



THE GEORGE  
WASHINGTON  
UNIVERSITY

WASHINGTON, DC

**THE GEORGE WASHINGTON UNIVERSITY**

---

WASHINGTON DC

**THE USE OF SEALED BIDDING AND  
COMPETITIVE NEGOTIATION  
IN BRAZIL AND WORLDWIDE**

*By: Wagner Rosa da Silva*

*Email: wagner9202@hotmail.com*

*Advisor: Professor Christopher R. Yukins*

The Minerva Program – Spring 2013

IBI - The Institute of Brazilian Business & Public Management Issues

The George Washington University

Washington, DC

**TABLE OF CONTENTS**

1. INTRODUCTION .....	4
2. BIDDING AND CONTRACTING UNDER U.S. AND BRAZILIAN LAWS .....	5
2.1 Regulation under U.S. Law .....	5
2.2 Regulation under Brazilian Law.....	7
3. SEALED BIDDING.....	10
3.1 Sealed Bidding under U.S. Law .....	10
3.2 The UNCITRAL Model Law on Procurement .....	12
3.3 The World Bank Guidelines.....	13
3.4 Brazilian’s Bidding and Government Contracts’ Law n. 8,666/1993 ....	14
4. COMPETITIVE NEGOTIATION.....	15
4.1 Competitive Negotiation under U.S. Law.....	15
4.2 Competitive Dialogue under the European Procurement Directive .....	17
4.3 Technique and Price under Brazilian Law n. 8,666/1993 .....	18
4.4 Integrated Contracting under Brazilian Law n. 12,462/2011.....	19
5. TRANSPARENCY AND ANTI-CORRUPTION MECHANISMS .....	23
5.1 Enhancing Transparency in Brazil.....	23
5.2 The Monitoring Process of Federal Budget Performed by CGU.....	25
5.3 Other Entities that Monitor Public Expenditures .....	28
5.4 Corruption and Procurement .....	30
6. HIGHLIGHTS AND DRAWBACKS OF COMPETITIVE NEGOTIATION....	35
6.1 The Dialogue with the Industry and Better Informed Contracting .....	35
6.2 Specific Points about Brazilian Infrastructure Area .....	37
7. CONCLUSION.....	38
8. REFERENCES .....	42

## ABSTRACT

*For decades, both public officials and the private sector have faced the challenge of efficiently procuring goods and services to governments. This task is of utmost importance in the infrastructure area of developing countries, considering the investments required and the scarcity of funds. Corruption is always a threat. Governments have issued rules to conduct bidding seeking standardization of procedures and agility. They also encourage competition and transparency. Some rules limit discussions and others encourages them. In the U.S., both methods are equally accepted since 1984. Brazil introduced legislation on a new regime in 2011, called Differential Public Procurement Regime (RDC) and just began initial experience with it. In this context, the questions that arise are: (1) should Brazil make broader use of competitive negotiation for infrastructure and other projects? (2) Are the mechanisms of control prepared for these changes? (3) What is the role of transparency in this process? (4) Is it necessary any change in legislation in order to improve it? (5) What else should be done? Answering to these questions seems to be premature, but efforts to promote transparency, to prevent and fight corruption and impunity are highlighted, once corruption occurs no matter the bidding method applied.*

**KEYWORDS:** *sealed competitive bidding, competitive negotiation, competitive dialogue, integrated contracting, public works, transparency, corruption.*

## 1. INTRODUCTION

The purpose of this paper is to present an overview of procedures related to bidding and procurement processes at public construction, focusing in the infrastructure area, especially on sealed bidding and competitive negotiation, describing the federal rules of Brazil, the U.S.A., the United Nations, the European Union, and the World Bank.

The first approach brings an outline of bidding and contracting rules under U.S. and Brazilian laws. The main focus is in the guidelines of U.S. Federal Acquisition Regulation, FAR (USA 1984), the Brazilian Bidding and Government Contracts Rule, Law n. 8,666/1993 (BRASIL 1993), and the Differential Public Procurement Regime (RDC<sup>1</sup>), Law n. 12,462/2011 (BRASIL 2011).

Afterwards, the focus is in the mechanisms and uses of *Sealed Bidding*. UNCITRAL<sup>2</sup> Model Procurement Law (UNCITRAL 2011) favors sealed bidding, and so does the Brazilian Law n. 8,666/1993. The following chapter deals with *Competitive Negotiation*, which is broadly allowed under U.S. federal law and also under European Procurement Directive, called competitive dialogue. In Brazil, Law n. 8,666/1993 allows its use only under specific circumstances<sup>3</sup>, and it is mandatory in the procedures related to information technology. Later on, innovations resulting from Law n. 12,462/2011 introduced significant changes in public bidding and contracting, gradually extended to the infrastructure area.

Taking into account the amount of expenditures, chiefly in the infrastructure area and its importance to the development of the country, it is also mandatory to enhance its checking mechanisms. Therefore, there is an overview of the monitoring process of the federal budget by the executive branch, and of the initiatives concerning transparency and anti-corruption bodies, which are powerful measures to prevent and fight corruption.

After describing sealed bidding's and competitive negotiation's mechanisms, as well as their monitoring process, there is an analysis of the highlights and drawbacks of competitive negotiation. Competitive negotiation allows a dialogue with industry, which means the government has a better

---

<sup>1</sup> RDC = *Regime Diferenciado de Contratações* [in Portuguese]

<sup>2</sup> UNCITRAL = United Nations Commission on International Trade Law

<sup>3</sup> Law n. 8,666/1993, article 46, § 3<sup>rd</sup>

informed contracting, once the discussions are designed to clarify to object. On the other hand, it opens the doors to corruption, but corruption occurs even with sealed bidding. Furthermore, the government is enhancing measures to prevent and combat corruption, putting into practice transparency tools and fostering civic participation.

So far, the questions that pop up are the following: (1) should Brazil make broader use of competitive negotiation for infrastructure and other projects? (2) Are the mechanisms of control prepared for these changes? (3) What is the role of transparency in this process? (4) Is it necessary any change in legislation in order to improve it? (5) What else should be done?

## **2. BIDDING AND CONTRACTING UNDER U.S. AND BRAZILIAN LAWS**

### **2.1 Regulation under U.S. Law**

In 1984, the Federal Acquisition Regulation (FAR), entered into force in the U.S., in order to provide uniform policies for executive agency acquisitions. It replaced the Defense Acquisition Regulation, the Federal Procurement Regulation, and the National Aeronautics and Space Administration Procurement Regulation. Consequently, since then all federal acquisitions must apply the FAR, except where expressly excluded.<sup>4</sup> According to its definition acquisition means “acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the federal government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated”.<sup>5</sup> In its turn, contract means “a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them”.<sup>6</sup>

A specialized attorney in government contract law in Washington DC, Mr. Steven N. Tomanelli (Tomanelli 2010), presents a historical background for FAR, its applicability, and structure. FAR’s structure includes eight subchapters, from A to H, consisting of 53 parts, each of them comprises a sequence of subparts, sections and subsections. Some of them are reserved. Its numbering

---

<sup>4</sup> FAR 1.102

<sup>5</sup> FAR 2.101

<sup>6</sup> Ibid.

system provides identification of each paragraph. According to FAR 1.105-2, the digits to the left of the decimal point refer the part number. The numbers to the right of the decimal point and to the left of the dash indicate the subpart (one or two digits) and the section (two digits), and the digit after the dash designates the subsection.<sup>7</sup>

There are three contracting methods established in FAR, parts 13 to 15. These are simplified acquisition procedures, sealed bidding, and contracting by negotiation. Part 17 also brings special contracting methods, such as multi-year contracting, options, leader company contracting, interagency acquisitions, management and operating contracts. Part 18 brings the guidelines for available acquisition flexibilities and emergency acquisition flexibilities. The types of contract, according to Part 16 of FAR, are fixed-price, cost-reimbursement, incentive, indefinite-delivery, and letter contracts, along with time and materials, labor-hour, and agreements. Subchapter F of FAR, in part 36, brings the rules for construction and architect-engineer contracts, including those for dismantling, demolition, or removal of improvements.<sup>8</sup>

Simplified acquisition procedures apply when the aggregate amount of the purchase does not exceed the threshold of \$150,000. This method of contracting targets reducing administrative costs, and improving opportunities for small groups to obtain a fair proportion of government contracts. As a result, the government increases efficiency and economy in contracting, avoiding unnecessary burdens for agencies and contractors. The policy reinforces its application to the maximum extent practicable for all purchases of supplies and services under the mentioned threshold.

The other methods, sealed bidding and competitive negotiation, are both acceptable.<sup>9</sup> The necessity of conducting further discussions to clarify the object is the key point for choosing one of them. Discussions usually occur when price-related factors are not the basis for the award, and so competitive negotiation applies. Its use also extends to situations when there is not a reasonable expectation of receiving more than one sealed bid or there is not enough time to permit the solicitation, submission, and evaluation of sealed bids.

---

<sup>7</sup> FAR 1.105-2

<sup>8</sup> FAR Subpart 36.7

<sup>9</sup> FAR 6.401

## 2.2 Regulation under Brazilian Law

Brazilian Federal Constitution of 1988 (BRASIL 1988) establishes that the “direct and indirect public administration of any of the powers of the Union, the States, the Federal District and the Municipalities shall obey the principles of legality, impersonality, morality, publicity and efficiency”.<sup>10</sup> Article 37, Item XXI specifies that:

With the exception of the cases specified by law, public works, services, purchases and sales shall be contracted by means of a public bidding procedure that ensures equal conditions to all bidders, with clauses that establish payment obligations, maintaining the actual conditions of the bid, pursuant to the law, which procedure shall only allow the requirements of the technical and economic qualifications that are indispensable to guarantee the performance of the obligations.<sup>11</sup>

In order to regulate that article, Brazilian authorities enacted Law n. 8.666/1993, which contains the general rules for the bidding process and government contracts relating to works and services. It also applies to advertisement services, purchases, sales and rental within government branches of the union, the states, the federal district and the municipalities.<sup>12</sup> This law is binding on all departments of government, as well as special funds, the autonomous government entities, the public foundations, the government-owned corporations, the mixed-capital corporations and all other entities that are directly or indirectly controlled by the union, the states, the federal district and the municipalities.

The methods of bidding are sealed competitive bidding, request for prices, invitation, contest, and auction.<sup>13</sup> Except for contest and auction, the estimated value of the contract determines the adequate method. In the case of bidding works or engineering services, invitation applies to contracting values up to R\$150,000,<sup>14</sup> request for prices from R\$150,000 up to R\$1,500,000, and sealed competitive bidding above the threshold for request for prices. The law also forbids creating other methods of bidding or combining them.<sup>15</sup> The types

---

<sup>10</sup> Brazilian Federal Constitution, article 37

<sup>11</sup> Ibid., Item XXI

<sup>12</sup> Law n. 8,666/1993, article 1

<sup>13</sup> Ibid., article 22

<sup>14</sup> <http://www4.bcb.gov.br/pec/conversao/Resultado.asp?idpai=convmoeda>. On Feb 1<sup>st</sup> 2013, \$1,00 was equivalent to R\$2,00.

<sup>15</sup> Law n. 8,666/1993, article 22, § 8<sup>th</sup>

of bidding, save for the method of contest, are lowest price, best technique, technique and price, and higher bid or offer.

Although there is a broad literature in Brazil on the application of Law n. 8,666/1993, there is a lack of technical publications in English about this subject. However, Marçal Justen Filho<sup>16</sup> presents a bilingual (Portuguese, English) version of the most relevant legal statutes, including Law n. 8,666/1993 (Justen Filho and Pereira 2010). At the end of 2012, he and his colleagues launched an updated edition of that book, including new analysis regarding infrastructure.

Both government and contractors consider that the application of Law n. 8,666/1993 to public works and engineering services implies delays in the contracting flow. Therefore, from time to time, there are attempts to modify the bidding rule, ordinarily including some adjustments or flexibilities by means of another law. In this context, it is relevant to mention that Law n. 9,478/1997 (BRASIL 1997) establishes that Petrobras, a Brazilian state company, while purchasing goods and services, shall use a simplified bidding procedure, to be defined by a presidential decree.<sup>17</sup>

In order to make such decree viable, it was necessary to amend Brazilian Constitution. Therefore, Constitutional Amendment n. 19 (BRASIL 1998) included Item III to paragraph one of article 173, giving more freedom to state companies to compete with private ones, once they may edit their own rules for their bidding and contracting of buildings, services, purchases and sales, “with the observance to the principles of public administration”.<sup>18</sup> Thus, Presidential Decree n. 2,745/1998 (BRASIL 1998) approved Petrobras’ simplified bidding procedures. Later on, Law n. 10,520/2002 (BRASIL 2002) created a method of bidding named reverse auction. This new method applies to the acquisition of ordinary goods and services. Márcio Amaral (Amaral 2011) brings an analysis of reverse action regarding the principle of administrative efficiency related to public procurement in Brazil.

---

<sup>16</sup> [http://en.wikipedia.org/wiki/Mar%C3%A7al\\_Justen\\_Filho](http://en.wikipedia.org/wiki/Mar%C3%A7al_Justen_Filho)

<sup>17</sup> Law n. 9,478/1997, article 67

<sup>18</sup> Brazilian Federal Constitution, article 173, § 1<sup>st</sup>, item III

Nine years after the creation of reverse auction, Law n. 12,462/2011 brought the Differential Public Procurement Regime for the 2014 FIFA<sup>19</sup> World Cup and the 2016 Rio Olympics. It also applies to infrastructure work and contracting services to the airports of the capital of the state distant up to 350 km of the host cities. The objective of RDC is to increase efficiency in government procurement, as well as competition among bidders, to promote the exchange of experiences and technologies in search of a better relationship between costs and benefits to the public sector. It also focuses on encouraging technological innovation, ensuring isonomic treatment among bidders, and selecting the most advantageous proposal for public administration.

RDC' Rules comprise seven phases in the bidding procedure,<sup>20</sup> as follows: (1) preparatory, (2) publication of the solicitation document, (3) submission of bids or offers, (4) evaluation, (5) qualification, (6) protests, and (7) closing. Open and closed modalities of contest may be adopted<sup>21</sup> and the may be combined, in accordance with Law 12,462/2011 and to the solicitation document. The evaluation criteria are established in article 18.<sup>22</sup>

The types of contracts for execution of works and engineering services established in RDC are task, unit price, lump sum, turnkey, and integrated contracting. While bidding on works and engineering services, the bidding authority, preferably must apply lump sum, turnkey or integrated contracting. Otherwise, the records of the proceedings must contain the reasons for the exception. The main innovation, introduced by article 9, is integrated contracting (named competitive negotiation in the U.S.). Afterwards, Law n. 12,688/2012 of July 18<sup>th</sup> (BRASIL 2012), article 28, included the Brazilian Growth Acceleration Program (PAC<sup>23</sup>) in the scope of RDC. Similarly, article 14 of Law n. 12,722/2012 (BRASIL 2012) and article fourth of Law n. 12,745/2012 (BRASIL 2012) included works and engineering services within the public school systems and the unified health system, respectively, under RDC's rules. The following table brings the scope of RDC:

---

<sup>19</sup> FIFA = Fédération Internationale de Football Association

<sup>20</sup> Ibid., article 12

<sup>21</sup> Ibid., article 16

<sup>22</sup> I – lowest price or highest discount; II – best technique and price; III – best technique and artistic contest; IV – highest price offer; or V – highest economic rate of return

<sup>23</sup> PAC = Programa de Aceleração do Crescimento [in Portuguese]

ESTIMATED INVESTMENTS IN BRAZIL SEGREGATED BY EVENT			
EVENT	AREA	PARTIAL	TOTAL
WORLD CUP 2014 (1.60%)	Airports	6,986,310,000	26,393,563,602
	Tourism Development	122,392,268	
	Arenas (Stadiums)	7,107,306,000	
	Urban Mobility	8,926,080,000	
	Ports	898,900,000	
	Public Security	1,981,355,334	
	Telecommunications	371,220,000	
OLYMPICS RIO 2016 (0.76%)	Accommodations	2,590,490,000	12,518,240,000
	Sports Facilities	1,518,360,000	
	Public Security	471,900,000	
	Technology	477,490,000	
	Urban Mobility (airports, roads, metro)	7,460,000,000	
PAC 2 (96.33%)	Better City (Cidade Melhor)	57,100,000,000	1,586,400,000,000
	Citizen Community (Comunidade Cidadã)	23,000,000,000	
	My House, My Life (Minha Casa, Minha Vida)	278,200,000,000	
	Water and Light for All (Água e Luz para Todos)	30,600,000,000	
	Transports (includes R\$4,5 bi to be used after 2014)	109,000,000,000	
	Energy (includes R\$629,9 bi to be used after 2014)	1,088,500,000,000	
HEALTH (0.74%)	Annual Investment Budget (for 2012)	12,113,511,874	12,113,511,874
EDUCATION (0.58%)	Annual Investment Budget (for 2012)	9,498,054,963	9,498,054,963
TOTAL (R\$)			1,646,923,370,439

Source: <http://www.portaltransparencia.gov.br>; <http://www.pac.gov.br> ; <http://www.planejamento.gov.br>

Figure 1 - Scope of RDC

Originally, the scope of RDC was the investments of sports events that will take place in Brazil in 2014 and 2016. Even in these cases, although included in the scope of RDC, several works had already been contracted according to the Law 8,666/1993, as the works of stadiums and part of urban mobility for 2014 World Cup. However, its importance increased greatly because of the amendments to the law enlarging its use to other areas. Thus, it now gathers the leading Brazilian infrastructure investments, as it is shown on figure 1. Similarly to the 2014 World Cup's case, many of the PAC's works had already been contracted before their inclusion in the scope of RDC.

### 3. SEALED BIDDING

#### 3.1 Sealed Bidding under U.S. Law

Under the U.S. law, *Sealed Bidding*, previously known as formal advertising, is a method of contracting that employs competitive bids, public opening of bids, and awards. It involves five steps, or elements, as follows:

- (a) *Preparation of invitations for bids.* Invitations must describe the requirements of the Government clearly, accurately, and completely. Unnecessarily restrictive specifications or requirements that might unduly limit the number of bidders are prohibited. The invitation includes all documents (whether attached or incorporated by reference) furnished prospective bidders for the purpose of bidding.
- (b) *Publicizing the invitation for bids.* Invitations must be publicized through distribution to prospective bidders, posting in public places, and such other means as may be appropriate. Publicizing must occur a sufficient time before public opening of bids to enable prospective bidders to prepare and submit bids.
- (c) *Submission of bids.* Bidders must submit sealed bids to be opened at the time and place stated in the solicitation for the public opening of bids.
- (d) *Evaluation of bids.* Bids shall be evaluated without discussions. [Emphasis added.]
- (e) *Contract award.* After bids are publicly opened, an award will be made with reasonable promptness to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, considering only price and the price-related factors included in the invitation.<sup>24</sup> [Emphasis added.]

There are four prerequisites to adopt sealed bidding.<sup>25</sup> It is necessary to have enough time to permit adequate solicitation, submission, and evaluation of sealed bids. Price and other price-related factors must be the basis for the award. There should be no need to conduct discussions about the bidding, and there is an expectation of receiving more than one sealed bid.

A bid must fully comply with the invitation for bids. Such responsiveness of bids enables bidders to stand on an equal footing and maintain the integrity of the sealed bidding system.<sup>26</sup> Prior to award, the bids must fulfill the rules for solicitation and submission of bids.<sup>27</sup> The contracting officer must ensure compliance to all requirements of law, executive orders, regulations, and all other applicable procedures. Additionally, the selected bid has to be the most advantageous to the government, considering only price and price related factors included in the invitation, in compliance with the rules for opening of bids and award of contract.

A contract resulting from sealed bidding is a firm-fixed-price contract. It is appropriate for acquiring commercial items, others supplies or services when there are reasonably definite specifications. Its usage is based on adequate competition and reasonable price comparisons with prior acquisitions. Moreover, available cost or pricing information provides realistic estimates of the probable cost. In these cases, the contractor usually is willing to accept the

---

<sup>24</sup> FAR Subpart 14.1

<sup>25</sup> FAR 6.401

<sup>26</sup> FAR 14.301

<sup>27</sup> FAR 14.103-2

assumption of the risks involved, once it is possible to reasonably identify and estimate their impact on cost.<sup>28</sup>

When adequate specifications are not available, there is a combination of competitive procedures, two-step sealed bidding, designed to obtain the benefits of sealed bidding. It allows the development of a sufficiently descriptive and not unduly restrictive statement of the government's requirement. It also includes an adequate technical data package, providing that the subsequent acquisitions may be made by conventional sealed bidding. Two-step bidding is especially useful in acquisitions requiring technical proposals, particularly those for complex items.<sup>29</sup>

Two-step bidding occurs in two phases. The first one consists of the request for, submission, evaluation, and (if necessary) discussion of a technical proposal. There is no pricing at this moment because this step focus in determining the acceptability of the supplies or services offered, such as the engineering approach, special manufacturing processes, and special testing techniques. It is also the moment to clarify questions relating to technical requirements. The following step involves the submission of sealed priced bids by those who submitted technical proposals in step one.

According to Cibinic and colleagues, the U.S. government adopted sealed bidding as the predominant contracting technique until World War II. Nevertheless, during the war the authorities suspended its use. When the war ended, sealed bidding regained privileged status. In 1984, however, the Competition in Contracting Act (CICA), ended the practice of favoring any technique. These authors also enlighten that nowadays sealed bid procurements are responsible for no more than 10% of federal contracts. (Cibinic Jr, Nash Jr and Yukins 2011, 501; 673).

### **3.2 The UNCITRAL Model Law on Procurement**

The UNCITRAL *Model Law on Procurement* aims to maximize economy and efficiency in procurement, foster and encourage participation in procurement proceedings regardless of nationality, thereby promoting international trade. It also focuses on promoting competition for the supply of

---

<sup>28</sup> FAR 16.202-2

<sup>29</sup> FAR 14.501

the object of bidding, providing for the fair, equal and equitable treatment of all suppliers and contractors. Equally important, the rule reinforces promoting the integrity and transparency in the procurement process.<sup>30</sup>

The methods of procurement adopted by UNCITRAL are open tendering, restricted tendering, request for quotations, request for proposals without negotiation, two-stage tendering, request for proposal with consecutive negotiations, competitive negotiations, electronic reverse auction, and single-source procurement.<sup>31</sup> Open tendering is the rule (article 28), despite the exceptions indicated in articles 29 to 31.

Article 39 brings the contents of solicitation documents for open tendering. It is noteworthy to highlight that among them are the following:

- (d) A detailed description of the subject matter of the procurement, in conformity with article 10 of this Law; the quantity of the goods; the services to be performed; the location where the goods are to be delivered, construction is to be effected or services are to be provided; and the desired or required time, if any, when goods are to be delivered, construction is to be effected or services are to be provided;*
- (e) The terms and conditions of the procurement contract, to the extent that they are already known to the procuring entity, and the form of the contract, if any, to be signed by the parties;*
- (f) If alternatives to the characteristics of the subject matter of the procurement, the contractual terms and conditions or other requirements set out in the solicitation documents are permitted, a statement to that effect and a description of the manner in which alternative tenders are to be evaluated;*

The procuring entity has to justify the use of a method of procurement other than open tendering. This requirement is under article 25, which means that UNCITRAL clearly favors open tendering. Biddings that admit discussion are thought to be more susceptible to corruption than those where negotiation is not allowed. This fact seems to be the foremost reason for such a preference.

### **3.3 The World Bank Guidelines**

The Guidelines Procurement under International Bank for Reconstruction and Development Loans and International Development Agency Credits (IBRD 2010) adopt International Competitive Bidding (ICB) as the leading method of procurement. The objective of ICB is to provide all eligible prospective bidders with timely and adequate notification of a borrower's requirements and an equal

---

<sup>30</sup> UNCITRAL Model Law on Procurement, Preamble.

<sup>31</sup> *Ibid.*, article 27

opportunity to bid for the required goods and works.<sup>32</sup> Nevertheless, the Bank's directives provide for other methods of bidding as limited international bidding, national competitive bidding, shopping, direct contracting, force account, and procurement from United Nations agencies.<sup>33</sup>

The bidding documents for ICB shall clearly state the type of contract and contain the appropriate provisions for it. The most common types of contracts provide for payments on the basis of a lump sum, unit prices, reimbursable cost plus fees, or a combination of these types of contracts. The Bank only admits reimbursable cost contracts in exceptional circumstances such as where it is not possible to determine costs in advance with sufficient accuracy. Such contracts shall include appropriate incentives to limit costs.

In the case of turnkey contracts, works of an exceptional nature or extremely complex, it may be impractical to prepare complete technical specifications in advance. In such a case, the guidelines propose a bidding procedure in two stages. At first, the invitation calls for technical proposals (no price yet) based on a conceptual design or performance specifications, subject to technical clarifications, which could result in adjustments in the proposal. In the second stage, bidders submit final proposals, both technical and price.

The Inter-American Development Bank's rules for procurement (IDB 2011) also favor International Competitive Bidding, once ICB is mandatory for use in works contracts where the estimated cost is higher than \$10 million.

### **3.4 Brazilian's Bidding and Government Contracts' Law n. 8,666/1993**

Sealed competitive bidding is the method of bidding applicable for the acquisition of goods and services, including construction, regardless of the amount of the project.<sup>34</sup> The use of competitive sealed bidding is mandatory for packages of works and services of the same nature and location that can be performed simultaneously, whenever the sum of their values exceeds the request for the prices' threshold.<sup>35</sup>

---

<sup>32</sup> IBRD Guidelines for Procurement, Item 2.1

<sup>33</sup> Ibid., Item 2.2

<sup>34</sup> Law n. 8,666/1993, article 23, § 3<sup>rd</sup>

<sup>35</sup> Ibid., § 5<sup>th</sup>

Public administration usually contracts a third party to carry out public works, either global or unit price, according to the type of the work. The first situation occurs when the government pays the execution of the work at a fixed and total price. The other possibility applies when the government pays a fixed price for each determined unit. In order to limit the risk that the value to be hired is very high, there is a maximum unit price binding the government to estimate the value of the contract. The Federal Budget Guidelines Law (LDO<sup>36</sup>) establishes the ceiling annually. For example, Law n. 12,708/2012 (BRASIL 2012), article 102, requires that the total cost of construction contracted with federal funds are obtained from compositions of unit costs, in line with the project. These unit costs must be less than or equal to the median of their counterparts in the National System of Costs Survey and Indices of Construction (SINAPI<sup>37</sup>). In the case of road and railroad works, the System Costs for Highway Works (SICRO<sup>38</sup>), is the preferred one, according to the same law. Both databases are available on the Internet.

#### **4. COMPETITIVE NEGOTIATION**

##### **4.1 Competitive Negotiation under U.S. Law**

Under the U.S. law, a contract awarded using other than sealed bidding procedures is a negotiated contract.<sup>39</sup> Consequently, competitive negotiation applies when an agency concludes that the conditions requiring the use of sealed bidding are not present. The need to conduct discussions usually excludes the use of competitive sealed bids, mostly because price and other price-related factors are not the basis for the award. There are two types of negotiated acquisition, as follows:

- (a) *Sole source acquisitions*. When contracting in a sole source environment, the request for proposals (RFP) should be tailored to remove unnecessary information and requirements; e.g., evaluation criteria and voluminous proposal preparation instructions.
- (b) *Competitive acquisitions*. When contracting in a competitive environment, the procedures of this part are intended to minimize the complexity of the solicitation, the evaluation, and the source selection decision, while maintaining a process designed to foster an impartial and comprehensive evaluation of offerors'

---

<sup>36</sup> LDO = Lei de Diretrizes Orçamentárias [in Portuguese]

<sup>37</sup> SINAPI = Sistema Nacional de Pesquisa de Custos e Índices da Construção Civil

<sup>38</sup> SICRO = Sistema de Custos Rodoviários [in Portuguese]

<sup>39</sup> FAR 14.101

proposals, leading to selection of the proposal representing the best value to the Government.<sup>40</sup>

The selection processes and techniques to design competitive acquisition strategies are lowest price technically acceptable, tradeoff, and a combination of both. The main difference lies in the fact that there is no possibility of opening negotiations in the case of using lowest price technically acceptable. According to FAR 15.101-1, the tradeoff process is appropriate when government considers awarding to other than the lowest priced offeror or other than the highest technically rated offeror. The solicitation has to state all evaluation factors and significant subfactors that will affect contract awarding and their relative importance. It also must specify whether all evaluation factors other than cost or price, when combined, are significantly more important than, approximately equal to, or significantly less important than cost or price. From another standpoint, the lowest price technically acceptable source selection process is appropriate when best value is expected to result from selection of the technically acceptable proposal with the lowest evaluated price.

The solicitation may require each offeror to submit part of its proposal through oral presentations. In this case the request shall provide adequate information for the offerors to prepare them. Thus, the solicitation shall describe the type of information the offerors will present orally, which evaluation factors they will use, and the personnel qualifications to provide it. Furthermore, it must outline the location, date and duration of the presentations, along with the scope and content of exchanges that may occur as part of the sessions, either allowing or prohibiting discussions.

Evaluation criteria (or evaluation factors and subfactors) describe what is determining while choosing the most advantageous proposal. Factors regarding to offer and capability are commonly used in this situation. Offer factors show in details the cost to the government, including the amount to be paid to the contractor, as well as other costs to the government. Additionally, there are also other non-cost offer factors that may be analyzed: enhancements, technical solutions, specific products or services, process or techniques to be used, terms and conditions, and delivery or completion schedule.

---

<sup>40</sup> FAR 15.002

There is great discretion in selecting the type of contract for competitive negotiation. It happens because it is necessary to balance the need to impose reasonable risks on the contractor with the need of motivating effective performance. FAR 16.104 contains a list of factors to be considered in selecting the contract type. These factors are price competition, price and cost analysis, type and complexity of the requirement, along with its urgency. It also shall consider the contractor's length of production run, technical capability and financial responsibility, adequacy of the accounting system, concurrent contracts, extent and nature of proposed subcontracting, and acquisition history.

The term *negotiation* has been in use since World War II, initially introduced by the Armed Services Procurement Act in 1948, and it was then considered an exception to formal advertising, that is, sealed bidding (Cibinic Jr, Nash Jr and Yukins 2011, 501, 673). However, in 1984, the amendment of Competition in Contracting Act put negotiation on an equal footing with sealed bidding. According to these authors, nowadays more than 90% of federal procurement dollars are spent in negotiated procurements.

### **4.2 Competitive Dialogue under the European Procurement Directive**

The Directive 2004/18/EC of the European Parliament (EU 2004) sets the guidelines for public procurement in the European Union. The contracting procedures under this Directive shall comply with fundamental principles such as freedom of establishment and of movement of goods, freedom to provide services and to the principles deriving therefrom. It demands equal treatment, non-discrimination, mutual recognition, proportionality, and transparency. As stated in recital 16, the member states may choose whether contracting authorities use framework agreements, central purchasing bodies, dynamic purchasing systems, electronic auctions or the competitive dialogue procedure.

The methods of contracting are open procedures, restricted procedures and competitive dialogue, as defined bellow:

- (a) 'Open procedures' means those procedures whereby any interested economic operator may submit a tender.
- (b) 'Restricted procedures' means those procedures in which any economic operator may request to participate and whereby only those economic operators invited by the contracting authority may submit a tender.

- (c) 'Competitive dialogue' is a procedure in which any economic operator may request to participate and whereby the contracting authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender.<sup>41</sup>

According to Article 28, contracting authorities shall award public contracts by applying either open or restricted procedure. The following article states that competitive dialogue applies to particularly complex contracts, where contracting authorities consider that the use of the open or restricted procedure will not allow the award of the contract.

In the case of competitive dialogue, all the procedures must observe the requirements for publicity, dialogues with selected candidates, successive stages of discussion until it reaches the identification of the solution. After concluding the dialogue, contracting authorities must inform all participants, and ask them to submit their final tenders on the basis of the solutions resulting from the dialogue. In compliance with the rules on advertising and transparency, the contracting authorities have to publish a contract notice.

As a result of the negotiations performed through this procedure, the bidding authority expects a better specified project, which will result in a better contracting, and consequently, a better value for money contract.

### **4.3 Technique and Price under Brazilian Law n. 8,666/1993**

Brazilian Law n. 8,666/1993 clearly favors sealed bidding, once it allows the use of competitive negotiation, named *technique and price*, only under specific situations. It is mandatory for the procurement of goods and services of information technology. Article 46 restricts its use stating that it applies exclusively for services of predominantly intellectual nature, and information technology. Although there is evaluation of technical criteria, there is no negotiation while using this type of bidding, therefore is it equivalent to tradeoff in the US regulations. The procedures for best technique are the following:

- I - the envelopes containing the technical offers exclusively of the previously qualified bidders shall be opened, and such offers shall be evaluated and ranked according to the criteria that are pertinent and adequate to the procured object, which are defined with clarity and objectivity in the solicitation and that consider the capacity of the offer, comprising methodology, organization, technology and

---

<sup>41</sup> 2004/18/EC, article 1, § 11

material resources to be used in the works, and the qualification of the technical teams to be mobilized for their performance.

- II – after the technical offers are ranked, there shall be the opening of the price offers of the bidders who have achieved the minimum evaluation defined in the solicitation, and the negotiation of the offered conditions with the best ranked bidder, based on the detailed schedule of prices presented and the respective unit prices and having as reference the limit corresponding to the lowest price offer among the bidders that have achieved the minimum evaluation;
- III – in case of a deadlock in the preceding negotiation, an identical procedure shall be adopted, successively, with each other bidder, following the ranking order, until an agreement is reached for the closing of the contract;
- IV – the price offers shall be returned intact to the bidders who are not preliminarily qualified or that have not achieved the minimum evaluations stipulated for the technical offer.<sup>42</sup>

For technique and price biddings, the solicitation has to define objective criteria for ranking both price offers and bidders, in accordance with the weights predefined in the solicitation. Exceptionally, the highest authority of the procuring administration may authorize the use of technique and price for the supply of goods and execution of works or provision of services of large scale. In such cases, the procured object admits alternative solutions with significant implications on its concretely measurable quality, productivity, output and durability, and these are apt to be adopted at free choice of the bidders<sup>43</sup>.

The Brazilian Court of Accounts (TCU<sup>44</sup>) understands that the contracting entities shall adopt reverse auction while applying technique and price for contracting services for supervision and consultancy of public works, where deemed common services (TCU 2011). The National Department of Transport Infrastructure (DNIT<sup>45</sup>) usually contracts this kind of service and highlights that change, considering that it greatly enhanced the bidding process, reducing its time at least 70% (DNIT 2013). DNIT also considers that it reduces costs to the bidders, and consequently increases the number of participants. However, the application of reverse auction is restricted to “common” services of engineering and defining the extent of “common” is still quite subjective.

#### **4.4 Integrated Contracting under Brazilian Law n. 12,462/2011**

The general rules on public bidding and procurement under Brazilian Law n. 8,666/1993 are often criticized for neither providing rapid bidding procedures

---

<sup>42</sup> Law n. 8,666/1993, article 46, § 1<sup>st</sup>

<sup>43</sup> Ibid., §§ 2<sup>nd</sup> and 3<sup>rd</sup>

<sup>44</sup> TCU = Tribunal de Contas da União [in Portuguese]. In Brazil, TCU is equivalent to U.S. Government Accountability Office (GAO).

<sup>45</sup> DNIT = Departamento Nacional de Infraestrutura de Transportes [in Portuguese]

nor good value for money for public contracts, due to its large number of bureaucratic provisions. André Mueller concluded that the Brazilian Procurement Law was to undergo a big change (Mueller 1998). According to his analysis, the procuring rules were inefficient in permitting agencies to make the best use of public time and money. As Márcio Amaral commented, there are some bills in progress in the National Congress since 2007 that have tried to make some deeper modifications in the legal system regarding procurement, but they are still under analysis (Amaral 2011). In fact it is a hard process ongoing deeper modification in that law. In that context, Law n. 12,462/2011 introduced a new regime for public contracting. The urgency of procurements related to the infrastructure for the 2014 World Cup and the 2016 Olympics justified propelling this law. As long as RDC still is a new rule, there are controversial positions concerning its application.

For execution of works and engineering services the methods of contracting under RDC are unit price, global price, task, turnkey (full contract), and integrated contracting (competitive negotiation).<sup>46</sup> Integrated contracting may be adopted in bidding of works and engineering services, according to article 9, provided it is technically and economically justified, as follows:

Art. 9. In biddings of works and engineering services within the scope of RDC, integrated contracting may be used, provided that it is technically and economically justified.

§ 1<sup>st</sup> The integrated contracting consists of the elaboration and development of basic and executive designs, the execution of works and engineering services, the assemblage, the carrying out of tests, the pre-operation and all other operations which are necessary and sufficient for the delivery of the final object.

§ 2<sup>nd</sup> In the case of integrated contracting:

I – the solicitation document shall contain an outline of the engineering design that contemplates the technical documents destined to enable the characterization of the work or service, including:

- a) the demonstration and justification of the ensemble of necessities, the global vision of the investments and the definitions regarding the desired level of service;
- b) the conditions of soundness, safety, durability and due date of delivery, observing the provision in the main clause and in § 1<sup>st</sup> of article 6 of this Law;
- c) the aesthetics of the architectural project; and
- d) the standards of adaptation to the public interest, to the economy in the use, to the simplicity of execution, to the environmental impacts and to the necessity;

II – the estimated value of the contracting will be calculated based on values obtained by the Public Administration in similar works and services or on the evaluation of the global cost of the work, determined

---

<sup>46</sup> Law n. 12,462/2011, article 8<sup>th</sup>

- by using a condensed budget or an efficient or parametric methodology;  
and  
III – the evaluation criterion of technique and price shall be adopted.
- § 3<sup>rd</sup> In case it is permitted to include in the outline of the engineering design the presentation of projects with differentiated execution methodologies, the solicitation document shall establish objective criteria for the assessment of the evaluation of bids.
- § 4<sup>th</sup> In the cases where integrated contracting is adopted, it is forbidden to execute added terms to the signed contracts, except in the following cases:
- I – for the reestablishment of the economic and financial balance resulting from acts of God or of *force majeure*; and
  - II – because of the necessity of altering the project or specifications for better technical adaptation to the goals of the procurement, through the request of the Public Administration, provided that they are not a result of mistakes or omissions by the contractor, according to the limits provided for by § 1<sup>st</sup> of article 65 of Law n. 8,666 of June 21<sup>st</sup>, 1993.<sup>47</sup>

When the result of the evaluation is defined, the public administration may negotiate more advantageous conditions with the first ranked.<sup>48</sup>

César Guimarães Pereira made brief comments about the new law, concluding that some of the changes had been tried before in more limited areas, others were brought back into legislation, but some were really new and that their effect needed to be verified in practice (Pereira 2011). The fact is that, even though it is a new rule, there are many studies about this subject. For example, Justen, Pereira, Oliveira & Talamini and their partners<sup>49</sup> have analyzed some specific aspects of this new law, as follows: competitive negotiation (Reisdorfer 2011), negotiation of more favorable conditions after the outcome of the trial (Justen Neto 2011), variable compensation contracts and efficiency (Schwind 2011), the judging criteria (Nester 2011). They also realized analyses about estimated budget and its publicity (Cardoso 2011), indirect execution of work and services (Ribeiro 2011), guidelines for procurement and contracts in accordance with RDC (Sá 2012), bidding in electronic form, open and closed methods of dispute in RDC (Pereira 2012), and an overview of RDC (Andrade and Veloso 2012). A bilingual version of RDC is also available.<sup>50</sup>

Although the large amount of discussions about RDC, there are just a few concrete examples of its use, and they still refer to ongoing contracts. The first example comes from the Brazilian Company of Airport Infrastructure (INFRAERO<sup>51</sup>). The company has already started 41 bidding using RDC and

---

<sup>47</sup> Ibid., article 9<sup>th</sup>

<sup>48</sup> Law n. 12,462/11, article 26

<sup>49</sup> <http://justen.com.br/informativo>

<sup>50</sup> [http://www.justen.com.br/pdfs/IE58/Lei\\_12462.pdf](http://www.justen.com.br/pdfs/IE58/Lei_12462.pdf)

<sup>51</sup> INFRAERO = Companhia Brasileira de Infraestrutura Aeroportuária [in Portuguese]

concluded 31 of them, but INFRAERO adopted integrated contracting only for São José dos Pinhais' Airport. Afterwards, DNIT also started applying RDC, launching 73 biddings under this new rule, and has already concluded 30, 15 of which are integrated contracting, all related to roads construction or their maintenance. There are also four bidding under integrated contraction ongoing in the area of railroads' construction.<sup>52</sup> Even in these cases, the agencies used mainly executives existing projects to start the bidding process, which does not characterize fully the use of integrated contracting for situations where there is only the concept of the project. The following table summarizes these data from the Secretariat of PAC at Ministry of Planning, Budget and Management of Brazil, highlighting the Differential Contracting Regime's innovations to Brazilian Mayors. (Correia 2013)

<b>FIRST EXPERIENCIES APPLYING RDC and INTEGRATED CONTRACTING</b>			
<b>ENTITY</b>	<b>RDC Bidding</b>	<b>Awarded</b>	<b>Integrated Contracting</b>
<b>INFRAERO (Company of Airport Infrastructure)</b>	<b>41</b>	<b>31</b>	<b>1</b>
<b>DNIT (National Department of Transpor Infrastructure)</b>	<b>73</b>	<b>30</b>	<b>15</b>
<b>VALEC Engineering, Construction and Rail</b>	<b>4</b>	<b>-</b>	<b>4</b>
<b>TRENSURB (Company of Urban Trains of Porto Alegre)</b>	<b>1</b>	<b>-</b>	<b>-</b>
<b>MCTI (Ministry of Science &amp;Technology and Innovation)</b>	<b>1</b>	<b>-</b>	<b>1</b>
<b>TOTAL</b>	<b>120</b>	<b>61</b>	<b>21</b>
Source: <a href="http://www.pac.gov.br">http://www.pac.gov.br</a>			

**Figure 2 - Use of RDC and Integrated Contracting - First Experiences**

According to DNIT, that department became a reference in using the RDC to PAC. Besides reducing the time of the bids, there is a substantial saving of resources. "Besides reducing the time of the bidding process, there is a substantial saving of resources. The average difference between the budget and the budget used as reference to the contract is around 20%"<sup>53</sup> (DNIT 2013). Even in this case, more time is needed to assess the actual results, since the data presented in the table above show that the use of RDC is only just beginning.

<sup>52</sup> <http://pac.gov.br/sobre-o-pac/apresentacoes>

<sup>53</sup> <http://www.dnit.gov.br/balanco-do-dnit>

## **5. TRANSPARENCY AND ANTI-CORRUPTION MECHANISMS**

### **5.1 Enhancing Transparency in Brazil**

Transparency is a mechanism that encourages public managers to act responsibly and provides information to the society, which helps to monitor the adequate spending of public funds. Hence the Brazilian government considers transparency to be the best antidote to corruption. The Office of the Comptroller General (CGU<sup>54</sup>), is responsible for enhancing transparency in the federal executive branch of the government.

The Minister of CGU said that to prevent corruption it is necessary, in a broader overarching context, carry on political and institutional reforms, as well as cultural and educational changes (Hage 2009). He also highlights some pillars that sustain the fight against corruption, pointing out that transparency is the best antidote to corruption, and citizen's participation is indispensable. The Minister also emphasizes that the application of penalties is vital to overcome the culture of impunity. Along with these points, he underlines that coordination and cooperation among public institutions are imperative for success, and also the cooperation between the public and private sector is of utmost importance.

In 2004, CGU launched the Transparency Portal of the Federal Government<sup>55</sup> to increase transparency in the public administration, enabling the citizen to track the allocation of public money and play a monitoring role in this process. The transparency portal provides information on the federal executive branch, disclosing direct spending, fund transfers to states and municipalities, contracts signed with individuals, entities or government bodies. It also displays the paycheck of every of the public servant at federal executive branch, and the companies sanctioned by government in the National Registry of Ineligible and Suspended Companies (CEIS<sup>56</sup>). Besides these, the Registry of the Suspended Non-Profit Private Entities (CEPIM<sup>57</sup>) is available for consultation in the Portal. This database consolidates barred nonprofit private entities that are either ineligible to sign agreements, transfer contracts, make partnerships with the federal government or receive fund transfers. It is worth

---

<sup>54</sup> CGU = Controladoria-Geral da União [in Portuguese]. In Brazil, CGU is equivalent to the Office of the Inspector General (OIG) in the U.S.

<sup>55</sup> <http://www.portaltransparencia.gov.br>

<sup>56</sup> CEIS = Cadastro de Empresas Inidôneas e Suspensas [in Portuguese]

<sup>57</sup> CEPIM = Cadastro de Entidades Privadas sem Fins Lucrativos Impedidas [in Portuguese]

noting that the transparency portal only discloses data from the federal executive branch. Thus, it does not feature data related to both the Judicial and Legislative branches that shall be accessed in the webpages of the respective bodies.

On May 4<sup>th</sup> 2010, CGU launched the websites “2014 World Cup”<sup>58</sup> and the “2016 Rio Olympics”.<sup>59</sup> They represent initiatives of the federal government to ensure greater transparency to the actions and expenditures for these major sport events, either via direct spending or transfer of funds to the states and municipalities. Leodelma Felix, whose paper highlights the concept of proactive transparency, brings an overview of Brazilian’s practices on transparency and compares them with the U.S. experience (Félix 2011).

Another ongoing activity is the Open Government Partnership (OGP<sup>60</sup>), a multilateral initiative to foster the government concrete commitments regarding transparency and the fight against corruption. It also aims to harness new technologies to make the government more open, effective and accountable. Brazil and the U.S co-chaired the 2011-2012 OGP’s International Steering Committee.

As of May 16, 2012, Law n. 12,527/2011 (BRASIL 2011), Brazil’s Open Data Act entered into force. With the law in place, any person may have access to documents and information kept by public bodies, within all branches of power (executive, legislative and judiciary) and in all government levels (federal, states, municipalities and the federal district). All public organs shall provide the requested data within 20 days, which can be extended for additional 10 days. That means that all information either produced or stored by the government, not regarded as classified, shall be available for all citizens.

CGU monitors the implementation of the Open Access Data Act within the federal executive branch, and it also runs an electronic system that registers information access requests, besides providing a standard request form. The system<sup>61</sup> is of crucial relevance to public administrators as it helps them manage the incoming requests and the time it takes to properly answer the requests. The Open Access Data Act is the first step of a wider revolution

---

<sup>58</sup> <http://www.portaldatransparencia.gov.br/copa2014/>

<sup>59</sup> <http://www.portaldatransparencia.gov.br/rio2016/>

<sup>60</sup> <http://www.opengovpartnership.org/open-government-declaration>

<sup>61</sup> <http://www.cgu.gov.br/acessoainformacao/sic.asp> [in Portuguese]

that is taking place in the relationship established between the society and the public sector. Furthermore, it is a critical tool to consolidate the country's democracy. The law regulates the constitutional principle where the citizen is the true owner of public information, and the government is only the depositary body.

## **5.2 The Monitoring Process of Federal Budget Performed by CGU**

The Brazilian Office of the Comptroller General,<sup>62</sup> created by Law n. 10,683/2003 (BRASIL 2003), is responsible for assisting the President of the Republic in matters related to the protection of public assets, internal control, and public audits. CGU also is in charge of conducting corrective and disciplinary measures, as well as fostering prevention and fighting against corruption. Equally important, CGU centralizes ombudsman's activities and the enhancement of management transparency. Moreover, it is the central body of the federal executive branch concerning internal control, along with corrective and disciplinary measures.

CGU's structure includes four high-level units, according to their respective area of expertise. The Federal Secretariat for Internal Control (SFC<sup>63</sup>) is responsible for internal control within the executive branch (in the federal level, including auditing, and assessment of the implementation of government programs. SFC also prepares the President's annual rendering of accounts. The Corruption Prevention and Strategic Information Secretariat (SPCI<sup>64</sup>) serves as an anti-corruption agency. Moreover, the National Disciplinary Board (CRG<sup>65</sup>) fights against impunity in the federal government. Besides that, the National Ombudsman's Office (OGU<sup>66</sup>) is responsible for the technical supervision and guidance of all ombudsman's units within the executive branch on the federal level.

The Council on Public Transparency and Corruption Fighting (CTPCC<sup>67</sup>), is also an integrating part of CGU's structure, serving as a collegiate and

---

<sup>62</sup> <http://www.cgu.gov.br/english/default.asp>

<sup>63</sup> SFC = Secretaria Federal de Controle Interno [in Portuguese]

<sup>64</sup> SPCI = Secretaria de Prevenção da Corrupção e Informações Estratégicas [in Portuguese]

<sup>65</sup> CRG = Corregedoria-Geral da União [in Portuguese]

<sup>66</sup> OGU = Ouvidoria-Geral da União [in Portuguese]

<sup>67</sup> CTPCC = Conselho de Transparência Pública e Combate à Corrupção [in Portuguese]

advisory board. The CTPCC comprises an equal number of representatives from the government and civil society, and aims at discussing and proposing measures to enhance public control, transparency, along with the fight against corruption and impunity.

CGU carries out nationwide on the spot control actions with the aim of checking the implementation of government programs, both by the authorities responsible for the local management of resources, and the beneficiary population. These activities require the use of available statistic tools to prepare representative samples of target groups within government actions. It also carries out inspections at the federal bodies responsible for the formulation and primary control of public policies, using databases that are critical for the implementation of the assessed public policies.

Within the scope of investigative actions, the results achieved show that CGU is in the right way. In 2011, CGU performed an audit of the Ministry of Transports to analyze bidding procedures, procurement contracts and the implementation of public works.<sup>68</sup> The report gave support to a complete redesign and renovation of the involved bodies, the National Department of Transport Infrastructure, and VALEC Engineering, Construction and Railways.<sup>69</sup> The analysis of 17 bidding procedures and procurement contracts identified irregularities pointing to a potential damage of R\$682 million. As a result of it, the federal government has fined contractors in R\$3.5 million, received R\$46.3 million of reimbursement, and canceled electronic procurement, resulting an additional saving of up to R\$14.6 million.

In the same year, CGU's auditors conducted an investigative audit of Eletrobras Furnas, a state owned company, to investigate the implementation of schedule of the power plants of *Simplício* and *Batalha*.<sup>70</sup> As a result of this audit, CGU has recommended an administrative process to investigate delays in execution of works, financial loss, and also to promote the upgrading of plant design and feasibility calculations. Another investigative audit completed in 2011 of the National Department of Works against Droughts (DNOCS<sup>71</sup>) and

---

<sup>68</sup> <http://www.cgu.gov.br/imprensa/Noticias/2011/noticia16211.asp> [in Portuguese]

<sup>69</sup> VALEC = VALEC Engenharia, Construções e Ferrovias S/A [in Portuguese]

<sup>70</sup> <http://www.cgu.gov.br/imprensa/Noticias/2011/noticia18611.asp> [in Portuguese]

<sup>71</sup> DNOCS = Departamento Nacional de Obras Contra as Secas [in Portuguese]

has identified serious irregularities that caused damages of R\$312 million.<sup>72</sup> Subsequently, DNOCS terminated a contract for the building of a dam because of R\$128 million overprice.

There are also activities based on partnership among organizations with similar functions relating to the protection and defense of the state. As a result of these partnerships, the Federal Police Department (DPF<sup>73</sup>), the Federal Public Ministry (MPF<sup>74</sup>) and CGU conducted over 80 joint operations from 2007 to 2011. These operations led to the adoption of measures providing for greater accountability and repayment to the Treasury. Included in these measures are: declarations of unfitness of companies, reimbursement, and investigations to arrest the federal public servants accountable for their illegal acts.

One example of cooperation among CGU's units is the Public Spending Observatory (ODP<sup>75</sup>). This initiative applies scientific methodology to produce information to support and accelerate the strategic decision making. Its goal is to contribute to the improvement of internal control and serve as a support tool for the government. Hence, the ODP seeks to identify signs of misuse of public funds. These systematic alerts may require further investigation to be carried out by specialized auditors of CGU.

An example of the interaction of auditing in the areas of management was the launch of Card Payments for Civil Defense (CPDC<sup>76</sup>). In August 2011, the SFC has developed, in partnership with the Ministry of National Integration and the Bank of Brazil, the CPDC as a managerial response to the risks identified in the management of resources in natural disasters. With similar mechanism to the Payment Card for the Federal Government (CPGF), the CPDC allows the user to identify the resources provisioned and also record and publish in the Transparency Portal expenditures, presenting itself as a dynamic and transparent financial management in emergency situations caused by disasters.<sup>77</sup>

The CGU routinely sends investigative reports to the judiciary. These reports have played a crucial role in identifying illegal practices and supporting

---

<sup>72</sup> <http://www.cgu.gov.br/Imprensa/Noticias/2012/noticia00412.asp> [in Portuguese]

<sup>73</sup> DPF = Departamento de Polícia Federal [in Portuguese]

<sup>74</sup> MPF = Ministério Público Federal [in Portuguese]

<sup>75</sup> ODP = Observatório da Despesa Pública [in Portuguese]

<sup>76</sup> CPDC = Cartão de Pagamento da Defesa Civil [in Portuguese]

<sup>77</sup> <http://www.cgu.gov.br/Imprensa/Noticias/2012/noticia15512.asp> [in Portuguese]

operations conducted by the Federal Police and the Public Ministry. For instance, the assets of individuals and companies identified as a result of a joint operation related to federal expenditures on roads,<sup>78</sup> ended up being blocked by judicial determination. This operation dismantled a fraud system in bidding procedures carried out by the DNIT's unit in the State of Ceará.<sup>79</sup> Another operation held in the State of Mato Grosso do Sul<sup>80</sup> resulted in a judicial determination to block R\$199 million.<sup>81</sup> That investigation aimed at dismantling a system of illegal manipulation of bidding for public servants and politicians of the Municipality of Dourados.

### 5.3 Other Entities that Monitor Public Expenditures

As mentioned throughout this paper, there are other institutions that act in defense of the State and in fighting corruption, such as the Brazilian Court of Audit,<sup>82</sup> the Federal Prosecutors' Office,<sup>83</sup> the General Attorney's Office (AGU<sup>84</sup>), and the Federal Police Department.<sup>85</sup>

TCU audits managers responsible for federal public funds, assets and other valuables, as well as the accounts of any person that may cause loss, misuse or other irregularities detrimental to the public treasury. TCU is an adjudicative and administrative authority as it is in Article 71 of the Federal Constitution. Law n. 8,443/1992 (BRASIL 1992) regulates the activities of TCU. Likewise in the federal level, there is also a Court of Audit in each state.

The Public Prosecutors form an autonomous body, working both at the federal and state level. There are three ranks in the Federal Prosecutors Office, according to the jurisdiction of the courts before which they officiate. *Federal Prosecutors* officiate before single judges and lower courts. *Regional Prosecutors* deal with federal appellate courts, and *General Under Prosecutors* officiate before the superior federal courts. The *General Prosecutor* heads the

---

<sup>78</sup> Two-way Operation = Operação Mão-Dupla [in Portuguese]

<sup>79</sup> <http://www.cgu.gov.br/Imprensa/Noticias/2012/noticia05712.asp> [in Portuguese]

<sup>80</sup> Operação Uragano [in Portuguese]

<sup>81</sup> <http://www.cgu.gov.br/Publicacoes/AvaliacaoPPA/Arquivos/CadernoSetorial2011.pdf>

<sup>82</sup> <http://portal2.tcu.gov.br/portal/page/portal/TCU/english>

<sup>83</sup> <http://www.pgr.mpf.gov.br/>

<sup>84</sup> AGU = Advocacia-Geral da União [In Portuguese]. <http://www.agu.gov.br>

<sup>85</sup> <http://www.dpf.gov.br/>

federal body and tries cases before the Supreme Court (STF<sup>86</sup>). Complementary Law n. 73/1993 (BRASIL 1993) regulates MPF's activities.

Since 1988, Brazil adopts a system in which the prosecution and the representation of the State are no longer concentrated in only one institution. Therefore, the *Attorney General* with the assistance of his Office, is the authority in charge of the legal advising of the executive branch and the judicial and extrajudicial representation of the Brazilian State. The Complementary Law n. 73/1993 also regulates AGU's activities.

The Federal Police Department is under to the Ministry of Justice. DPF's main assignments are the investigations of crimes against the federal government, the combat of international drug trafficking and terrorism. They also deal with immigration and border control (including airports and water police).

There are several studies about preventing and fighting against corruption in Brazil. For example, Frederico Oliveira published a comparative study between the U.S and Brazilian systems of combating corruption (Oliveira 2011, 47-53), which brings an overview of the main anti-corruption bodies in Brazil. Power and Taylor bring updated studies regarding corruption and democracy. They analyze accountability institutions and political corruption. Their understanding is that accountability has been inadequate, although there were some progress. They also classify three types of potential corruption: grand corruption, cash for policy and policy for cash, as follows:

Within the policy-making arena, at least three types of potential corruptions exist: *Grand corruption* is perhaps the simplest and most commonly recognized form of corruption, visible clearly in Judge *Lalau's* multimillion-dollar heist in the construction of the São Paulo Labor Court and the bilking of the Amazonian Development Superintendency (SUDAM)... *Cash for policy* schemes subvert the policy process by offering personal rewards to legislators in return for their support of determined policy objectives and are perhaps best exemplified by the *mensalão* scandal, in which the government expanded its coalition by *renting* members of Congress. *Policy for cash* schemes reverse this logic, with policy choices driven by the likely rents that will accrue to policy makers. Examples include both the budget *dwarves scandal of 1993-94* (Krieger, Rodrigues and Bonassa 1994) and the *Sanguessuga* (bloodsucker) scandals, in which decisions about budget allocations were taken with an eye to private gain. In all of these cases, the supposed emphasis of policy on achieving the *public good* was subverted. (Power and Taylor 2011, 7)

---

<sup>86</sup> STF = Supremo Tribunal Federal [in Portuguese]  
[http://www2.stf.jus.br/portalStfInternacional/cms/verPrincipal.php?idioma=en\\_us](http://www2.stf.jus.br/portalStfInternacional/cms/verPrincipal.php?idioma=en_us)

These authors also discuss the question of autonomy of accountability bodies and recognize that, even when an institution is formally independent, it may avoid triggering a hostile reaction against other institutions. They also bring some examples of accountability entities' interaction, as CGU, the Federal Police and Federal Prosecutors.

In fact, integration is binding to all entities related to control, accountability and anti-corruption activities, once the challenges they have to face are similar. They have increased sharing activities in a strategically way, in order to foster governance and prevent corruption. That is one of the ways of mitigating the scarce resources available for each organization. The examples presented in this paper highlight some of the results of these integrated activities.

#### **5.4 Corruption and Procurement**

Corruption is an economic, political, and social problem that has to be adequately addressed, since it is spread all over the world, therefore, affecting and undermining development in many countries. Consequently, it is a recurring theme for both national and international organizations. According to Susan Rose-Ackerman "corruption is a moral category that signifies putrefaction and rot".<sup>87</sup> She also says, "some claim that deep cultural, historical and social factors are the fundamental determinants of corruption and also can explain the impact of corruption on economic growth and other variables"<sup>88</sup> (Rose-Ackerman 2006, xiv-xx). Her conclusion, however, points out that even in these situations making changes is still possible, even though they may need to be more radical.

In a 2002 report of the Center for Strategic and International Studies, David Fleischer defines corruption as "illegal behavior by public officials to obtain private profits".<sup>89</sup> He also brings historical examples of corruption in Brazil, including procurement in public works and services, as well as military procurement. One of his examples refers to a controversial procurement where the Brazilian Air Force intends to purchase fighter aircrafts (Fleischer 2002). On

---

<sup>87</sup> Rose-Ackerman 2006, xiv

<sup>88</sup> Ibid., xx

<sup>89</sup> Fleischer 2002, 14

this subject, it is worth noting that eleven years after the publication of the report, the bidding process is still ongoing, and no award had been made so far.<sup>90</sup> The mentioned report also highlights the existence of legal loopholes within the judicial system that ends up favoring impunity. The author's understanding is still up to date.

The Brazilian Comptroller General's Minister has always emphasized the importance of reducing these loopholes and the innumerable judicial appeals. For example, in 2012 the Minister declared that the fight against corruption still demands radical changes, including the reduction of appeals to the judiciary:

*[We must] reduce the multitude of features that make a process in Brazil is not complete in less than ten to 15 years, specifically in the cases against the administration, by those called white-collar defendants*

*While the Brazilian procedural law, especially in the field of criminal procedure does not change, we will not have major advances in combating impunity. There are no procedural rules in any civilized country that offer so many possibilities to the defendant and appellate, like the legislation in Brazil.*<sup>91</sup>

In addressing corruption, it is also useful to measure it, which poses a number of challenges. Firstly, the databases often rely on reported cases, but they may not accurately reflect the actual extent of corruption. Secondly, the application of statistical methods to the data available can also bring some distortions as a result of gathering the data collected in different forms and sources. Thirdly, the definition of corruption itself is not very precise, involving subjectivity, because perception varies from one country to another. Four, reflecting every nuance of corruption in a composite indicator is not very simple, and should be interpreted with caution.

According to Eric Uslaner, "measuring corruption is even more controversial than its definition" (Uslaner 2008, 11). He also explains that there are basically two approaches for measuring perception corruption: perceptions indices and surveys. The Transparency International Corruption Perceptions Index<sup>92</sup> (CPI) is the most used in the first approach. These aggregated indicators are available since 1995 and bring annual information of more than 150 countries. However, there is also criticism of this method. The disadvantages cited are: the measures may be imprecise and unreliable,

---

<sup>90</sup> <http://noticias.r7.com/brasil/ministro-diz-que-licitacao-para-cacas-segue-de-pe-01022013>

<sup>91</sup> <http://www.ultimanoticia.com.br/ultimanoticia/Portugues/detNoticia.php?cod=16308>

<sup>92</sup> <http://www.transparency.org>

country ranks may vary from year to year, and the aggregate indices may not have a strong relationship with people's actual perceptions of corruption. The 2012 report compared 176 countries, where Brazil's score is 4.3, on the 69<sup>th</sup> position.

Lenise Cecchin's analysis on transparency and combating corruption reinforces that CPI does not bring an accurate representation of the world context (Cecchin 2009). Furthermore, being at the top of the rank does not mean being free from corruption, as pointed out by Susan Rose-Ackerman, "Corruption in contracting occurs in every country – even those at the high end of the honesty index" (Rose-Ackerman 2006, 457).

The second approach relies on surveys. UNODC notes that direct indices such as sample surveys generally provide clear information to policymakers and anti-corruption agencies with uni-dimensional indicators. However, they also have limitations (UNODC 2009). The cost of the surveys is an example of these limitations. Therefore, its use is more appropriate to measure the petty corruption than larger corruption.

Besides the study of levels of corruption, economists have also studied the cost of corruption. Once again, the measurement is not an easy task. However, Martinez-Vasquez and his colleagues analyzed the economics of corruption under the concept of marginal costs, and concluded "the amount of corruption optimal for a society is ... [where] the costs of preventing the last unit of corruption equal to the costs that this unit of corruption imposes on society" (Martinez-Vazquez, Granado and Boex 2006). They say that the cost of corruption is similar to a tax imposed on production, shifting the supply curve to the right, consequently increasing the price and reducing economic activities. It occurs because the supply curve is upward sloping and the demand curve has a negative slope. José Nascimento in his analysis about the contribution of the public participation to avoid the misuse of public funds also addressed this subject and cites the studies previously mentioned (Nascimento 2012).

Despite all these problems, governments still need to purchase goods and build public works. Therefore, it is urgent enhancing bidding procedures and preventing related fraud. William Olsen explains that the federal government in U.S created in 2006 the National Procurement Fraud Task Force, focusing on several types of frauds (Olsen 2010, 111). Examples of

these frauds are: kickbacks, vendor fraud, bid rigging, defective pricing, price fixing, contract fraud, cost/labor mischarging, product substitution, misuse of classified and sensitive information, false claims, ethics and conflict of interest violations. For each type, he suggests investigative procedures to assess it. Specifically regarding to corruption in public works, the author lists the most common frauds and reinforces that the best recommended remedy is strengthening internal controls:

- Bribes, bid rigging, and the leaking of confidential information during the bidding process.
- Bribes and kickbacks received for contract selection, approval of change order pricing, schedule modification, material substitution, or favorable site/sequence access.
- Market division or market sharing among competitors.
- Conflict of interest.
- Employment of illegal (undocumented) workers.
- Fraudulent reporting of safety, minority content, environmental, or other information required by a construction contract or by a government regulatory entity. (Olsen 2010, 125)

Gerald Caiden and colleagues analyze the relation between corruption and governance. They list the most commonly recognized forms of official corruption, and also cite certain universal generalizations. In fact, the analysis on the subject registers:

EVER SINCE THE DAWN OF CIVILIZATION, it has been recognized that anyone put in a position of exercising communal, collective, or public power and commanding public obedience is tempted to use public office for personal gain and advantage.

...

Indeed as long as human beings are imperfect corruption will persist. What anticorruption measures seek to do is drive it out of major areas of governance, reduce its scope, lessen its occurrence, implement fail-safe devices. These measures should improve the image of governance, increase effectiveness and efficiency, streamline operations, and make for more civic activity and greater public participation. (Caiden, Dwivedi and Jabbara 2001)

In Brazil, the Office of the Comptroller General has spotted several causes of corruption in public works (CGU 2012) such as restrictive clauses in the bidding, contracted works with serious flaws in basic design and with inflated prices. There is also failure to comply with technical specifications and standards, payment for services that were not performed, lack of quality of the public good delivered, inadequate monitoring procedures, along with low level of internal control of the contracting entity.

CGU emphasized that, by and large, there is no need to enact new laws to elude these key causes. The remedy is the improvement in management, such as strengthening adherence to bidding guidelines, both Law n. 8.666/1993 and RDC; along with the numerous TCU's judgments and decisions. In 2012, the Chamber of Deputies and the Strategy for Combating Corruption and Money Laundering, ENCCLA<sup>93</sup> sponsored the First Seminar on Best Practices in Procurement. The seminar focused on bidding and contracts in the areas of information technology (IT) outsourcing and works. CGU's lecture brought an overview related to public works, as follows<sup>94</sup>:

- Public Works Subgroup of the Control Network – it is a group of specialized professionals from AGU, CGU, DPF, MPF, NGOs (e.g.: IBRAOP), and TCU (along with State Court of Accounts) that discuss the standardizing of procedures and integrated tasks. They also share new technologies and knowledge.
- Work Group for World Cup 2014 – The MPF created and coordinates a group to monitor the investments on the host cities for World Cup 2014. The components of this group are AGU, CGU, ENCLLA, MPF (one Federal Prosecutor per host city, along with the State Prosecutors), and TCU. The group also invites members from the Ministry of Sports and the Presidential Chief of Staff or others related to the subject in discussion.
- Use of Information technology to promote transparency – Transparency Portals (expenditures, World Cup 2014, Olympics Rio 2016, purchases<sup>95</sup>), Open Access Data Act, the use of webcam on construction building in large cities, etc.
- Training and fostering the social control through civic participation.

There are many challenges to improve the bidding procedures. One of them is the standardization of procedures and understandings about the extent of control on public works. It urges the improvement of the projects' quality and the managerial efficiency (including appropriate supervision), as well as

---

<sup>93</sup> ENCCLA: Estratégia Nacional de Combate à Corrupção e à Lavagem de Dinheiro [in Portuguese].

<sup>94</sup> <http://www.cgu.gov.br/Imprensa/Noticias/2012/noticia15312.asp>.

<sup>95</sup> The Comprasnet Portal. <http://www.comprasnet.gov.br>

fostering transparency and social control. Investing in technical personnel with both theoretical and practical expertise in the multidisciplinary areas of engineering, along with appropriate equipment and software are crucial points. The expected outcomes are the continuous detection and mapping of wrongdoings in public works, along with the ability to monitor, combat and prevent fraudulent practices. Other challenges are already placed and are the focus of attention, such as the use of Public-Private-Partnership (PPP<sup>96</sup>) for infrastructure of urban mobility, along with insurance contracts and the standardization of procedures for budgeting public works.

Once again, it is extremely important to pay attention to all phases of public spending, including but not being limited to the bidding procedures. Proper planning is the basis for the achievement of an effective bidding. Furthermore, the monitoring process is vital to ensure compliance with specifications (quality), schedules, and budgets, in order to guarantee the adequate delivery of the public good. The fact is that government agencies must improve the entire management cycle, not just the bidding procedures.

## **6. HIGHLIGHTS AND DRAWBACKS OF COMPETITIVE NEGOTIATION**

### **6.1 The Dialogue with the Industry and Better Informed Contracting**

The expected result of a public bidding is the best value for money contract, which means that the public administration has contracted high-quality products that meet its needs at reasonable prices. One of the ways to achieve this goal is to allow an exchange of information between public administrators and the probable contractors.

In the U.S., the Federal Acquisition Regulation encourages exchanges of information among all interested parties, from the earliest identification of a requirement up to the receipt of proposal. This exchange of information must be consistent with procurement integrity requirements.<sup>97</sup> By exchanging information, it is possible to improve the understanding of both government necessities and industry capacity. The potential offerors have the opportunity to better judge the bidding's requests, which may enhance the government's ability to obtain higher quality services and supplies at reasonable prices, as

---

<sup>96</sup> PPP = Parceria –Público-Privada [in Portuguese]

<sup>97</sup> FAR15.201

well as increase its efficiency in proposal preparation, evaluation, negotiation, and contract award.<sup>98</sup>

In Brazil, although competitive negotiation, called *technique and price* (equivalent to tradeoff), is allowed for specific situations under law n. 8,666/1993, the new procurement regime (RDC) introduced by Law n. 12,462/2011 brings a new method, called *integrated contracting*. RDC aims to promote the sharing of experiences and technologies in search of a better cost-benefit ratio for the public sector, and to encourage technological innovations.<sup>99</sup> In bidding of works or engineering services, the winning bidder shall redevelop the spreadsheets that indicate the quantities, the unit costs, the details of indirect dividend & expenditures,<sup>100</sup> the social charges, and submit them to the public administration. When the result of the evaluation is defined, the public administration may negotiate more advantageous conditions with the first ranked bidder.<sup>101</sup> In contrast to the treatment given by Law n. 8,666/1993, the *integrated contracting* is one of the preferable methods of contracting, and adopting the evaluation criterion of technique and price is required.

Under the European Procurement Directive, when the contracting authorities consider that the use of the open or restricted procedure will not allow the award of the contract, they shall open a dialogue in order to identify and define the means best suited to satisfying their needs. All of the aspects of the contract may be discussed with the chosen candidates. The dialogue continues until it can identify the solution or solutions that are capable of meeting its needs.

The dialogue with the potential contractors should be highlighted, as it may clarify the adequate specification of the required subject to be contracted. Additionally, the public administration allows the potential contractors to get involved in the best solution for a specific work of engineering or service. Considering that the dialogues established during to bidding procedures, a better informed contracting is expected. Consequently, it helps the public administration to achieve its main goal: the best value for money contract, which

---

<sup>98</sup> Ibid.

<sup>99</sup> Law n. 12,462/2011, article 1<sup>st</sup>, § 1<sup>st</sup>, Items II, III

<sup>100</sup> It is called BDI = Bonificações e Despesas Indiretas [in Portuguese]

<sup>101</sup> Law n. 12,462/2011, article 26

means that the government has contracted high-quality products that meet its needs at reasonable prices.

## 6.2 Specific Points about Brazilian Infrastructure Area

The Brazilian infrastructure sector faces some difficulties, regardless of the type of bidding or the contracting method. Inadequately detailing basic designs is one of the utmost problems, as the specifications do not attend to minimum requirements established in law, therefore, affecting the accuracy of the estimated budget. In an attempt to address this question, the Brazilian Institute of Public Works Auditing<sup>102</sup> (IBRAOP 2006) published the Technical Guidance n. 001/2006,<sup>103</sup> detailing the understanding related to the definition of basic designs, in accordance with Law n. 8,666/1993. In 2012 TCU recommended the observation of the mentioned guidance on the inspections of public works (TCU 2012, Item 9.1). Furthermore, the mentioned institute also focused on the accuracy of the budgets, by launching another technical guidance proposal, OT-IBR 004/2012 (IBRAOP 2012). Besides this foremost subject, price references are always under discussion in Brazil. The main reason is that the official price references for infrastructure area are defined yearly within the federal budgetary process, specifically in the Brazilian Budget Guidelines Law. As a result, every year some adjustments may occur, and they really do occur. Enacting a law to establish these references in a permanent way would strengthen the use of such unit prices' thresholds.

The attention concentrated on both bidding and procurement practices aimed at promoting transparency, as well as preventing and combating corruption. The World Economic Forum's webpage states that corruption "is the single greatest obstacle to economic and social development around the world".<sup>104</sup> André Mueller in his critical study to Law n. 8,666/1993 says:

*Corruption can happen in many ways in Public Procurements. The Public Agent may favor a specific supplier that he happens to know. He may receive; from the bidder, a financial compensation for awarding a contract to his firm. Bidders may collude as to set the results of the procurement. The whole process is very acceptable to many forms of corruption, from within and outside the public administration. (Mueller 1998)*

---

<sup>102</sup> IBRAOP = Instituto Brasileiro de Auditoria de Obras Públicas [in Portuguese]

<sup>103</sup> [http://www.ibraop.org.br/media/orientacao\\_tecnica.pdf](http://www.ibraop.org.br/media/orientacao_tecnica.pdf)

<sup>104</sup> [http://reports.weforum.org/global-agenda-council-2012/councils/anti-corruption/?doing\\_wp\\_cron=1361227097.1368548870086669921875](http://reports.weforum.org/global-agenda-council-2012/councils/anti-corruption/?doing_wp_cron=1361227097.1368548870086669921875)

The news frequently shows cases of corruption in infrastructure areas, no matter the bidding or contracting process. Consequently, as this paper presents, there are many institutions (at the federal, state or municipal level) that, working alone or together with other bodies, combat it and look for preventive actions.

At the international level, there is also a countless apprehension and effort looking forward to reinforcing procurement rules in the countries. International organizations, such as OECD,<sup>105</sup> recognize that these procedures shall be “unambiguous and reliable over time to provide for steady and consistent practice and transparency, and to ensure that training programs in the subject are not made obsolete by constant changes in the procurement framework” (OECD 2006). In Brazil’s case, some may say that all this changes in the scope of RDC or the annual changes in price references may undermine the stability of the framework over time. From another point of view, others may consider that these changes are necessary to update bidding rules in order to increase competitiveness and also give more agility to the procedures. Nevertheless, the focus should not only be on a specific phase of the process, such as regulating only the selection, in order to expedite the procedures available, but also look at covering others aspects of the management’s process. It is necessary to enhance previous planning, control implementations that favor transparency through the whole process, and consider the quality of the product delivered or public work constructed.

## **7. CONCLUSION**

Regulations regarding public bidding and procurement in many parts of the world have demonstrated that governments target the best value contracting, in a transparent process, with no room for corruption. Specifically in the infrastructure area, because of the complexity of adequately specifying the object, it is not an easy goal. Furthermore, for achieving the best outcomes someone should consider not only the amount to be spent, but also the quality and usefulness of the contracted object. Additionally, a transparent process means that all potential bidders and the society itself had enough information to

---

<sup>105</sup> OECD = Organisation for Economic Co-operation and Development

make their proposals (the potential bidders) and to monitor the public resources applied (society). Throughout the process, corruption has to be definitely fought, and proactive measures shall be adopted to prevent it. In this context, some governments may consider that negotiation might open the doors to corruption, others focus on the advantages of negotiation, taking into consideration their given priority to reinforcing anti-corruption measures.

In the past, the U.S. regulations favored sealed bidding, but since 1984, the Federal Acquisition Regulation gives no preference to it anymore, as long as competitive negotiation is at the same level, and government officers may choose any of them to start a bidding process. Nowadays, competitive negotiation represents the majority (about 90%) of procedures in the country. The European Union applies competitive dialogue in the case of particularly complex contracts, according to the European Procurement Directive. On the other hand, the UNCITRAL Model Procurement Law, the World Bank Guidelines and the IDB favor sealed bidding, called *International Competitive Bidding*.

In Brazil, Law n. 8,666/1993 clearly favors sealed bidding, but since 2011, a new method of bidding entered into practice under Law n. 12,462/2011, called *integrated contracting*. The integrated contracting consists of the elaboration and the development of basic and executive designs, along with the execution of works and engineering services. It also includes assemblage, carrying out of tests, and all other operations which are necessary and sufficient for the delivery of the final object. The public administration may negotiate more advantageous conditions with the first ranked bidder, after defining the result of the evaluation.

The Brazilian government's current position clearly favors the use of RDC, which includes integrated contracting. At first, it applied only for the 2014 FIFA World Cup and the Olympics Rio 2016. Later on, it included the Brazilian Growth Acceleration Program, along with works and engineering services within the public school systems and the unified health system. PAC represents more than 95% of the scope of RDC, in financial terms. However, by the time RDC's Law was enacted or had its scope expanded, several works of both the 2014 World Cup and the PAC had already been contracted under the rules of Law 8.666/1993.

In 2013, the Ministry of Planning, Budget and Management of Brazil highlighted the Differential Contracting Regime's innovations to Brazilian Mayors (Correia 2013). Meanwhile, effective contracting under RDC is just beginning and evaluating its results seems to be premature. Nonetheless, all mechanisms of control held by the Federal Government (CGU, DPF and AGU), agencies, Court of Accounts, Federal Prosecutors, and Civil Society are adjusting their procedures in order to face this new reality, including ways to enforce anti-corruption measures, improve governance and accountability. A powerful tool they may count on is transparency and a big step was done by putting into practice the Brazilian Open Data Act, or Freedom to Information Law. Besides these initiatives, public administrators should also concentrate efforts to planning and monitoring practices, improving governance and accountability.

Although it is usual to say that negotiation techniques open the doors to corruption, the fact is that corruption also exists under sealed bidding contracting, as the examples throughout this paper broadly show. Therefore, no matter the method used, it is mandatory getting civil society mobilized to monitor public expenditures. Additionally, the government has to provide the information needed and be ready to firmly fight corruption. Finally, innovation in transparency and anti-corruption measures are really essential tools to assure the correctness of the resources applied through public bidding, attending to the principles of lawfulness, efficiency, efficacy and effectiveness. Once again, it is necessary to see beyond the bidding process, improving the entire cycle of management, governance and accountability, in order to guarantee the adequate execution of contracts, and also the best result to society. Other challenges are already placed and are the focus of attention, such as the use of PPP for infrastructure of urban mobility, along with both insurance contracts and the standardization of procedures for budgeting public works.

Revisiting the initial questions proposed in this paper, it is already clear that Brazilian Government intends to make a broader use of competitive negotiation (or integrated contracting) and envisaged the sports events that will take place in 2014 and 2016 as an opportunity to improve this change. Secondly, the mechanisms of control, along with accountability and anti-corruption bodies have to update and improve their approach, in order to

perform an adequate monitoring, focusing on the entire cycle of management, not only on the bidding procedures. Thirdly, transparency is crucial to the implementation of this new method of bidding, as it motivates civic participation and is a powerful tool to foster the implementation of the Open Data Act. Fourthly, it does not seem to be necessary enacting new laws regarding to the bidding process. On the other hand, it really demands passing more effective laws to reduce the possibility of recurrent judicial appeals and to foster integrity, in order to avoid impunity. Lastly, improving the complete cycle of management is of utmost importance. It has to start with an adequate planning, going through a transparent bidding, providing satisfactory monitoring and evaluation tools. Similarly important, it urges improving permanent strategies to combat corruption, fight impunity, foster governance, integrity and accountability, no matter the bidding procedure used.

## 8. REFERENCES

- Amaral, Márcio A. "Analysis of the Principle of Administrative Efficiency Applied to Public Procurement in Brazil." *The Institute of Brazilian Issues*. 2011. [http://www.gwu.edu/~ibi/minerva/Spring2011/Marcio\\_Amaral.pdf](http://www.gwu.edu/~ibi/minerva/Spring2011/Marcio_Amaral.pdf) (accessed Dec 7, 2012).
- Andrade, Ricardo B., and Vitor L. Veloso. "Uma visão geral sobre o Regime Diferenciado de Contratações Públicas: objeto, objetivos, definições, princípios e diretrizes." *Informativo Justen, Pereira, Oliveira e Talamini*. Feb 2012. <Http://www.justen.com.br/informativo> (accessed Jan 27, 2013).
- BRASIL. *Constitution of Brazil*. Oct 5, 1988. <http://www.v-brazil.com/government/laws/constitution.html> (accessed Jan 20, 2013).
- . *Decreto nº 2.745*. Aug 24, 1998. [http://www.planalto.gov.br/ccivil\\_03/decreto/D2745.htm](http://www.planalto.gov.br/ccivil_03/decreto/D2745.htm) (accessed Jan 20, 2013).
- . *Emenda Constitucional nº 19*. June 5, 1998. <http://www.in.gov.br/visualiza/index.jsp?data=05/06/1998&jornal=1&pagina=3&totalArquivos=97> (accessed Jan 20, 2013).
- . *Lei Complementar nº 73*. May 20, 1993. [http://www.planalto.gov.br/ccivil\\_03/leis/lcp/lcp75.htm](http://www.planalto.gov.br/ccivil_03/leis/lcp/lcp75.htm) (accessed Jan 27, 2013).
- . *Lei nº 8.443*. July 16, 1992. [http://www.planalto.gov.br/ccivil\\_03/leis/L8443.htm](http://www.planalto.gov.br/ccivil_03/leis/L8443.htm) (accessed Jan 27, 2013).
- . *Lei nº 8.666*. June 21, 1993. [http://www.planalto.gov.br/ccivil\\_03/leis/L8666cons.htm](http://www.planalto.gov.br/ccivil_03/leis/L8666cons.htm) (accessed Jan 20, 2013).
- . *Lei nº 9.478*. Aug 6, 1997. [http://www.planalto.gov.br/ccivil\\_03/leis/L9478.htm](http://www.planalto.gov.br/ccivil_03/leis/L9478.htm) (accessed Jan 20, 2013).
- . *Lei nº 10.520*. July 17, 2002. [http://www.planalto.gov.br/ccivil\\_03/leis/2002/L10520.htm](http://www.planalto.gov.br/ccivil_03/leis/2002/L10520.htm) (accessed Jan 20, 2013).
- . *Lei nº 10.683*. May 28, 2003. [http://www.planalto.gov.br/ccivil\\_03/leis/2003/L10.683.htm](http://www.planalto.gov.br/ccivil_03/leis/2003/L10.683.htm) (accessed Jan 27, 2013).
- . *Lei nº 12.462*. Aug 4, 2011. [http://www.planalto.gov.br/ccivil\\_03/\\_ato2011-2014/2011/Lei/L12462.htm](http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/Lei/L12462.htm) (accessed Jan 20, 2013).
- . *Lei nº 12.527*. Nov 18, 2011. [http://www.planalto.gov.br/ccivil\\_03/\\_ato2011-2014/2011/lei/l12527.htm](http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12527.htm) (accessed Jan 27, 2013).
- . *Lei nº 12.688*. July 18, 2012. [http://www.planalto.gov.br/ccivil\\_03/\\_ato2011-2014/2012/lei/l12688.htm](http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2012/lei/l12688.htm) (accessed Jan 20, 2013).
- . *Lei nº 12.708*. Aug 17, 2012. [http://www.planalto.gov.br/ccivil\\_03/\\_Ato2011-2014/2012/Lei/L12708.htm](http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2012/Lei/L12708.htm) (accessed Feb 12, 2013).

- . *Lei nº 12.722*. Oct 3, 2012. [http://www.planalto.gov.br/ccivil\\_03/\\_ato2011-2014/2012/Lei/L12722.htm](http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2012/Lei/L12722.htm) (accessed Feb 18, 2013).
- . *Lei nº 12.745*. Dec 19, 2012. [http://www.planalto.gov.br/ccivil\\_03/\\_ato2011-2014/2012/lei/l12745.htm](http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2012/lei/l12745.htm) (accessed Jan 20, 2013).
- Caiden, E. Gerald, O. P. Dwivedi, and Joseph Jabbra. *Where Corruption Lives*. Bloomfield: Kumarian Press, Inc., 2001.
- Cardoso, André G. "O regime diferenciado de contratações públicas: a questão da publicidade do orçamento estimado." *Informativo Justen, Pereira, Oliveira e Talamini*. Dec 2011. <http://www.justen.com.br/informativo> (accessed Jan 27, 2013).
- Cechin, Lenise B.M. "Public Transparency and Combating Corruption." *The Institute of Brazilian Issues*. 2009. <http://www.gwu.edu/~ibi/minerva/Spring2009/Lenise.pdf> (accessed Dec 28, 2012).
- CGU. "Reflexões sobre Obras Públicas." *Controladoria Geral da União*. 2012. <http://edemocracia.camara.gov.br/documents/768485/1104582/Palestra+T%C3%A9cnica+do+Senhor+Wagner+Rosa+da+Silva+-+CGU> (accessed Mar 8, 2013).
- Cibinic Jr, John, Ralph C. Nash Jr, and Christopher R. Yukins. *Formation of Government Contracts*. 4th . Washington, DC: Wolters Kluwer Law & Business, 2011.
- Correia, Marcelo B. "Oficina do RDC - Encontro Nacional de Prefeitos e Prefeitas." *Secretaria do Programa de Aceleração do Crescimento do Ministério do Planejamento, Orçamento e Gestão*. Jan 30, 2013. <http://www.pac.gov.br/sobre-o-pac/apresentacoes> (accessed Feb 20, 2013).
- DNIT. "Balanço - 2012." *Departamento Nacional de Infraestrutura de Transportes*. 2013. <http://www.dnit.gov.br/balanco-do-dnit> (accessed Mar 6, 2013).
- EU. *Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts*. March 31, 2004. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:134:0114:0240:EN:PDF> (accessed Jan 27, 2013).
- Félix, Leodelma M. "Proactive Transparency: What has been done in Brazil." *The Institute of Brazilian Issues*. 2011. [http://www.gwu.edu/~ibi/minerva/Spring2011/Leodelma\\_Felix.pdf](http://www.gwu.edu/~ibi/minerva/Spring2011/Leodelma_Felix.pdf) (accessed Dec 7, 2012).
- Fleischer, David V. *Corruption in Brazil: Defining, Measuring and Reducing*. CSIS, 2002.
- Hage, Jorge. *Prevention of Corruption – Challenges, Good Practices and Ways Ahead*. Sep 17, 2009. [http://www.cgu.gov.br/english/Ministro/20090917\\_Astana.pdf](http://www.cgu.gov.br/english/Ministro/20090917_Astana.pdf) (accessed Feb 24, 2013).
- IBRAOP. "OT - IBR 001/2006 - ORIENTAÇÃO TÉCNICA - PROJETO BÁSICO." *Instituto Brasileiro de Auditoria de Obras Públicas*. Nov 7,

2006. [http://www.ibraop.org.br/media/orientacao\\_tecnica.pdf](http://www.ibraop.org.br/media/orientacao_tecnica.pdf) (accessed Feb 18, 2013).
- . "OT-IBR 004/2012 - ORIENTAÇÃO TÉCNICA - Precisão do Orçamento de Obras Públicas." *Instituto Brasileiro de Auditoria de Obras Públicas*. Nov 2012. [http://www.ibraop.org.br/media/orientacao\\_tecnica.pdf](http://www.ibraop.org.br/media/orientacao_tecnica.pdf) (accessed Feb 18, 2013).
- IBRD. *Guidelines Procurement under IBRD Loans and IDA Credits*. May 2010. <http://siteresources.worldbank.org/INTPROCUREMENT/Resources/ProcGuid-10-06-RevMay10-ev2.pdf> (accessed Jan 27, 2013).
- IDB. *Standard Bidding Documents - Procurement of Works & User's Guidelines*. 2011. <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=786722> (accessed Feb 23, 2013).
- Justen Filho, Marçal, and César A. Guimarães Pereira. *Infrastructure Law of Brazil*. Belo Horizonte: Editora Forum, 2010.
- . *Infrastructure Law of Brazil*. Belo Horizonte: Editora Forum, 2012.
- Justen Neto, Marçal. "A negociação de condições mais vantajosas após o resultado do julgamento no Regime Diferenciado de Contratação (Lei n. 12.462/2011)." *Informativo Justen, Pereira, Oliveira e Talamini*. Sep 2011. <http://www.justen.com.br/informativo> (accessed Jan 27, 2013).
- Martinez-Vazquez, Jorge, Javier A. Granado, and Jameson Boex. *Contributions to economic analysis*. Atlanta: Elsevier, 2006.
- Mueller, André P.M. "A Critical Study of the Brazilian Procurement Law." *The Institute of Brazilian Issues*. 1998. <http://www.gwu.edu/~ibi/minerva/Fall1998/Andre.Mueller.html> (accessed Feb 18, 2013).
- Nascimento, José Leonardo R. "The Contribution of the Public Participation to Avoid the Misuse of Public Funds: A Comparison of Brazil and The United States Cases." *The Institute of Brazilian Issues*. 2012. [http://www.gwu.edu/~ibi/minerva/Spring2012/Jose\\_Leonardo.pdf](http://www.gwu.edu/~ibi/minerva/Spring2012/Jose_Leonardo.pdf) (accessed Jan 27, 2013).
- Nester, Alexandre W. "Os critérios de julgamento previsto no regime diferenciado de contratações públicas." *Informativo Justen, Pereira, Oliveira e Talamini*. Sep 2011. <http://www.justen.com.br/informativo> (accessed Jan 27, 2013).
- OECD. "Curbing Corruption in Public Procurement in Asia and the Pacific - Challenges and Progress in 25 Countries." *Organisation for Economic Co-operation and Development*. 2006. <http://www.oecd.org/site/adboecdanti-corruptioninitiative/37575976.pdf> (accessed Mar 6, 2013).
- Oliveira, Frederico R. "Comparative Study between The North American And Brazilian Systems of Combating Corruption." *The Institute of Brazilian Issues*. 2011. <http://www.gwu.edu/~ibi/minerva/Fall2011/Frederico> (accessed Dec 7, 2012).

- Olsen, William P. *The Anti-Corruption Handbook - How to Protect Your Business in the Global Marketplace*. New Jersey: John Wiley & Sons, Inc., 2010.
- Pereira, César A.G. "Procedimento Licitatório da Lei nº 12.462: licitações em forma eletrônica e os métodos de disputa aberto e fechado." *Informativo Justen, Pereira, Oliveira e Talamini*. March 2012. <http://www.justen.com.br/informativo> (accessed Jan 27, 2013).
- . "The Differential Public Procurement Regime "RDC" for the 2014 FIFA World Cup and the 2016 Rio Olympics; brief comments." *Informativo Justen, Pereira, Oliveira e Talamini*. June 2011. <http://www.justen.com.br/informativo> (accessed Jan 27, 2013).
- Power, Timothy J., and Matthew M. Taylor. *Corruption and Democracy in Brazil - The Struggle for Accountability*. Notre Dame, Indiana: University of Notre Dame Press, 2011.
- Reisdorfer, Guilherme F.D. "A contratação integrada no Regime Diferenciado de contratação (Lei 12.462/2011)." *Informativo Justen, Pereira, Oliveira e Talamini*. Sep 2011. <http://www.justen.com.br/informativo> (accessed Jan 27, 2013).
- Rezende, Renato M. *O Regime Diferenciado de Contratações Públicas: comentários à Lei nº 12.462, de 2011*. Aug 2011. [http://www.senado.gov.br/senado/conleg/textos\\_discussao/TD100-RenatoRezende.pdf](http://www.senado.gov.br/senado/conleg/textos_discussao/TD100-RenatoRezende.pdf) (accessed Feb 14, 2013).
- Ribeiro, Diogo A.G. "Os regimes admitidos pela Lei nº 12.462 para a execução indireta de obras e serviços." *Informativo Justen, Pereira, Oliveira e Talamini*. Dec 2011. <http://www.justen.com.br/informativo> (accessed Jan 27, 2013).
- Rose-Ackerman, Susan. *International Handbook on the Economics of Corruption*. Northampton, MA: Edward Elgar, 2006.
- Sá, Mayara R.A. "As diretrizes para as licitações e contratos realizados em conformidade com o RDC." *Informativo Justen, Pereira, Oliveira e Talamini*. Feb 2012. <http://www.justen.com.br/informativo> (accessed Jan 27, 2013).
- Schwind, Rafael W. "Remuneração variável e contratos de eficiência no regime diferenciado de contratações públicas (Lei 12.462/2011)." *Informativo Justen, Pereira, Oliveira e Talamini*. Oct 2011. <http://www.justen.com.br/informativo> (accessed Jan 27, 2013).
- TCU. "Acórdão n. 0632/2012 - TCU - Plenário." *Tribunal de Contas da União*. Mar 21, 2012. <https://contas.tcu.gov.br/juris/Web/Juris/ConsultarTextual2/Jurisprudencia.faces> (accessed Mar 7, 2013).
- . "Acórdão nº 2.932/2011-TCU Plenário." *Tribunal de Contas da União*. Nov 9, 2011. <http://portal2.tcu.gov.br/TCU> (accessed Mar 06, 2013).
- Tomanelli, Steven N. *Annotated Federal Acquisition Regulation - Desk Reference*. Edited by Steven N. Tomanelli. Vol. 1. 2 vols. WEST, 2010.

- UNCITRAL. *Model Law on Public Procurement*. July 1, 2011. [http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/ML\\_Public\\_Procurement\\_A\\_66\\_17\\_E.pdf](http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/ML_Public_Procurement_A_66_17_E.pdf) (accessed Jan 20, 2013).
- UNODC. "Quantitative approaches to assess and describe corruption and the role of UNODC in supporting countries in." *United Nations Office on Drugs and Crime*. Nov 2, 2009. [https://www.unodc.org/documents/data-and-analysis/statistics/corruption/Pape\\_measurement\\_corruption\\_CRP2.pdf](https://www.unodc.org/documents/data-and-analysis/statistics/corruption/Pape_measurement_corruption_CRP2.pdf) (accessed Feb 27, 2013).
- USA. "Federal Acquisition Regulation (FAR)." *Acquisition Central*. April 1, 1984. <http://www.acquisition.gov/far/> (accessed Feb 13, 2013).
- Uslaner, Eric M. *Corruption, Inequality, and the Rule of Law*. New York: Cambridge University Press, 2008.