

LEGAL ALERT

APRIL 8, 2021

RELEVANT COMPLIANCE ASPECTS IN THE NEW PUBLIC PROCUREMENT LAW

On April 1st, Federal Law No. 14,133/2021 (New Public Procurement Law) was signed into law. It enacts a new public procurement regime for the Public Administration, which revokes Laws No. 8,666/1993 (Public Procurement Law); 10,520/2002 (Reverse Auction Law) and 12,462/2011 (Differentiated Public Procurement Regime Law) and, consequently, their respective regulations.

The New Public Procurement Law came into force on April 1st. However, it provides for a transition period: the Public Administration may still, at its sole discretion, choose to use Law No. 8,666/1993 for a period of 2 (two) years from the entry into force of the New Public Procurement Law.

The New Public Procurement Law brings relevant changes from a compliance perspective. Please find below the main points of attention.

OBLIGATION TO IMPLEMENT COMPLIANCE PROGRAMS IN SUBSTANTIAL CONTRACTS

The New Public Procurement Law sets forth an obligation for the winning bidder to implement compliance program, within six (6) months of the execution of substantial contracts for construction works, rendering of services or supplies (article 25, fourth paragraph).

Considering the wording used by the legislator (“winning bidder”) to set forth the abovementioned obligation, it is unclear whether it will also be applicable to contracts executed without a prior tender procedure, due to waiver or infeasibility.

The criteria adopted to define “substantial contracts” was amounts higher than BRL 200 million¹ (article 6, XXII). This was one of the alterations made, in the context of the legislative procedure, by the House of Representatives that was maintained by the Federal Senate – the original text considered BRL 100 million to define substantial contracts.

In principle, the practical effects of this obligation are rather limited. In 2020, only eleven (11) contracts by the federal government, including those by waiver and infeasibility of tender, were higher than BRL 200 million²; in 2019, the number was of twelve (12)³.

It is worth highlighting that, depending on the stage of existence of the compliance program in the company, six months may be a challenging and insufficient timeframe to create and implement a robust and efficient program.

¹ Around USD 39 million as of December 22, 2020.

² Pursuant to information available at the Federal Government’s Transparency Portal, with data updated until 03/10/2020. Available at <http://www.portaltransparencia.gov.br/contratos/consulta?ordenarPor=valorContratado&direcao=desc>. Access on 12/15/2020.

³ Pursuant to information available at the Federal Government’s Transparency Portal. Available at <http://www.portaltransparencia.gov.br/contratos/consulta?paginacaoSimples=true&tamanhoPagina=&offset=&direcaoOrdenacao=asc&assinaturaDe=01%2F01%2F2019&assinaturaAte=31%2F12%2F2019&colunasSelecionadas=linkDetalhamento%2CdataAssinatura%2CdataPublicacaoDOU%2CdataInicioVigencia%2CdataFimVigencia%2CorgaoSuperior%2CorgaoEntidadeVinculada%2CunidadeGestora%2CformaContratacao%2CgrupoObjetoContratacao%2CnumeroContrato%2CnomeFornecedor%2CcnpjFornecedor%2Csituacao%2CvalorContratado&ordenarPor=valorContratado&direcao=desc>. Access on 12/15/2020.

As for the obligation to implement a compliance program, the New Public Procurement Law indicates the future enactment of a regulation “which will provide for the measures to be adopted, the form of proof and the penalties for non-compliance” (art. 25, fourth paragraph). The New Public Procurement Law does not establish who should enact the regulation.

Considering that the New Public Procurement Law does not have guidelines on the topics to be dealt with in said regulation, questions remain as to the functioning of the inspection, evaluation and proof of implementation or existence of compliance programs.

Federal Decree No. 8,420/2015, which regulates Federal Law No. 12,846/2013, could give us a good idea as to what to expect with regard to the provisions of the new regulation about the measures that shall be adopted in order to implement a compliance program. However, in the States and Municipalities, especially those in which regulations about the matter have already been enacted, uniformity could be a challenge.

As for the inspection of the compliance programs, some state and district laws that contain similar obligations mainly provided rather inefficient solutions. For instance, Rio de Janeiro State Law No. 7,753/2017 sets forth that the manager of the contract (“*gestor do contrato*”, in Portuguese) is responsible for inspecting the implementation of the compliance program. In case there is no manager of the contract, the responsibility is assigned to the auditor of the contract (“*fiscal do contrato*”, in Portuguese) (article 11). The lack of specialized knowledge could also be a challenge for the adequate evaluation of the programs.

With regards to the proof of implementation or existence of the programs, the solution set forth in some state and district laws⁴ was to request the filing of profile and compliance reports before the Public Administration, in the same model as the ones required in administrative proceedings for the imposition of liability (PARs, acronym in Portuguese) set forth in Law No. 12,846/2013.

Another possibility to provide proof of the implementation of compliance programs is to require its certification by an external and independent company accredited by the Public Administration. In other words, to require, in substantial contracts, that the winning bidder implements a compliance program duly certified by an external accredited entity. This was the approach taken in the New Measures Against Corruption, jointly proposed by Fundação Getúlio Vargas – FGV and Transparency International Brazil in 2018⁵, to provide proof of the existence of effective compliance programs in the context of substantial contracts.

Regardless of the chosen path, it is desirable to seek to adopt, as far as possible, uniform criteria and rules for the fulfillment of the obligation in the different entities and powers.

BENEFITS OF ADOPTING A BROAD COMPLIANCE PROGRAM

The New Public Procurement Law sets forth that, in case of ties between two or more proposals, the following criteria, among others, are considered tiebreakers: (i) the development of measures to promote gender equity in the workplace (article 60, III); and (ii) the existence of an integrity program (article 60 IV). Another criteria is the proof of measures to mitigate greenhouse gas emissions (article 60, first paragraph, IV).

Moreover, the New Public Procurement Law forbids the participation in tender procedures of companies and individuals who have been convicted for exploitation of child labor, for submitting workers to conditions analogous to slavery or for hiring adolescents in cases prohibited by law (article 14, VI).

Thus, the New Public Procurement Law favors companies that invest in broad integrity programs, which include sustainable corporate practices and the promotion of diversity, and also prevents the participation of companies convicted for violations of labor laws and human rights rules and regulations. In this

⁴ District Law No. 6,112/2018; Goiás State Law No. 20,489/2019; Mato Grosso State Law No. 11,123/2020; and Pernambuco State Law No. 16,722/2019.

⁵ The final report of the Project is available at <https://diretorio.fgv.br/projetos/novas-medidas-anticorrupcao>. Access on 12/18/2020.

sense, in addition to anti-corruption measures typically found in compliance programs, the New Public Procurement Law expands the incentive for even more comprehensive compliance practices, making them a real competitive advantage.

The New Public Procurement Law also establishes that the implementation or improvement of the compliance program is a factor taken into consideration in the imposition of fines, warnings, suspension and debarment (article 156, first paragraph, item V). Moreover, it also establishes that the implementation or improvement of compliance program will be required as a condition for rehabilitation for the practice of offenses (article 163, sole paragraph), in line with the provisions of Ordinance No. 1214/2020 of the Office of the Federal Comptroller-General (CGU), which regulated the same subject, only in relation to the sanctions provided for in Law No. 8.666/1993.

INTERACTION WITH PUBLIC OFFICIALS

According to the New Public Procurement Law, public official is the “individual who, by virtue of election, appointment, designation, hiring or any other form of investiture or bond, exercises a mandate, position, job or function in a legal entity that is part of the Public Administration” (article 6, V). An interesting aspect is that the definition is less comprehensive than the one established in the Administrative Improbability Law (8.429/1992⁶), since the latter comprehends individuals with any bond with entities that receive subventions, benefits, or incentives from public bodies, but not necessarily are part of the Public Administration.

In addition to the forms of interaction with public agents already contemplated by traditional public procurement laws, the New Public Procurement Law creates a new tender modality, that will necessarily imply close interaction with public officials: the competitive dialogue.

Competitive dialogue is the “tender modality for contracting works, services and purchases in which the Public Administration conducts dialogues with previously selected bidders according to objective criteria in order to develop one or more alternatives capable of meeting their needs, and the bidders must present a final proposal after the dialogue is closed” (article 6, XLII).

Article 32 of the New Public Procurement Law establishes the circumstances for using the new modality, which are restricted to procurement (i) of technological or technical innovation; (ii) in which it is impossible for the agency or entity to have its need satisfied by the solutions available on the market; (iii) in which it is impossible for technical specifications to be defined with sufficient precision by the Public Administration; (iv) in which there is a need to define the means and alternatives that can satisfy their needs; and (v) for which it considers that the open and closed dispute modes do not allow an adequate appreciation of the variations between proposals.

To mitigate the risk of irregularities, “meetings with pre-selected bidders will be registered in minutes and recorded using technological audio and video resources” (article 32, first paragraph, item VI), which shall be attached to the records of the tender procedure (article 32, first paragraph, item VIII).

Another relevant aspect is that the New Public Procurement Law allows the Public Administration to convene a public hearing, in person or electronically, about the tender it intends to carry out, with the prior disclosure of pertinent information and the possibility of manifestation of interested parties (article 21, *caput*). In the same sense, it is also possible to submit tenders to public consultation for the formulation of suggestions (article 21, sole paragraph).

Although this is not necessarily a new aspect brought about by the New Public Procurement Law, it is important that companies participating in tender procedures make sure that any interactions with public agents regarding future or ongoing tenders are inserted in the context of consultations or formal public hearings.

⁶ Article 2 “A public agent is considered, for the purposes of this law, anyone who exercises, even temporarily or without remuneration, by election, appointment, designation, hiring or any other form of investiture or bond, mandate, position, employment or function in the entities mentioned in the previous article”.

PUBLICITY AND TRANSPARENCY

The New Public Procurement Law makes significant improvements to the transparency and publicity of contracts executed with the Public Administration.

First, we highlight the creation of the National Portal of Public Procurement – PNCP (acronym in Portuguese) (article 174). This portal shall centralize procurement information and documents for all public entities, including (i) procurement plans; (ii) tender notices; (iii) price registers; (iv) registration of bidders; and (v) contracts and amendments.

Moreover, and in line with article 23 of Law No. 12,846/2013, another important modification is that the New Public Procurement Law expressly provides that the National Register of Unlawful and Suspended Companies (CEIS, acronym in Portuguese) and the National Register of Sanctioned Companies (CNEP, acronym in Portuguese) shall be updated, with the indication of the sanctions applied, by the “*bodies and entities of the Executive, Legislative and Judiciary Powers of all federative entities*”. Also, these registers shall be consulted by the Public Administration prior to entering into or extending contracts.

In addition to promoting transparency and increasing publicity of information, the expansion of availability and the centralization of this data will be relevant for legal entities, in the context of conducting compliance due diligences, and for the Public Administration, which may also consult the records in the course of tender procedures.

STATUTE OF LIMITATION

Article 158, fourth paragraph, of the New Public Procurement Law sets forth a relevant alteration in relation to the statute of limitation period for the imposition of suspension and debarment sanctions (article 155, III and IV, respectively).

Unlike the provisions set forth in Law No. 8.666/1993, the 5-year statute of limitation period for the exercise of the punitive action by the Public Administration is now counted from the Administration’s awareness of the irregularity and no longer from the date of the act (as prescribes the first article of Law No. 9.873/1999, whose application extended to Law nº 8.666/1993).

The effect, from a practical point of view, is extremely relevant. There could be a significant extension of the statute of limitation period.

APPRAISAL OF ADMINISTRATIVE OFFENSES

Article 159 of the New Public Procurement Law sets forth that the acts foreseen as administrative offenses in both the New Public Procurement Law and in Law No. 12,846/2013 shall be appraised and judged jointly in an administrative proceeding for the imposition of liability.

This process of joint appraisal is in line with the provisions set forth in Article 12 of the Federal Decree No. 8,420/2015, which regulates Law No. 12,846/2013, as well as in the Normative Instruction No. 13/2019 of the Federal Office of the Comptroller-General (CGU), which is applicable to all bodies and entities of the Federal Executive Branch.

If it is found that, in fact, one of the harmful acts provided for in Law 12.846/2013 has been committed, the New Public Procurement Law provides that the following sanctions may be applied cumulatively:

- / fine, not less than five tenths percent (0.5%) nor more than thirty percent (30%) of the amount of the contract (article 156, third paragraph); and
- / debarment to participate in tender procedures or enter into contracts with the direct and indirect Public Administration of all federal levels, for at least three (3) to up to six (6) years (article 156, fifth paragraph).

LENIENCY

Before being converted into the New Public Procurement Law, Bill No. 4,253/2020 provided that in processes that deal with administrative offenses typified both in the New Public Procurement Law and in Law No. 12,846/2013, the Public Administration “may exempt” the legal entity from sanctions, if a leniency agreement is entered into under Law No. 12,846/2013 (original wording of article 159, sole paragraph).

According to said provision, the legal entity could have been exempted from the following sanctions:

- / sanctions provided in article 156 of the New Public Procurement Law (warnings, fines, suspension and debarment); and
- / sanctions provided in the organic laws of the competent audit court, which, in this case, shall only be possible if there is a favorable opinion from the respective court.

However, this provision was vetoed by President Jair Bolsonaro on April 1st, 2021, due to alleged violation of the principle of separation of Powers and lack of public interest in conditioning the execution of leniency agreement to the analysis by audit courts.

Therefore, the New Public Procurement Law no longer contains an express reference to the possibility of leniency for acts that constitute offenses to both the New Public Procurement Law and Law No. 12,846/2013, in case a leniency agreement is being negotiated under Law No. 12,846/2013. Nevertheless, as this possibility is expressly recognized by Law No. 12,846/2013 (Article 17), the practical consequences of excluding a similar provision from the New Public Procurement Law are limited. Please note, however, that Law No. 12,846/2013 does not expressly provide for the involvement of audit courts in leniency agreements and does not address the possibility of application or exclusion of sanctions by these authorities in the context of leniency agreements.

PROHIBITION OF PARTICIPATION OF COMPANIES WHICH HAVE BEEN SANCTIONED BY OFFICIAL FOREIGN COOPERATION AGENCIES OR INTERNATIONAL FINANCIAL BODIES IN PROJECTS AND PROGRAMS FINANCED BY THESE ENTITIES

The New Public Procurement Law provides that companies and individuals which have been sanctioned by official foreign cooperation agencies and/or international financial bodies are prevented from participating in tender procedures related to projects partially financed by these entities (article 14, fifth paragraph).

In this context, the Inter-American Development Bank – IDB and the World Bank, for instance, keep lists of companies and individuals which have been sanctioned and debarred. In said lists, there are individuals and companies from several countries, including Brazil. For example, twenty-three (23) Brazilian companies

and five (5) Brazilian individuals are included in IDB's list of sanctioned entities⁷, and, thus, are prevented from participating in tender procedures and contracts related to projects and programs partially financed by the IDB (with financing resources or national counterparts). In the scope of the World Bank, the total number of Brazilian entities is thirty-six (36), including companies and individuals.

CRIMINAL PROVISIONS: HARSHER SANCTIONS AND NEW CRIME

In criminal matter, the New Public Procurement Law provides for relevant alterations.

The crimes, except for one, are similar to the ones set forth in Federal Law No. 8,666/1993, but the punishment, in general, are more severe. Thus, apart from the direct impact in the calculation of criminal statute of limitation periods, some crimes are no longer considered as minor offenses and, therefore, the benefits of a settlement ("*transação penal*", in Portuguese) (article 76, of Law No. 9,099/1995) and suspension programs ("*suspensão condicional do processo*", in Portuguese) (article 89, of Law No. 9,099/1995) no longer apply.

Moreover, a new crime was created: "gross omission of data or information by the project designer", which provides for imprisonment, for six (6) months to three (3) years, and a fine. The crime encompasses omissions, modifications or delivery of technical appraisal documents, in the context of the preparation of basic and executive projects or pilot studies in competitive dialogues ("*diálogo competitivo*", in Portuguese) and in the course of expression of interest procedures ("*procedimento de manifestação de interesses*" in Portuguese) that (i) are highly dissonant from reality; (ii) frustrate the competitive nature of tender procedures; or (iii) are not the most advantageous proposal to the Public Administration.

HOW TO PREPARE FOR THE NEW PUBLIC PROCUREMENT LAW?

Some measures can be implemented in advance to prepare for the enactment of the New Public Procurement Law, from a compliance perspective. Please find below the main relevant measures.

- ✓ **Drafting of profile and conformity reports:** to draft these reports in advance can be a good strategy to identify gaps in the compliance program, to enhance the evidencing of existing compliance measures and proceedings, and to address challenges that are faced when proving that you have a compliance program (e.g., best way to demonstrate a company conducts a periodical risk analysis without waiving the applicable privilege). Moreover, the reports can also be an efficient way to prove the existence and effectiveness of the compliance program and, as it is occurring in some States, it is possible that the future regulation will require the use of these reports in order to do so. Additionally, the presentation of the reports is also required in the context of Administrative Proceedings for the Imposition of Liability – PARs, with a challenging deadline for drafting, consolidating the evidence and elaborating the written defense (30 days). In other words, to draft the reports in advance and have more time to do so is a strategical measure to assure the best possible quality of these documents, which can assist in mitigating sanctions and in obtaining other benefits already mentioned above.
- ✓ **Preparation of gap analysis based on compliance program certification standards:** as the New Public Procurement Law does not define how to prove the implementation of a compliance program, a relevant measure that can be taken in advance is to conduct an analysis to verify possible gaps in the compliance program, based on certification standards. By doing so, in case

⁷ Pursuant to information available at <https://www.iadb.org/pt/transparency/empresas-e-pessoas-sancionadas>. Access on 12/16/2020.

this is the criteria adopted by the future regulation to prove the existence of a compliance program, possible gaps can be identified and remediated in advance.

- / **Implementation of a comprehensive compliance program:** as detailed above, the New Public Procurement Law establishes benefits to bidders that have a compliance program that includes not only measures for preventing, identifying and remediating corrupt practices, but also initiatives related to promotion of diversity, environmental protection and compliance with labor law and human rights.
- / **Update trainings focused on public tenders and contracts:** sometimes, in the context of public tender procedures, there is a thin line between what can and cannot be done. Situations that may pose risk from a compliance perspective can be close to what is allowed. In this context, it is important that the trainings and the institutional materials (policies, proceedings and internal rules) consider these aspects. Moreover, it is also important to conduct specific trainings, with practical examples of DOs and DONTs, to raise awareness among individuals who work in the departments responsible for tender procedures and/or who interact with public agents, with respect to the allowed conducts, good practices and how to act in situations of risk.
- / **Assure that the scope of compliance due diligences contemplates searches on the CEIS and CNEP databases:** most companies that maintain a compliance due diligence routine already contemplate searches on these databases as part of the scope of their analysis. Notwithstanding this, to those companies that do not contemplate these searches, considering the alterations of the New Public Procurement Law with respect to the consolidation of information of bodies and entities of the Executive, Legislative and Judiciary branches of all federative entities in the CEIS and CNEP databases, it is essential to include searches to these databases in the scope of compliance due diligences.
- / **Consider adjusting the scope of due diligences conducted in the context of corporate transactions:** considering the potential lengthening of the statute of limitation period for the imposition of suspension and debarment sanctions, due to the alteration in the effective day of the limitation period, a measure that could be relevant is the adjustment in the scope, mainly the period under analysis, of due diligences carried out before corporate transactions. This way, a larger period is encompassed, in order to mitigate potential risks of liability during or after the corporate transaction.

* * *

Bruno Maeda
+55 11 3578-6665 / 95029-9005
bruno.maeda@maedaayres.com.br

Carlos Ayres
+55 11 3578-6665 / 98711-0591
carlos.ayres@maedaayres.com.br

Renata Politanski
+55 11 3578-6665 / 93800-8478
renata.politanski@maedaayres.com.br

Thomas Greco
+55 11 3578-6665 / 93800-0663
thomas.greco@maedaayres.com.br