminary studies: (a) similar contracts of other entities to identify new methodologies, technologies or innovations that better meet the needs of the administration; and (b) public consultation, public hearing or transparent dialogue with potential bidders. The use of these sources is not compulsory.

Regulation 5/2014, as amended by Regulation 03/2017, sets out the sources of information that procurement entities must consider when conducting a **price research** (see Section 6.1).

Market research should be based in as many sources of information as possible. Historical information that can be found in the price panel and in similar government contracts is a good starting point, but requires supplementing with other sources. Prior contracts may have resulted from non-competitive procedures or been affected by collusive agreements, or simply market conditions may have evolved, reducing historical data's usefulness in the market analysis by not actually reflecting genuine market conditions (OECD, 2018_[13]).

Supply information obtained from potential contractors (see Box 6.4) can be useful. Engaging suppliers at different stages of the procurement process helps reduce the information asymmetry between the market and the procuring entity. Indeed, suppliers often have more information than the procuring entity regarding costs, prices, market trends, products or services, and their substitutes. Early exchanges with suppliers may also maximise participation in the tender procedure, allowing potential bidders the time to prepare their offers (OECD, 2019_[9]). Early-engagement mechanisms, which can range from requests for information, prior information notice, one-on-one consultations with suppliers, information meetings, competitive dialogues to hosting industry and supplier days, can be extremely helpful to contracting

authorities and improve the quality of technical specifications (OECD, 2016^[15]). Many countries publish minutes or summaries of early engagement or roundtable meetings with suppliers, but this practice is not systematic.

According to a 2018 survey conducted by the OECD to assess progress on the implementation of the OECD Recommendation on Public Procurement, 73.5% of 39 respondents countries held regular dialogues with suppliers and business associations in a variety of institutional settings (OECD, 2019^[9]). Box 6.4 illustrates a selection of international experiences with supplier engagement.

Box 6.4. International experience with supplier engagement

In certain countries – such as Belgium, Norway or Hungary – business associations or chambers of commerce participate in institutional committees to discuss the overall procurement system.

In Ireland, the Office for Government Procurement engages with suppliers at six annual workshops.

Certain central purchasing bodies conduct formal and informal consultations directly with a panel of suppliers. This is the case in Italy and Korea, and France, where Industry Days (*conventions entreprises-acheteurs*) allow buyers to meet directly with suppliers.

In Canada, requests for information are issued prior to tenders, while in Greece, the central purchasing body establishes bilateral dialogue with relevant suppliers selected from the Central Electronic Registry for Public Procurement depending on the goods and services to be procured. In Latvia, contracting authorities advertise pre-tender market consultation meetings on their website.

In New Zealand, “meet the buyers” are organised for certain categories of suppliers, such as SMEs.

Source: (OECD, 2019^[11]).

Brazil should make the use of all the sources of information included in Regulatory Instruction No. 5/2014 on price research and Regulatory Instruction No. 40/2020 on market surveys mandatory, including early engagement with suppliers in the form of public hearings, public consultation or transparent informal dialogue. Other sources of information may also be considered when conducting price and market research. These include:

- International experiences with procurement of the same or equivalent product, service or work; even if market conditions can differ, this can be an appropriate benchmark.
- Contract execution information – rather than tender outcomes – such as supply shortages, breaches or termination of contracts and contract modifications, particularly from requesting units; this can be valuable in the design and specifications of calls for tender.
- Local conditions of supply and demand, which may include the geographical location and proximity to sources of supply or particular characteristics in terms of the pattern of consumption; these should inform the tender design, including the make-up of lots or awarding contracts for geographical zones.

All sources of information should be documented and guidelines on their correct usage are recommended.

For early engagement with suppliers, public entities should privilege meeting suppliers individually rather than gathering them all in the same place or rely on digital tools that ensure anonymity of the participants to such meetings, in particular, for tenders in markets that are more prone to collusion (see Section 9.4). Public entities should also take care not to tailor tender terms using exclusively or too faithfully information provided by potential contractors during the market analysis; they should use a variety of other sources and their own judgement to adapt tenders to market reality.

There have been cases where companies have been known to co-ordinate the information provided during market analysis to influence a contracting entity's procurement decisions. Box 6.5 shows an investigation by the Mexican competition authority, COFECE, into the manipulation of price quotes during the market-analysis phase of a procurement process.

Box 6.5. COFECE investigation into manipulation of quotes in market research, Mexico

On 30 January 2018, COFECE announced that it had imposed fines of over MXN 7 million on three companies and several individuals for rigging public-procurement procedures of media-monitoring services for a number of public bodies over the period 2012-2016.

COFECE found that the companies had agreed to: 1) manipulate the price quotes submitted during the market-analysis stage; 2) co-ordinate bids; and 3) strategically abstain from bidding in certain procurement procedures. One company was then awarded contracts for media-monitoring services, while the other colluding companies were rewarded with subcontracts or assignments of related services by the winner.

COFECE estimated that the collusion resulted in an average overcharge of 14.5%, which translated into damages of over MXN 3 million.

Source: COFECE (2018), press release COFECE-05-2018, www.cofece.mx/wp-content/uploads/2018/02/COFECE-05-2018-COFECE.pdf.

Early consultation with suppliers should also be subject to publicity and transparency rules, which may include, for instance, publishing minutes or summaries of early engagement or roundtable meetings with suppliers (OECD, 2019^[9]). Box 6.6 shows how the Chilean central purchasing body, *ChileCompra*, uses electronic means to ensure transparency of its consultation process with suppliers. Dialogue with potential suppliers could take into consideration the questions and points illustrated in Box 6.7.

Box 6.6. Consultation with suppliers by the Chilean central purchasing body *ChileCompra*

Prior to issuing a tender, ChileCompra carries out an open consultation process with suppliers, which it announces online at <https://www.chilecompra.cl/> as well as on twitter. The consultation aims to obtain information about prices, the characteristics of the required goods or services, the time that bidders need to prepare, and any other information that might contribute to a successful tendering process.

ChileCompra also has an online forum with questions and answers about each tender in advance of bid deadlines. This is particularly practical for possible suppliers who are geographically distant from Santiago, where *ChileCompra*'s offices are located. It also ensures transparency and supports equitable treatment and fair competition.

Source: OECD Public Procurement Toolbox (2016), "Country Case: Consultation with suppliers by the Chilean central purchasing body ChileCompra", www.oecd.org/governance/procurement/toolbox/search/consultation-suppliers-chilean-central-purchasing-body-ChileCompra.pdf.

Box 6.7. Example questions to open a dialogue with potential suppliers

- Are you interested in this opportunity?
- If not, why not?
- Is the business model realistic?
- Are the business aims realistic? Is the business attractive?
- What do you see as the risks?
- Can you give an early indication of cost, the major cost drivers, and how these can be minimised?
- Can you give a broad indication of the likely timescales?
- Are there other, better approaches?
- What added value in terms of sustainability could the potential supplier provide related to the contract's subject matter?
- How can potential suppliers provide added value on sustainability and other issues over and above the regulations' requirements?
- Can you share examples of good or bad practice in terms of how others have tried to secure these products or services and what we can do to ensure clarity and improve the tendering process for potential suppliers?

Source: Extract from Route 3 (Supply Market Analysis - Example Questions) of the Scottish government's "Procurement Journey". www.procurementjourney.scot/supply-market-analysis-example-questions

Standard procedure for conducting a market analysis

Brazil does not have a standardised procedure for conducting market surveys. As explained in Section 6.1, procurement entities are not obliged to conduct market surveys, which has perhaps led to their being no guidelines available on how to do so.

In addition to an obligation to conduct market surveys as recommended in Section 6.1, Brazil might consider introducing standardised guidelines for their operation. Some OECD countries provide contracting entities with guidelines on how to carry out relevant and structured market analysis. For example, in Australia, Queensland's state government has developed guidelines on how to carry out relevant and structured market research (see Box 6.8).

Box 6.8. Guidelines on supply market research from Queensland, Australia

Supply Market Analysis, a set of guidelines published by the Queensland state government, emphasises the importance of conducting solid supply market analysis. According to the document, resources invested in supply market analysis for procurement are always more than offset by the benefits gained in improved value for money and reduced risk for the agency.

According to the guidelines, the steps for conducting a structured market analysis are the following:

1. Planning for supply market analysis

- a. **Preliminary steps** to understand the need and business requirements for the product or service and to check whether a supply market analysis has been recently conducted within government (or is planned to be conducted) for the category of product or service under consideration.
- b. **Development of a research plan**, by defining a project schedule outlining the key activities and timelines for finalising the analysis; clearly establishing the goals, objectives and scope of the analysis; identifying the human, financial and physical resources required to undertake the analysis; establishing a sound framework for undertaking the research; and finally, identifying potential information sources and research methods.

2. Components of a supply market analysis

- a. **Market structure**: determining the relevant market or market segments; total market size; key suppliers in the market and their respective market shares; existing ownership structures in the market; and profitability of different suppliers.
- b. **Competition**: analysing of how suppliers compete in the market, including the availability and current and future pricing of products and services; future trends; and the likelihood of competitors entering or leaving the market.
- c. **Supply chains**: investigating all parties involved in the process of creating a good or service – from inputs to production, distribution and marketing to the end user – to analyse the supply chain to understand the different parties' added value; possible unnecessary costs within it; dependencies within it and their potential risks, and how they and other risks can be managed.
- d. **Substitute goods and services**: exploring substitute goods or services to look into alternative ways of realising the agency's requirements.
- e. **Agency's value as a customer (or buyer power)**: understanding the agency's value to the supply market, and to individual suppliers in order to develop strategies based upon suppliers' willingness or reluctance to meet agency needs; this may identify how a contracting entity can be seen as a more attractive customer, and so increase competition for its requirements.

Supply Market Analysis includes many examples to help procurement officials better understand each step of the market research.

Source: Queensland Government, Department of House and Public Works (2020), *Supply Market Analysis: Office of the Chief Advisor – Procurement*, www.for.gov.qld.gov.au/search-procurement-resources/supply-market-analysis.

The electronic form developed by the Ministry of the Economy for ETP could include such as standardised procedure for the market survey. This would help ensure that all market surveys meet at least minimum requirements, and information can be more easily shared between procuring authorities.

Exchanging good practices among public-procurement entities

Comprasnet, the Brazilian e-procurement tool, provides a good platform for posting and sharing tender and contract information. Since 1 July 2020, Comprasnet has allowed procurement entities to access the ETPs carried out by other entities, which can help standardise processes and promote procedural economy. As well as this electronic information exchange, Brazil could explore ways in which procurement entities active in similar sectors could exchange valuable details of best practices, such as:

- comparative results from differently designed tenders;
- identification of suspicious bidding patterns;
- benchmarking comparisons of the supplier pool participating in tenders for similar contracts, and prices offered; and
- market intelligence.

Box 6.9 shows how contracting authorities from 17 levels of government in Argentina created a network to share relevant information. Brazil has developed a similar initiative, the National Network of Public Purchases (*Rede Nacional de Compras Públicas*).⁸¹ This network gathers procuring agencies at federal, federal district, state and municipal level and promotes the sharing of experiences among them. It also aims at professionalising the public procurement function and integrating information for the improvement, modernization and greater efficiency of public procurement. At the time of writing, the network was still in its initial phase. Brazil could promote the sharing of information and practices mentioned above by developing and using this network.

Box 6.9. Federal Network of Government Procurement, Argentina

In Argentina, each of the three government levels – national, provincial and municipal – can adopt its own contracting regime. This has resulted in inefficiencies for suppliers, contracting authorities, and citizens. Suppliers have been faced with different contracting rules and e-procurement systems, and if providing goods, services and works in different provinces have often been required to submit the same document for each procurement procedure. This saw increased costs for submitting bids and has had a negative impact on competition.

Against this background, in 2009 contracting authorities from 17 levels of government decided to create the Federal Network of Government Procurement (*Red Federal de Contrataciones Gubernamentales*). The main objectives of the network are to: 1) strengthen its members' contracting regimes; 2) share good practices; 3) promote capacity building; 4) establish co-operation and exchange of information mechanisms; and 5) promote law harmonisation.

The network meets regularly and invites officials or experts from other entities (such as the competition agency) to talk on relevant topics. Network members have reported that the meetings are useful and allow them improve their procurement processes.

Source: (Montes and Fretes, 2013^[12]).

6.3. Recommendations for action

Brazil should make the market survey step mandatory for all procurement processes (possibly with the exception of low value repetitive tenders, for which market research has recently been conducted) and

adopt guidelines on how to conduct them. The electronic form developed by the Ministry of the Economy for ETP could include such a standardised procedure for the market survey.

The OECD recommends either creating specialised market-research departments inside the contracting entities or ensuring that public procurers have sufficient resources and support to conduct thorough market analysis through existing structures. Teams in charge of market research should be allocated the necessary budget, IT capabilities, and staff knowledgeable about market developments and innovations in the corresponding sector.

Brazil should make mandatory the use of all the sources of information included in Regulatory Instruction No. 5/2014 on price research and Regulatory Instruction No. 40/2020 on market surveys, including early engagement with suppliers in the form of public hearings, public consultation or transparent informal dialogue. Other sources of information may also be considered when conducting price and market research. These include:

- International experiences with procurement of the same or equivalent product, service or work; even if market conditions can differ, this can be an appropriate benchmark.
- Contract execution information – rather than tender outcomes – such as supply shortages, breaches or termination of contracts and contract modifications, particularly from requesting units; this can be valuable in the design and specifications of calls for tender.
- Local conditions of supply and demand, which may include the geographical location and proximity to sources of supply or particular characteristics in terms of the pattern of consumption; these should inform the tender design, including the make-up of lots or awarding contracts for geographical zones.

All sources of information should be documented and guidelines on their correct usage are recommended.

For early engagement with suppliers, public entities should privilege meeting suppliers individually rather than gathering them all in the same place or rely on digital tools that ensure anonymity of the participants to such meetings, in particular, for tenders in markets that are more prone to collusion (see Section 9.4). Public entities should also take care not to tailor tender terms using exclusively or too faithfully information provided by potential contractors during the market analysis; they should use a variety of other sources and their own judgement to adapt tenders to market reality. Early consultation with suppliers should also be subject to publicity and transparency rules.

Brazil could explore ways in which procurement entities active in similar sectors could exchange valuable details of best practices, such as comparative results from differently designed tenders, identification of suspicious bidding patterns, benchmarking comparisons of the supplier pool participating in tenders for similar contracts, and prices offered; and market intelligence.

7. Maximising participation of genuine competing bidders

Maximising the participation of bidders increases competition and reduces the risks of bid rigging, which in turn increases the likelihood of obtaining value for money (as long as participation is genuine).

7.1. Prioritising competitive bidding

During the period 2017-2019, most public procurement funds in Brazil were assigned using direct awards. In 2017, for example, 75% of the value of federal contracts was directly awarded. This percentage has since decreased, which is a positive development, but direct awards still represented 54% of the value of federal contracts in 2019 (see Figure 7.1). The use of direct awards differs among procurement entities in Brazil and seems to be inversely correlated to the complexity of procurement contracts. For example, only 6.23% of the value of the complex infrastructure contracts procured by the Ministry of Infrastructure in 2019 was directly awarded. For the Ministry of Education that figure was 50%, while the Ministry of Health used direct awards for 33% of the value of its contracts.⁸²

At the time of drafting this report, the COVID-19 pandemic had created an unprecedented health and economic crisis that has caused severe shocks in the supply and distribution chain of goods, works and services used by the public sector. At the same time, public purchasers around the world have urgently needed specific goods at dramatically increased volumes, in particular for face masks, protective gloves, ventilators, beds, medicines, intensive care material, COVID-19 tests, lab supplies and hospital infrastructure (OECD, 2020_[17]).

Box 7.1. OECD policy paper, COVID-19: Competition and emergency procurement

In the context of the COVID-19 pandemic, the OECD published a policy paper with recommendations to public procurement entities and competition authorities on emergency purchases:

Public procurement entities should:

- Follow national and international rules and guidelines on emergency and Covid-19 related procurement.
- Use direct awards only to respond to current, urgent and unforeseeable needs.
- Check first whether they can renew or extend existing contracts before a direct award.
- Ensure that the supplier with whom they intend to contract is the only one able to provide the required goods, services and/or works on time. If there are a number of possible alternative suppliers consider whether there is time to conduct a fast-track competitive procedure. If there is no time, a direct award to one or more of the available suppliers can be justified.
- Use, to the extent possible, existing market intelligence to inform decisions on emergency purchases. Existing procurement data on observed prices, suppliers, capacities, etc. could be useful to get an overall picture of market conditions before the pandemic, and negotiate prices and delivery terms during the crisis.
- Pool forces and conduct joint procurements to attract suppliers, achieve economies of process and limit price spikes through economies of scale and exercise of purchasing power.
- Phase out direct award procedures and contracts as needs become foreseeable and start planning competitive tendering for the medium and long-term needs resulting from the crisis.

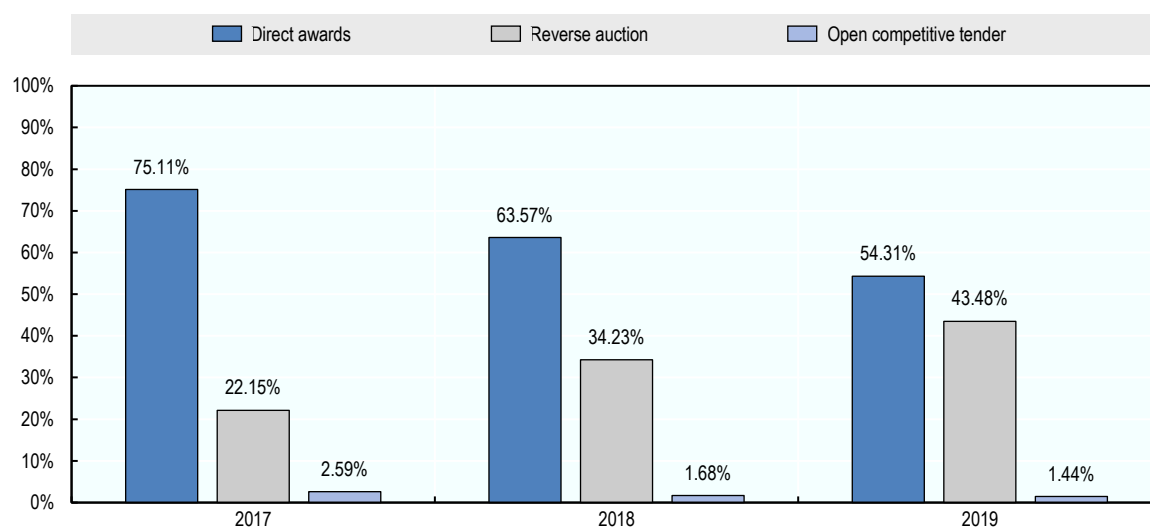
Competition authorities should:

- Intensify their competition advocacy initiatives vis-à-vis procurement entities to alert them to the risks and conditions that should be met for emergency direct awards to be considered.
- Be vigilant and monitor suspicious selling patterns (i.e. high prices) in Covid-19 emergency procurements.

Source: <https://www.oecd.org/competition/COVID-19-competition-and-emergency-procurement.pdf>

This context of reduced supply-side capacity and increased demand has urged public administrations around the world increasingly using direct awards to satisfy emergency needs. This has also been the case in Brazil, where 87% of the value of federal contracts from January to June 2020 were directly awarded.⁸³ Federal Law No. 13.979/2020, adopted to fight the public health emergency caused by the COVID-19,⁸⁴ establishes that competitive tendering is suspended for the acquisition of goods, services, and inputs purchased as part of the pandemic response. This exemption will only be valid during the public-health emergency. The law also simplified the tender procedure for competitive procedures by, for example, removing the obligation to carry out ETPs for common goods and services and allowing for simplified tender terms.

Figure 7.1. Procurement methods in terms of contract value, 2017-2019



Note: The use of other procurement methods is insubstantial. Note that the contract data published in www.portaltransparencia.gov.br includes contracts concluded by the public entities with state-owned enterprises, which are exempted from the application of the public procurement laws and are, in general, directly awarded.

Source: www.portaltransparencia.gov.br/licitacoes?ano=2017.

The OECD Recommendation on Public Procurement encourages the use of competitive bidding as a standard procurement method and the restriction of direct awards (OECD, 2015^[18]). Competitive bidding is the most effective way to obtain value for money. Genuine rivalry among participants – when they construct and make bids completely independently – drives efficiencies, fights corruption, obtains fair and reasonable pricing and ensures competitive outcomes, resulting in better quality and more innovative solutions. For example, the use of competitive tendering by the Mexican Institute of Social Security (IMSS) during 2013-2017 resulted in prices 11.2% to 11.9% lower than the price prevailing when a direct award or a restricted invitation was used (OECD, 2018^[14]).

Brazil should tighten the conditions under which direct awards can be used (see Box 7.1). It should further control when these exceptional procedures are carried out, check if the necessary conditions are strictly met and block unjustified direct awards, if necessary. Box 7.2 illustrates a UK investigation into the contracts that were awarded during the first four months of the COVID-19 pandemic. The investigation found irregularities in some of the awarding procedures (most of them direct awards or direct contracts under existing framework agreements).

Box 7.2. UK Investigation into government procurement during the COVID-19 pandemic

On 18 November 2020, the UK comptroller and auditor general issued a report regarding an investigation on government procurement during the COVID-19 pandemic covering the period from March to 31 July 2020.

By 31 July 2020, over 8,600 contracts related to the pandemic were awarded, with a value of £18.0 billion. New contracts represented £17.3 billion, of which 60% was awarded through direct contracts, 39 % directly using existing framework agreements and 1% using a competitive tender procedure or a competitive bidding process from a framework agreement.

While the report recognises that the COVID-19 pandemic was an exceptional circumstance it emphasises that the public sector must always respect certain standards. The investigation found that:

- The awarding bodies did not adequately document why a particular supplier was chosen and how any associated risks from a lack of competition were identified and mitigated.
- Some contracts were awarded after some work had already been carried out.
- In certain cases, some of the documentation did not support key procurement decisions, such as why suppliers with low due diligence ratings were awarded contracts or how conflicts of interests were managed.
- Many of the contracts were not made public in a timely manner.

The report concludes with a number of recommendations for the awarding bodies, including:

- The publication of basic information on contracts within 90 days of award.
- Provide clear documentation for establishing and using other contracting procedures than open tenders.
- For direct awards, clearly document how they have considered and managed potential conflicts of interest or bias in the procurement process.

Source: www.nao.org.uk/wp-content/uploads/2020/11/Investigation-into-government-procurement-during-the-COVID-19-pandemic-Summary.pdf

The crisis caused by COVID-19 should not be used as the justification to perpetuate direct awarding of contracts. The duration of the crisis is still uncertain and while the initial impact of the pandemic was unexpected, public purchasing needs in the medium and longer term may be easier to plan. Direct awards should, thus, be gradually abandoned in favour of more competitive procurement solutions (OECD, 2020^[17]).

7.2. Standardised procurement documents

The Office of the General Counsel of the Federal Government (AGU) has developed standard documents for common procurement procedures and made them available on its website.⁸⁵ The templates provide a starting point in the design of tender notices, terms of reference, basic projects of works and services, and contracts. They are intended to ensure the legality of procurement documents and facilitates legal checks by AGU. Regulatory Instruction No. 5/2017 makes the use of AGU's templates mandatory for the contracting of services.

These standardised documents now include: electronic reverse auctions; purchases in the context of COVID-19; procurement of works through the differentiated procurement regime; reverse-auction

procurement of continuous services, which cannot be interrupted without causing damage to the public administration; procurement of non-continuous services; reverse-auction procurement of common engineering services; non-common engineering services; and IT services.

The Ministry of the Economy is also developing templates for creating electronic PACs and ETPs on Comprasnet. TCU has also created its own standardised tender notice and contract for electronic reverse auctions.⁸⁶

Using standardised procurement forms covering all stages of the procurement procedure (from planning to the execution of the contract) streamlines the process, reduces bidding costs and encourages participation in tenders.

Brazil should consider developing standard and mandatory templates for all types of procurement and all stages of the process (planning, tender phase and execution of the contract). All entities involved in overseeing procurement – AGU, TCU, CGU, and eventually CADE – should co-operate in this. Templates should not only serve to ensure the legality of the texts – the main objective of templates developed by AGU – but also consider other elements, such as clarity and strategic planning; for example, by creating conditions that favour participation-encouraging technical specifications.

Box 7.3. Mexican Ministry of Public Administration procurement manual

Mexico's Ministry of Public Administration (*Secretaría de la Función Pública*, SFP) has simplified and standardised procurement processes by developing a procurement manual. First published in 2010, it provides a step-by-step guide for all stages of the procurement cycle – from tender planning and organisation to contract award – and standardises existing procedures in the Mexican public administration. It contains standardised procurement forms (*formatos de contratación*, FO-CONs); templates for the different acts of the procurement cycle, such as the annual procurement plan; requests for quotes; and the document containing market-research results. The use of these templates, which are available in the Mexican e-procurement system, *CompraNet*, and SFP's online library, are mandatory for public entities, unless specific requirements justify the use of a different format.

Source: (OECD, 2018_[15])

7.3. Limiting prequalification of suppliers

Federal Law No. 12.462/2011 (Differentiated Procurement Act) provides for a procedure in which the procurement entity can pre-qualify bidders.⁸⁷ Prequalification excludes bids from non-prequalified bidders, thus lowering the number of bids to be assessed and saving procurement resources. Prequalifying bidders to ensure that they have the necessary technical specialisation and the financial and labour resources to fulfil the contract makes sense where there are many tenderers in the market, and ample supply of the sought goods or services. For complex contracts that require costly preparation, restricting participation to market operators with high levels of specialisation can make the tender more attractive as the chance to win the tender is higher for pre-qualified tenderers than it would be in an open competitive procedure (although in such cases the number of bidders with the required experience and turnover is lower in any event) (OECD, 2014_[19]).

Prequalification may, however, inhibit competition by minimising unnecessarily the number of bidders in a procurement procedure. A procedure involving a reduced number of prequalified bidders reduces price and quality competition. Moreover, the fact that prequalified bidders are made public, as is the case in differentiated procurement processes in Brazil, adds unnecessary transparency to the process (see

Section 9.3). Under these circumstances, prequalified bidders may find it easier to communicate and agree on rigging bids (see for example in Box 7.4).

Box 7.4. Electronuclear public bids (Administrative Proceeding 08700.007351/2015-51)

A leniency agreement signed by the General Superintendence, CADE's investigative body, the Federal Prosecution Service in the State of Paraná, and Brazilian civil engineering and construction company Construções e Comércio Camargo Corrêa led to the opening of this investigation. It revealed an alleged bid-rigging scheme affecting public bids put out to tender by Eletrobras Electronuclear for works at its Angra 3 nuclear power plant.

The design of the procurement process and, in particular, the prequalification phase, favoured the bid-rigging scheme that involved 7 companies and 21 individuals. The procurement process took place in two stages: the pre-qualification of bidders and the competitive bidding. The contract was divided in two lots and a bidder could only win one lot. After only two consortia pre-qualified, they allegedly conspired to fix prices and divide the lots.

Source: CADE (2015), "Cade instaura processo administrativo na investigação de cartel em licitação de Angra 3", www.cade.gov.br/noticias/cade-instaura-processo-administrativo-na-investigacao-de-cartel-em-licitacao-de-angra-3. See also [histórico de conduta](#).

Procurement entities should make sure that the use of prequalification does not limit participation, when for example there are few bidders that can sell the good or service with capacity to deliver the required volumes at the time desired. Market research will be valuable in assessing the status of the supply market. Also, if prequalification is used, the identity of pre-qualified bidders should be kept confidential (see Section 9.3).

7.4. Maximising participation of foreign companies

According to Article 3 of Federal Law No. 8.666/1993 (General Procurement Act), public officials deciding on the winner of a tender should treat national and foreign companies equally; in the case of a tie, however, national goods or services will be preferred.⁸⁸ The same article establishes restrictions for international participation by authorising a preference for contracting national companies under certain circumstances.⁸⁹

The act contains certain other provisions that mention "international tenders". It remains unclear as to what the term means precisely, but there appears to be a general understanding among public and private stakeholders that it refers to procurement of contracts financed by an international financial body or a foreign co-operation agency, such as the World Bank or the Inter-American Development Bank (IADB). The new law 14.133/2021 clarifies this point. International tenders will refer to those conducted in Brazil and where foreign bidders are admitted, with the possibility to offer bids in foreign currency. They will also include tenders for contracts that can or must be executed in another country.⁹⁰ In Brazil, foreign bidders can participate in all procurement processes provided they meet all the legal and technical requirements. However, the OECD's fact-finding has shown that, in practice, foreign companies face more obstacles than national companies. A foreign company wishing to participate in a local tender by itself needs to obtain an authorisation order from the Ministry of the Economy to operate in the country. This is not required if it is participating in a consortium, so the majority of foreign companies prefer to bid jointly with a local company, artificially reducing participation in tenders.

Also, until 11 May 2020, foreign companies without an authorisation order could not be registered in the SICAF electronic suppliers' registry. In case of procurement for works and engineering services, most tender notices require that foreign companies and their engineers are registered in the corresponding

Regional Council of Engineering and Agriculture (*Conselho Regional de Engenharia e Agronomia*, CREA), but they tend to be disadvantaged by the registration procedure as international experience is not recognised by CREA.⁹¹

While CREA registration is not required in tenders for contracts funded by international bodies, foreign companies without an authorisation order from the Ministry of the Economy are required to show compliance with all qualification requirements by presenting equivalent foreign documents authenticated by the relevant consulate and translated by a sworn translator. Complying with all these formalities makes preparation of proposals more costly and complex, which is particularly challenging when tender deadlines are tight.

It is common in Brazil to present a bid for a tender, win the contract and then find it substantially amended after signature (see Section 8.4). Foreign companies are unused to navigating the Brazilian procurement system and in particular, the uncertainties regarding contractual modifications after signature. This makes it complex to calculate the risks of participating in procurement and so often prevent them from doing so.

Brazil has recently announced the adoption of measures to improve equal treatment of foreign companies in procurement processes. On 10 February 2020, the Ministry of the Economy adopted Regulation No. 10/2020 to reduce the bureaucracy for foreign companies. According to this regulation, foreign companies will be able to register in SICAF presenting foreign documents and certifications with free (and not sworn) translation. Sworn translation of documents certificated by the relevant consulate will only be required if the foreign company wins the tender. Furthermore, on 18 May 2020, the government applied for accession to the World Trade Organization's Agreement on Government Procurement (GPA), which requires that procurement processes are open to foreign bidders.⁹²

Brazil should consider further options to relax rules on tendering by international companies and allow for increased independent participation – rather than as part of a consortium – of foreign companies in tenders. It could consider conducting an evaluation of the effect relaxing the rules and further opening up tenders to foreign participants would have on national companies and the economy as a whole. This would provide insights on how best to proceed with legislative modifications, such as reducing restrictions imposed on foreign companies to register with CREA or registration of foreign medical supplies with ANVISA.

7.5. Joint bidding

According to Federal Law No. 8.666/1993 (General Procurement Act), procuring entities may allow joint bidding through consortia and when permitted, must apply specific rules. Companies bidding jointly must commit to creating a consortium that must appoint a leading company, which must be a national company in consortia composed of foreign and national companies. Responsibility for a consortium's acts is equally shared by its members. Finally, companies participating in a procurement process cannot be part of more than one consortium or be part of a consortium and submit a bid separately.⁹³

According to TCU, procurement entities must decide whether to accept or not joint bidding on a case-by-case basis based upon an assessment of the pro- and anti-competitive effects of consortia. Identifying when a joint bid is likely to produce pro-competitive or anticompetitive effects is not straightforward. TCU has recognised that in complex contracts, consortia do allow companies lacking the capacity to participate individually to submit a joint offer with other bidders, which increases participation and fosters competition. On the contrary, allowing consortia of companies that could actually compete with each other can reduce participation and hamper competition.⁹⁴ Joint bidding may be used, for example, to implement a collusive scheme by sharing the market among participants (see Box 7.6). TCU's ruling is in line with general OECD indications for determining pro- or anticompetitive effects of joint bidding (see Box 7.5).

Box 7.5. OECD criteria for determining whether a joint bid is pro- or anticompetitive

Pro-competitive	Anticompetitive
Suppliers are active in different (product) markets.	Each firm has the economic, financial and technical capabilities to fulfil the contract on its own.
Co-operators provide a single integrated service that none could supply independently.	Joint bidders are the strongest competitors in the relevant market.
Two or more providers active in different geographical areas submit a single bid for the whole of the contract area, producing efficiencies.	A joint bid does not produce any efficiencies, or the efficiencies are not passed on to the buyer in terms of lower price, higher quality or better delivery.
Two or more providers combine their capacities to fulfil a contract too large for either individually.	A consortium allows its members to exchange sensitive information that might harm competition in future tenders.

Source: (OECD, 2018^[15]).

Box 7.6. Subway construction bid-rigging scheme, Brazil

In July 2019, CADE imposed fines of up to BRL 535 million upon 11 companies and 42 individuals for participating in a bid-rigging conspiracy for a subway-construction bid.

The bid rigging, which affected 26 tenders and 12 projects in the states of São Paulo, Distrito Federal, Minas Gerais and Porto Alegre, saw cartel participants divide the tenders among themselves and simulate competition in the procedures by, for example, agreeing on bid prices. The bid-rigging scheme included participation in consortia and subcontracting. Cartel members defined which companies would take part in a given consortium and which would bid individually, which companies or consortia would present cover bids, which consortium would win the tender, and the compensation mechanisms for losing bidders, and bidders withdrawing offers or not presenting them at all. Compensation included direct payments and subcontracting.

Source: CADE Administrative Proceeding [08700.003241/2017-81](#).

Although competition authorities are well placed to guide procurement agencies in assessing the competitive effects of joint bidding, this evaluation should not depend entirely on their assessment; they may not be the best-placed entities to evaluate and understand other aspects of the procurement process, such as projects' technical complexity.

In 2018, the Danish Competition and Consumer Authority published guidelines that provide a good example of how thorough guidance on useful criteria can help contracting authorities distinguish whether a joint bid is pro- or anticompetitive; they also contain advice on issues related to information exchange in joint tenders (Danish Competition and Consumer Authority, 2018_[20]).⁹⁵ In its guidelines on how to fight cartels in public procurement, CADE sets out some of the conditions under which joint bidding may be pro- or anticompetitive (CADE, 2019_[21]).

CADE should continue building on these efforts and engage in further advocacy initiatives, such as capacity building, detailed guidelines and ad hoc consultations, targeted to raise awareness and inform public-procurement officials of the effects that joint bidding may have on the competitive conditions of tender.

7.6. Sub-contracting

Brazilian procurement entities allow parts of contracts to be subcontracted.⁹⁶ That possibility, as well as the parts of the contract that can be executed by third parties, should be established in the tender notice and successful bidders must report all subcontracting to the procuring authority. TCU jurisprudence has established that subcontracting is not allowed for an entire contract⁹⁷ and should not alter the object of the contract.⁹⁸ Subcontracted parties must present documents proving that they comply with all legal, economic and technical requirements.⁹⁹

The pro- and anticompetitive effects generated by subcontracting are similar to those of joint bidding: companies that can fulfil a contract alone should bid individually against each other, not tender as contractor and subcontractor or using subcontracting as compensation in a bid-rigging scheme (see Box 7.5). For example in 2014, CADE sanctioned two companies and two individuals for rigging bids in a procurement process held by state-owned postal service, *Empresa Brasileira de Correios e Telégrafos* (ECT).¹⁰⁰ One of the main pieces of evidence was the signature of a subcontracting agreement four days before the procurement process was decided, in which the winning company undertook to share the provision of services with the losing bidder. The defendants argued that the tender terms authorised subcontracting agreements and that they had no intention of engaging in any unlawful conduct. In its decisions, CADE considered that regardless of their intent, subcontracting agreements restrained competition in that public-procurement process.¹⁰¹

The OECD recommends that in the contracts for public procurement, Brazilian entities require bidders to disclose not only whether subcontracting will take place, but also:

- the identity of any subcontractor; and
- the reasons why subcontracting is necessary for the correct performance of the contract.

Information gathered, especially the reasons why, may prove useful in establishing whether subcontracting generates efficiencies or rather undesirable anticompetitive effects.

Procurement entities should also be vigilant about any subcontracting that takes place during the execution of the contract. It is common in Brazil that a procurement authority hires a separate company to audit contract execution. These companies should also be required to check whether subcontracting is taking place and request the information about identity and reasons.

Certain stakeholders have reported to the OECD situations where subcontracting was not disclosed. Others have claimed that a legal business form known as a silent partnership (*sociedade em conta de participação*) allows the circumvention of the rules on subcontracting and its reporting. A silent partnership is generally created for a limited period of time and for the completion of a project, and is composed of two or more partners with a common interest. As it does not have a separate legal personality, it does not require registration. Under a silent partnership, only one member is made public as the contractor, while the other member(s) remain anonymous. The responsibilities and obligations assumed before third parties

are only made in the name of the public partner. In theory, a losing bidder could become the anonymous member of a silent partnership as a way to compensate the presentation of a non-genuine bid or for not bidding at all under a bid-rigging scheme, without having to make use of subcontracting and report it (see Box 7.7). The use of this legal figure in procurement procedures should be prohibited or, if permitted, it should be reported.

Box 7.7. Sabesp case: circumventing subcontracting and its reporting through a silent partnership

In 2015, CADE sanctioned two companies, Saenge Engenharia de Saneamento e Edificações and Ônix Construções (now trading as Concic Construções Especiais), and five employees of those companies for rigging bids in a procurement process organised by São Paulo sanitation provider Sabesp (Companhia de Saneamento Básico do Estado de São Paulo) for works in the metropolitan area of Baixada Santista. The competition authority imposed fines of BRL 19.6 million.

During the procurement process the companies had agreed to create a silent partnership, in which Concic would act as the anonymous partner and Saenge as the public partner. After concluding the agreement, Concic, which was set to win the tender, deliberately missed the deadline to present clarifications regarding the eligibility of its bid and withdrew its offer. This saw Saenge, which was placed second in the tender procedure, awarded the contract for a sum 23.1% higher than Concic's annulled offer. Under the silent partnership, the companies had agreed to share 50% of the contract.

Source: CADE (2015), "Cade condena cartel em licitação realizada pela Sabesp", www.cade.gov.br/noticias/cade-condena-cartel-em-licitacao-realizada-pela-sabesp

7.7. Consolidation and centralisation

There are two ways of consolidating purchases in Brazil: 1) centralisation, which is most often conducted by the central purchasing department (Central de Compras); or 2) price registration.¹⁰²

Centralised purchasing is a recent development in Brazil. The central purchasing department has only existed since 2014 and was initially founded to develop pilot projects for innovative purchasing solutions. Between its creation and 2019, the department developed two important centralisation projects.

The first project, National Virtual Warehouse (*Almoxarifado Virtual Nacional*), is an electronic platform on which public entities can buy office supplies and small IT devices to cover their immediate needs. This initiative has resulted in economies of scale, process simplification, savings of up to 30%, and a drastic reduction of storage costs.

The second project, TáxiGov is an app-based transportation service for public officials. Before its creation in 2017, federal government officials were using leased or purchased private cars for transportation, which involved high costs in drivers, management and maintenance of vehicle fleets, fuel and cleaning. With TáxiGov, federal employees hire drivers and cars working for transportation services, such as Uber, Cabify, Easy Taxi, 99, Wappa, through the TáxiGov app. This initiative has produced 65% savings (equivalent to BRL 17.4 million) and an estimated reduction of 1,600 tonnes of CO₂ emissions.¹⁰³ In 2019, the app was rolled out nationwide after previously having been restricted to Distrito Federal state.

In 2019, the central purchasing department's resources were increased, which allowed it to take a more proactive and strategic approach to centralised purchasing. The department can now analyse more broadly the shared needs and planned procurement across different federal entities and better evaluate the market to assess where centralisation is suitable. The recently adopted PAC provides extremely valuable

information to design centralisation initiatives and the central purchasing department is already using it. Twenty-three projects on centralisation of purchases were approved for 2020, including a project on COVID-19-related acquisitions.¹⁰⁴ Entities directly linked to the federal government without their own legal personality, assets and administrative autonomy, such as ministries, are obliged to use the centralised acquisition process if procurement of the desired goods and services has been centralised. Entities belonging to the indirect administration – those with own legal personality, administrative and budget autonomy – are allowed, but not obliged to use the centralised purchasing process.¹⁰⁵

As well as centralisation, public entities use price registration to procure jointly goods and services and so aggregate demand. Price registration is similar to the European Union's dynamic purchasing system and is used by Brazilian purchasing entities when an item is needed but the precise volume of needs cannot be established. Federal Law No. 8.666/1993 (General Procurement Act) provides that all purchases of the public administration should, preferably, be conducted through price registration. This includes purchases for which volumes can be established. The law is, however, silent about how to procure when using this process. Price registration was first regulated by Decree No. 3.931/2001, replaced by Decree No. 7.892/2013.¹⁰⁶ Price registration is formalised in price record minutes (*ata de registro de preços*), which engage the suppliers and the public entity to contract in the future, at volumes corresponding to needs as these arise. The document also identifies the participating suppliers and public entities, the unitary prices, and the terms and conditions of future contracts. Price registrations must be tendered through the open competitive process or reverse auction.

Public buyers that are not part of the initial price registration process may join after the contract-award phase and purchase under the same terms and conditions as initial participants. Adherence to an existing price registration should, however, be justified by efficiency considerations established in an ETP; it is also subject to acceptance by the chosen supplier. Adhering entities are limited to purchasing only up to 50% of the quantity originally procured.

In OECD countries, central purchasing bodies are gaining strategic importance as efficiency enablers. Centralisation and aggregation of purchasing activities often increase value for money, enabling governments to reduce administrative red tape and costs, while increasing bargaining power and obtaining better terms and conditions (OECD, 2019^[9]). The case of Chile, explained in Box 7.8, illustrates how framework agreements can generate savings from the consolidation of demand.

Box 7.8. Savings from framework agreements in Chile

Chile introduced framework agreements in 2003 and the central purchasing body, ChileCompra, carried out the implementation, award and management of these agreements. Chile's public procurement act (Law No. 19 886 of 30 July 2003) mandated the use of framework agreements, which has been further supported by their use within the national e-procurement system, ChileCompra Express. From 2014 onwards, there has been a consistent upward trend in usage for some product categories, such as data centres and associated services. As a result, Chile has achieved substantial savings from both centralisation and the introduction of framework agreements.

Table 7.1. ChileCompra total and average savings amounts, 2015-2017

	2015	2016	2017
Savings average	11.7%	19.5%	21.2%
Total amounts transacted (USD million)	2 197	2 661	2 999
Total amounts saved (USD million)	257	518	635

ChileCompra calculates price savings based on the difference between prices proposed by bidders awarded under framework agreements, and the average price proposed by at least three suppliers outside the procurement instrument. In addition, increasing framework-agreement coverage for goods and services has also generated process savings. These are estimated from the difference between costs borne by contracting authorities after the issuance of a purchase order from one of ChileCompra's framework agreements, and the costs generated by the issuance of a public tender or direct-award procedure. According to ChileCompra, process savings amounted to USD 18.6 million in 2017, or 0.62% of the overall transaction amount.

Source: (OECD, 2019^[16]).

Other benefits of centralisation are the professionalisation of civil servants exclusively dedicated to the procurement of aggregated needs and a larger degree of control over the execution of contracts (Sanchez Graells and Herrera Anchustegui, 2014^[22]). Central purchasing can, however, also have negative competition consequences on market structures over the medium or long term. Aggregation of purchases at a central level can result in greater concentration and market power (see example in Box 7.9). The greater the volume of the goods or services procured, the smaller the number of suppliers with the capacity or financial capability to provide these volumes. As centralised contracts also tend to be infrequent, less resilient companies may have to exit the market, in particular, if the public buyer is the dominant purchaser of goods or services (Sanchez Graells and Herrera Anchustegui, 2014^[22]). This may result in a reduced number of potential suppliers, which in turn also increases the risk of collusion. In the long run, market concentration has the potential to increase prices and have a negative impact upon variety and innovation.

Box 7.9. KL-Kuntahankinnat case

In 2014, KL-Kuntahankinnat, a Finnish central-purchasing body ran a four-year framework-agreement procedure for health supplies on behalf of a district hospital and three municipalities. The call for tender established that other entities using f KL-Kuntahankinnat – which could include all Finnish municipalities – were able to join the framework agreement in the future.

The framework agreement set out that the contract would be awarded to one company; bidders were not able to tender for separate lots and were required to submit a global bid that covered stock-management, home-delivery services, and a minimum of 5 000 items in each of the 12 health-product categories. These requirements imposed by KL-Kuntahankinnat effectively excluded all potential bidders active in the market except two.

Four excluded bidders challenged the bidding procedure before the Finnish Market Court, which rejected the claims. That decision was appealed before the Finnish Supreme Administrative Court, which found that the call for tender's requirements did restrict competition. According to the Court, the possibility for other bidders to joint through consortia or subcontracting did not remove the tender procedure's discriminatory, disproportionate and competition-restricting features. The negative effects of the single-provider framework agreement were considered particularly serious due to the four-year length of the contract.

Source: Kirsi-Maria Halonen, "Framework Agreements Should Not Be Used Improperly or in Such a Way as to Prevent, Restrict or Distort Competition". www.howtocrackanut.com/blog/2016/12/8/framework-agreements-should-not-be-used-improperly-or-in-such-a-way-as-to-prevent-restrict-or-distort-competition-quest-post.

However, for this strategy to be effective public entities need to design lots adequately; this is not always straightforward (see Section 7.8). In Brazil, Federal Law No. 8.666/1993 (General Procurement Act) requires public buyers to divide contracts into lots.

Box 7.10. Division into lots of contract for the National Virtual Warehouse

The National Virtual Warehouse contract was first designed and implemented at the Distrito Federal state level. In 2020, the central purchasing department extended the contract to the whole country. The contract has been procured through reverse auctions selecting bidders offering the lowest price. To prevent market concentration in the medium and long term, the central-purchasing department has divided the contract into two lots. One lot covers the North and the South-east regions and the other the South, North-east and Central Regions.

Source: Ministry of the Economy, "Apresentação do Serviço Almoarifado Virtual Nacional – AVN", www.youtube.com/watch?v=KUWPGNoBqa0&feature=youtu.be.

7.8. Dividing contracts into lots

To prevent market concentration and allow SME participation in large centralised procurement contracts, some countries divide contracts into lots (Sanchez Graells, 2020^[24]). As a general rule, Federal Law No. 8.666/1993 (General Procurement Act) provides that public buyers must parcel contracts into as many lots

as economically and technically possible. The Act also provides that the allotment of contracts should aim to increase competition by taking into consideration the positive effects of economies of scale.¹⁰⁷

Procurement officials in Brazil must assess whether dividing the contract into lots will actually increase the number of bids. They must also consider whether these benefits outweigh the savings resulting from the economies of scale that result from procuring larger contracts (see Section 7.7).

The central purchasing department seems to be aligned with the general practice of breaking large contracts into lots to prevent market concentration (see Box 7.10). The National Fund for the Development of Education (FNDE), the department charged with centralising purchases for national education entities, also splits contracts into lots (in this case, regions) when an ETP favours this solution.

Contracting entities should also consider that how a contract has been split into lots may facilitate market allocation among bidders. Box 7.11 below provides the OECD's guidance on when to split contracts into lots and how to do it without having an adverse effect on competition.

Box 7.11. OECD checklist for protecting competition when splitting contracts into lots

When to split contracts into lots

A decision on splitting contracts into lots may be taken when the contracting authority is concerned about the risk that large bundled contracts may reduce competition. This could be because:

1. efficient SME or specialist firms are unable to provide the full bundle of goods or services that the procurer is purchasing; and
2. where public purchases account for all or most of the market for a certain good or service, awarding the contract to a single firm may increase the market power of the chosen supplier and reduce the number of bidders in future tenders.

Before splitting the tender into lots to address these two concerns, procurers should conduct a market analysis to consider whether, given the type of product or service that they are procuring, tendering smaller lots actually is the best solution.

For 1)

Are there no other methods to encourage participation by smaller specialist firms? For example, could simplifying the bidding procedure help them bid for the contract? Might they be able to form a joint bidding consortium?

For 2)

Would losing bidders exit the market and so not participate in future procurements, or would they and others bid again for the next tender? Similarly for future procurements, would the strength of rival bids be limited by their lack of experience or would they be able to strengthen their bids and demonstrate their experience by hiring staff from the incumbent contractor?

How to split a contract into lots without reducing competition

At the **pre-tendering stage**, the contracting authority should:

1. Provide all potential bidders with clear tender documentation including all available and relevant information about the product or service to be procured in order to minimise any advantage to the incumbent supplier; this can be done electronically and should be free of charge.
2. Consider dividing a contract into lots when it is understood that small or specialist firms will not otherwise participate in the bidding. For example, an additional lot should not be carved out if that lot is expected to have fewer competitors than there would be for a bundle of lots.

3. Allow package bidding when a bidder can make bids for different combinations of lots to obtain any cost synergies available from providing a larger bundle of goods or services; obtaining these synergies may, for example, encourage non-local bidders to bid for packages even if they are unwilling to bid for individual lots.
4. Use award limits rather than participation limits to prevent all lots being awarded to a single firm, but only if the benefits will clearly outweigh the reduced competition for the contract.
5. Consider making the number of lots less than the number of expected bidders, provided it does not create inefficiency; this can make it more difficult for colluding bidders to agree a division of lots, and so improve achieved value.
6. Consider creating differently sized lots than bidders' market share, provided it does not create inefficiency; this can make it more difficult for colluding bidders to agree a division of lots, and so improve value achieved.
7. Consider making the division into lots unpredictable (for example, by changing the size or composition of the lots) in repeated procurements, provided it does not create inefficiency; this can reduce the risk of lot division facilitating collusion.

At the **tendering stage**, the contracting authority should:

1. Refer to the competition authority any suspicious actions taken by incumbents to obstruct rivals' abilities to put together an attractive bid; the authority can then determine whether this constitutes anti-competitive exclusionary conduct.
2. Refer to the competition authority any suspicious actions taken by bidders to rig the bidding.
3. Be aware that joint bidding may be anti-competitive in cases where bidders are capable of submitting separate bids.

Source: OECD Public Procurement Toolbox, "Checklist for protecting competition when splitting contracts into lots", www.oecd.org/governance/procurement/toolbox/search/checklist-protecting-competition-splitting-contracts-lots.pdf.

Decisions on whether and how to split a contract into lots entails complex analysis. Public-procurement officials should take into consideration the market conditions and the object of the contract, as well as the risks of bid rigging. CADE has trained public procurement officials on how to divide contracts into lots (see Section 10.2), but its guidelines on how to fight collusion in public procurement do not address this topic. Despite being trained, many public buyers may lack the time, technical support and specific knowledge to split contracts into lots in an optimal and competitive way (see Section 5. and 6.2). Brazil should consider adopting specific guidelines on when and how to divide contracts into lots; properly train public-procurement officials; and target market research to feed into right lot division strategies. CADE could also consider issuing specific guidelines.

According to TCU, the public administration often argues that the costs of managing several contracts and ensuring co-ordination between various small projects justify procuring as one large contract instead of dividing it into lots. TCU acknowledges that this justification may be valid under certain circumstances, but it has been applied too broadly. Brazil should consider limiting the use of this justification and ensure that contracts are split into lots when it is the most competitive solution and delivers value for money.

7.9. The use of e-procurement

Article 20 of Federal Law No. 8.666/1993 (General Procurement Act) provides that tendering must be done in person at the premises of the procuring entity. This means that open competitive tenders, price requests and invitations to bid – the bidding procedures foreseen under the act – may not be conducted

electronically. Only reverse auctions must be carried out electronically unless it is technically unfeasible or detrimental for the public administration.¹⁰⁸ Procurement under the differentiated procurement regime may be done in-person or electronically.

In practice, most public tendering is carried out electronically as around 98% of competitive bidding is done through reverse auction (see Section 7.1).

New law 14.133/2021 establishes that electronic procurement should be preferred over in-person proceedings. In-person public procurement will still be allowed, if justified.

Most federal entities use Comprasnet for e-procurement. The modules of the platform, developed in the 1990s, cover all stages of the procurement process, from the publication of the notice to the award of the contract.

At the time of drafting, SEGES was developing an update of Comprasnet. The new version of the e-procurement platform, Comprasnet 4.0, will make the system more user-friendly and accessible to more public buyers, while integrating procurement planning and the execution of contracts, currently managed by separate modules. Comprasnet 4.0 will also include a virtual marketplace, an electronic platform for small-value direct awards, and applications where suppliers can obtain information and be notified of public-procurement opportunities in real time. It will also allow the sharing of digital information and experiences among public-procurement officials and with controlling agencies (such as CGU and TCU). The information contained in Comprasnet 4.0, which will now include procurement planning and contract-execution monitoring, will be useful to fulfilling transparency objectives and in aiding the design of competitive procurement processes. The use of artificial intelligence to analyse procurement data could help the public administration in this effort.

Procurement data are currently spread across different e-procurement platforms, which makes their collection and analysis challenging. The information shared in Comprasnet only covers part of the public procurement carried out at national level as many municipalities and states use other e-procurement platforms, including *Licitações-e*, developed by the Bank of Brazil, and *Licitações Caixa*, created by *Caixa Econômica Federal*, a public federal financial institution.

Brazil is taking action to address the issue of distinct platforms. The National Network of Public Purchases (Rede Nacional de Compras Públicas, RNCP) was founded in 2018 to promote the sharing of experiences among procurement officials at all levels. It has since created a platform that consolidates procurement information from federal, municipal and state procurement systems; it also carries out capacity-building events.¹⁰⁹

Moreover, the new law 14.133/2021 provides for the creation of the Public Contracting National Portal (*Portal Nacional de Contratações Públicas*, PNCP), which may be used by the states for conducting electronic procurement. The use of this platform will, however, not be mandatory and procurement authorities at state level will be allowed to use other platforms, as long as they are integrated to the PNCP. The PNCP will also centralise the disclosure of information regarding procurement conducted at federal, state and municipal level.

The adoption of e-procurement contributes to reducing the risks of collusion, by eliminating the need for bidders to meet in the same place to submit their bids or to participate in other stages of the tender process. Moreover, e-procurement is likely to lower tendering costs for potential bidders, in particular foreign bidders or bidders operating in other parts of the country than the seat of the awarding authority, and so encourage participation and increase competition in procurement.

Moreover, electronic procurement may result in savings for the public administration thanks to reduced time, resources and storage space for physical documents and events, and lower organisational and hosting costs for the presentation and opening of bids and contract awards.

Brazil should make the use of e-procurement mandatory for all types of public-procurement process, not only reverse auctions. It should also integrate into one platform all stages of the procurement process, including pre-publication planning for a tender notice and post-award contract execution and monitoring. Comprasnet 4.0 would appear to solve many of these issues.

Brazil should also attempt to consolidate procurement data that are currently spread across different platforms. This may require making the use of Comprasnet mandatory for all public buyers other than federal entities.

7.10. Abnormally low prices

For procurement conducted in accordance with Federal Law No. 8.666/1993 (General Procurement Act) and Federal Law No. 12.462/2011 (Differentiated Procurement Act), the public buyer must disqualify proposals with unrealistic prices that are out of line with market prices if bidders cannot show the viability of the offer documenting the costs of inputs and the productivity rates. For public works and engineering services, the law considers non-viable offers as those lower than 70% of the following values, whichever is lower: (a) the estimated budget or (b) of the average value of the proposals that are 50% higher than the estimated budget. If the global value of the proposal is lower than 80% of the above the public administration must request an additional guarantee for the signature of the contract.

Abnormally low prices are considered risky by many contracting entities because winning bidders with low-value proposals may attempt to renegotiate the contract after award and request a higher-priced contract (see Section 8.4) or simply stop the project because the price being paid does not cover their costs, leading to budget overruns and long delays (OECD, 2015^[23]).

An abnormally low price may be genuine, however, and can result from a new entrant having a more efficient cost structure than its rivals, the use of new technologies, or economies of scale or scope. The restoration of competitive conditions in a market (for example, the termination of a cartel agreement following the initiation of a cartel infringement investigation by a competition authority) could also explain significantly lower tender prices compared to previously offered ones. Procurers should therefore consider the tender terms and the market reality when deciding whether a price offered is too low.

The OECD recommends that Brazil consider adopting more detailed regulation in this. In doing so, Brazil could follow the OECD checklist on how to reduce the risks of abnormally low prices while protecting competition, described in Box 7.12.

Box 7.12. OECD checklist on ways to reduce the risks of abnormally low tenders (ALT), while protecting competition

1. To address the risks of abnormally low tenders without acting in a way that may reduce competition, at the pre-tendering stage, the procurer should:
 - Provide all potential bidders with clear tender documentation, including all the relevant information available on the product or service being procured, in order to help bidders make the most realistic cost estimates possible.
 - Ensure that the time allotted for suppliers to respond is proportionate to the size and complexity of the procurement. This is particularly important in technically complex projects for which it may take time to develop more accurate cost estimates.
 - Use assessment criteria that focus not only on price, but also factors such as quality, deliverability, value or others important to the procurer that bidders might reduce in order to offer a very low price.
 - Require the winning bidder to take pre-emptive steps to internalise the risk if its costs are higher than expected. For example, by taking out professional liability or project insurance, or providing a performance bond that pays out to the procurer in the event that the contractor cannot deliver the project on the originally agreed terms.
 - Set out in detail in the tender documentation that renegotiation will only be considered when the information originally provided by the procurer proves to be inaccurate (incorrect or incomplete), or when clearly specified conditions are satisfied (for example, an increase in the price of specific inputs that could not have been predicted by the bidder). Furthermore, applicable procurement law may set out conditions that must be fulfilled for renegotiation to be permitted.
 - Include sanctions in the contract for any bidder that pulls out or fails to deliver the terms of its contract, unless the information originally provided by the procurer proves to be inaccurate (incorrect or incomplete). These sanctions could include financial penalties, temporary debarment of firms or individuals, or legal claims for damages by the contracting authority against the contractor. In the large majority of cases, sanctions are a sufficient deterrent, suppliers deliver at the conditions at which the tender was decided, and no extra action is necessary. Any sanctions would need to be consistent with applicable procurement law.
 - Set out in the tender documentation that if a procurer suspects a firm has strategically bid below its average variable cost, it will refer the case to the competition authority, which may decide to assess whether the action is problematic under the relevant standards.
 - Consider, in high-value projects, creating whistle-blower rewards for reporting evidence that a firm has bid at a price it intends to renegotiate at a later date, especially if accompanied by evidence of corrupt agreements with procurement officials.
2. To address the risks of ALT, while not reducing the value that the procurement might achieve, at the tendering stage, the procurer should:
 - Assess all bids against its evaluation criteria, which might include the quality or deliverability of the bid, and not automatically exclude a bid on the basis of its low price. Doing so would, for example, risk excluding new entrants making loss-leading bids to obtain a foothold in a market.
 - Check the cost assumptions of the winning bid to make sure it is deliverable, whether it is an abnormally low bid or not. Any checks carried out need to be proportionate to the procurement in question to avoid creating unnecessary costs and delays in the bidding process.

Source: OECD Public Procurement Toolbox, Checklist for protecting competition when managing the risks of very low tenders, www.oecd.org/governance/procurement/toolbox/search/checklist-protecting-competition-managing-risks-very-low-tenders.pdf

7.11. Recommendations for action

Under normal circumstances, Brazil should tighten the conditions under which direct awards can be used. It should further control when these exceptional procedures are carried out, check if the necessary conditions are strictly met and block unjustified direct awards, if necessary. The crisis caused by COVID-19 should not be used as the justification to perpetuate direct awarding of contracts. The new law 14.133/2021 increases oversight of direct awards by requiring AGU to conduct a preliminary legal analysis during the planning phase.¹¹⁰ Moreover, the new law provides that direct award proceedings should be accompanied by a list of documents proving their legality. These documents include the justification of the choice of bidder, the price paid and the authorization of the use of the direct award process by the competent authority. If the direct award presents irregularities, the contracted firm and the responsible public official will be held jointly liable for the damages caused to the public treasury.

Brazil should consider developing standard and mandatory templates for all types of procurement and all stages of the process (planning, tender phase and execution of the contract). All entities involved in overseeing procurement – AGU, TCU, CGU, and eventually CADE – should co-operate in this. Templates should not only serve to ensure the legality of the texts – the main objective of templates developed by AGU – but also consider other elements, such as clarity and strategic planning. Some provisions of the new law 14.133/2021 align with this recommendation. The new law provides for the creation of template documents, such as the minutes of the notice, the terms of reference or standardized contracts.¹¹¹

Procurement entities should make sure that the use of prequalification does not limit participation. If prequalification of bidders is used, the identity of pre-qualified bidders should be kept confidential (see Section 9.3).

Brazil should consider options to relax rules on tendering by international companies and allow for increased independent participation – rather than as part of a consortium – of foreign companies in tenders. It could consider conducting an evaluation of the effect relaxing the rules and opening up tenders to foreign participants would have on national companies and the domestic economy as a whole. In doing so, Brazil should also consider the likely positive effects of allowing more participation of foreign companies in public procurement, such as increase choices and innovation, and decrease prices. This would provide insights on how best to proceed with legislative modifications and procurement practices. Brazil can for example consider reducing restrictions imposed on foreign companies to register with CREA.

Procurement entities should also be vigilant about the competitive or anti-competitive nature of joint bidding and subcontracting. CADE should engage in further advocacy initiatives, such as capacity building, detailed guidelines and ad hoc consultations, targeted to raise awareness and inform public-procurement officials of the effects that joint bidding and subcontracting may have on the competitive conditions of tenders.

The OECD recommends that in the contracts for public procurement, Brazilian entities require bidders to disclose not only whether subcontracting will take place, but also:

1. the identity of any subcontractor; and
2. the reasons why subcontracting is necessary for the correct performance of the contract.

Central purchasing bodies and entities participating or adhering to price registration initiatives should:

- closely monitor supplier participation in tenders carried out centrally or through price registration; they should remain attentive to any indications that suppliers are being discouraged from bidding or unable to meet required volumes;
- follow developments in the market, beyond their own tenders, to spot and prevent unnecessary supply-side market concentration, which is particularly relevant for large and long-duration centralised contracts or price-registration systems; and

- adopt initiatives to prevent market concentration in the supply side (such as dividing contracts into lots) if justified by the technical preliminary study; division of contracts should maximise participation and encourage competition. Contracting entities should also consider that how a contract has been split may facilitate market allocation among bidders (see Box 7.11 on general OECD principles for dividing contracts into lots).

The new law 14.133/2021 sets a preference for electronic procurement but still allows procurement in person, when justified. Brazil should make the use of e-procurement mandatory unless in limited cases where submission of physical samples or mock-ups are necessary.

E-procurement should also integrate into one platform all stages of the procurement process, including pre-publication planning for a tender notice and post-award contract execution and monitoring. Comprasnet 4.0 would appear to solve many of these issues.

Brazil should also attempt to consolidate procurement data that are currently spread across different platforms. This may require making the use of Comprasnet mandatory for all public buyers. The PNCP established by the new law attempts at centralising national procurement data and could address this recommendation if effectively implemented.

8. Improving tender terms and contract-award criteria

8.1. Unclear or incomplete tender terms

Tender terms should be designed to maximise bidder participation. For example, the clearer the tender terms, the easier it is for potential suppliers to make an informed decision on whether to bid for the tender. If tender terms are unclear, bidders may not take the risk of participating. TCU's case law is in line with this principle. Its Judgement No. 79/2010 established that it is essential for a bidder to know the specificities of the object of a tender, such as the requested services, the type of material, and the required staff qualification, to prepare a proper proposal and define the price accurately. According to TCU, a bidder without access to these elements cannot properly budget its offer and so may decide not to participate in the procurement process.¹¹²

According to the Brazilian Law, public buyers may organise in-person or digital meetings to clarify elements related to the object of the tender. The tender notice must contain information on the date and time, premises and access codes of remote communication for this meeting.¹¹³ Bidders may also appeal the procurement notice if the technical specifications are not sufficiently clear or comprehensible.¹¹⁴ These initiatives help both the public administration and bidders to understand and clarify grey areas in the tender terms, increase certainty, and maximise bidders' chances of winning by allowing bids to be genuinely tailored to requirements.

Before the publication of a notice of high-value contracts, the procurement entity must organise a public hearing (see Section 6.1). This informative event can be used by both the private and the public sector to exchange information about technical issues and better understand the requirements of the procurement. In addition to increasing early engagement and maximising the number of bidders, this initiative may streamline the process by reducing the number of bidders challenging unclear tender notices.

The majority of stakeholders interviewed by the OECD consider that procurement processes organised under Federal Law No. 8.666/1993 (General Procurement Act) and Federal Law No. 10.520/2002 (Reverse Auction Act) include clear and comprehensible tender terms. Conversely, the tender terms of projects procured under the integrated contract modality (see Section 3.2) are not specified; the public entity procures engineering works and services without issuing concrete tender terms. The tender notice of integrated contracts contains a draft engineering project with technical documents that allow for profiling the works or services, including the: 1) description and justification of the needs, an overall view of the investments and the level of service; 2) conditions of solidity, safety, durability and delivery time; 3) aesthetics of the architectural design; and 4) parameters to meet the objectives of public interest, savings, ease of execution, environmental impact and ease of access. Bidders take the responsibility of designing the technical specifications of the project and assume the risks for its completion.

Integrated contracts were initially designed to be used for exceptionally innovative and complex engineering projects¹¹⁵ that meet the following conditions: 1) when it involves a technological innovation; 2) when the project can be completed using different methodologies; or 3) when the project may be

executed using complex technologies, which are offered by a limited number of companies. Some stakeholders believe that the lack of thorough market studies and proper planning by procuring entities, which prevents a proper definition of projects' technical criteria, have led to a growth in the use of these contracts to projects that are neither particularly complex nor innovative. Opening a tender while a contract is still not clearly defined may harm competition, if bidders unwilling to take on the project risks are discouraged from bidding. Alternatively, bidders that do bid would reflect their assumptions of project design and implementation risks in their offered price, which might lead to costlier solutions for the public sector. Some bidders may even offer unrealistic low prices and try to use project delivery risks, if they materialise, as reasons to agree to a contract price increase. For all these reasons, Brazil should limit the tendering of contracts that are not fully defined to projects that can clearly benefit from the private sector's innovation and know-how.

8.2. Prioritising functional requirements and allowing for substitutes or alternative solutions

Brazilian public procurement entities are bound by the technical specifications of a tender notice, which must be concisely described. Public buyers have interpreted this rule rigidly and the tender terms tend to be specific, leaving little room for innovation, with substitute or alternative solutions rarely accepted. Procurement officials' reluctance to innovate and propose tender terms that focus on other elements than price is likely to be influenced by the issues identified in Section 5 the under-professionalisation of public procurement officials, excessive penalties imposed on officials for procedural mistakes, and the lack of clear guidelines on the interpretation of procurement rules.

TCU's case law favours a broader interpretation of the law, however. According to TCU, the tender requirements should encourage competition and be limited to what is strictly necessary to achieve the object of the tender.¹¹⁶ Highlighting specific brands, exclusive specifications or products is allowed for technical reasons only.¹¹⁷ If a brand is used for indicative purpose, the tender notice should expressly accept the presentation of equivalent, similar or superior solutions. TCU has also accepted the use of functional requirements describing the end result or function of a tender, as opposed to specifying detailed product or process characteristics.

The OECD Guidelines recommend that, in general, public bodies define tender specifications in terms of functional – performance-based – requirements, so that they focus on the objective rather than the method of its implementation. This can encourage alternative or innovative solutions and so make collusive practices less likely.

Performance-based contracting spells out clearly the overall targets to be achieved by the winning bidder, leaving the specific manner employed to achieve such results to the winning bidder's discretion. This contracting method differs from traditional contracts that focus on inputs and procedures. Good performance may be measured by commonly accepted outcome measures that are appropriate to the product in question such as timeliness, reliability, and meeting the contract's targets. Performance-based contracts generally contain a scheme of penalties or rewards for performance throughout the contract period. As the contractors' remuneration is tied to their ability to meet the targets, such agreements provide an incentive for the contractor to improve its performance and efficiency (OECD, 2006_[24]) (OECD, 2014_[19]). Rewards or penalties can be financial, but can also include extensions of contracts for particularly good service. For example, Transport for London's bus tendering introduced performance incentives to invest in quality by means of concession duration extensions (see Box 8.1) (OECD, 2014_[19]).

Box 8.1. Quality incentives in London bus tenders

Contracts for the provision of bus services in Greater London, United Kingdom, are awarded through a tender process managed by transport authority Transport for London (TfL); awards and contracts are designed with the aim of improving service quality. Private bus operators bid for contracts to run specific routes for five-year periods. The award criterion is “best value for money”, taking into account quality and safety. Automatic two-year extensions are granted if performance meets a number of qualitative indicators. Each year, around 15-20 % of the network is subject to tender.

Beginning in 2001, quality incentives were introduced and progressively generalised. These are mainly gross-cost contracts with a scheme of incentive payments and disincentive penalties related to mileage and reliability and based on observed quality. Further performance payments schemes were introduced in 2008 for driving quality and vehicle presentation (evaluated using mystery-traveller surveys and inspections). Quality is measured through criteria including mileage operated reliability (regularity on high-frequency services, punctuality on low-frequency services); driver and vehicle quality; engineering quality; customer satisfaction; safety and passenger and staff security. A number of monitoring systems are used for evaluation, including consumer surveys.

Source: (OECD, 2014^[21])

The Central Purchasing Department at the Brazilian Ministry of the Economy has launched a pilot project for procuring cleaning services based on functional (or performance-based) requirements. On 11 May 2020, it published a tender notice introducing functional requirements and performance-based specifications that aimed to mitigate the problems identified under the previous system, namely, low service quality, inappropriate qualification requirements, and contract-execution monitoring addressing only labour law and civil liability issues. The object of the tender was to contract services to ensure the Ministry’s buildings were clean for staff and visitors. As the ability to monitor performance is essential for incentive schemes to work, bidders were also required to provide a technological solution to monitor contract execution and compliance with performance indicators, through a web and a mobile application. Payment of the services is subject to compliance with performance indicators as specified in the terms of reference.¹¹⁸

Brazil should build on this initiative and incentivise the use of functional requirements by procurement entities, when appropriate.

8.3. Contract-award criteria

According to Article 45 of Federal Law No. 8.666/1993 (General Procurement Act), procurement entities in Brazil must award contracts based upon the following criteria.

- **Lowest price or highest discount.**
- **Best technical quality.** This is used for services of a predominantly intellectual nature, in particular in the elaboration of projects, calculations, audits, supervision and management and engineering consulting. The public buyer assesses the technical offers on the basis of the capabilities and previous experience of bidders as well as a proposal’s technical quality, including its methodology, organisation, technology and human resources. Then a price negotiation takes place based on a maximum price indicated in the tender notice. To be considered for the negotiation phase, a proposal must meet minimum technical requirements. The public buyer begins negotiations with

the bidder that has submitted the best technical offer. If the negotiation fails, it will continue with the next bidder and so on.¹¹⁹

- **Technical quality and price.** If the procurement entity uses these criteria, bids are classified according to the weighted average of the score obtained by both the technical and economic proposals. The contract will be awarded to the proposal with the highest weighted average.
- **Highest economic return.** This criterion may only be used in procurement carried out under the differentiated procurement regime and in relation to “efficiency contracts”. This type of contracts refer to service contracts whose aim is to generate savings for the public administration.¹²⁰ The awarded bidder is paid a percentage of the savings.¹²¹

Reverse auctions, initially designed for common goods and services, are now extensively used by the public administration for all kinds of contracts. Around 98% of the competitive bidding is carried out through reverse auction (Sections 2.1 and 7.1). This means that almost all contracts procured through competitive bidding are awarded to the lowest-priced or highest-discounted offer. Contracting officials may feel that an objective and clear criterion, such as a price, limits the risk of their impartiality being questioned and the award decision being successfully challenged in court. Moreover, assessing an offer on the basis of price is less burdensome and complex than using non-price criteria.

Price-only criteria are suitable for more standardised goods, works or services for which price is the main issue for the contracting authority. Non-price criteria are better suited to tenders in which price only is insufficient to provide a good response to the contracting authorities’ requirements (OECD, 2015^[23]). For technical, complex and innovative projects, award criteria based on quality rather than on price can yield better procurement outcomes and also reduce the risk of collusion as quality is more difficult to rig than prices. In Mexico, for instance, non-price criteria, such as points-based and cost-benefit evaluation criteria, are mandatory when the goods or services being procured are technically highly specialised or innovative.¹²²

Quality criteria may relate to technical performance, aesthetic and functional characteristics, maintenance service, technical assistance and staff quality. Other criteria may include past performance; for example, Canada refers to “competences” related to, for example, managerial structure, key personnel, prior industrial experience, facilities, and financial strength (OECD, 2015^[23]).

Scoring rules that measure the relative importance of each criterion using, for example, weights or metrics, should be clearly stated in the call for tender. In Spain, the law stipulates that criteria should be translatable into figures or percentages, obtained through the application of formulas included in the tender specifications. Some procurement systems allow for a descending ranking of the criteria whenever it is not possible to specify weights (for example, in the EU, Sweden, Spain, Bulgaria and Czech Republic). In Switzerland, case law has stipulated that price should be given a weight of at least 20% in the scoring rule; in Ukraine, the relative weight of the price in the scoring rule cannot be lower than 70%, price or aggregate life cycle cost; and in Brazil and Costa Rica, price must be given a greater weight than non-price criteria (OECD, 2015^[23]).

The OECD recommends Brazil encourage the use of non-price award criteria, such as technique and price, when quality is a relevant dimension of the procured goods, services and works. Quality award criteria should improve the value of the procured object, reward innovation and cost-cutting measures, and promote competitive bidding.

8.4. Limiting modifications of contracts after award

According to Article 65 of Federal Law No. 8.666/1993 (General Procurement Act), the public administration may unilaterally modify contracts if: 1) the public administration decides to change the original project and specifications to be better aligned with the objectives of the contract; and 2) the

modification of the contract value is necessary in view of a variation of the procured object. The contractor is obliged to accept changes representing up to 25% of the value of the contract and up to 50% in case of contracts for building or urban reforms. The public administration and the contractor may also agree to contract modifications if it is: 1) convenient to replace the execution warranty; 2) necessary to change the regime of the execution of public works or service or the supply of goods; 3) necessary to change the payment method; and 4) necessary to re-establish the original economic and financial equilibrium of the contract in case of unforeseeable events, or immeasurable consequences of foreseeable events.

Stakeholders interviewed during the OECD fact-finding mission indicated that contracts related to infrastructure works or engineering services are often modified. This trend is also observed in other countries. During 1990s and 2000s, in the concessions sector in Latin America, excluding telecommunications, as much as 41% of infrastructure concessions were renegotiated. The incidence rose to 55% for transportation and 75% for water and sanitation concessions. It has also been estimated that the value of the economic costs of contract modifications in highway paving contracts in the state of California ranged from 7.5 to 14 % of the winning bid (OECD, 2014^[19]). It is common in Brazil that parties agree on modifications that go beyond the legal thresholds. Inadequate design of projects' technical specifications results in higher rates of renegotiation.

The Differentiated Procurement Regime Act has tried to address this issue by creating the integrated contract modality for highly innovative and complex projects. As explained in Section 8.1, under this modality the contractor, who is more likely to master and understand the technical complexity and cost estimates of the project, is responsible for the definition of specifications.

The possibility of contracts being easily modified post-award may discourage the participation of more risk-averse bidders. Firms that expect to have to renegotiate the contract and feel confident about their bargaining position with the public administration may react strategically by undercutting their bids. This might lead to contracts being awarded to bidders most confident of their ability to renegotiate rather than the most efficient (OECD, 2014^[19]). In Brazil, the TCU has named this practice of estimated-price manipulation *jogo de planilha* or spreadsheet games. The bidder underestimates the costs of items or services most likely not to be executed or have their volumes reduced through renegotiations, while overestimating the prices of items or services whose volumes are susceptible to be increased by contractual modifications.¹²³ TCU has developed measures to address this issue through methodologies to renegotiate unit prices in such a way that the original economic equilibrium of the public contract is preserved. Neither the law nor case law focuses on the impact that contract modifications may have on the initial participation of bidders.

In most jurisdictions, when a public contract needs to be substantially modified, the starting assumption is that the modification will trigger a new competitive public tender process in order to give all potential bidders the chance to submit offers that meet the altered circumstances (SIGMA, 2016^[25]).

Limited modifications to an existing public contract are often allowed when they are necessary and justified, such as in situations where genuinely unforeseeable circumstances occur. Box 8.2 shows how the European Union Public Procurement Directive has regulated modifications.

Box 8.2. Modification of contracts under the EU directive on public procurement

EU Directive 2014/23/EU on public procurement permits the modification of a contract without the need to conduct a new procurement procedure only within strict boundaries and in specified situations. In general, contracts may be modified when the modifications are not substantial.

The directive sets out six non-substantial modifications permitted during the term of a contract.

4. **Modifications expressly provided for in the initial procurement documents.** Review clauses in procurement documents must be clear, precise and unequivocal; they must specify the scope and nature of possible modifications or options, as well as the conditions under which they may be used. Review clauses must not alter the overall nature of the contract.
5. **Additional works, services or supplies** that have become necessary, but were not included in the initial procurement. These are only possible where a contractor cannot be changed for economic or technical reasons such as interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement, and changes would cause significant inconvenience or substantial duplication of costs for the contracting authority. Any increase in costs from modifications should not exceed 50% of the original contract's value. Contracting authorities that use this provision to modify a contract must publish a modification notice in the Official Journal of the European Union (OJEU).
6. **Modifications due to unforeseen circumstances** that a diligent contracting authority could not have foreseen and which do not alter the contract's overall nature. Any increase in costs from modifications should not exceed 50% of the original contract's value. Contracting authorities that use this provision to modify a contract must publish a modification notice in the OJEU.
7. **Replacement of a contractual partner** is allowed in three situations: a) when it is the consequence of a clear, precise and unequivocal review clause that sets out the scope and nature of the replacement, as well as the conditions under which it may be used; b) when a contractor faces structural changes during a contract, such as an internal reorganisation, takeover, merger, acquisition, or even insolvency; c) when the contracting authority itself assumes the main contractor's obligations towards its subcontractors.
8. **Low-value, non-substantial modifications.** These modifications must be: a) below the relevant EU financial threshold for the contract; and b) less than 10% of the initial contract value for a services-supplies contract or less than 15% for a works contract.
9. **Other non-substantial modifications.** Modifications are considered to be substantial and to require a new procurement procedure when they render the contract "materially different in character from the one initially concluded". According to the Directive, this is the case when the modification: a) has an impact on the initial procurement procedure; b) changes the economic balance in favour of the contractor; c) extends the scope of the contract considerably; d) sees the contractor replaced in other situations than those mentioned above as non-substantial changes to the contract.

Source: Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN>; (SIGMA, 2016_[13]).

Brazilian law should put in place more specific regulations to allow contract changes only if they are non-substantial or are expressly provided for in the contract's review clauses; for example, allowing the parties to agree on modifications that go beyond the legal thresholds would most probably be contrary to this principle. The law should impose a new procurement process when the modifications are so substantial that they change the initial competitive realm.

8.5. Recommendations for action

The tender terms of projects procured under the integrated contract modality generate uncertainty among bidders. Stakeholders reported that this type of contracts, initially created for complex technical projects, are being increasingly used for projects that are neither particularly complex nor innovative. Brazil should limit the tendering of contracts that are not fully defined to projects that can clearly benefit from the private sector's possibly superior innovation and know-how.

Brazil should encourage public bodies define functional - performance-based - tender requirements, so that they focus on the objective rather than the method of its implementation. The pilot project for procuring cleaning services based on functional requirements launched by Central Purchasing Department at the Brazilian Ministry of the Economy is a positive initiative and Brazil could build on this experience.

The OECD recommends that Brazil encourage the use of non-price award criteria, such as technique, when quality is a relevant dimension of the procured goods, services and works. Quality award criteria should improve the value of the procured object, reward innovation and cost-cutting measures, and promote competitive bidding. Scoring rules that measure the relative importance of each criterion using should be clearly stated in the call for tender.

Brazilian law should put in place more specific regulations to allow contract changes only if they are non-substantial or are expressly provided for in the contract's review clauses; for example, allowing the parties to agree on modifications that go beyond the legal thresholds (up to 25% of the value of the contract and up to 50% in case of contracts for building or equipment reforms) would most probably be contrary to this principle. The law should mandate a new procurement process when the modifications are so substantial that they change the initial competitive realm.

9. Transparency, disclosure and integrity in submitting bids

The OECD recommends that governments ensure an adequate degree of transparency at all stages of the procurement process. Transparency in public procurement prevents mismanagement, fraud, corruption and asymmetry of information (OECD, 2015^[18]). Transparent procurement should:

- promote fair and equitable treatment for potential suppliers by providing adequate and timely information;
- allow free access to public procurement information, through an online portal, for all stakeholders, including potential domestic and foreign suppliers, civil society and the general public;
- ensure visibility of the flow of public funds, from the beginning of the budgetary process throughout the public procurement cycle.

Procurement processes that are too transparent may facilitate collusion, however. Public buyers should avoid disclosing business-sensitive information unless they are required by law (OECD, 2012^[5]).

According to Article 3 of Federal Law No. 8.666/1993 (General Procurement Act), procurement processes must be strictly aligned to the general principle of transparency. Brazil has developed different platforms to disseminate procurement information.

- The **purchasing panel** (*painel de compras*)¹²⁴ run by the Ministry of the Economy contains aggregated data of procurement carried out by federal-government entities. The platform includes information from PACs, procurement procedures and contract execution. It allows data to be exported in several formats and queries to be personalised.
- The **price panel**, also run by the Ministry of the Economy, contains information on prices paid by the federal government for purchasing goods and contracting services; it is particularly useful for market research and estimating reference prices.
- Managed by the CGU, the **transparency portal** was launched in 2004 and contains information on public expenditure, including public procurement. A new version was launched in 2018 and includes improved data presentation, new and more user-friendly search tools and more graphs, and integration to social networks. Data disclosed by the transparency portal are taken from various official sources, including the integrated system of financial administration (*Sistema Integrado de Administração Financeira*, SIAFI) and the integrated system of human resources (*Sistema Integrado de Administração de Pessoal*, SIAPE).

In addition to these platforms, Comprasnet is a more operational tool on which bidders can participate in procurement processes and interact with the public administration. Comprasnet contains information about the different stages of a procurement, from tender notice, opening of proposals, clarifications regarding the notice, appeals, to contract award. Comprasnet is only accessible for bidders that have created an account in the platform, and public buyers. This information is also made public in the Official Journal and other institutional websites for in-person procurement.

Some of the procurement information that is published in these platforms or through other means is business sensitive and may facilitate collusion depending on the degree of detail and the timing of disclosure. This is the case for the PAC, the ETP and the opening of bids.

9.1. Limiting disclosure of the full annual procurement plan

The publication of a PAC has pro-competitive effects as it informs suppliers of procurement opportunities, allowing them to prepare a business case, and eventually, submit an offer. However, if the published plan is too detailed with, for example, volumes, costs, delivery locations and schedules, it could serve as the basis of a collusive scheme (OECD, 2016^[7]).

Federal procurement entities must create a detailed PAC every year and register it on a module of Comprasnet.¹²⁵ In general, the detailed version is only available for public officials, while a less comprehensive version is published on the purchasing portal, which indicates the items that each administrative entity¹²⁶ is planning to acquire in the following year, but does not disclose volumes, reference prices, procurement schedules and delivery locations.

Federal procurement entities are also required to publish simplified versions of their PACs on their websites.¹²⁷ However, some, such as the FNDE, release the detailed version as citizens are entitled to request access to it under the Public Information Act (Federal Law No. 12.527/2011).¹²⁸ There is a trade-off to be made between transparency and possible negative effects on competition, given that market transparency is a facilitating factor for collusion. While complying with the relevant legal requirements procurement entities should ensure that no information is unnecessarily shared. They should avoid making the complete version of the PAC automatically available to the public and limit publication to the simplified version as required by law. The more detailed version should be used for internal purposes, such as sharing experiences and information among public officials or applying artificial intelligence for the adoption of strategic procurement decisions.

Comprasnet 4.0 will integrate all stages of the procurement process – planning, bidding process, contract award and execution – that are now being held and managed by separate modules, in a single platform. It remains unclear to what extent and in what way the information contained in Comprasnet 4.0, including the PAC, will be made available to the public.

9.2. Limiting disclosure of the technical preliminary studies (ETP)

The ETP must be an annex to the tender notice and so is publicly available at the beginning of the procurement process.

The ETP contains the analysis, such as market surveys and price research, and the sources used by the public administration to adopt strategic procurement decisions. Sharing this information could facilitate the formation, monitoring and continuation of bid-rigging schemes. The ETP should not be disclosed to the public.

In certain jurisdictions, such as Mexico, market studies are considered part of the deliberative process of civil servants and are protected from disclosure until the contract has been awarded (OECD, 2018^[14]). If the ETP must be disclosed, Brazil should consider protecting information in ETP until the procurement process is over, based upon paragraph 3 of Article 7 of Federal Law No. 12.527/2011 (Public Information Act), which protects information that serves as the basis of a decision-making process of the public administration.

9.3. Limiting disclosure of information about bidders and bids

Under Federal Law No. 8.666/1993 (General Procurement Act), the envelopes containing bidders' qualification documents and those holding their offers are opened in public sessions. The identity of bidders and their bids are therefore known before the contract has been awarded. Bidders are, however, unlikely to use this information to rig bids during the tender procedure as the offer is submitted at the same time as the envelope containing qualification documents at the beginning of the procurement process. Moreover, bidders are not allowed to withdraw their proposals after the qualification phase, avoiding agreements between competitors during the tender procedure to reduce the number of bids. Information on bids and bidders could, however, be used for monitoring and eventually applying retaliation measures against non-compliant cartel members.

In reverse auctions, the different rounds of the auction session are public, but the identity of participating bidders is confidential and only disclosed after the contract has been awarded.

Under the differentiated procurement regime, if the procurement entity decides to opt for the pre-qualification of bidders, the list of shortlisted candidates is made public after this phase.

The OECD recognises that there are public-policy considerations in deciding whether bid-level information is disclosed, including accountability of public officials, transparency regarding allocation of public bodies' budgets, fighting corruption, as well as participants' right to appeal contracting authorities' decisions. These other objectives may be still achieved, however, if the public release of information about bids and bidders is delayed until a certain time after the conclusion of the tender – say, six to eight months after the award of the contract – or bidders' information is anonymised, for example, by identifying them using a code known only by the contracting entity. This would make it more difficult for members of a collusive scheme to monitor bidding behaviour in real time. The winning bidder would still be announced publicly (OECD, 2018^[14]).

The trade-off between making procurement as transparent as possible and protecting business secrets concerning bids and bidders in view of preserving the competitive process has been widely interpreted by European Union case law.

Box 9.1. European Dynamics Luxembourg and Others v European Commission, Case T-536/11

In this 2015 judgement, the General Court dismissed a challenge to a European Commission decision to limit the disclosure of bid information to a disappointed tenderer.

It ruled that the contracting authority was entitled not to disclose certain details where disclosure could distort competition between bidders. It stated that: “in the context of an action brought against a decision taken by a contracting authority in relation to a contract award procedure, the adversarial principle does not mean that the parties are entitled to unlimited and absolute access to all of the information relating to the award procedure concerned. On the contrary, that right of access must be balanced against the right of other economic operators to the protection of their confidential information and their business secrets. [...] The principle of the protection of confidential information and of business secrets must be observed in such a way as to reconcile it with the requirements of effective legal protection and the rights of defence of the parties to the dispute and, in the case of judicial review, in such a way as to ensure that the proceedings as a whole accord with the right to a fair trial”.

Source: Judgement of the EU General Court (Ninth Chamber) of 8 July 2015 in Case T-536/11, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62011TJ0536>

As shown in Box 9.2, certain OECD countries have adopted disclosure rules that take into account not only transparency requirements, but also competition considerations.

Box 9.2. Disclosure rules of public procurement information in France and Germany

In France, contracting authorities are required to ensure the confidentiality of industrial or commercial secrets, as well as the non-disclosure of information that could distort competition, such as information on general or detailed prices of tenders during the procurement procedure. The practice has been to protect all bids from access by competing tenderers. Information about the winning tender such as overall pricing must, however, be disclosed to competitors post-award. The technical and financial details of the winning tender (such as unit prices) may be redacted to preserve confidentiality. The goal is to avoid facilitating collusive practices.

In Germany, business secrets are understood broadly as “all facts, circumstances and processes referring to a company, which are not obvious, but accessible to a limited number of persons only and in which the legal entity has a justified interest of non-disclosure”. Business secrets cover the entirety of the bids submitted in procurement procedures and the contracting authority is required to protect them during the tender process.

Source: (Sanchez-Graells, 2018^[14])

In line with the OECD Recommendation and international practices, Brazil should consider avoid making public:

- the list of prequalified candidates in differentiated procurement processes during the tender procedure and instead consider sending invitations to tender to shortlisted bidders on a confidential basis;
- the list of bidders in procurement processes under Federal Law No. 8.666/1993 (General Procurement Act) during the tender procedure; and
- information regarding bids and bidders; this should only be disclosed once the contract has been awarded or even at a later stage to prevent immediate monitoring and retaliation measures of the cartel members.

9.4. Regulating public hearings, public consultations and site visits

For the procurement of a high-value contract, Brazilian procurement entities are required to organise a public hearing. Public consultations with potential bidders may also take place for the preparation of ETP. Finally, firms may be invited to technical site inspections when necessary or useful for preparing a bid (for example, for engineering, security or cleaning services).¹²⁹

Brazil has not regulated the way in which these events take place. The OECD recommends avoiding gathering potential bidders in the same place and at the same time as this may facilitate communication between competitors and eventually the formation of bid-rigging arrangements. The TCU has stressed these concerns with site inspections.¹³⁰

If possible, site inspections should be organised individually and be attended by two procurement officials to assuage concerns of corruption, which could arise when a bidder meets with a procurement officer on his/her own. The contracting authority could also improve efficiency and avoid bringing together potential bidders by using technology such as drones for site inspections.

Public hearings or consultations with interested parties may be difficult to organise and manage individually for practical reasons. These events may, however, take place electronically to limit the opportunities for bidders to meet in person. If minutes of these events are made public, the contracting unit should not disclose the contact details of participating firms. An alternative could be to identify firms using a confidential code. Following a recommendation from the OECD, the Mexican Institute of Social Security (Instituto Mexicano del Seguro Social, IMSS) adopted measures to run most of its procurement events remotely. Clarification meetings and presentations and openings of bids in electronic tenders are now held in closed meetings in the presence of the social witness (an individual out of a list of non-government organisations and individuals selected by Mexico's Ministry of Public Administration, who participate in procurement procedures above certain thresholds to promote public scrutiny) and internal control unit (IMSS' internal auditors). Bidders are not invited to attend these meetings, but the minutes are published on CompraNet, the Mexican e-procurement system, for transparency purposes. In particular for consolidated purchases (joint procurement between IMSS and other procurement entities, usually for the procurement of medicines), IMSS has broadcast clarification meetings, presentation and opening of bids, and the award of contracts on social networks (Facebook and YouTube) and on the IMSS website (OECD, 2018^[14]).

Brazil should regulate how public hearings, public consultations and technical inspection of sites take place. When organising these events, procurement entities should avoid gathering potential bidders in the same site. Site inspections could be done using electronic means such as drones and public hearings and public consultations could be carried out remotely keeping participants' identities confidential.

9.5. Estimated prices

Depending on the modality of procurement process, different rules apply to the publication of maximum reserve prices or estimated budgets.

According to Federal Law No. 8.666/1993 (General Procurement Act), the estimated budget of the procured object must be an annex to and published with the tender notice.¹³¹

For reverse auctions, the estimated value of the contract or maximum accepted value is confidential and will only be disclosed once the bidding session has been closed. Conversely, if the award criteria is the biggest discount the maximum reference price must be indicated in the tender notice.¹³²

For the differentiated procurement regime, the estimated budget of the project is classified unless the award criteria is biggest discount or best technique.¹³³ The OECD Guidelines recommend using maximum reserve prices only if they are the result of thorough market analysis and contracting officials are convinced of their competitive nature (see Section 6.2 for recommendations on overhauling market analysis). Reference prices should remain confidential as publishing them informs bidders how much the contracting authority is willing to pay, which makes price-fixing easier. It also creates a focal point around which bidders will likely estimate their bids, regardless of whether they explicitly agree to fix prices (OECD, 2009^[4]).

Brazil procurement entities should not reveal the estimated budget of the procured object in the tender notice. This information could be disclosed once the procurement process is over and the contract awarded. This decision could be based on the Federal Law No. 12.527/2011 (Public Information Act) that protects information used for the administrative deliberative process (see Section 9.2). Public buyers should also avoid to the extent possible the use of the biggest discount criterion for awarding contracts as this procedure requires disclosing the maximum prices giving bidders a reference on the basis of which price-fixing arrangements could take place.

9.6. Recommendations for action

Procurement entities should avoid making the complete version of the PAC automatically available to the public and limit publication to the simplified version as required by law.

Brazil should consider protecting information in ETP. If the ETP has to be disclosed, Brazil could consider protecting this information until the procurement process is over, based upon paragraph 3 of Article 7 of Federal Law No. 12.527/2011 (Public Information Act), which protects information that serves as the basis of a decision-making process of the public administration. The new law 14.133/2021 provides the public administration with the possibility to keep the estimated value of the contract and the reference unit price included in the ETP confidential until the end of the procurement process.¹³⁴ Procurement entities should make an extensive application of this prerogative and consider protecting the remaining elements of the ETP.

Brazil should consider avoid making public:

- the list of prequalified candidates in differentiated procurement processes during the tender procedure and instead consider sending invitations to tender to shortlisted bidders on a confidential basis;
- the list of bidders in procurement processes under Federal Law No. 8.666/1993 (General Procurement Act) during the tender procedure; and
- information regarding bids and bidders; this should only be disclosed once the contract has been awarded or even at a later stage to prevent immediate monitoring and retaliation measures of the cartel members.

Brazil should regulate how public hearings, public consultations and technical inspection of sites take place. When organising these events, procurement entities should avoid gathering potential bidders in the same site. Site inspections could be done using electronic means such as drones and public hearings and public consultations could be carried out remotely keeping participants' identities confidential. New law 14.133/2021 provides for the possibility to conduct public hearings electronically.¹³⁵ Electronic public hearings should be preferred to in-person events. The new law also provides for individual site inspections, which, in principle, would avoid gathering potential bidders in the same place.¹³⁶

Brazil procurement entities should not reveal the estimated budget of the procured object in the tender notice or at a later stage during the procurement process. This information could be disclosed once the procurement process is over and the contract awarded. This decision could be based on the Federal Law No. 12.527/2011 (Public Information Act) that protects information used for the administrative deliberative process (see Section 9.2). Public buyers should also avoid to the extent possible the use of the biggest discount criterion for awarding contracts.

Brazil should consider adopting more detailed regulation in this area and avoid automatically excluding low value offers. In doing so, Brazil could follow the OECD checklist on how to reduce the risks of abnormally low prices while protecting competition.

10. Raising awareness of the risks of bid rigging

10.1. The role of the competition authority in enforcement and awareness-raising

Strong and regular competition enforcement is important for preventing and deterring bid rigging. CADE's anti-bid-rigging enforcement activity has been outstanding, especially in investigations initiated in the context of the Car Wash anti-corruption investigation. However, CADE has been less active in advocating against bid rigging and in favour of competitive procurement processes with other public bodies, including the legislature.

As noted in Section 4.2, while government and legislative bodies are not obliged to consult CADE when enacting legislation on public procurement, CADE is free to provide comments from a competition perspective on legislation under discussion if it deems it appropriate or if requested by a public body. CADE does not frequently issue opinions, but has done so in the past. For instance, in May 2020, CADE expressed its concerns about an executive order authorising the National Social Security Institute to contract state-owned companies in the information technology market without a bidding process; the opinion was issued at the request of the Ministry of Justice.¹³⁷ SEAE also has powers to comment on legislation, but does not seem to have the necessary resources to issue regular opinions regarding public procurement and bid rigging.

CADE also holds powers to comment on public-procurement procedures, and has done so infrequently. For instance, for a sale of refineries by state-owned oil Brazilian company Petrobras, CADE advised that the refineries be sold to several purchasers rather than one to maximise their value for Petrobras. CADE is currently advising the Brazilian government on the procurement of 5G technology. SEAE is also empowered to analyse procurement notices and issue opinions on government procurement strategies.

It would be beneficial if CADE and SEAE joined forces and co-ordinated their efforts on advocacy. At present, no formal co-operation arrangements between the two bodies are in place, even if they informally co-operate on specific issues.

Further, both CADE and SEAE should adopt a more active role issuing opinions on relevant pieces of legislation and procurement procedures. Notably, CADE and SEAE have not commented on the draft bill on public procurement, which was being discussed in Congress at the time of drafting. It would be advisable that they co-ordinate more closely to ensure that at least one comments on public-procurement legislation and relevant procurement procedures consistently. CADE and SEAE should adopt a set of criteria, such as contract value and the industry involved, to determine on which procurement procedures they are typically expected to provide an opinion.

10.2. Capacity building of public-procurement staff

Raising awareness among procurement officials about the costs and risks of collusion is important in the fight against bid rigging. The OECD Guidelines recommend that procurement agencies regularly train their staff in bid-rigging prevention and detection.

As explained in Section 4.2, CADE conducts events and training courses aimed at fighting bid rigging. CADE reached an agreement with the National School of Public Administration (Escola Nacional de Administração Pública, ENAP)¹³⁸ to develop 10 courses (see Box 10.1). So far, CADE has launched two courses: one on cartel prevention and detection in public procurement and a second about its antitrust leniency programme.¹³⁹ Both are primarily aimed at public procurement officials, but anyone can register and take the course. In addition, CADE has carried out lectures and courses for officials of public prosecution services and control bodies, addressing issues related to competition, investigative techniques and Project Cérebro (see Box 4.1). Apart from disseminating knowledge, these events aim to create a network of partner bodies allowing for more co-ordinated and effective investigations of anticompetitive conducts.

However, CADE's events and training courses are not part of a general training programme for procurement officials and for officials otherwise potentially confronting bid rigging, such as public prosecutors, and CGU and TCU employees. In fact, stakeholders pointed out that officials wishing to obtain training about public procurement need to identify the available resources themselves. This may explain why not all relevant public bodies are aware of CADE's guidance and capacity building efforts.

Box 10.1. CADE and ENAP course on the detection of cartels in public procurement

In October 2019, CADE launched an online course in partnership with ENAP about prevention and detection of cartels in public procurement. The programme is primarily aimed at officials in charge of public procurement, although it is not mandatory. It is open to the public and accessible through the government virtual school, *Escola Virtual do Governo* (EVG), an education platform.

The programme takes 30 hours to complete and at the time of writing, of the 6,100 people who registered around 2,500 people had completed it. It aims to prepare procurers to identify indications of collusion between competitors and report such behaviour to the appropriate authorities, in order to prevent, detect and suppress cartels in procurements.

Source: OECD with information at www.escolavirtual.gov.br/curso/152 and <https://emnumeros.escolavirtual.gov.br/indicadores/>.

The CADE/ENAP course on the detection of cartels in public procurement is relatively interactive, requiring participants to answer questions throughout its four modules and offering several examples. Still, based on feedback from stakeholders provided by CADE,¹⁴⁰ the content of the course is too general, lacks focus on public procurement and is too theoretical, with, for example, limited practical tips on how public procurement officers should act to prevent cartels or when one is detected. Indeed, the course materials deal too extensively with issues irrelevant to public-procurement officials, such as abuse of dominance, theoretical discussions on the effects of cartels on consumer welfare and the role of indirect evidence to prosecute cartels. In addition, explanations are too abstract and possibly overly detailed for non-specialists. Practical tips aimed at public officials are limited. These flaws may explain why, at the time of writing, 33.4% of those who registered for the course dropped out.¹⁴¹

CADE and ENAP should carefully consider the results of the survey and implement changes aimed at making the course more practical and easier to follow for public procurement officials. The training manual prepared by the OECD as part of this project could be used as a basis. The modules might benefit from having less text and a clearer focus on topics relevant to fighting bid rigging. Most of these, such as

detecting collusion in bids, are already covered, but may not have sufficient prominence, given the amount of information provided in the course. Further, the course should add more audiovisual materials and practical exercises (such as a hypothetical role-playing) to make the course more interactive.

Building officials' capacity is an extremely useful tool in the fight against bid rigging. By acquiring appropriate knowledge, public officials can design tenders that make rigging bids more challenging. Further, they can detect anticompetitive agreements more easily when they occur. Indeed, CADE officials have noticed that complaints from public officials increase after they have benefitted from training, although the exact impact is difficult to determine.

Brazil should consider developing and implementing a comprehensive, long-term programme of capacity building in public procurement and fighting bid rigging, rather than relying on isolated initiatives. ENAP's and CADE's course and the training manual produced by the OECD on bid rigging for this project provide a good basis from which to develop such a programme. Training on bid rigging should be compulsory for all officials involved in public procurement and be part of an eventual professionalisation strategy and certification framework for the public-procurement workforce (see recommendation in Section 5). Capacity building should stress the importance of reporting bid-rigging infringements and the reporting channels available, and clarify that officials will suffer no negative consequences from reporting this type of conduct, as long as they are not actually involved in the scheme.

10.3. Raising awareness in the private sector about the risks of bid rigging

Initiatives to improve training about competition risks in public procurement for the private sector, including SMEs, was identified as a subject for future work in the 2016 report on implementing the OECD recommendation on fighting bid rigging. Raising private-sector awareness about the risks of cartels is an important step in the fight against bid rigging. Companies should be aware the rigging bids is illegal, the legal consequences in terms of civil, administrative and criminal sanctions, and its negative effects on business reputation and future opportunities.

Federal Law No. 12.846/2013 (Anti-corruption Act) adopted in 2013 explicitly mentions that compliance programmes will be positively considered in the determination of penalties.¹⁴² This has resulted in the rapid development of anti-corruption compliance programmes in Brazil.

Federal Law No. 12.529/2011 (Competition Act) does not mention compliance programmes as an element that can be taken into consideration in the calculation of fines of anticompetitive conduct, but they are generally considered as a mitigating factor by CADE. According to the Competition Act, when calculating fines, CADE must take into consideration variables such as the good faith of the infringer, the extent of the damage caused by the infringements, the effects in the market, and any recidivism. The existence of a strong compliance programme may be considered evidence of good faith on the part of the infringing company and of the reduction of the negative economic effects derived from the unlawful practice. Also, compliance programmes are often discussed during settlement negotiations. If the settling company agrees on developing a compliance programme or has a compliance programme in place, CADE may consider granting a higher discount on the fine. CADE will, however, only take into consideration serious and solid compliance programmes that are in line with its Guidelines for Competition Compliance Programmes.¹⁴³

CADE's sanctions policy, which places a positive value on compliance programmes, the Car Wash investigations and the success of the leniency programme have incentivised the adoption of competition-compliance programmes and culture by an increasing number of companies. However, the development of competition compliance programmes differs across sectors and varies with company size.

Some states, notably Rio de Janeiro¹⁴⁴ and Distrito Federal,¹⁴⁵ require a compliance and integrity programme in place as a condition for companies participating in high-value procurement processes. For

Rio de Janeiro, the contract value should be above than BRL 1.5 million for public works and engineering services and BRL 650 000 for goods and services, with a contract duration of more than 180 days. For Distrito Federal, the contract value should be above than BRL 5 million. Competition law is not, however, explicitly mentioned as an element that must be covered by these programmes. Other countries also have rules compelling companies to adopt integrity (and sometimes competition) compliance programmes. This trend is often associated with the adoption of regimes on corporate criminal liability (see Box 10.2)

Box 10.2. Compliance programmes in Argentina and Spain

Argentina

On 8 November 2017, the Argentine government enacted Law 27.401 which establishes corporate criminal liability for crimes against the public administration and for international bribery. According to the law, legal entities contracting with the government are required to implement an integrity programme, which should be adapted to the specific risks of its activities, size, economic capacity and, eventually, specific sector-regulations. The programme must contain at least the following elements: 1) a code of ethics or conduct, or the existence of integrity policies and proceedings applicable to all employees; 2) specific rules and procedures for preventing unlawful acts within the scope of public tenders, in the execution of administrative contracts or in any other interaction with the public sector; and 3) regular training of all employees in the integrity programme. There are no rules requiring a competition compliance programme to contract with the government.

Spain

The Spanish Criminal Code's reforms of 2010 and 2015 introduced direct corporate criminal liability for criminal offences committed by a company's legal representatives or employees not subject to adequate controls. This required companies of all sizes to implement effective [integrity and competition?] compliance programmes.

According to the compliance guidelines published by the Spanish Competition Commission (Comisión Nacional de los Mercados y la Competencia, CNMC), competition compliance programmes might be taken into account as a factor in reducing potential sanctions. Moreover, the Spanish Public Procurement Law (Ley 9/2017 de Contratos del Sector Público) establishes that an economic operator under investigation may avoid a debarment sanction or have it lifted when it implements an effective compliance programme, or makes improvements to a pre-existing one.

Source: Marval O'Farrell Mairal (2017), "Corporate Criminal Liability Regime", www.marval.com/publicacion/responsabilidad-penal-para-las-personas-juridicaspor-delitos-de-corrupcion-13091&lang=en; CNMC (2020), Antitrust Compliance Programmes Guidelines, www.cnmec.es/sites/default/files/editor_contenidos/Competencia/Normativas_guias/202006_Guia_Compliance_FINAL_eng.pdf

Requiring compliance programmes as a condition for participation in procurement processes may protect the public administration from wrongful acts, guarantee that contracts are executed in accordance with the law, and reduce the risk of the occurrence of illegal acts, such as corruption and bid rigging. This requirement may, however, become an obstacle for companies and, in particular SMEs, without the capacity and the resources to develop solid compliance programmes. Authorities can take this into consideration – as does the state of the Distrito Federal¹⁴⁶ – to providing differentiated and preferential treatment to SMEs.

Brazil could analyse the costs and benefits of requiring the adoption of a compliance programme, covering competition law, to companies participating in federal procurement processes.

Further to its competition compliance guidelines, CADE could consider carrying out training for private companies on the requirements that a compliance programme must meet to be considered robust and effective.

Public buyers may also contribute to raising the awareness of companies about the risks of bid rigging by informing them in the procurement documents of its illegality and the consequences of violating competition law. While procurement notices in Brazil mention the wrongdoings and sanctions provided for in Federal Law No. 8.666/1993 (General Procurement Act) and Federal Law No. 10.520/2002 (Reverse Auction Act), they do not contain any explicit reference to the laws sanctioning cartels in procurement.

Brazil should consider explicitly mentioning laws prohibiting and sanctioning cartels in all tender notices. These rules could also explicitly appear in the Certificate of Independent Bid Determination, which only contains a general reference to the law and Article 299 of the Brazilian Criminal Code regarding false declaration (see Annex A).

10.4. Recommendations for action

CADE and SEAE should co-ordinate their advocacy efforts and adopt a more active role advising on public-procurement legislation and strategic, complex or high-value procurement procedures. They should make sure that relevant laws and procedures are reviewed and that they do not provide overlapping comments. With this aim, they may adopt a formal co-operation agreement delimiting their roles and laying down the criteria used to determine which procurement procedures to review.

Brazil should set up a comprehensive, long-term programme of capacity building on fighting bid rigging for public-procurement officials and officials otherwise involved in fighting bid rigging, such as public prosecutors. Participation in this training should be mandatory and part of an eventual professionalisation strategy and certification framework for the public-procurement workforce. The new law 14.133/2021 requires TCU to promote capacity building for procurement officials. Training on fighting bid rigging should be part of this effort.

Capacity building on fighting bid rigging should stress the importance of reporting suspicions of bid rigging, available reporting channels and that officials reporting any wrongdoing will not be negatively affected unless they have participated in illegal behaviour.

CADE and ENAP should update the online course on prevention and detection of cartels in public procurement, so that it contains topics more focused on fighting bid rigging and offers more practical tips for public procurement officials.

Brazil could analyse the costs and benefits of requiring the adoption of a compliance programme, covering competition law, to companies participating in federal procurement processes.

Further to its competition compliance guidelines, CADE could consider carrying out training for private companies on the requirements that a compliance programme must meet to be considered robust and effective.

Brazil should consider explicitly mentioning laws prohibiting and sanctioning cartels in all tender notices. These rules could also explicitly appear in the Certificate of Independent Bid Determination, which only contains a general reference to the law and Article 299 of the Brazilian Criminal Code regarding false declaration.

11. Detecting and punishing collusive agreements

11.1. Co-operation with other enforcement entities

Several stakeholders have pointed out that the system governing bid rigging in Brazil can be difficult to navigate for companies, given the legal and institutional frameworks' complexity. Companies may not be certain about which law or laws are applicable to a specific conduct and which enforcement authority is involved. Further co-operation among enforcement authorities could bring **legal certainty and simplify procedures**. In particular, authorities could provide clarity as to which conducts are investigated by which authority and according to which legal framework. There are already a number of bilateral memorandums of understanding and other arrangements among enforcement authorities (see Section 4.3), but there is no formal global framework specifying the role of each.

Co-operation among enforcement authorities is also important to ensure the efficacy of the **leniency programmes** of CADE, CGU and the compensated co-operation mechanism used by public prosecutors. Companies may be less willing to apply for leniency with one agency, if they fear that, as a result, they may be prosecuted by other enforcement entities. Stakeholders have indicated that despite the initiatives to establish protocols, in practice, there is little co-ordination between authorities in the context of leniency programmes. For example, in Operation Car Wash only one company managed to benefit from leniency with all relevant authorities. They also complained that some companies obtained leniency agreements with certain enforcers, but were still prosecuted by TCU. There also appear to be co-ordination issues among different prosecutors. Stakeholders complain that even if a company signs a compensated co-operation agreement with one public prosecutor office, another public prosecutor – such as one from another state – may prosecute if it has the powers to do so, because, say, the conduct also occurred in that second state.

Some stakeholders have mentioned that a one-stop-shop for leniency applications and compensated co-operation requests would help companies feeling confident about co-operating with enforcement agencies and would boost the use of these detection tools. At the time of drafting, a company wanting to negotiate leniency applications in addition to CADE's must do each one separately. In practice, pursuant to its guidelines on the leniency programme, CADE facilitates the negotiation with other authorities with the aim that applicants are not worse off than non-co-operative companies when investigated by other enforcers. CADE pointed out that co-operation with other authorities works well if their team is used to working with CADE; this is typically the case for administrative federal authorities or federal prosecutors, but less common for other officials, such as state prosecutors. Cease-and-desist agreements are treated by CADE similarly to leniency applications.

Also, parties signing leniency agreements with CADE are not protected from being debarred from participating in government procurement. In 2019, TCU debarred four contractors for a cartel in the procurement of electromechanical assembly for the Angra 3 nuclear power plant in Rio de Janeiro, including one company, UTC Engenharia, that had signed leniency agreements with both CADE and CGU.

Finally, different leniency programmes grant different protection to individuals. For example, while CADE's leniency programme protects the individuals involved in the conduct, CGU's does not.

Co-operation among enforcement authorities can also be useful in the **detection and investigation of infringements**. CADE is provided with sets of data directly by other public bodies, which along with information obtained from public databases, allows the authority to apply artificial intelligence screens to detect cartels; this is done mainly through Project Cérebro (see Box 4.1). Since 2010, CGU has granted access to the data contained in the Public Expenditure Observatory (*Observatório da Despesa Pública*) and CADE has indicated that it is working to reach similar agreements with other public bodies, including public prosecutors.

There are certain challenges in the context of information exchanges, however. Some public bodies are unwilling to provide information to CADE and other enforcement authorities, fearing that the information may be used to investigate them. Even when the data are provided or made publicly available on a bodies' website, its format may not be compatible with CADE's analysis tools or lacking in quality; for example, items may not be classified in the correct category or format. These problems do seem to be improving. For instance, TCU and state court of accounts are attempting to provide Cérebro-compatible data in the same format. In addition, enforcement authorities may need to pay to obtain the data; this is the case for information that belongs to (the Ministry of the Economy. Even when enforcers do gain access to the data, the Ministry of the Economy does not disclose information it considers confidential, such as the IP address of bidders participating in electronic procedures.

Around 30% of CADE's investigations have been initiated thanks to co-operation with other entities. Co-ordination among enforcement authorities can still be difficult due to different institutional cultures. CADE claims that communication with public prosecutors, especially at federal level, is relatively close. At state level, communications are more limited, but do take place. For instance, in the past, procurement officials in small cities have reached out to public prosecutors who, in turn, have contacted CADE. Officials also contact CADE directly.

Co-operation methods among authorities involved or concerned by the fight against bid-rigging has been identified as a topic for future work in the OECD Competition Committee (OECD, 2016^[6]). In November 2019, the US announced the creation of a strike force to co-ordinate the national response to combat antitrust crimes and related schemes in government procurement, grant and program funding (see Box 11.1)

Box 11.1. US strike force to combat bid rigging

In November 2019, the Justice Department in Washington, D.C announced the creation of the Procurement Collusion Strike Force (PCSF) focusing on deterring, detecting, investigating and prosecuting antitrust crimes, such as bid-rigging conspiracies and related fraudulent schemes, which undermine competition in government procurement, grant and program funding.

The PCSF is an interagency partnership consisting of prosecutors from the Antitrust Division, prosecutors from 22 U.S. Attorneys' Offices, and investigators from the FBI, the Department of Defense Office of Inspector General, the U.S. Postal Service Office of Inspector General, United States Air Force Office of Special Investigations and Department of Homeland Security, Office of Inspector General other partner federal Offices of Inspector General.

Prosecutors from the Antitrust Division and the participating U.S. Attorneys' Offices, along with agents from the FBI and partner Offices of Inspector General, work together to conduct outreach and training for procurement officials and government contractors on antitrust risks in the procurement process. In addition, the partnered prosecutors and investigators jointly investigate and prosecute cases that result from their targeted outreach efforts.

More than two dozen active grand jury investigations were opened during the first years of existence of the PCSF.

The PCSF has a publicly available website at <https://www.justice.gov/procurement-collusion-strike-force>, where government procurement officials and members of the public can review information about the federal antitrust laws and training programs, and report suspected criminal activity affecting public procurement.

Individuals and companies may also contact the PCSF if they have information concerning anticompetitive conduct by emailing pcsf@usdoj.gov

Source: www.justice.gov/opa/pr/justice-department-announces-procurement-collusion-strike-force-coordinated-national-response and www.justice.gov/atr/blog/justice-department-s-procurement-collusion-strike-force-caps-successful-inaugural-year

11.2. Annulment or suspension of procurement procedures and public contracts in case of bid rigging suspicions

According to Article 49 of the General Procurement Act, the procurement entity may only cancel the bidding process for reasons of public interest arising from facts that are duly proven, pertinent and sufficient to justify such decision. The procurement entity must substantiate the annulment of a bidding process in a written opinion.

It has been reported that public procurement officials do not use this prerogative frequently at least in the case of bid rigging. There is no common understanding of what would justify the annulment of a bidding process. Also, they lack the investigation powers and time to verify that a specific fact is proven, pertinent and justifies such action. Moreover, annulment of a procurement process may result in shortages of goods or services that are essential and urgent. In fact, CADE recommends public officials to balance the costs of a shortage of essential goods and services against those resulting from a cartel when deciding whether to annul the procurement process. Procurement officials should also consider that a cartel can be punished at a later stage, the damages caused be claimed and the contract annulled; still, contract annulment is not a

practical solution if delivery under the contract has begun, while the award of damages will be easier if the action is based on CADE's first determining that bid rigging has occurred ("follow-on" action section 11.3).

When the procurement entity suspects that bidders are rigging the process and decides to annul the procurement process, it launches an administrative investigation, notifies the bidders about the alleged illegal behaviour and questions them about the suspicions.

If the bid rigging suspicion is detected during the contract execution, the contracting party may suspend the execution of the contract to investigate the facts.¹⁴⁷

Brazil should consider encouraging public procurement officials to report any bid rigging indication to CADE before annulling the procurement process and starting an inquiry. If the procurement entity still considers that the bidding process should be annulled, they should co-ordinate with CADE. It is advised that the annulment of the process and the launch of an investigation by the procurement entity take place once CADE has conducted dawn raids. This is to avoid that companies alerted by the annulment of the process eliminate key evidence for the competition investigation.

It is more common for the judiciary or TCU to suspend procurement processes following a complaint or appeal.¹⁴⁸ In these cases, co-ordination and consultation with CADE is also recommended.

11.3. Damages claims resulting from bid rigging

As explained in Section 4.1, from a civil-law perspective, cartel members can also be held liable for the damages they cause to public purchasers and third parties; the injured entity may file a damage claim against the cartel members. Other public bodies, even if not directly affected by the bid rigging conduct, may file a civil public action under Federal Law 7.347/1985 or the Federal Law 8429/1992. Finally, citizens may bring a popular action, pursuant to Federal Law 4.717/1965.

Stand-alone actions are allowed in Brazil. This means that a finding by CADE of anti-competitive conduct is not required for a civil action to be initiated. Follow-on actions – those triggered by the adoption of a CADE decision establishing an infringement of Federal Law No. 12.529/2011 (Competition Act) – are also allowed in Brazil. In these, the competition agency's decision becomes a source of evidence for civil proceedings. In particular, and in accordance with Article 93 of Federal Law No. 12.529/2011 (Competition Act), infringement decisions handed down by CADE are considered extrajudicial enforcement orders, allowing victims of antitrust infringements to use the authority's decision as evidence of harm in court proceedings.

Although Brazil's system of civil liability normally only allows the award of single case of damages, victims of antitrust misconduct may seek the payment of double damages on the basis of Article 42 of Brazil's Consumer Protection Code (Federal Law No. 8.078/1990). In 2010, in an effort to promote follow-on antitrust damage actions, CADE included in a cartel decision for the first time an order that a copy of the decision be sent to potential injured parties to allow them to recover their losses. As a consequence, a number of parties allegedly affected by the cartel sued for damages in courts throughout the country (OECD, 2018^[29]).¹⁴⁹ It is also common that CADE issues an official letter with a copy of the decision addressed to the Federal Public Prosecutor's Office, for acknowledgment and eventual filing of collective competition damage claims.

The Brazilian senate is currently discussing Bill No. 11.275/2018 that aims at establishing mechanisms to foster private enforcement. The Bill provides for the double damages (the damaged party has the right to be compensated for twice the amount of the damage). It also establishes that the time limitation (legal deadline) for competition damage claims will be suspended while CADE is investigating the anti-competitive conduct.

There has been some controversy regarding the access to leniency documents during competition damage claim procedures. In 2016, Brazil's Superior Court of Justice ordered CADE to disclose confidential leniency documents. In 2018, a court ruling clarified that leniency documents could only be disclosed after a final ruling by CADE and that the disclosed documents could not include business secrets and commercially sensitive information. CADE's Resolution 21/2018 and CADE's Ordinance No. 869/2019 set rules and procedures for accessing documents and information in CADE's investigation file, including those arising from leniency agreements and settlement procedures.¹⁵⁰ According to these regulations, documents and information contained in CADE's file are public except: (a) leniency documents elaborated by the investigative body of CADE based on self-incriminatory information voluntarily submitted during the negotiation of leniency and settlement agreements (so called "History of Conduct"); and (b) other documents submitted for leniency purposes, such as documents protected by judicial order or commercial and trade secrets. However, these documents may still be disclosed if access is mandated by law or by a court order.¹⁵¹

Leniency is key for uncovering secret cartels. Despite the regulations adopted by CADE to protect leniency documents, disclosure is still possible if a court or a legal act orders it. There is, thus, still a concern that increasing the exposure of potential leniency applicants to civil liability will reduce their incentives to come forward and apply for leniency. If sensitive leniency documents can be disclosed, the leniency beneficiary may be more exposed to damage claims than those cartel members that did not apply for (OECD, 2018_[27]). Brazil should consider adopting a Law status rule that increases the legal certainty about protection of leniency statements and documents from transparency default rules of art. 5o. LX, of Constitution.

The EU provides a good example of how to adopt a nuanced approach as regards the disclosure of leniency documents for damages claims (see Box 11.2).

Box 11.2. Disclosure of leniency documents for damages claims in the EU

The EU Directive on Competition Damages Actions (Directive 2014/104/EU) provides an example of how disclosure rules can vary for categories of documents to balance the interest of leniency applicants and those of potential follow-on claimants for damages. The Directive distinguishes between three categories of documents:

- Leniency statements and settlement submissions, which can never be disclosed by court order.
- Documents prepared for the purpose of the investigation, such as replies to requests for information, which can be disclosed by court order only after the relevant agency has taken a decision in the case or closes the proceedings.
- Pre-existing materials not prepared in connection with the investigation, such as texts of emails or minutes of meetings, which can be disclosed by court order at any time.

Source: OECD (2019), Background note – Access to the case file and protection of confidential information, [https://one.oecd.org/document/DAF/COMP/WP3\(2019\)6/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3(2019)6/en/pdf).

To preserve the attractiveness of leniency programmes, some jurisdictions have reduced the civil liability of the successful leniency applicant. For example, in the US a leniency applicant is only subject to single – instead of treble – damages, on condition that he also co-operates with private claimants in their damage actions against the remaining cartel infringers.¹⁵² Similarly, the EU Damages Directive limits the civil liability of the leniency beneficiary to the damages caused by it to its direct or indirect purchasers or providers, exempting it from the rules on joint and several liability¹⁵³ (OECD, 2018_[27]). The OECD has stated that it is important that the design of the private enforcement system takes into account the fundamental need to preserve the effectiveness of leniency programmes (OECD, 2015_[28]). Brazil should consider reducing the

liability of the leniency beneficiaries. The Draft Bill No. 11.275/2018 already considers applying single (versus double) damages to leniency applicants. It also exempts leniency applicants from joint and several liability. According to the Draft Bill, they would only be held liable for the damages they caused.

Successful private enforcement actions for anticompetitive conduct are limited in Brazil, despite the fundamental elements of the framework being in place. In Brazil courts generally lack familiarity with competition law and its complex legal and economic analysis, and this may hinder the bringing of damages claims (OECD, 2019^[31]). Thus, more initiatives like the one described below is was done as part of this project (see Box 11.3) would be desirable.

Box 11.3. OECD/CADE Workshops on competition damage claims

During the weeks of 15 March and 22 March 2021, CADE and the OECD organised four online capacity building events for Brazilian judges and prosecutors on competition damage claims. During the workshops high profile judges from different jurisdictions (Spain, the Netherlands, Canada, UK and Brazil) and Brazilian and international experts discussed the following topics:

- Determination of the damage caused by an anti-competitive conduct and how to establish the causal link between the damage and the anti-competitive conduct
- Coexistence and complementarity of the public and private enforcement of competition law
- Collective actions for damage claims in competition cases
- Methodologies to quantify damages and the treatment of this and other competition damage issues by specialised courts.

Around 80 Brazilian judges and prosecutors participated in the workshops.

11.4. Recommendations for action

All entities involved in the prosecution of bid rigging – including CADE, public prosecutors, CGU, and TCU – should provide clarity about which behaviours they, each of them, investigate; this could be done, for instance, by issuing written guidance documents. In addition, authorities are encouraged to co-operate closely and adopt a multilateral framework agreement to delimit each one's role.

Brazil should consider creating a one-stop-shop for leniency applications or, if that is not possible, CADE, public prosecutors, CGU and TCU should adopt protocols to ensure that companies and natural persons that co-operate with one authority in the context of a leniency programme or similar are not worse off than other infringers that have not co-operated.

CADE and the other authorities involved in the prosecution of bid rigging should have access to all relevant data from public-procurement bodies for free. Data should be provided in a user-friendly format to facilitate their extraction and treatment (for example, for conducting statistical or econometric analyses of bidding patterns).

Brazil should consider encouraging public procurement officials to report any bid rigging indication to CADE before annulling the procurement process and starting an inquiry. If the procurement entity still considers that the bidding process should be annulled, they should co-ordinate with CADE. It is advised that the annulment of the process and the launch of an investigation by the procurement entity take place once CADE has conducted dawn raids. This is to avoid that companies alerted by the annulment of the process eliminate key evidence for the competition investigation.

Brazil should establish clear rules on potential claimants' access to CADE's investigation file. Damage claimants should have access to evidence that support competition damages claims. However, access to CADE's file should not be granted: (i) if the investigation is still on-going; (ii) when it may disrupt ongoing enforcement activities, either in Brazil or abroad; (iii) when evidence can be available to the parties without granting access to the file. Leniency statements and settlement submissions should never be disclosed.

To preserve and protect the leniency programme, Brazil can consider limiting the amount of damages that successful leniency applicants are exposed to as provided for in Draft Bill No. 11.275/2018.

Brazil should develop the technical skills and competences of civil courts and judges dealing with competition damage claims. These courts and judges should receive capacity building in general concepts of competition law as well as in more complex issues related to competition damage claims, such as methodologies to calculate damages.

Annex A. DRAFT CERTIFICATE OF INDEPENDENT BID DETERMINATION

(identification of the procurement process)

(complete identification of the representative of the company), as duly appointed representative of (complete identification of the company or of the consortium) hereinafter called (company/consortium), for the purposes set forth in item (to complete) of the Notice (to complete with identification of the Notice), declares, under penalty of law, especially of Article 299 of the Brazilian Criminal Code, that:

(a) The proposal presented to participate in the (identification of the procurement process) was prepared independently by the (Company/Consortium), and the content of the proposal was not, in whole or in part, directly or indirectly, informed to, discussed with or received from any other potential or actual participant of the (identification of the procurement process), by any means or by anyone;

(b) The intention to present the proposal to participate in the (identification of the procurement process) was not informed to, discussed with or received from any other potential or actual participant of the (identification of the procurement process), by any means or by any person;

(c) Has not tried, by any means or by any person, to influence the decision to any other potential or actual participant of the (identification of the procurement process) as to whether or not to participate in the referred procurement;

(d) The content of the proposal submitted to participate in the (identification of the procurement process) will not be, in whole or in part, direct or indirectly communicated to or discussed with any other potential or actual participant of the (identification of the procurement process) before the award of the object of the referred procurement;

(e) The content of the proposal submitted to participate in the (identification of the procurement process) was not, in whole or in part, directly or indirectly, informed to, discussed with or received from any member of the (requesting party) before the official opening of the proposals; and

(f) Is fully aware of the content and extent of this declaration and that has full powers and information to sign it”.

____[name]_____, on _[day]_ of ____[month]_____ of _[year]____

(Legal representative of the company/consortium, within the scope of the procurement process, with complete identification)”

Annex B. Technical co-operation agreements between CADE and other institutions

Table A B.1. Technical co-operation agreements between CADE and other institutions

Technical co-operation agreement	Collaborating body (Portuguese acronyms)	Date of signature
No. 01/2020	Federal Prosecutor's Office (MPF)	February 2020
No. 22/2019	Public Prosecutor's Office of the State of Amazonas (MP-AM)	November 2019
No. 17/2019	State of Santa Catarina	October 2019
No. 14/2019	Public Prosecutor's Office of the State of Mato Grosso do Sul (MP-MS)	July 2019
No. 02/2019	Public Prosecutor's Office of the State of Rio Grande do Norte (MP-RN)	June 2019
No. 01/2019	Public Prosecutor's Office of the State of Roraima (MP-RR)	June 2019
No. 15/2019	Public Prosecutor's Office of the State of Rio de Janeiro (MP-RJ)	May 2019
No. 06/2019	Public Prosecutor's Office of the State of Pernambuco (MP-PE)	May 2019
No. 006/2013	National Agency of Petroleum, Natural Gas and Biofuels (ANP)	April 2013; amended in February 2019
No. 24/2018	Public Prosecutor's Office of the State of Amapá (MP-AP)	December 2018
No. 22/2018	Public Prosecutor's Office of the State of Ceará (MP-CE)	December 2018
No. 29/2018	Public Prosecutor's Office of the State of Bahia (MP-BA)	November 2018
No. 21/2018	Public Prosecutor's Office of the State of Tocantins (MP-TO)	October 2018
No. 19/2018	Public Prosecutor's Office of the State of Piauí (MP-PI)	September 2018
No. 18/2018	Public Prosecutor's Office of the State of Mato Grosso (MP-MT)	September 2018
No. 17/2018	Public Prosecutor's Office of the State of Alagoas (MP-AL)	September 2018
No. 16/2018	Public Prosecutor's Office of the State of Paraíba (MP-PB)	August 2018
No. 15/2018	Public Prosecutor's Office of the State of São Paulo (MP-SP)	August 2018
No. 14/2018	Public Prosecutor's Office of the State of Sergipe (MP-SE)	August 2018
No. 07/2018	Public Prosecutor's Office of the State of Maranhão (MP-MA)	August 2018
No. 01/2018	Public Prosecutor's Office of the State of Espírito Santo (MP-ES)	August 2018
No. 12/2017	Court of Accounts of the State of São Paulo (TCE-SP)	September 2018
No. 11/2017	Public Prosecutor's Office of the State of Santa Catarina (MP-SC)	December 2017
No. 14/2016	Court of Accounts of the City of São Paulo (TCM-SP in the Portuguese acronym)	December 2016
No. 12/2016	Public Prosecutor's Office of Distrito Federal and Territories (MP-DFT)	October 2016
No. 09/2016	Public Prosecutor's Office of the State of Rio Grande do Sul (MP-RS)	May 2011; amended in 2016
No. 08/2016	Public Prosecutor's Office of the State of Minas Gerais (MP-MG)	March 2011; amended in 2016
No. 06/2016	Public Prosecutor's Office of the State of Goiás (MP-GO)	February 2011; amended in 2016
No. 27/2015	Public Security Secretariat of the State of Parana	October 2010; amended in 2015
No. 24/2015	Public Prosecutor's Office of the State of Acre (MP-AC)	October 2010; amended in 2015
No. 23/2015	Public Prosecutor's Office of the State of Rondônia (MP-RO)	August 2010, ; amended in 2015
No. 20/2015	Banco do Brasil	July 2015
No. 15/2015	Comptroller-General of the State of Minas Gerais (CGE-MG)	July 2015
No. 14/2015	Empresa Brasileira de Serviços Hospitalares (Brazilian Hospital Services Company)	January 2016
No. 13/2015	Court of Accounts of the State of Rio de Janeiro (TCE-RJ)	April 2015
Not provided	Public Prosecutor's Office of the State of Pará (MP-PA)	June 2010, ; amended in 2015
No. 27/2014	Office of the Comptroller General of the City of São Paulo (CGM-SP)	September 2014
No. 03/2014	Court of Accounts of the State of Minas Gerais (TCE-MG)	June 2014, ; amended in 2019
No. 02/2014	Office of the Comptroller-General of Brazil (CGU)	January 2014

Source: Pereira Neto

Endnotes

¹ See opinion of the Department of Economic Studies/CADE on the administrative procedure n. 08012.009611/2008-51.

² 18 OECD Members (Australia, Canada, Chile, Denmark, Estonia, France, Greece, Iceland, Ireland, Israel, Japan, Korea, Mexico, Norway, Slovak Republic, Slovenia, United Kingdom and the United States) provide for criminal sanctions for all hard core cartels (therefore including bid rigging). An additional 11 Members (Austria, Belgium, Colombia, Czech Republic, Finland, Germany, Hungary, Italy, Poland, Portugal and Turkey) provide for criminal sanctions for bid rigging cases only. See www.oecd.org/daf/competition/review-of-the-1998-oecd-recommendation-concerning-effective-action-against-hard-core-cartels.htm

³ See www.oecd.org/competition/cartels/fightingbidrigginginpublicprocurement.htm.

⁴ See http://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2021/Lei/L14133.htm#art193.

⁵ Regulated by Federal Law No. 8.987/1995.

⁶ Regulated by Federal Law No. 11.109/2004.

⁷ Regulated by Federal Law No. 13.303/2016.

⁸ See <http://www.portaltransparencia.gov.br/contratos>.

⁹ States, federal district and municipalities also have the power to adopt regulations (Presidential Decrees, Ministerial Decrees and Normative Instructions). At the federal level, the competence for standardization rests with the Management Secretariat of the Ministry of Economy with regard to much of the federal government (central government, agencies and foundations). The Management Secretariat is aware that some states and the Federal District, although having their own regulatory capacity, have used regulations issued at the federal level.

¹⁰ The plenary of the Brazilian House of Representatives (Câmara dos Deputados) approved the main text of the new Procurement Law (Draft Bill No. 1292/95) on 25 June 2019; it is currently being discussed in the Federal Senate.

¹¹ According to Federal Law No. 10.520/02 (Reverse Auction Act), common goods and services are “those whose performance and quality standards could be objectively defined in the tender terms by means of usual market specifications”. Complex engineering works, for example, are not considered “common goods and services”.

¹² The differentiated regime can be used for engineering works and services for the public health system and construction, expansion and refurbishing and administration of penal establishments, and socio-educational service units; initiatives within the scope of public safety; engineering works and services

associated with improvements in urban mobility or expansion of logistics infrastructure; and initiatives in bodies and entities dedicated to science, technology and innovation.

¹³ See, Federal law 14.065 of 30 September 2020.

¹⁴ See <https://portal.tcu.gov.br/espanol/el-tcu/auditoria/>.

¹⁵ Article 71 of the Federal Constitution.

¹⁶ Article 46 of Organic TCU Law No. 8443/1992.

¹⁷ See www.gov.br/cgu/pt-br.

¹⁸ See www.portaltransparencia.gov.br.

¹⁹ In Portuguese, it is called the Sistema eletrônico do Serviço de Informação ao Cidadão, <https://esic.cgu.gov.br/sistema/site/index.aspx>.

²⁰ See www.planalto.gov.br/ccivil_03/_ato2011-2014/2013/lei/112846.htm.

²¹ Article 38 of Federal Law No. 8.666/1993 (General Procurement Act).

²² Article 38 of Federal Law No. 8.666/1993 (General Procurement Act).

²³ Standardised documents can be found in www.gov.br/agu/pt-br/composicao/consultoria-geral-da-uniao-1/modelos-de-convenios-licitacoes-e-contratos/modelos-de-licitacoes-e-contratos.

²⁴ Decree No. 9.745/2019, www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/decreto/D9745.htm#anexo1.

²⁵ Normative Instruction IN SEGES ME No. 01/2019, www.in.gov.br/materia/-/asset_publisher/Kujrw0TZC2Mb/content/id/59109742/do1e-2019-01-11-instrucao-normativa-n-1-de-10-de-janeiro-de-2019-59109733.

²⁶ Normative Instruction No. 40/2020, www.in.gov.br/en/web/dou/-/instrucao-normativa-n-40-de-22-de-maio-de-2020-258465807.

²⁷ Normative Instruction No. 5/2017, www.in.gov.br/materia/-/asset_publisher/Kujrw0TZC2Mb/content/id/20239255/do1-2017-05-26-instrucao-normativa-n-5-de-26-de-maio-de-2017-20237783.

²⁸ Normative Instruction No. 01/2019. www.in.gov.br/materia/-/asset_publisher/Kujrw0TZC2Mb/content/id/70267659/do1-2019-04-05-instrucao-normativa-n-1-de-4-de-abril-de-2019-70267535.

²⁹ Section IV, Article 43 of Federal Law No. 8.666/1993 (General Procurement Act) and Article 8 of Federal Law No. 12.462/2011 (Differentiated Procurement Act).

³⁰ See Article 39 of Federal Law No. 8.666/1993 (General Procurement Act).

³¹ See Regulation 2/2009, www.comprasnet.gov.br/legislacao/legislacaoDetalhe.asp?ctdCod=265

³² See, paragraph 6, Article 43, of Federal Law No. 8.666/1993 (General Procurement Act).

³³ SICAF registration has six criteria: 1) accreditation; 2) legal eligibility; 3) federal tax compliance; 4) state and municipal tax compliance; 5) technical qualification; and 6) economic and financial qualification.

³⁴ See Article 34 of Federal Law No. 8.666/1993 (General Procurement Act) and Decree No. 3722/01.

³⁵ See Article 22 of Federal Law No. 8.666/1993 (General Procurement Act).

³⁶ Eligibility requirements include compliance with all legal formalities related to the setting up and registration of the company, and with tax and labour obligations. Companies must also show evidence of

their technical qualifications, through registration in the relevant professional entity or by proving that it employs staff with the relevant qualifications. See Articles 27-31 of Federal Law No. 8.666/1993 (General Procurement Act).

³⁷ At the federal level, price requests are currently set at BRL 3.3 million for construction and engineering services and BRL 1.43 million for goods and other services.

³⁸ See Article 22 of the General Procurement Act.

³⁹ See paragraph XXVII, Article 22, of the Brazilian Constitution.

⁴⁰ Up to 10% of the limit established for the use of invitation to bid for works and engineering services and up to 10 % of the limit established for the use of invitation to bid for other goods and services (see Table 3.1).

⁴¹ See Articles 24 and 25 of Federal Law No. 8.666/1993 (General Procurement Act). When it comes to direct wards, this law distinguishes between *waivers*, when a formal procurement process would frustrate the achievement of a public interest, and *exemptions*, when conducting a formal procurement processes is not possible.

⁴² See, Article 45, paragraph 1, I, II and III of Federal Law No. 8.666/1993 (General Procurement Act).

⁴³ See Article 56 of Federal Law No. 8.666/1993 (General Procurement Act).

⁴⁴ See Article 86 of Federal Law No. 8.666/1993 (General Procurement Act).

⁴⁵ See Article 77 of Federal Law No. 8.666/1993 (General Procurement Act).

⁴⁶ See Article 41, paragraph 1 of Federal Law No. 8.666/1993 (General Procurement Act).

⁴⁷ See Article 36, §3º, section I, subsection (d).

⁴⁸ Registration of the wrongdoers' names in the National Registry for Consumer Protection is foreseen in Article 38 of the Brazilian Competition Law (Law 12,529/2011) as one of the possible penalties imposed on individuals or companies which infringe the law. However, the Registry is still in process of regulation and is not operating so far. The Brazilian competition authority, CADE, holds a database with the wrongdoers to whom this penalty applies. Once the Registry is launched, the details of the wrongdoers will be registered and publicised. The main effect of this registry is expected to be negative reputational effects. See www.oecd.org/daf/competition/review-of-the-1998-oecd-recommendation-concerning-effective-action-against-hard-core-cartels.htm

⁴⁹ Federal Law No. 8.137/1990 (Economic Crimes Act), www.planalto.gov.br/ccivil_03/leis/18137.htm

⁵⁰ See, Article 4 of the Federal Law No. 8.137/1990 (Economic Crimes Act).

⁵¹ See Article 12 of Federal Law No. 8.137/1990 (Economic Crimes Act).

⁵² Decree-Law No. 2.848/1940 (Criminal Code), www.planalto.gov.br/ccivil_03/decreto-lei/del2848.htm.

⁵³ Article 335 of Decree-Law No. 2.848/1940 (Criminal Code) refers to public auctions called by a federal, state or municipal administration or by a parastatal entity.

⁵⁴ See Article 90 of Federal Law No. 8.666/1993 (General Procurement Act). Article 93 of the same law prohibits any acts aimed at preventing, hindering or defrauding a public tender in more general terms; contrary to Article 90, it does not deal with anticompetitive practices between competitors. Article 93 focuses on acts considered deceptive and in bad faith, or which are intended to harm or deceive or void the fulfilment of a duty imposed in the law or in the public notice. These may include, for example, forging a document or delivering goods different to those contracted. Article 178 of Draft Bill No. 4253/2020 will insert this provision in the Brazilian Criminal Code as Article 337-F.

⁵⁵ Section 4, Article 5 of Federal Law No. 12.846/2013 (Anticorruption Act) prohibits any actions by legal persons “which cause losses to national or foreign governments, and which go against the principles of public administration or international agreements”, including with regard to procurements or contracts, those that “[f]rustrate or defraud, by means of adjustment, combination or any other way, the competitive nature of the government procurement process.”

⁵⁶ See Article 24 of Decree No. 8.420/2015.

⁵⁷ Article 47 of Federal Law No. 12.529/2011 (Competition Act).

⁵⁸ Articles 186 and 927 of Federal Law No. 10.406/2002 (Civil Code).

⁵⁹ Federal Law No. 7.347/1985, www.planalto.gov.br/ccivil_03/leis/l7347orig.htm.

⁶⁰ Federal Law No. 4.717/1965, www.planalto.gov.br/ccivil_03/leis/l4717.htm.

⁶¹ Criminal immunity includes protection from penalties under Federal Law No. 8.137/1990 (Economic Crimes Act) and related crimes, including the Federal Law No. 8.666/1993 (General Procurement Act) and Decree-Law No. 2.848/1940 (Criminal Code).

⁶² For detailed information please see OECD (2018), Challenges and Coordination of Leniency Programmes at www.oecd.org/competition/challenges-and-coordination-of-leniency-programmes.htm, and ICN (2019), Cartel Working Group, report on “Good Practices for Incentivising Leniency Applications” at www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/CWG-Good-practices-for-incentivising-leniency.pdf.

⁶³ See www.cade.gov.br/noticias/cade-lanca-cursos-on-line-sobre-leniencia-antitruste-e-deteccao-de-carteis-em-licitacoes.

⁶⁴ <https://emnumeros.escolavirtual.gov.br/indicadores/>.

⁶⁵ CADE (2019), *Guia de Combate a cartéis em licitação*, www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/guia-de-combate-a-carteis-em-licitacao-versao-final-1.pdf.

⁶⁶ Departamento de Proteção e Defesa Econômica de Secretaria de Direito Econômico do Ministério da Justiça (2008), *Combate a cartéis em licitações: Guia prático para pregoeiros e membros de comissões de licitação*, www.cade.gov.br/noticias/cade-publica-guia-de-combate-a-carteis-em-licitacao.

⁶⁷ CADE (2016), *Medidas para estimular o ambiente concorrencial dos processos licitatórios: Contribuições do Cade*, www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/contribuicoes-do-cade/contribuicoes-cade-ppi.pdf/view.

⁶⁸ SEAE (2014), *Aplicação do Direito da Concorrência a Licitações Públicas; Cartéis*, www.gov.br/fazenda/pt-br/centrais-de-contudos/publicacoes/apostilas/advocacia-da-concorrenca/2-seae_aplicacao_direito_concorrenca_licitacoes_publicas_carteis.pdf/view.

⁶⁹ SEAE (2014), *Questões prático-operacionais de licitações públicas para servidores*, www.gov.br/fazenda/pt-br/centrais-de-contudos/publicacoes/apostilas/advocacia-da-concorrenca/5-seae_questoes_pratico_operacionais_licitacoes_servidores.pdf.

⁷⁰ Law No. 13.334/2016, governing public-private partnerships (Programa de Parcerias de Investimentos, PPIs), establishes that bodies involved in the partnership project must adopt practices recommended by CADE (Section III, Article 6). PPIs are not covered by this report, however.

⁷¹ SEAE has provided comments on certain pieces of public-contracting legislation, which did not cover public procurement. First, SEAE provided comments about Provisional Measure No. 752/2016 (which was converted into Law No. 13.448/2017), which established general guidelines for deadline extensions and new procurement for partnership contracts with the Federal Government related to the road, rail and airport

sectors. SEAE also presented possible adverse impacts of Decree No. 9048/2017, which allowed the extension of port leasing agreements up to a maximum of 70 years.

⁷² Article 20 of Federal Law No. 12.529/2011 (Competition Act).

⁷³ See Articles 3-A to 7 of Law No. 12.850/2013 defining Criminal Organisations.

⁷⁴ Some examples of pure criminal cartel prosecutions are criminal prosecutions No. 2003.71.00.007397-5 and No. 0115992-93.2005.8.21.0027, relating to cartels, which were prosecuted and sanctioned.

⁷⁵ Article 46 of Organic Law 8.443/1992 (TCU).

⁷⁶ Articles 16 and 17 of Federal Law No. 12.846/2013 (Anticorruption Act).

⁷⁷ CGU (2019), *Relatório de Avaliação: Contratos de Terceirização*, <https://auditoria.cgu.gov.br/download/13680.pdf>.

⁷⁸ See Article 58 of Law 8.443/1992, www.planalto.gov.br/ccivil_03/Leis/L8443.htm and Portaria-TCU No. 15 of 15 January 2021, <https://portal.tcu.gov.br/lumis/portal/file/fileDownload.jsp?fileId=8A81881F77142EC001771632497F56A1&inline=1>.

⁷⁹ Unidos Contra a Corrupção (2018), *Novas Medidas Contra a Corrupção*, FGV, São Paulo and Rio de Janeiro.

⁸⁰ See Decree No. 9.412/2018, https://www.in.gov.br/materia/-/asset_publisher/Kujrw0TZC2Mb/content/id/26370034/do1-2018-06-19-decreto-n-9-412-de-18-de-junho-de-2018-26369935.

⁸¹ See www.gov.br/compras/pt-br/assuntos/rede.

⁸² Data from www.portaltransparencia.gov.br (accessed on 21 October 2020).

⁸³ Data from www.portaldetransparencia.gov.br (accessed on 8 July 2020).

⁸⁴ See www.planalto.gov.br/ccivil_03/ato2019-2022/2020/lei/l13979.htm.

⁸⁵ See www.gov.br/agu/pt-br/composicao/consultoria-geral-da-uniao-1/modelos-de-convenios-licitacoes-e-contratos/modelos-de-licitacoes-e-contratos.

⁸⁶ [Portaria conjunta segedam/conjur n.º 1, de 8 de julho de 2009.](#)

⁸⁷ Paragraph III of Article 14 of Federal Law No. 12.462/2011 (Differentiated Procurement Act).

⁸⁸ In order of preference, procurement officials will choose: 1) products manufactured in Brazil; 2) products or services manufactured or provided by Brazilian companies; 3) products or services manufactured or provided by companies that invest in technological research and development in Brazil; and 4) products or services manufactured or provided by companies that comply with the quota provided for in the Law for the Inclusion of People with Disabilities (Federal Law No. 13.146/2015), or people participating in social programmes for rehabilitation.

⁸⁹ Procurement officials can establish a preference for manufactured products or services that comply with Brazilian standards, goods or services produced or provided by companies that hired personnel with disabilities or participate in social programmes for rehabilitation or products and services resulting from technological development or innovation that took place in Brazil.

⁹⁰ See Article 6 paragraph XXXV of the new law 14.133/2021.

⁹¹ The same rules apply across CREAs as they are all regulated by CONFEA - <https://www.confea.org.br/>

⁹² See www.wto.org/english/news_e/news20_e/gpro_19may20_e.htm.

⁹³ Article 33 of Federal Law No. 8.666/1993 (General Procurement Act).

⁹⁴ TCU Judgement No. 1946/2006.

⁹⁵ At the time of writing, the guidelines were being reviewed by the Danish Competition Authority, but a draft of the new guidelines was published for public consultation in May 2020, www.en.kfst.dk/media/56474/20200507-joint-bidding.pdf.

⁹⁶ Article 72 of Federal Law No. 8.666/1993 (General Procurement Act).

⁹⁷ TCU Judgement No. 2189/2011.

⁹⁸ TCU Judgement No. 14193/2018.

⁹⁹ Paragraph XXXIII, Article 7 of the Federal Constitution.

¹⁰⁰ Administrative Process No. 08012.010362/2007-66, decided by the Tribunal on 19 February 2014.

¹⁰¹ See CADE's press release, <http://en.cade.gov.br/press-releases/cade-sanctions-three-anticompetitive-conducts> and https://ibrac.org.br/UPLOADS/Livros/arquivos/Brazilian_Competition_Law_-_5_years_Preliminary_Version.pdf.

¹⁰² Article 15 of Federal Law No. 8.666/1993 (General Procurement Act).

¹⁰³ See www.gov.br/antt/pt-br/assuntos/noticias/antt-adere-ao-servico-do-taxigov-30.

¹⁰⁴ These projects include cleaning services, security services, the implementation of TÁxigov and National Virtual Warehouse at national level (until now only implemented in Distrito Federal), purchase of airplane tickets, software and cloud services.

¹⁰⁵ Initiatives of procurement centralization, by means of the Central Procurement Authority, are established via Ordinance or Normative Instruction that assigns exclusivity for carrying out such procedures, for example: - TaxiGov - Ordinance 6, of January 15, 2018 - <https://pesquisa.in.gov.br/imprensa/jsp/visualiza/index.jsp?data=16/01/2018&jornal=515&pagina=61&totalArquivos=80> - Virtual Warehouse - Normative Instruction 8, of September 27, 2018 - https://www.in.gov.br/materia/-/asset_publisher/Kujrw0TZC2Mb/content/id/42826861/do1-2018-09-28-normative-instruction-n-8-of-27-september-of-2018-42826604.

¹⁰⁶ See www.gov.br/compras/pt-br/assuntos/rede.

¹⁰⁷ Article 23 of Federal Law No. 8.666/1993 (General Procurement Act).

¹⁰⁸ Decree No. 10.024/2019, www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/decreto/D10024.htm.

¹⁰⁹ See www.gov.br/compras/pt-br/assuntos/rede.

¹¹⁰ Article 52 of Draft Bill No. 4253/2020.

¹¹¹ Article 19 of Draft Bill No. 4253/2020.

¹¹² TCU Judgement No. 79/2010.

¹¹³ See section VIII, Article 40 of Federal Law No. 8.666/1993 (General Procurement Act).

¹¹⁴ See paragraph 1, Article 41, of Federal Law No. 8.666/1993 (General Procurement Act).

¹¹⁵ Article 9 of Federal Law No. 12.462/2011 (Differentiated Procurement Act).

¹¹⁶ TCU Judgement No. 1.229/2008.

¹¹⁷ TCU Judgement No. 2.206/2014) states the indication of a brand is restricted "to the circumstance in which there are justifications based on objective parameters, which clearly demonstrate that this option is the best in technical and economic terms for the government".

¹¹⁸ www.gov.br/economia/pt-br/aceso-a-informacao/licitacoes-e-contratos/licitacoes/pregoes/2020/pregao-eletronico-no-1-2020-central-de-compras-uasg-201057.

¹¹⁹ Article 46 of Federal Law No. 8.666/1993 (General Procurement Act).

¹²⁰ The bid object will be provided through an efficiency contract. It is a type of contract that links the contractor's remuneration to the economic return that the contract will generate for the public administration. As an example, we may have a service contract, which provides not only the object or service to be performed, but also the estimated savings that the company proposes to generate for the Administration, such as the reduction of current expenses, etc. Thus, the contractor's remuneration is stipulated based on the percentage of savings generated for the public administration. As such, this involves risk: the benefit to the individual will be proportional to the gain generated for the public administration. Consequently, if the goal is not achieved, the contractor is subject to penalties. See https://www.justen.com.br/pdfs/IE58/Nester_RDC.pdf.

¹²¹ Article 24 of Federal Law No. 12.462/2011 (Differentiated Procurement Act). If the contracted savings are not achieved: 1) the difference between the contracted savings and those actually generated will be discounted from the payment to the awarded bidder; or 2) if the difference between the contracted savings and those actually generated is higher than the payment to the awarded bidder, the procurement entity will impose a fine equal to the value of that difference for non-compliance of contract.

¹²² Article 36 of the Law of Public-Sector Acquisitions, Leases and Services, the Mexican Procurement Act (Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público, LAASSP).

¹²³ TCU Judgement No. 2.640/2007.

¹²⁴ See <http://paineldecompras.economia.gov.br/planejamento>.

¹²⁵ This module is called System for Planning and Management of Contracts (Sistema de Planejamento e Gerenciamento de Contratações, PGC).

¹²⁶ Unidade de Administração de Serviços Gerais, UASG.

¹²⁷ Paragraph 3, Article 8 of Regulation No 1/2019, www.in.gov.br/materia/-/asset_publisher/Kujrw0TZC2Mb/content/id/59109742/do1e-2019-01-11-instrucao-normativa-n-1-de-10-de-janeiro-de-2019-59109733.

¹²⁸ Federal Law No. 12.527/2011, www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12527.htm.

¹²⁹ Based on Article 30 of Federal Law No. 8.666/1993 (General Procurement Act).

¹³⁰ TCU Judgement No. 110/2012. In this ruling, TCU provided that “when site visits are necessary, the contracting entity should avoid all potential bidders meeting at the same time and place as this would give allow them to know who the competitors are and restrict competition”.

¹³¹ See Article 40 of Federal Law No. 8.666/1993 (General Procurement Act).

¹³² See Article 15 of the Law 10.024/2019 regulating electronic reverse auctions.

¹³³ See Article 6 of Federal Law No. 12.462/2011 (Differentiated Procurement Act).

¹³⁴ See Article 18 of new law 14.133/2021.

¹³⁵ See Article 21 of new law 14.133/2021.

¹³⁶ See Article 63 of new law 14.133/2021.

¹³⁷ CADE's report is available at:

https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYic

[buRZEFhBt-n3BfPLlu9u7akQAh8mpB9yNPIW3MVDDiFfU0nMyhzsj-uaTnnYBSNwIO8DRiAF7tnVZYaw88E4L3rxXz7g2lpFwHlAtAlHr3eBCulOpxwiiio](https://www.cade.gov.br/boas-praticas/boas-praticas-licitacoes).

¹³⁸ ENAP is a public foundation, under the aegis of the Ministry of the Economy, whose statutory purpose is to promote, formulate and implement human resources training programmes for the federal government.

¹³⁹ See www.cade.gov.br/noticias/cade-lanca-cursos-on-line-sobre-leniencia-antitruste-e-deteccao-de-carteis-em-licitacoes.

¹⁴⁰ ENAP (2020), *Relatório de avaliação da turma piloto de cursos EAD*, not publicly available.

¹⁴¹ <https://emnumeros.escolavirtual.gov.br/indicadores/>.

¹⁴² See paragraph VIII, Article 7 of Federal Law No. 12.846/2013 (Anti-corruption Act).

¹⁴³ See www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/compliance-guidelines-final-version.pdf. See also Article 49 of the General Procurement Act.

¹⁴⁴ Federal Law No. 7.753/2017, <https://gov-rj.jusbrasil.com.br/legislacao/511266335/lei-7753-17-rio-de-janeiro-rj>.

¹⁴⁵ Federal Law No. 6.112/2018, www.legisweb.com.br/legislacao/?id=356400.

¹⁴⁶ Act 6.112/2018 provides that the compliance requirements for SMEs should be softer.

¹⁴⁷ According to paragraph 14 Article 78 of the General Procurement Act, the temporary suspension may not exceed 120 days.

¹⁴⁸ According to Article 1, Section XXII of Law 8446, TCI may suspend, if not awarded, the performance of the challenged acts, communicating the decision to the Chamber of Deputies and to the Federal Senate. Court appeals are suspensive.

¹⁴⁹ As a result of the decision and the disclosure of the conviction of the industrial gas cartel, at least three cartel damage actions were filed in Brazil: in 2009, by the Association of Hospitals of Minas Gerais; in 2011, by the Basic Sanitation Company of the State of São Paulo (Sabesp); and in 2012, by the Federal Public Prosecutor's Office.

¹⁵⁰ <https://thelawreviews.co.uk/title/the-private-competition-enforcement-review/brazil>.

¹⁵¹ Also if confidentiality is waived by the party that submitted the information and CADE agrees with the disclosure; or as a result of a cooperation between the CADE and a foreign authority and only upon agreement of the party that provided the information.

¹⁵² Section 213(b) of the 2004 Antitrust Criminal Penalty and Reform Act, Pub L No, 108-237.

¹⁵³ However, in Europe the other injured parties can only claim damages from the successful immunity applicant when they show that they cannot obtain full compensation from the other undertakings that were involved in the same infringement. The amount of the contribution of the successful immunity applicant must not, in any event, exceed the amount of harm caused to his own direct or indirect purchasers or providers. See EU Damages Directive, Art. 11(4) to 11(6).

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