

**PARTICIPATION OF FOREIGN COMPANIES IN PUBLIC TENDERS IN BRAZIL AND THE NEW
BRAZILIAN LAW ON PUBLIC PROCUREMENT (FEDERAL LAW 14133/2021): A BIG AND
NECESSARY STEP TOWARDS THE WTO/GPA ACCESSION**

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1. Introduction

In general, public tenders in Brazil are open to foreign companies. However, these companies face certain practical difficulties to enter into the domestic market of public contracts, as revealed by public data on the subject and recognized even by the Brazilian Government as it can be seen in public reports. This is because there are severe difficulties for foreign companies to comply with all the formalities required by the legislation that has governed (for almost thirty years) the bidding procedures in Brazil (Federal Law 8666/1993).

But there are some winds of change in this regard and they are about to blow more vigorously in Brazil.

On April 1, 2021, a new general law on public bidding and contracting was enacted in Brazil (Federal Law 14133/2021). The new law will coexist with the previous one for a period of two years.

In line with Brazil's aim to become a signatory to the WTO's Government Procurement Agreement, the new law seeks to facilitate the participation of foreign companies in public tenders in the country by amending and improving certain rules contained in previous legislation.

In this brief article, I intend to contextualize the existing difficulties for foreign companies to participate in public tenders in Brazil and to analyze the innovations established by Law 14133/2021 and other recent rules. These changes, as it will become clear in the conclusion, are a big and necessary step towards Brazil's accession to the WTO/GPA.

2. Difficulties for foreign companies to participate in public tenders in Brazil

Public tenders and public contracts in Brazil are formally open to foreign companies at national and subnational levels – including when public tenders and public contracts are held by their respective entities such as state-owned companies, for example. The participation of foreign companies is only prohibited in very specific situations in which the object of the public contract relates to aspects of national sovereignty.

Although the general rule is to open up the Brazilian market of public contracts to foreign companies, the participation of these companies has always been hampered by the need to comply with certain formal requirements. In practice, these requirements ended up making this market relatively closed to the effective participation of foreign companies.

An example illustrates this kind of difficulties. To operate in Brazil, a foreign company must have a formal authorization that is granted if the applicant complies with the prerequisites established in articles 1134 to 1143 of the Brazilian Civil Code (for example, nominate a legal representative in the country and deposit a certain amount of money in a Brazilian bank account). Instead of requiring this authorization only for the formalization of the public contract or for the beginning of its execution, Law 8666/1993 required this authorization (as a general rule) *ex ante*, namely for the mere participation in the public tender.¹ However, it takes months to obtain such authorization. Therefore, in practice, it becomes an obstacle for the participation of foreign companies in several situations. After all, foreign companies do not intend generally to spend time and money for this such an authorization without a concrete prospect of being hired by a Brazilian public entity.

Due to formal difficulties like this, the participation of foreign companies in public tenders is relatively reduced in Brazil.

A detailed study carried out by Carlos Cesar Martins Ferreira² collected data for the period between 2011 and 2018 from the *Brazilian Federal Government Procurement Panel*. According to the available data, in this period, public purchases were carried out by the Federal Government in the total amount of BRL 422.6 billion (equivalent to \$ 74.1 billion dollars). From this total, only BRL 28.9 billion (\$ 5.07 billion dollars) were used in contracts with foreign companies (out of a total of 22726 public contracts in the given period).

¹ Article 28 of Law 8.666/1993: “The documentation relating to the legal qualification, depending on the case, shall consist of: (...) V – a decree of authorization, in the case of a foreign company or partnership in operation in the country, and act of registration or authorization to operate issued by the competent body, whenever the activity requires it”.

² FERREIRA, Carlos Cesar Martins. Participação estrangeira em licitações federais: uma abordagem quantitativa utilizando o Painel de Compras. *Revista do Serviço Público (RSP)*, Brasília, n. 72, p. 779-802 oct./dec. 2021.

This means that only 6.83% of public purchases carried out by the Brazilian Federal Government between 2011 and 2018 were awarded to foreign companies. In relative terms, the smallest participation of foreigners occurred in 2012 (with only 3.75% of public purchases awarded to foreign companies). The largest participation occurred in 2015 (12.36%). The Ministry of Health was responsible for 88.67% of public purchases from foreign companies, followed by the Ministry of Education and the Ministry of Science, Technology and Innovation.

Even the Federal Government recognizes these difficulties for the participation of foreign companies in public tenders in Brazil as it can be seen in a public report.³

The participation of foreign companies is more consistent in the case of long-term contracts – such as concessions of public services, public-private partnerships and port leases. This relates to the fact that, in these types of contracts, the private party can normally be a Special Purpose Entity incorporated (after the bidding) under national laws, with eventual foreign bidders as its shareholders. For this situation, article 1134 of the Brazilian Civil Code does not require the foreign company to have a formal authorization to operate in Brazil.

3. Regulatory measures to facilitate the participation of foreign companies

In order to facilitate the participation of foreign companies in public tenders in Brazil, a few regulatory measures have been adopted in the last few years. Two of them are worth mentioning.

On September 20, 2019, Federal Decree 10024/2019 was issued, exempting foreign bidders from submitting sworn translations (i.e. officially accepted translations) of their tender documents. Since the Decree was issued, translations would only need to be presented for the signing of the contract (if a foreign company is the winner of the public tender).

The second measure was the issuance, on February 10, 2020, of Normative Instruction n. 10, of the Special Secretariat for Debureaucratization, Management and Digital Government of the Ministry of Economy.⁴ According to this Normative Instruction, foreign companies can be registered in the Unified Registration System for Suppliers (“Sicaf”) of the Federal Government without having legal representation in Brazil. Legal representation in the country will only be required when the contract is signed.

³ *Participação de empresas estrangeiras em licitações – Cadernos de Logística*, nov.2020, available in: <https://www.gov.br/compras/pt-br/agente-publico/cadernos-de-logistica/midia/empresas-estrangeiras-em-licitacoes-publicas.pdf>.

⁴ Available in: <https://www.gov.br/compras/pt-br/acao-a-informacao/legislacao/instrucoes-normativas/instrucao-normativa-no-10-de-10-de-fevereiro-de-2020-atualizada>.

With these provisions, the electronic public procurement system in Brazil can be accessed from anywhere, thus facilitating the participation of companies from all over the world in public tenders in Brazil.

It is interesting to note that these innovations were issued just after Brazil expressed its intention to join the WTO/GPA – which was publicly announced at the World Economic Forum in Davos, in January 2019.

Nevertheless, the enactment of a formal law was still necessary to consolidate these provisions and to introduce other innovations aimed at enhancing the participation of foreign companies in public tenders in Brazil.

4. The new Brazilian law on public biddings and contracting (Law 14133/2021)

On April 1, 2021, after several years of discussions, the new Brazilian law on public biddings and contracting was enacted (Law 14133/2021).

Among several other aims, the new law intends to facilitate further the participation of foreign companies in public tenders in Brazil. This aim is precisely in accordance with Brazil's intention of becoming a signatory to the WTO/GPA.

Some innovations of the new Brazilian law must be highlighted.

4.1. Legal definition of international bidding

Law 14133/2021 finally created a definition of international bidding, which did not exist in the previous legislation. The elements of this definition are the following: (1) tender processed in Brazilian territory; (2) mandatory admission of foreign companies; (3) possibility of quotation in foreign currency; or (4) possibility of the contract object to be performed in whole or in part in foreign territory.

Among these elements of the definition of international bidding, it is worth noting that the admission of foreign companies is *mandatory*. This provision, in addition with the fact that the new law no longer demands the formal authorization to operate in Brazil as a qualification requirement, leads to the conclusion that foreign companies are no longer required to have authorization to operate in Brazil only for participating in public tenders. If a foreign company wins a public tender and the object of the contract involves “operation in Brazil”, it will need to obtain the formal authorization required by the Brazilian Civil Code. But this formal authorization will not be necessary for the mere participation in the public tender. Therefore,

there is no longer a practical difficulty that was really a barrier for the participation of foreign companies in public tenders in Brazil.

4.2. Possibility of a foreign company leading a consortium with Brazilian companies

Brazilian law allows two or more companies to join together in a consortium to participate in public tenders. The formation of a consortium permits the companies to join their technical, economic and financial qualifications in order to fulfill all the participation requirements. Every consortium must have a leading company, which is normally the one with the largest share.

Article 33 of Law 8666/1993 admitted the possibility of consortium between Brazilian and foreign companies, but prohibited any foreign company from being the leader of the consortium in these situations. The leadership of the consortium should always be provided by the Brazilian company. This situation generated uncertainty among foreign companies because they could not lead the consortium with Brazilian companies even if they had the largest share. Moreover, the prohibition made no sense given that the legislation always admitted the participation of foreign companies alone and in a consortium between them. In other words, if they can participate alone or in a consortium, there was no reason to prevent their leadership in a consortium with Brazilian companies.

Law 14133/2021 no longer forbids foreign companies from being the leaders of a consortium with Brazilian companies. The rules on consortium formation are established in article 15 and none of them prohibits the leadership by foreign companies. Therefore, from now on, in case of a consortium between Brazilian and foreign companies, they are free to define that the leadership may be provided by the foreign company.

4.3. Facilitating the submission of documents by foreign bidders

Law 14133/2021 created facilitations for submission of documents by foreign companies. Two examples must be mentioned.

First, according to the new law, foreign companies can present certificates of technical qualification "or other competent documents" issued by foreign entities, provided that they are translated into Portuguese and that the entities issuing these documents are reliable (article 67, paragraph 4). If these requirements are met, any document that demonstrates the technical qualification of the foreign company must be accepted without further formalities.⁵

⁵ In public tenders in Brazil, bidders must present documents demonstrating that they have experience (technical qualification) to carry out the bid object. The request for bids must list the experiences that bidders must demonstrate.

The second example concerns the need for registration with the competent professional body. In some cases, Brazilian legislation requires companies to be registered with certain professional bodies (for example, in order to carry out constructions, the company must be previously registered with the Regional Board of Engineering – CREA). The previous legislation (Law 8666/1993) required bidders – including foreigners – to be registered with the competent professional body as a prerequisite for participating in public tenders. However, Law 14133/2021 permits that foreign companies can apply for such registration only to sign the contract (article 67, item V). Therefore, foreign companies will be able to participate in public tenders even without having the registration.

4.4. Overcoming the idea of "equalization" of bid proposals

Paragraph 4 of article 42 of Law 8.666/1993 established that “For the purpose of judging the bid, the proposals submitted by foreign bidders shall be increased by the amount corresponding to the taxes that burden exclusively the Brazilian bidders in relation to the final sales transaction”. As a result, a number of scholars understood that the tax burden levied on Brazilian bidders should be simply “added” to the bid proposal of foreign bidders.

In my book *“Licitações Internacionais”*⁶, I argued that this understanding was wrong due to several reasons. One of them is that simply adding the Brazilian tax burden to the bid proposal of foreign bidders contradicts the principle of equality and practically makes it impossible for foreign companies to win public tenders in Brazil.

Law 14133/2021 does not contain any rule providing for the “equalization” of the bid proposals presented by foreign bidders. Therefore, their bid proposals cannot be increased by the amount corresponding to the taxes that burden exclusively the Brazilian bidders.

5. Conclusion

As I intended to demonstrate, the regulation of public tenders in Brazil has evolved towards facilitating the participation of foreign companies. Such development is in the interest of the Brazilian Public Administration itself, which, in doing so, manages to increase the number of interested companies. In theory, an increase of the number of interested bidders, increases competition and thus the chances of obtaining the best value for money.

⁶ SCHWIND, Rafael Wallbach. *Licitações Internacionais: participação de estrangeiros e licitações com financiamento externo*. 3.ed. Belo Horizonte: Fórum, 2022.

This facilitation of participation of foreign companies ends up promoting a more effective opening of the Brazilian market of public contracts, which is a necessary step to promote Brazil's accession to the WTO/GPA.