

Chapter 15

The Use of the Public Procurement Power to Promote the Development of Small Businesses: The Brazilian Experience

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INTRODUCTION

The question of the participation of small businesses (SBs) in government procurement has acquired a special significance in the context of the Brazilian political scene, reflecting the importance dedicated to this theme on the international level, as shown by the intense studies and debates that occurred at the “II Procurement Conference of the Americas”, Atlanta, GA, USA, from 31 October to 2 November 2005.

This conference marked the consolidation of an understanding of the importance of SBs to the economies of individual nations and that public procurement is an ideal instrument for the promotion of this sector. As a result of this consensus, a group for the exchange of information was created in order to integrate and share the experiences of individual countries in the use of Procurement power, so that each country might learn from the experiences of the other countries in the Americas.

The understanding that the promotion of SBs is an effective instrument for economic development, generation of employment and income, elimination of poverty and reduction of social and regional inequalities has led the Brazilian federal government to adopt new forms of incentives for this sector and to opt for government procurement as a central development tool. The main goal is to induce the formalization and legalization of SBs, to guarantee access to markets and to stimulate the transfer of technology, the formation of clusters and building competitive

capacity in order to face competition on the domestic and foreign markets.

It should be noted that support for SBs by means of preferential procurement is part of a wider policy for the use of public procurement power, in which the government demand for goods and services are used as an instrument of industrial policy for the development of sensitive, vulnerable or strategic sectors of the economy.

Therefore, several initiatives are being developed to adapt the Brazilian procurement system for it to become an instrument for the development of SBs. The first stage of these initiatives is to reform the legislation, which currently focuses exclusively on the efficiency of procurement, that is, seeks to promote the equal treatment of tender participants, competitiveness, transparency, control and cost efficiency of the procurement.

In addition to changes in the legislation, recent research conducted in Brazil on SBs indicates a low degree of computer usage and a reduced capacity to participate in public procurement procedures. This reality, allied to the priority allocated to electronic auction by the Brazilian government, requires a policy of capacity-building and digital inclusion so that these enterprises can become aware of, and participate in tenders, and, furthermore, the building of capacity among those responsible for procurement with regard to the relevance and differentiated status of SBs.

Thus, the aim of this study is to analyze the theoretical base, principles, objectives and challenges for the adoption of the use of the public procurement power to stimulate the development of SBs in Brazil, to analyze the current situation of SBs and the Brazilian public procurement system, and, finally, to present an overview of the main innovations proposed, showing their current stage of implementation, challenges and perspectives.

CONTEXT

SBs entered the national agenda during the drafting of the Constitution of the Federative Republic of Brazil, in 1988, in which they were guaranteed a special legal status, differentiated and simplified in relation to medium and large-sized enterprises. However, in the field of public procurement, priority has been given to

the fight against corruption by means of the promulgation of the General Law on Tenders and Contracts, Law No. 8666 Article 3), which prohibits differentiated treatment based on the size or location of the enterprise. It is in this sense that one can say that the adoption of the use of the public procurement power to stimulate SBs represents a new paradigm for public procurement in Brazil. The prevailing paradigm, which can be called the efficiency paradigm, focuses on increasing competitiveness, cost efficiency, transparency and control of public purchases, and reflects a historical moment rife with allegations of fraud and embezzlement, which culminated in the passage of Law No. 8.666/93 (General Law on Tenders and Contracts), and, with similar objectives, of Law No. 10.520/02, which instituted a new type of tender, named Pregão (similar to an English reverse auction). The most important expression of this paradigm occurred recently in the form of the introduction of electronic procurement procedures, especially the electronic form of auction.

It is important to note that, in this new model of public procurement that is being developed in Brazil and which seeks to include the use of the procurement power as an instrument of public policy, the efficiency paradigm is not discarded, as it is not perceived as antagonistic to the use of the public procurement power, since, by reducing the bureaucratic costs of tender procedures, facilitating participation and social control, facilitating contracting and payment, inhibiting fraud and embezzlement, and guaranteeing the impersonality and competitiveness of the tender procedures, the participation of SBs, which rarely have the resources to participate in complex, costly, slow, obscure or unfair tender procedures, will be indirectly facilitated.

According to this assumption, no abdication of the efficiency paradigm occurs, such that the Brazilian government has been dedicating a growing priority to initiatives in the field of electronic government, above all in the area of government procurement. However, with regard to the final results of tenders, instruments are being developed to ensure that public procurement plays a redistributive role without affecting the competitiveness and efficient costing of the goods and services under contract.

Brazilian actions to promote the efficiency of public procurement have emphasized the dissemination of procedures, norms and technologies that promote transparency, cost reduction, digital

inclusion, rationality and democratization of the means of access to tender procedures.

For this reason, the Federal Government has adopted e-auctions as its main form of electronic procurement. This type of tender is conducted at the site www.comprasnet.gov.br, which was implanted in May 2000, and was made obligatory for the Federal Public Administration by means Decree No. 5.450/2005. The electronic auction is equivalent to a reverse auction, but the starting prices for the product are presented by the participants in their initial proposals.

The use of electronic auctions represents an important step forward for the Federal Government in terms of savings, transparency, competitiveness and control of tenders. The electronic form of tender inhibits collusion and possible fraud, because of the ample publicity, non-identification of the participants (who are only revealed at the end of the proceedings) and the possibility of participation by suppliers without requiring a physical presence, as well as the registration and control of all the tender acts by the electronic system.

In view of the positive results in terms of efficiency achieved by electronic auctions, the Federal Government issued Decree No. 5.504, in August 2005, which requires the use of electronic auctions for tenders held by instances of federal sub entities (states and municipalities) or private entities when using funds supplied by the federal government, by means of agreements or similar instruments.

Thus, the use of the public procurement power is allied with the search for efficiency in contracting, which remains a primary factor in Brazilian public procurement policy, as pointed out by the Secretary for Logistics and Information Technology of the Ministry of Planning, Rogério Santanna (2005): "The electronic auction has achieved great success as the most efficient tool for public administration in the area of government procurement. This is the most cost efficient, transparent and speediest form of procurement, since society as a whole is able to monitor, via Internet, the electronic purchases of the Federal government."

In 2005, the electronic auction became the Federal Government's main type of tender procedure. This policy generated savings in public expenditures of R\$ 598 million in 2005 (SIASG,

2006), which led to international recognition for the Federal Government's electronic procurement system.

In November 2005, the Inter-American Development Bank (IDB) approved the use of the Brazilian Federal Government's electronic procurement system, Comprasnet, for contracting using funds supplied by the Bank. The adoption of Comprasnet for contracting with IDB funds was the result of an agreement signed by the Brazilian Ministry of Planning, the IDB and the World Bank (IBRD). Through this agreement, Comprasnet became the first electronic procurement system in the world to be accepted by these two multilateral financial institutions.

The preference for electronic procurement in relation to traditional contracting processes, one of the mainstays of efficiency in Brazilian public procurement, also is one of the pillars of the new policy for the use of public procurement power, since the application of information technology resources in tender processes ensures their fairness and facilitates the participation of SBs.

However, despite preserving this concern with the efficiency of public procurement, the adoption of the use of the public procurement power will always require a tradeoff between redistribution and efficiency, which is a central point in economic debate, such that the process of transformation of the Brazilian procurement system into a redistributive instrument is confronted with the challenge of proving that the benefits of such a policy are greater than its costs.

The scarcity of studies on this type of policy in Brazil does not allow a more informed analysis of the economic impacts of the concession of preferences to SBs in public contracts. This scarcity arises from the fact that, with the exception of the United States, which has been using this type of policy since 1933, by means of the Buy American Act, the world's countries are still developing the use of the public procurement power to stimulate SBs.

Studies on this theme made by American researchers, such as, for example, the one developed by Justin Marion (Marion, 2004, p. 27),¹ serve as an indicator of policy impacts, but cannot be transposed to different contexts, such as the Brazilian one, due to factors that include differences between the legal systems and in the structure of public procurement in the two countries. In addition, the

US system of affirmative action in public Procurement is not limited to SBs, in that it targets certain minorities, such as ex-prisoners, firms directed by women, veterans, etc.

The importance of SBs for contemporary economies is unquestioned, as revealed by data for the European Union, in the document: "Craft and Small Business", based on data from the Small- and Mid-Sized Enterprises Observatory, of 2003² (European Commission, 2003, p. 1).

For this reason, OECD countries are increasingly seeking to develop the use of the public procurement power as a tool for industrial competitiveness, in order to strengthen the regional bases of technological development, to consolidate networks of SBs, and to develop areas considered to be strategic for economic development (Além, 2000; p. 205).³

As we shall see below, the experience of SBs in Brazil is similar to that of other countries, justifying the use of the public procurement power, as is emphasized by the analysis of the situation and importance of the SBs to the country's economy and to the generation of employment and income, in comparison with large enterprises, while further taking into consideration that the latter, as a result of scale of production and better administrative and logistical structures, hold a competitive advantage over SBs.

The new policy is further justified by the fact that the targeting of the public procurement power, by its very nature and flexibility, has all the attributes necessary to make an impact on industrial and technological competitiveness since the State, as a major consumer of goods and services, is at an ideal position to implant a system to promote increased productivity, quality control and transfer of technology.

Thus, while not being applicable in their entirety to Brazil, the experiences of the USA, the OECD countries and nations such as South Africa, as well as examples of the use of Procurement power in the private sector, show that when the large-scale Procurement power of an institution is targeted, it has the capacity to stimulate suppliers to improve the quality of their goods and services, to form networks and clusters, with increasing gains in terms of productivity and transfer of technology, guaranteeing the domestic market and preparing these enterprises for international competition.

Therefore, the development of policies to broaden the participation of SBs in public procurement, especially by electronic means, is a way to add a social function to public procurement, transforming it into an instrument at the disposal of administrators with the capacity to stimulate the nation's economy.

A BRIEF OVERVIEW OF THE USE OF THE PUBLIC PROCUREMENT POWER AND SBs ON THE INTERNATIONAL SCENE

As emphasized by many countries in the "II Procurement Conference of the Americas," the use of the public procurement power to promote SBs is a practice that is recognized and considered to be legitimate on the international scene. For this reason, within the scope of the World Trade Organization, the General Procurement Agreement – GPA, that is, the Agreement on Government Procurement for the liberalization and expansion of world trade, focusing on public procurement, provides for the use of the public procurement power by the signatory states, especially in benefit of SBs and local economies. This permission is directed to developing countries, being provided for in the norms of the SDT (Special and Differential Treatment for Developing Countries) more specifically in its Article V. It should be noted that Brazil is not a signatory to the GPA, but in case it decides to sign, the agreement provides for the possibility of negotiating with the signatory countries exceptions to rules regarding national treatment, conferring preferences on domestic SBs, as provided for in Article V.

As already mentioned, the USA makes wide use of the public procurement as a tool of industrial development policy. The guidelines for the procurement and contracting of goods, services, construction works and public works in the USA are established in the Federal Acquisition Regulation (FAR) and adopt the following principle: to make available in due time the good or service with the best price for the buyer, maintaining the confidence of the public and achieving the objectives of public policies. One can see, therefore, that government procurement in the USA has the use of the public procurement as an intrinsic principle, and is based on three programs: the Buy American Act, the Balance of Payment Program, and the Small Business Act.

Although the provisions for the use of procurement power in the USA are wide-ranging, affecting sectors other than the SBs, these

preferences may be derogated by international treaties and agreements that confer national treatment, with the exception of preferential treatment for small- and medium-sized enterprises, as provided for by the Trade Agreements Act. “Reserved procurement for small businesses constitutes, therefore, a general exception in the commercial agreements of the USA” (Moreira & Moraes, 2002; p. 87), which reflects the importance of policies for the use of Procurement power in support of SBs.

Specifically for SBs, the main forms of incentive adopted in the USA are: the concession of a price preference (6% in federal works); reserve on contracts up to US\$ 100,000 (small business set aside), with the further possibility of setting aside contracts with a greater value so long as a reasonable expectation exists that two or more SBs will offer fair prices; possibility of setting aside parts of contracts with a higher value; requirement that the procurement agencies possess a sector specifically for support for tenders; provision for setting aside parts of major contracts for SBs classified as HUBZone Small Business (located in the least developed areas of the USA); participation in contracts of winning bidders (subcontracting, partnerships, joint ventures) with value greater than US\$ 500,000, by means of a subcontracting plan, with the possibility of allocation of subsidies to the main supplier for up to 10% of the value in excess of the target for subcontracting. US legislation further provides for a series of actions in support of SBs, such as the planning of procurement, division of large contracts in smaller lots, programming of deliveries that takes into account the logistical capacity of SBs, etc. (Moreira & Moraes, 2002; p. 92).⁴

In addition to the USA, South Africa has implanted, since 1995, an advanced and structured program for the use of the public procurement power that had as its initial base an Interim 10-point Plan (Watermeyer, Letchmiah & Gounden, 1995; table of contents).⁵ Based on this initial experience, the Constitution of the Republic of South Africa, approved in 1996, expressly provides for the use of the public procurement power in Article 217, Subsection 1.⁶ In 1997 the Parliament approved the “Green Book for the Reform of Public Procurement in South Africa” that serves as the base of the use of the public procurement power of South Africa (Watermeyer, Letchmiah & Gounden, 1995, p. 2).⁷

As presented in the summary of the South African Green Book, there is recognition of the capacity to target public procurement as an instrument for the generation of employment and economic and social development, which must complement macroeconomic policy. The document further establishes the long-term goals for affirmative public contracting, which are to be focused on the development of human resources.⁸

Watermeyer, Letchmiah and Gounden, who were responsible for the elaboration of the program in South Africa, explain that the main objective of the policy is to correct distortions created by the apartheid regime, so as to generate employment and income for those who are disadvantaged from the social and economic viewpoints, by means of the development of the SBs as a strategy for the reduction of poverty and unemployment (Watermeyer, Letchmiah & Gounden, 1995).⁹

With regard to the analysis of the norms for government procurement in the European Union, only recently, from 2004 onwards, after the approval of a new set of guidelines, has there come into existence a specific provision allowing member states to adopt measures in public procurement with the objective of increasing the participation of SBs, even if these measures are restricted and refer only to incentives for subcontracting (European Parliament and of the Council, 2004).¹⁰ The previous guidelines did not expressly provide for the possibility of use of the Procurement power by the member states to stimulate SBs, since the main concern at the time was regional integration through the liberalization and transparency of public procurement, with the objective of forming a single market in public procurement. An interpretative communication of the Commission of the European Communities, contains the understanding, albeit restricted, that the previous guidelines were compatible with the use of the Procurement power by member states for social policy objectives, especially with regard to the generation of employment for minorities at a competitive disadvantage in the labor market (European Commission, 2001, p. 5).¹¹

The Green Book on Public Procurement of the European Union, (European Commission, 1996) contains a chapter dedicated to SBs, presenting the main difficulties faced by these enterprises in public

tenders, presenting suggestions for actions to be implemented in order to stimulate the participation of SBs in public procurement.

“The Single Market Review Series – Subseries III – Dismantling Barriers: Public Procurement” study, (European Commission, 1996), showed that the integration of the markets for public procurement was not taking place, emphasizing that the share of foreign participation in the public procurement of the member countries had risen only from 7%, in 1987, to 10% in 1996. The “Wood Review – Investigating UK Business Experiences of Competing for Public Contracts” study, commissioned by the Office of Government Commerce of the United Kingdom and released in November 2004, reached a similar conclusion, and notes that, although the legislations of the member states do not discriminate in favor of domestic suppliers, there exists a culture on the part of those responsible for public procurement, which acts in a normative gray area, that establishes preferences for domestic enterprises to the detriment of foreign ones, even though the latter may present more advantageous proposals.

Another study, “A report on the functioning of public procurement markets in the EU: benefits from the application of EU directives and challenges for the future,” released in March 2004, shows that the guidelines have played a leading role in the liberalization of the European market for public procurement, which has presented a significant improvement in the process of opening to foreign competition (European Commission, 2004-a; p. 24),¹² although only 16% of public procurement proceedings are published in the official register of the European Union, as required by the guidelines.

The EU final report, “The Access of SME’s to Public Procurement Contracts,” indicates that SBs are awarded contracts that are smaller in value than those of large enterprises, and in a smaller number, further showing that, although the participation of SBs in public contracts reaches 78% of the total, they represent 99.8% of the total of enterprises in existence, thus revealing a strong growth potential (European Commission, 2004-b, p. 56).¹³ The study shows that several countries in the European Union already practice some form of support for the participation of SBs in public contracts, such as the splitting up of large purchases, technical assistance in the preparation of proposals, planning of public procurement, bank financing in cases of delays in payment of public contracts (France),

provision of a “guide” throughout the tender process (Denmark), standardization and simplification of the procedures for SBs (Luxembourg), online availability of a register for the subcontracting of SBs (Greece), etc.

The report also suggests that effective measures for the targeting of public procurement to SBs should be adopted by the member states in the contracting of values below the limits to which the European Union guidelines apply, in addition to the adoption of training, use of electronic tenders, simplification and standardization of procedures, etc.

Therefore, although the main concern of the European Union is the internalization by the member countries of the guidelines for public procurement in order to form and consolidate the single market, one can observe that preferential treatment for domestic SBs permeates the bureaucratic culture of the member countries, as noted in the Wood Review, and has been gaining increasing relevance and urgency in the improvement and consolidation of the political context of public procurement in the European Union.

SMALL BUSINESSES IN BRAZIL

A research study carried out by the Sebrae (the Brazilian government small business development agency) in conjunction with the Brazilian Institute of Geography and Statistics (IBGE), published in the “Boletim Estatístico das MPEs,” (Sebrae & IBGE, 2005) issued in the first semester of 2005, showed that SBs generate six times more jobs than medium- and large-sized enterprises (jobs generated / share of GDP), are responsible for around 67% of jobs and represent 99% of the enterprises formally established in Brazil, although these results vary according to the definition used as to what constitutes a small business. In addition to these factors, one must add the great vulnerability of the SBs which must compete with large enterprises, which are consolidated and better-structured, and which sometimes use unfair trading practices, such as dumping or the formation of cartels. This unequal, and often unfair, competition leads to a situation where, based on data from the commercial registers, 50% of the SBs that started operations in 2002 had closed down by the beginning of 2004.

Although the use of the public procurement power as a support instrument for SBs in Brazil is not yet in operation, these enterprises have already attained a differentiated legal status in Brazilian legislation, which confers preferential, differentiated and simplified treatment in the fiscal, labor, social security, credit and other areas.

The legal basis for the differentiated treatment of SBs can be found in the Constitution of the Federative Republic of Brazil, in Articles 146, 170, Item IX and 179.¹⁴

In order to implement these constitutional provisions, Law No. 9.841/99 (Statute of the Small- and Micro-Sized Enterprise) and Law No. 9.317/96 (which institutes differentiated and favorable fiscal treatment – SIMPLES, with regard to federal taxes) were passed. However, the Statute of the Small- and Micro-Sized Enterprise, in its Article 24, limited itself to establishing guidelines for the differentiated treatment for SBs in public procurement, awaiting the regulation of the law. Nevertheless, the regulation of the Statute did not contain any provision in regard to this matter, causing the legal provision not to enter into force.

To the contrary, the General Law of Tenders and Contracts, Law No. 8.666/93, which has the status of a National Law and is binding on all the component parts of the Federation (Union, Federal District, States and Municipalities), prohibits, in Article 3, the inclusion in tenders of conditions that restrict competition, establish preferences based on the location of suppliers, or further establish differentiated treatment as a function of the size or nature of the tender participant.

For this very reason, in order to adopt the use of the public procurement power in Brazil it is necessary to make urgent changes in the legislation so as to allow differentiated treatment for SBs in tenders coupled with effective instruments for preferential treatment in contracts.

With regard to the definition and legal status of SBs in Brazil, we reproduce a recent study conducted by the Sebrae and the National Confederation of Industry (CNI), which summarizes the legal and economic situation of SBs in Brazil (Sebrae & CNI, 2006).¹⁵ Table 1 shows all legal and technical criteria for definition of SBs in Brazil.

TABLE 1
Legal and Technical Criteria for definition of SBs

		Micro-Business	Small-Business
Statute of the Small & Micro business		R\$ 433,755*	R\$ 2,133,222.00*
SIMPLES Law (Taxes criteria)		R\$ 240,000*	R\$ 2.4 million*
BNDES (Nat'l Development Bank)		R\$ 1.2 million*	R\$ 10.5 million*
MERCOSUR***	Industry	1-10** and US\$ 400,000*	11-40** and US\$ 3.5 million*
	Trade/Services	1-5** and US\$ 200,000*	6-30** and US\$ 1.5 million*
IBGE	Industry	0 - 19**	20 - 99**
	Trade/Services	0 - 9**	10 - 49**

Notes: * Gross annual income (1 dollar, on 11/04/06: 2.3 R\$).

** Number of employees.

*** Mercosur Resolution GMC No. 90/1993.

THE BRAZILIAN PUBLIC PROCUREMENT SYSTEM AND THE SBs

As has already been noted, Brazil is an atypical federative country with three levels (namely the Union, the States and federal district and the municipalities). In all, there are 26 States, as well as the Federal District, and 5,562 municipalities. Public procurement is conducted on a decentralized basis, according to which each component part of the Federation acts autonomously and, depending on the administrative organization of the component part, procurement is made in a centralized fashion or by each body and public entity that forms this part.

In Brazil, as a general rule, public procurement is conducted by the use of public tenders, as provided for in the Federal Constitution, in Article 37, Item XXI, which states:

With the exception of the cases specified by law, the works, services, procurement and transfers **shall be contracted by a public tender process that assures equal opportunity to all competitors**, with clauses that establish payment obligations, maintaining the effective conditions of the proposal, in the terms of the law, which shall only permit requirements in terms of technical and economic qualification that are indispensable in order to ensure compliance with the obligations (our emphasis).

Although the text of the above-mentioned constitutional provision, especially the emphasized section, may suggest that the use of Procurement power is prohibited, this understanding does not prevail, since, as demonstrated in the previous chapter, the Constitution itself establishes exceptions to this general rule, as provided for in Articles 146, 170, item IX and 179 for SBs.

Even though Brazil, as a federated country, adopts a decentralized public procurement system, there exists a General Law of Tenders and Contracts, Law No. 8666/93, which regulates tenders and contracts throughout the Public Administration, with the exception of regulatory agencies and some parastatal enterprises (e.g. Petrobras) which are entitled to possess their own procurement regulations based on the principles established in the general law.

This General Law includes exceptions to the requirement for tendering, provided for in Article 17 (transfers) and Articles 24 and 25 (contracting of goods and services). These exceptions, called tender exemption (Article 24) and ineligibility (Article 25), are linked to value (procurements with small values), emergency cases, and specific cases of lack of need or impossibility of tender.

With regard to information about Procurement power in Brazil and the share of SBs in contract awards, information is available only for the procurement of the Federal Government (see Table-2), based on the Integrated System for Administration of General Services (SIASG), which does not include data for parastatal enterprises and the regulatory agencies. Questions related to difficulties in the integration of information systems of public procurement, as well as deficiencies in the information technology infrastructure of small municipalities in remote or less developed regions, prevent a consolidation of data on public procurement in Brazil.

TABLE 2
Total Value of Procurement of the Federal Government (Direct Administration, Autarchies and Foundations)

From 2002 to 2005	R\$ 50.1 billion
2002	R\$ 10 billion
2003	R\$ 8 billion
2004	R\$ 12.4 billion
2005	R\$ 20.7 billion

Considering only procurement made using the auction system, in both physical and electronic forms, and taking into account that these types are used for the procurement of common goods and services, which constitute the main types of goods and services offered by SBs in public procurement proceedings, the total value of federal procurement was R\$ 11 billion in 2005 and the participation of SBs in this whole was approximately 19% (R\$ 2.1 billion). It should be noted that, according to Brazilian legislation, common goods and services are those standardized goods and services that are available on the open market and have an approximately equivalent quality, not including engineering works or complex goods and services or those of a predominantly intellectual nature.

In 2005, SBs represented 52% of the enterprises registered in The Register of Suppliers of the Federal Government – SICAF, but participate in only 19% of the total value of the procurement of common goods and services by the Federal Government. As shown by the analysis of Figure 1 (SIASG), the SBs have, in general, been reducing their share of public procurement, which is considered to be caused by the increase in the number and value of the auctions.

Similarly, an analysis of the participation of SBs not with regard to the value but as to the number of contracts awarded for common goods and services (see Table 3) demonstrates that the share of these enterprises fell in 2005. As shown in Figure 2, the reduction in the participation of SBs, although significant, is attenuated by the increase in the number of auctions in 2005, resulting in a decrease of approximately 10% in the participation of small-sized enterprises and 3.5% in the participation of micro-sized enterprises, such that the difference between micro- and small-sized enterprises remained practically stable, rising from 4 to 5%.

Thus, it can be seen that the introduction of electronic procurement procedures is insufficient, in and of itself, to widen the participation of SBs in public procurement, if only because large-sized enterprises, as a result of their scale, logistical capacity and better administrative and information systems, have a considerable competitive advantage in Brazil. This leads one to conclude that an actual increase in the participation of SBs in public procurement requires the establishment of new instruments to counterbalance the

FIGURE 1
Evolution of the Share of Small- and Micro-Sized Enterprises in the Value of Procurement of Common Goods and Services, 2002 to 2005

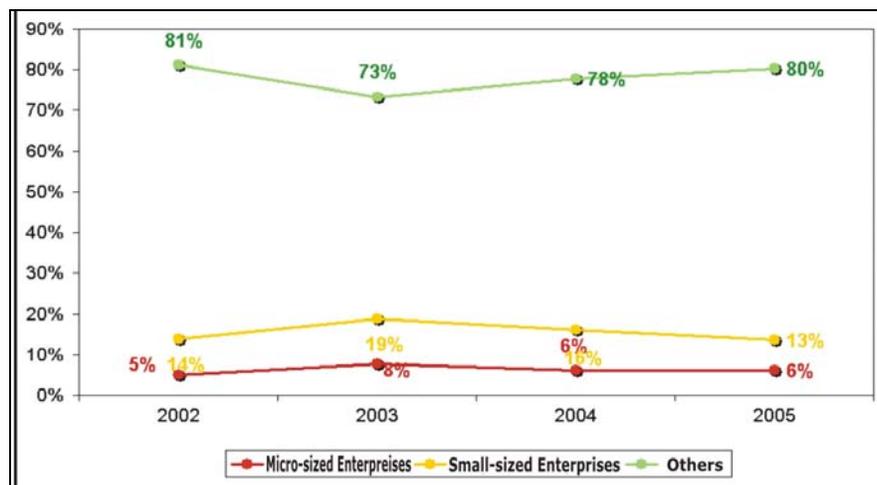
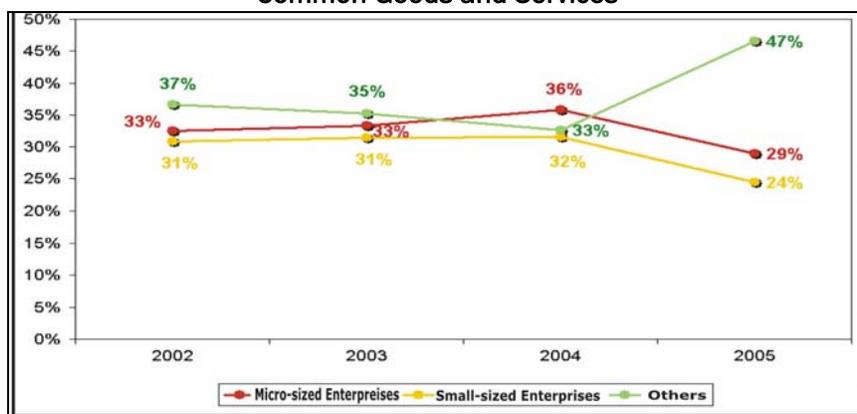


TABLE 3
Quantity of Contracts (Items) Awarded

Size	Quantity of Contracts			
	2002	2003	2004	2005
Micro-sized Enterprises	484,237	473,666	537,672	504,491
Small-sized Enterprises	459,355	445,532	473,437	426,168
Others	546,117	499,890	489,237	811,126
Total	1,489,709	1,419,088	1,500,346	1,741,785

FIGURE 2
Evolution of the Participation of SBs in The Number of Contracts for Common Goods and Services

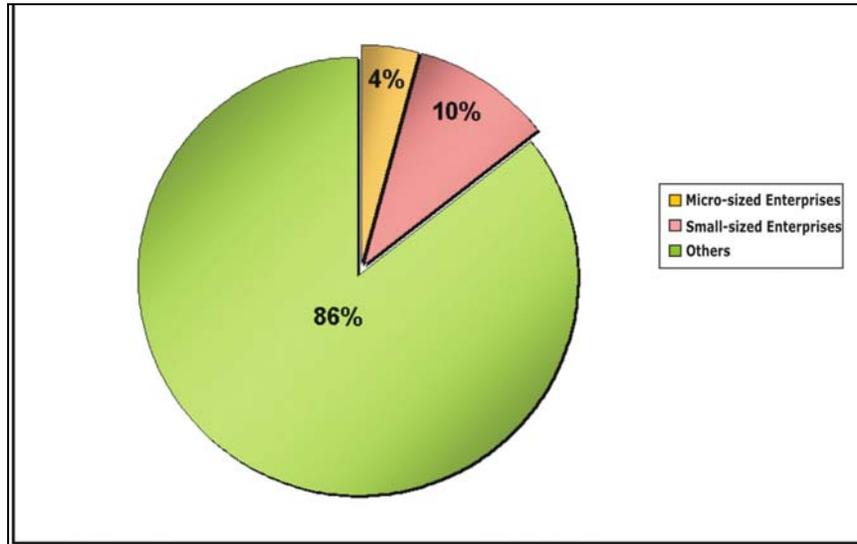


competitive disadvantage of Brazilian SBs in relation to large-sized enterprises.

This conclusion is supported by data on the participation of SBs in the total value of public procurement, considering not only the contracting of common goods and services by auction, but also the contracting of works, complex goods and services and those of an intellectual nature and contracted by other types of tender. Considering the total value of procurement, the share of SBs was only 14% (Figure 3).

However, this low percentage of participation in the total value of procurement of the Federal Government must be put into perspective, since not every public contract awarded in Brazil can be performed by a SB, as is the case, among others, of the direct contracting by exemption from tender of parastatal enterprises and public bodies that provide public services (Article 24, item VIII, of Law No. 8,666/93) and ineligibility of tender (Article 25 of Law No. 8,666/93), in case competition is not a viable option, as in cases of exclusive suppliers, or goods and services of a special nature, for example, the acquisition of works of art.

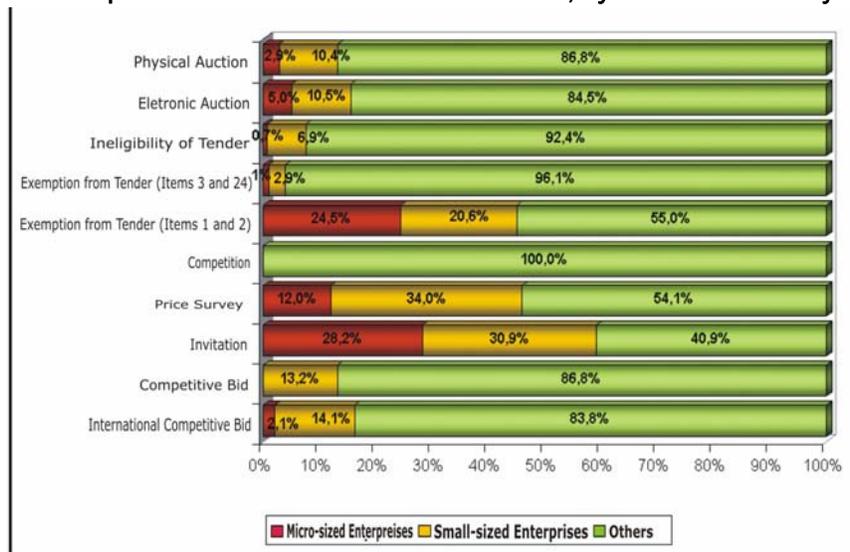
FIGURE 3
Share on Total Value Procured - Federal Gov. 2005



For this reason, in order to verify the actual insertion and the potential for insertion of SBs in public procurement in Brazil, one must analyze the participation of these enterprises in the value of procurement by type of tender. Figure 4 show how SBs achieve a greater insertion in the invitation, price survey, electronic and physical auction modalities, as well as in cases of exemption from tender based on Items I and II of Article 24 of Law No.. 8,666, which refer to direct contracts with an extremely low value (less than R\$ 8,000 for goods and services, and R\$ 16,000 for engineering works and services).

The situation of the SBs in the Invitation And Price Survey modalities is justified by the fact that these modalities are intended for contracts with small values (invitation: up to R\$ 80,000 for goods and services and R\$ 150,000 for engineering goods and services; and price survey: up to R\$ 650,000 and up to R\$ 1.5 million, respectively), while noting that these modalities receive less publicity, since the participants are chosen by the Administration in the case of invitations. However, these modalities cannot be described as having restricted participation, since any interested party that becomes

FIGURE 4
Participation in The Value Procured in 2005, by Size and Modality.



aware of the tender and is interested can participate, although the lack of publicity of such proceedings normally results in a restricted number of participants.

It is also understandable that SBs are able to achieve a greater degree of insertion in the electronic and physical auction modalities since, although no limits exist regarding values for use of the auction, these modalities are, as already noted, characterized by easier access, simplified and speedy proceedings and greater transparency and control, preventing and hindering collusion and fraud.

With regard to cases of exemption, a brief explanation is justified regarding cases based on Items 3 and 26 of Law No. 8,666, as shown in Figure 5. The low value procured from SBs derives from the fact that these cases cover a wide range of situations, such as the contracting of parastatal or public bodies that provide public services, national security, contracting of non-profit research institutions, institutions for the rehabilitation of prisoners, contracting of official registers etc., that is, fields with restricted participation by SBs.

Nevertheless, even though these data must be evaluated in perspective, there is no doubt that SBs in Brazil face serious difficulties and are in a situation of competitive disadvantage in public tenders, demonstrating the urgent need for the adoption of new legal instruments and new policies for the support and stimulation of SBs in public tenders.

POLICIES ON THE USE OF THE PUBLIC PROCUREMENT POWER IN BRAZIL - PRINCIPLES, CHALLENGES AND OBJECTIVES

The use of Procurement power entails giving a social function to the State's demand for goods and services, in which the lowest cost of public procurement ceases to be the exclusive consideration in the award of contracts in order to incorporate wider objectives, such as sustainable economic development, generation of employment and income and eradication of poverty. Thus, Moreira and Morais (2002, p. 110) state that "by deciding to use the public procurement power as an instrument for the development or stimulation of the production of certain goods and services, produced by enterprises of a certain size or social group, society manifests its agreement to pay a possible overprice in favor of the development of the national economy".

According to the definition of the Ministry of Development, Industry and Trade, Procurement power signifies the power of the consumer, whether a private company, public body, cooperative or person, when acquiring goods and services, to define its requirements and needs, transforming itself into an instigator of quality, productivity and technological innovation, generating employment, occupation and income and contributing to the country's development and competitiveness.

The main objectives that underlie the use of the public procurement power in Brazil can be summarized as follows:

- The improvement of competitiveness as a preparatory stage for international competition, by encouraging capacity building and technological innovation, as a policy for the stimulation and qualification of suppliers, the simplification and planning of procurement processes, and favoring consortia, partnerships and the subcontracting of small- and micro-sized enterprises; and

- The generation of economic and social development, especially of local communities and regions with a lesser degree of development, by generating employment and income.

From the analysis of the current state of public procurement in Brazil, one can observe a series of challenges for the implementation of the use of the public procurement power in Brazil in benefit of SBs, among which the following are noteworthy:

- Absence of legislation supporting the use of the Procurement power of the State as an instrument of industrial policy;
- The focus on the principles of cost efficiency, competitiveness, equal treatment and efficiency of public procurement prevents/restricts the use of Procurement power as a development policy, since there is a cost associated with any development policy;
- The trend to greater concentration, by the increasing use of the price registration system (benchmark contracts), in which several public bodies and agencies jointly use a single procurement process, entailing increased scale of purchases which hinders the participation of SBs;
- The priority in the use of electronic auctions, on one hand eases access for SBs by reducing costs but, on the other hand, restricts the participation of SBs due to their low degree of computer use, and the greater ease of participation of medium- and large-sized enterprises in tenders held in other geographical locations because of their greater capacity and scope of their logistics systems;
- Lack of planning and programming of public procurement, due to absence of adequate stock control and planning for public contracts, which constitute an obstacle to the participation of SBs in the tenders since they are unable to keep products in stock or have sufficient time to prepare themselves to meet the demands of the Public Administration;
- Lack of knowledge on the part of those responsible for public tenders about the use of the public procurement power as a development tool, as shown by the absence of a professional bureaucracy in the field of procurement and a focused and ongoing capacity building process;

- Constant requirements of performance guarantees by the Administration end up restricting the participation of SBs, due to high interest rates and difficulties in access to credit;
- Delays in payments of public contracts, especially at the state and municipal levels, are detrimental to SBs, which possess little or no working capital;
- The Brazilian system of public expenditures, coupled with rigorous compliance with fiscal targets and budgetary restrictions, hinders/prevents the planning of public procurement. This happens because public budgets in Brazil are not mandatory and are frequently subject to suspension in order to attain fiscal targets. Thus, funds for acquisitions are frequently released only in December, and even then not in full, so that the public bodies responsible for procurement are unable to know beforehand the amount of funds that will be made available for procurement, or when this amount will be available for use.

In order to solve these questions, the development of a new strategy in public procurement is necessary, which emphasizes a greater interaction between the State and the private sector, in order to maintain the transparency of the cost formation process of the goods and services demanded by Government, such that the profit margin of its suppliers is negotiated on a dynamic basis, observing the technical and commercial risks, and creating stimuli for the reduction of costs and the improvement of quality.

Only based on this understanding can one ensure the efficient use of Procurement power, with inducements for quality, capacity building and the development of SBs, increasing the linkages between the State and the private sector, and leading to the existence of a balance between cost efficiency and aid in public procurement that, in the long run, will lead to price reductions in public procurement from SBs as a result of the increase in productivity in the sector and the formation of partnerships and clusters.

Thus, by means of the evolution in the policies of use of the public procurement power, it is expected that public procurement will play an important leadership role in initiatives related to metrology, standardization and quality certification.

For this reason, technological and industrial policies must be integrated, cohesive and in line with economic policy. The State should act, above all, as a planner of general strategy and seek greater articulation among its agents, eliminating multiple coordinations, duplication of functions and, sometimes, contradictory policies, which increase uncertainty in the private sector.

Therefore, to be efficient, the coordination and articulation of the public procurement power must be based on a multi-year public investment program and a multi-year public procurement plan, so as to provide guidance for the programming of production and investment by local suppliers. Actions must be integrated, while seeking to stimulate technological innovation, networking and the improvement in quality of local suppliers.

It should be noted that Brazil, as a federative country, uses a decentralized approach to public procurement. Each component part of the Federation (namely the union, the states and federal district, and the municipalities) is directly responsible for its procurement and procurement may be further decentralized within each of these parts. For example, the federal union, as well as most states, uses decentralized procurement. This means that each public agency and entity possesses its own procurement department.

This reality, in addition to the priority given to electronic procurement, leads to a need not only to change the legislation, but also to make procurement officials more aware of the social relevance of SBs and the latter more proficient in the use of the electronic tools required for participation in the tenders.

Therefore, in addition to changes in the legislation, an examination of the current state of Brazilian SBs shows the need for a policy based on capacity building and digital literacy so that they can get to know and participate in tenders, and, furthermore, the building of the capacity of procurement officials so that they can understand the relevance and differentiated status of SBs.

The building of the capacity of SBs is, therefore, of the utmost importance, since lack of knowledge about procurement procedures and use of digital procurement systems are seen as obstacles to the participation of firms in public procurement contracts.

The building of the capacity of procurement officials, at the three levels of the federation, is also extremely relevant in Brazil for a broader participation of SBs in public procurement, especially electronic auctions. This is a result of the low awareness of the importance of this segment to the national economy and a profound lack of knowledge about the legal instruments available to stimulate the participation of SBs in public procurement contracts. Therefore, these officials must understand the need to give as much priority as possible to this type of firm, within the legal framework available and come to view the procurement of public goods, services and works as a way to put public policies into practice.

So, due to this reality, public procurement as a function has historically played a secondary role in Brazil, and not a strategic one as a type of economic and social development policy.

Based on this brief overview of the main challenges to the implementation of a policy on the use of the public procurement power in Brazil, we shall analyze the proposals presented by the federal government and their current stage of development. It must be noted that the proposals in question represent only an initial stage in the implementation of this policy and do not address all the challenges presented in this chapter. At a second stage, new actions, taking into account international experiences, will be developed to achieve the maximum potential efficiency proposed in this chapter.

THE USE OF THE PROCUREMENT POWER OF THE STATE AND SBs – PROPOSALS AND EVOLUTION

The debate on the use of the public procurement power in Brazil is relatively recent, dating from the end of the 1990s. However, only in 2004 did proposals arise for changes in the legislation governing public procurement in order to allow the use of the public procurement power in support of SBs.

The proposals for changes in this legislation form a part of a wider proposal for a new legal status for SBs, to be achieved by proposed legislation for a general law for SBs, which contains a specific chapter dealing with governmental procurement.

This chapter on governmental procurement was developed by a partnership including the Ministry of Planning, Budget and Administration, the Sebrae and the National Confederation of

Municipalities. In general, the proposal reflects the US experience and uses incentive instruments provided for in the Buy American Act and the Small Business Act, and which are consolidated in section 19,000 of FAR, but adapted to Brazilian conditions.

However, when the proposal for the general law of the SBs was being prepared, no consensus existed within the federal government regarding the adoption of the use of the procurement power of the State in support of SBs, which faced resistance from the Ministry of Finance, which was reticent to adopt such a policy, especially because of the lack of information about the costs and economic impacts of the policy being proposed.

Based on the exchange of experiences during the "II Procurement Conference of the Americas," held in November 2005, the federal government began a process of forming internal consensus towards the goal of promoting development of SBs through government procurement, using as ammunition the experiences of other countries around the world. From these negotiations, the conclusion arose to adopt the use of the public procurement power in support of SBs, in line with the provisions of the general law of the SBs, which suffered only minor modifications in order to ensure the fairness of procurement procedures (the final version of the chapter on government procurement is due to be voted in the Brazilian Congress by March 27, 2006).

From these negotiations, it is reasonable to say that there is a consensus within the government and in Congress, such that the approval of this proposal is considered to be one of the priorities of the legislative body. Nevertheless this approximate consensus, until March 26, 2006, The proposal of general law for SBs has not been approved. Causes for this delay are problems in the approval of the annual public budget for 2006, and other important matters from the last year that blocked the Congress's agenda.

In addition to this proposal of new legislation, the federal government is developing a complementary program to increase the participation of SBs in public procurement by means of the building of the capacity of small businessmen and procurement agencies, focusing on electronic procurement and the legal instruments available for the differentiated treatment of SBs in public procurement contracts. This project also includes actions to stimulate

use of computers, since, according to Sebrae data, 50% of SBs in Brazil do not have access to the Internet, which is indispensable for participation in electronic auctions.

The objective of these complementary programs is to develop effective actions to increase the participation of small- and micro-sized enterprises in public procurement, focusing on aspects related to the management and modernization of public agencies, and on building the capacity of relevant persons. These actions complement the proposal for the general law of the SBs that will enable small businesses to receive special treatment, but have the potential to introduce changes even within the existing legislation. The Ministry of Planning, Budget and Administration and the SEBRAE will coordinate the implementation of these actions.

The above-mentioned program is divided in three main lines of action. First, legislation, by: a) a process of convincing the bodies responsible for external control, procurement and their respective legal staffs, about the applications and best practices under the Law No. 8,666/93 capable of favoring SBs in public auctions; b) the support for the publication of decrees regulating state and municipal policies towards SBs; and c) upon the approval of the general law of the SBs, the introduction of a specific module to promote visibility, build capacity and provide legal advice with regard to the innovations introduced by the new law.

Second, the modernization of public management, through the development of a permanent program in support of digital infrastructure for public management and SBs, the implantation of a *National Network for Education and Information* for the implementation of public policies and to build capacity of government managers (policymakers and procurement officials) so as to increase knowledge and use of the legal instruments available to stimulate the participation of SBs in public procurement.

And third, the relationship with suppliers, the market and society, by means of information about procurement planning, through the identification and training of professionals for the preparation of *Government Unit Acquisition Plans*, identifying those goods and services that can adequately be supplied by local or regional SBs, building the capacity of entrepreneurs from SBs to act as suppliers to Governments, initiatives to reduce risk in supplies by

SBs to Governments and publicizing procurement opportunities for SBs, by means of a specialized Procurement Portal and information management, including publicity about the results and promotion of this new model of government procurement.

In addition to these three main lines of action, other initiatives are also under development, including:

- Standardization and simplification of the Procurement Portals of the Federal, State and Municipal Governments and parastatal enterprises;
- Ongoing support to SBs in their interaction with the Procurement Portals, including the creation of a Portal dedicated specifically to support SBs;
- Development of studies for the definition of indicators of productivity and satisfaction in governmental procurement, in order to certify good practices; and
- Reformulation of the Digital Information System for the Administration of General Services – SIASG of the Federal Government, which currently only incorporates functions linked to the operationalization and transparency of tenders and contracts. After the reformulation, the new system will incorporate artificial intelligence functions and new modules, providing new managerial functions for public agencies, which will then encompass the pre-tender phase (stock control, planning of public procurement and preparation of tender procedures), the tender (with new digital certification resources, eliminating traditional bureaucratic costs) and contract monitoring (providing effective control instruments and monitoring of the execution of the contract).

THE PROPOSAL FOR THE GENERAL LAW OF SBs

The main action of the Brazilian government to adopt the use of the public procurement power in support of SBs is the proposal to change the legislation governing SBs, by means of the proposed general law of the SBs. Therefore, a more detailed examination of this proposal and its provisions must be conducted, with emphasis on Chapter V, which deals with preferential treatment for SBs in public

procurement contracts, in order to understand its impact on the Brazilian government's procurement system.

In summary, in addition to government procurement, the proposal for the General Law of the SBs covers the following subjects: the substitution of the current simplified tax system for SBs - SIMPLES, established by Law No. 9,317/96, by the creation of a "SUPER SIMPLES," with unified collection of taxes payable by SBs to all component parts of the federation (union, states and municipalities); the substitution of the rules in the Statute of the Micro- and Small-Sized Enterprise, current Law No. 9,841/99, by "debureaucratizing", simplifying and reducing payroll contributions, instituting an educational instead of punitive approach (punishment only in cases of repetition), promoting networking among SBs, stimulating credit and capitalization, supporting technological and managerial innovation, facilitating access to the judicial system, providing access to new legislation in bankruptcy and related matters and stimulating public policies for supporting and strengthening the representation of SBs on the political scene.

With special regard to "Chapter V - Market Access", it is important to note that the new legal instruments described in this chapter were developed based on international experiences, especially regarding the United State's legislation.

Nevertheless, the initial proposal suffered a great opposition within the Federal Government, especially from the Ministry of Finance, that had concerns regarding the increase of public expenditure, and argued that the policy of supporting SBs through government procurement is not compatible with the Brazilian economic policy, that is focused on reducing public expenditure to guarantee financial surplus. The Federal Government constituted an inter-ministerial working group for the review of these proposals in January 2005, and a consensus was reached within the government and with Congress in February 2006, such that the final version of the proposal to create the General Law of the SBs (note 17) is currently on the list of bills to be voted by the Congress.

It should be noted that, as a result of negotiations within the government and with the Congress, several of the provisions developed have ceased to be mandatory and are now available for optional use by public agencies. For example, the proposal originally

provided that all public tenders with a value below R\$ 80,000 would obligatorily be set aside for SBs. In the final version, procurement by exclusive tender for contracts up to R\$ 80,000 can now be used optionally but is not mandatory for acquisitions by public agencies.

In view of these changes, the need for complementary programs is reinforced, since a change in the culture of public procurement officials is required, so as to stimulate them to adopt the new legal instruments that will be established in the proposal for the General Law. The main points developed in chapter V are:

- Simplification and “debureaucratization” of the tender procedures for SBs, which will only need to demonstrate that they possess the legal, fiscal and economic conditions to participate in the tender at the moment when the contract is awarded; providing for a period of two working days to enable regularization of documentation;
- Preferences in the award of contracts to SBs, with the possibility that they may exceed the price of mid- and large-sized enterprises (by up to 10%);
- Enabling of tenders exclusively for SBs (set asides) for contracts with a value below R\$80,000;
- Enabling of the inclusion of requirements in tenders for mid- and large-sized enterprises to subcontract SBs (up to 30% of the object of the contract);
- Enabling of the division of the object under tender, when possible, with a set aside quota for the exclusive participation of SBs; and
- Transformation of overdue credits receivable by SBs from public agents into credit notes, negotiable at financial institutions;

It is also important to note that, as part of the process of negotiation and formation of a consensus about the general law, the provision that provided for the adoption of arbitration in lawsuits between the government and SBs was eliminated. The objective of this provision was to assure a speedier resolution of contractual differences, avoiding losses to SBs as a result of lengthy judicial proceedings.

CONCLUSION

The Brazilian federal government has intensified its actions for the implementation of the use of the public procurement power in benefit of SBs, which has become one of the priorities of the Logistics and General Services Department, of the Ministry of Planning, Budget and Administration, which is the entity responsible in the federal government for norms, guidelines, coordination and monitoring of public procurement made by the all levels of the federal public administration.

These actions seek to exploit the demand of the government for goods and services in ways that stimulate micro- and small-sized enterprises, by means of qualification, transfer of technology and competitiveness, simplifying, planning and targeting procurement procedures, inducing the establishment of partnerships, consortia and subcontracts, as part of a wider policy in favor of local development, generation of employment and distribution of wealth and preparation for international competition.

Among several actions implemented, special mention must be made of the proposal for the general law of the SBs, which contains a chapter dedicated to public procurement, and also is relevant to spotlight the Complementary Program “Increasing Brazil’s Procurement from Micro- and Small-Sized Enterprises.” During the 2005-06 period, these actions made significant progress, as demonstrated by the process of negotiation for the formation of a consensus within the government and with the Congress with regard to the chapter on public procurement of the general law of the SBs, thereby creating the conditions necessary for the approval of this measure. Note should also be taken of the constitution of an Inter-ministerial Working Group for the coordination and implementation of all the actions developed with regard to the use of the public procurement power in benefit of SBs.

With regard to the Complementary Program “Increasing Brazil’s procurement from Micro- and Small-Sized Enterprises,” it should be emphasized that this is a pilot program, which will result in ongoing actions for the support, managerial and digital capacity building of SBs and of procurement officials for the adoption and consolidation of the use of the public procurement power in Brazil. With regard to the proposal for a general law of SBs, this represents the central

focus of the strategy of the Federal Government to develop in Brazil the use of the public procurement power in benefit of SBs.

If the general law of the SBs will not be approved, what is unlikely due the consensus formed, then the efficacy of all the other actions of the Federal Government will be restricted, since Brazilian SBs are not on an equal footing in comparison with mid- and large-sized enterprises in public tenders, being in a situation of competitive disadvantage because of smaller scale of production, technical and administrative deficiencies, reduced logistical capacity, etc.

By the implementation of these proposals, the share of SBs in the total value of public procurement is expected to rise from the current 14%, to 20% in the short term, and to 30% in the medium and long term, a percentage that is considered to be adequate according to studies of foreign experiences, especially in the USA and South Africa.

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NOTES

1. "Public procurement of goods and services is a significant means of redistribution across economic agents. Bid preferences have the potential to achieve redistribution while at the same time lowering procurement costs to Government".
2. "There are 25.3 million non-primary private enterprises in Europe (28 countries of the European Economic Area plus candidate countries to the European Union). 99.8% of these are craft and small and medium-sized enterprises (SME). Within the group of SMEs, the vast majority of over 90% are micro businesses with less than 10 employees. In fact, the typical European enterprise is a micro business employing 3 persons. Crafts and small businesses employ more than 53% of Europe's workforce (around 95 million people) and are responsible for half of Europe's total turnover. The average company size in Europe is 5 occupied persons. Small businesses and craft enterprises are therefore the rule in Europe and not the exception. Small enterprises and craft businesses are a key source of jobs and a breeding ground for business ideas. Small businesses are the main driver for innovation and employment as well as social and local integration in Europe. This role has largely been recognised by the European Union and policy makers (see [SME Observatory reports](#), in particular 2003 Data available in the [Observatory Report 2003/7](#) [en](#) [fr](#) [de](#) [it](#))".
3. Among the principal instruments used to stimulate increased productivity of industry in the main OECD countries, the following

stand out: i) the use of the Procurement power of the State and the direct restructuring of sectors – used selectively, targeting specific sectors, especially state-of-the-art technology; ii) performance requirements for foreign risk investments; iii) subsidies and fiscal-financial aid, whether direct or indirect – by means of reduction in the tax burden or indirectly by means of the concession of a variety of subsidies, such as loans at preferential interest rates.

The objective of these policies is to adapt enterprises to new technology, usually by incentives for expenditures on R&D and technological diffusion and cooperation in long-term generic research. In addition, the consolidation of the regional bases for technological development is intended to strengthen networks of small- and mid-sized enterprises and the development of activities that are considered as strategic for domestic economic growth, such as incentives for cutting-edge technology sectors and basic research activities. In other words, the competitiveness policies are directed towards a greater investment in knowledge and to capacity building within the enterprise.

4. “a) divide the procurement of goods and services (except construction) in small lots, in order to enable proposals for quantities smaller than the total procurement;
- b) plan procurement so that, if possible, more than one SB can supply the demand;
- c) program deliveries in a manner that is realistically compatible with the characteristics of small businesses;
- d) encourage suppliers to subcontract small businesses;
- e) forward a copy of documents referent to proposed acquisitions to the *Small Business Administration* – SBA – at least 30 days before the notice of tender when the value indicates that the participation of small businesses is improbable; and
- f) encourage the participation of new small businesses by means of the inclusion of all potential suppliers of this size in their mailing lists, especially those located in areas with a surplus of labor and by means of contacts with the *Small Business Administration*” (FAR 19,202-1).

5. The 10 points are:
 1. Access to Tendering Information,
 2. Tender Advice Centres (TACs),
 3. Review of Procurement Procedures for Contracts less than R7 500,
 4. Waiver of Security / Sureties,
 5. Break-out Procurement (Packaging into Smaller Contracts),
 6. Early Payment Cycles,
 7. Preferences / Targeting,
 8. Simplification of Tender Submission Requirements,
 9. Appointment of a Procurement Ombudsperson, and
 10. Classification of Building and Engineering Contracts.
6. Constitution of the Republic of South Africa (1996, Procurement 217):
 - (1) When an Organ of State in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods and services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
 - (2) Subsection (1) does not prevent the Organs of State or institutions referred to in that subsection from implementing a procurement policy providing for -
 - (a) categories of preference in the allocation of contracts; and
 - (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
 - (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) may be implemented.
7. The African National Congress in 1993 realised that public sector procurement could be used as an instrument to address imbalances arising from the system of apartheid, particularly the skewed business ownership patterns on racial lines. Following South Africa's first democratic elections in 1994, a Procurement Forum was established by the Ministeries of Finance and Public Works to initiate a process of public sector procurement reform in South Africa. Sivi Gounden (a special advisor to the Minister of Public Works and thereafter a Deputy Director General in the

Department of Public Works) was appointed as one of two co-chairman of the Forum tasked to oversee the direction and work of the Forum. Deen Letchmiah was appointed leader of the Task Team to research and develop policy proposals. Ron Watermeyer was appointed as a member of the task team. (The team comprised five members in total, two of which were trainees.) Procurement Reform in South Africa had two basic objectives, viz good governance and the attainment of socio-economic objectives through procurement.

8. - Promote development objectives with a focus on human resource development.
 - provide opportunities for skill transfer, capacity building and the acquiring of experience.
 - encourage commitment to human resource development and social responsibility programmes within organisations to specifically redress historical imbalances.
 - facilitate growth in terms of the efficiency and effectiveness of delivery as well as numbers and size of business owned and controlled by previously disadvantaged individuals.
 - ensure that emerging enterprises contribute to the tax base, engage workers who are affiliated to labour associations, adhere to safety regulations and reflect norms and standards in their business activities associated with those of developed countries”.
9. “In South Africa, Targeted Procurement has been used mainly to target those groups of society that were disadvantaged under the apartheid system. It has however also been used within South Africa to support local economic development, to promote growth within the small business sector and to target the unemployed in poverty alleviation programmes. However, it is important to emphasise that this kind of approach can be used by governments to target any kind of community or group or used to underpin a range of socio-economic policies; for example, it is recognised in Namibia as being one of the key implementation strategies for a labour-based works policy”.

10. "(32) In order to encourage the involvement of small and medium-sized undertakings in the public contracts procurement market, it is advisable to include provisions on subcontracting".
11. "This Communication aims to identify the possibilities under existing Community law applicable to public procurement for taking social considerations into account in the best way in public procurement. The Communication examines the different phases of a procurement procedure and sets out, for each phase, whether and to what extent social considerations can be taken into account"

"In general, any contracting authority is free, when defining the goods or services it intends to buy, to choose to buy goods, services or works which correspond to its concerns as regards social policy including through the use of variants, provided that such choice does not result in restricted access to the contract in question to the detriment of tenderers from other Member States."
12. "There is overwhelming evidence showing that the procurement directives have contributed to increased transparency in public procurement markets. The new evidence, based on a sample of firms and public authorities, suggests that increased transparency has effectively resulted in more cross-border competition, price convergence and lower prices for goods and services purchased by public authorities."
13. "The involvement of SMEs in public procurement seems to leave opportunities for improvement. 78% of the successful enterprises are an SME, while 99.8% of the enterprise population are an SME. When the strict EC definition of SMEs (including the independency criterion) is used, the access of SMEs (defined as percentage of SME amongst the enterprises that won a public procurement contact) might be lower. In the EC definition of SMEs the access rate of SMEs to public procurement is somewhere between 53 and 78%. Notice that the SME share in the population also drops due to applying the strict EC definition."
14. Article 146, item III, sub item d: "A complementary law shall: III – establish general norms in terms of tax legislation, especially regarding: d) the definition of differentiated and preferential treatment for micro- and small-sized enterprises (...);

Article 170, item XI – preferential treatment for small businesses constituted according to Brazilian laws and which are established and administered in Brazil; and

Article 179: The Union, States, Federal District and the Municipalities will provide micro- and small-sized enterprises, as defined in law, with a differentiated legal treatment, with the aim of providing incentives for such enterprises by the simplification of their administrative, tax, social security and credit obligations or by the reduction of these by means of legislation.

15. “There are a variety of definitions of micro- and small-sized enterprises in Brazil. The Statute of the Micro- and Small-Sized Enterprise (Law No. 9,841, dated 5 October 1999) considers micro-sized enterprises as those with gross annual income up to R\$ 433,755.14 and small-sized ones as those with gross annual income up to R\$ 2,133,222.00.

According to the special tax regime (Law No. 9,317, dated 5 December 1996 – Simples), micro-sized enterprises are those with income up to R\$ 120,000 and small-sized ones have income up to R\$ 1,2 million. These values have been increased by Law No. 11,196/2005 to R\$ 240,000 and R\$ 2.4 million respectively. For purposes of taxation, different definitions are used by each State in their programs for the support of micro- and small-sized enterprises – State Simples programs. Thus, an enterprise that is considered to be small by the Federal Government may not be so considered by the State government and vice versa.

The BNDES (National Economic and Social Development Bank) has special credit lines for SBs. The definitions adopted, based on a Mercosur Resolution, are substantially different: micro-sized enterprises are those with gross annual income up to R\$ 1.2 million and small-sized ones are those with gross annual income of up to R\$ 10.5 million. The Foreign Trade Secretariat of the Ministry of Development, Industry and Trade considers micro-sized enterprises to be those with exports up to US\$ 440 mil and small-sized ones as those with exports up to US\$ 3.5 million. According to this definition and based on an exchange rate of R\$ 2.5/US\$, a small-sized enterprise would have earnings of at least R\$ 8.75 million.

In this study, as well as in practically all statistical studies, the definition was based on the number of employees. Industrial micro-sized enterprises are considered to be those with up to 19 employees and small-sized ones are those with more than 19 and less than 100 employees. For purposes of the construction of the study sample, only enterprises with 5 or more employees were taken into consideration.

SBs, as defined in this study, account for more than 90% of Brazilian industrial enterprises and for less than 15% of industrial production, according to the IBGE (Brazilian Institute of Geography and Statistics). They are found mainly in the Clothing, Food, Non-metallic Minerals, Metal Products, Wood, Furniture and Printing sectors.

Based on a sample of 496 SBs, this study found that 85% of the micro-sized enterprises were eligible to opt for the current Simples system, i.e., presented a gross income below R\$ 1.2 million in 2003. In the case of small-sized enterprises, this percentage fell to 36%. In summary, almost 40% of the SBs consulted are not eligible for the Simples in its current form

The SBs dedicate themselves almost exclusively to the domestic market. Just 8.6% of the micro-sized enterprises and 27.4% of small-sized ones export. Among those SBs that export, in almost half of them foreign sales account for under 5% of gross income, which reflects the low level of international insertion of these enterprises.”