

state taxes on these goods is suspended. The regime is granted with the waiver of all import taxes until 31 December 2020.<sup>222</sup>

305. The Competitiveness Promotion Guarantee Fund (FGPC) was created in 1997 to guarantee the risk of financing operations undertaken by the BNDES and FINAME to micro, small, and medium-sized enterprises that: export; produce inputs to manufacture, assemble, or package exports; or engage in projects to increase their competitiveness.<sup>223</sup> Each operation can be guaranteed, using FGPC funds, for 70% or 80% of its value, depending on the size of the enterprise, its location, and the type of credit received.<sup>224</sup> Some 77 operations for a total of R\$13.3 million were conducted in 2006.<sup>225</sup> In 2007, 24 operations for a total of R\$2.9 million, were approved by the BNDES.

(v) **Government procurement**

306. Brazil has taken steps to increase transparency in its government procurement regime, with procurement based on best-price criteria when tendering takes place. In practice, over 40% of procurement contracts take place under some kind of waiver from tendering requirements. Although in general national treatment is afforded to foreign suppliers legally established or represented in Brazil, preference may be given to goods and services produced in Brazil as a criterion for deciding between identical offers. Also, a preference margin of up to 10% for micro and small enterprises was introduced in 2006. Brazil is not a party to the GPA; joining it would increase the predictability of its trade regime and could result in benefits to taxpayers by reducing procurement costs, and to domestic producers as there are Brazilian firms that could realistically compete for contracts in foreign markets.

307. In 2006, government procurement expenditure for programming, executing, and implementing Federal Government activities (excluding hospital, medical services, pharmacological, and laboratory material) totalled R\$22.2 billion (some US\$13.4 billion, or 1% of GDP), up 29% from 2005. In the same year, total tendering by the Federal Government was R\$28.9 billion (US\$17.4 billion, or 1.3% of GDP; this was 37% higher than in 2005). The Ministries of Defence and of Transport had the highest expenditure (17% and 16.4% of the total, respectively), followed by the Ministry of Education (14.5%), the Ministry of Health (11.7%), and the Ministry of Finance (10.1%).<sup>226</sup> Data for 2007 show total expenditure of R\$20.5 billion (US\$12.8 billion), and tenders totalling R\$38.2 billion (US\$23.9 billion).<sup>227</sup> These figures are relatively low because they refer to purchases by the Federal Government only.

308. The authorities indicate that the Federal Government does not have comprehensive estimates of overall government procurement, since Brazil procurement is decentralized at three levels (federal, state and municipal).

309. Brazil is not a party to the WTO Plurilateral Agreement on Government Procurement (GPA). However, it participates in the Working Group on Transparency in Government Procurement. In the context of this Review, the authorities indicate that becoming a party to the GPA is not currently a

<sup>222</sup> Decree No. 5,138, of 12 July 2004 extended the period from 31 December 2005, as stipulated in Decree No. 4,543 of 26 December 2002, to 31 December 2020.

<sup>223</sup> Law No. 9,531 of 10 September 1997 regulated by Decree No. 2,509 of 9 March 1998.

<sup>224</sup> BNDES online information at: <http://www.bndes.gov.br/produtos/instituicoes/fgpc2.asp>.

<sup>225</sup> BNDES (2006).

<sup>226</sup> *ComprasNet Bulletin*, December 2006. Viewed at <http://www.comprasnet.gov.br/publicacoes/boletins/12-2006.pdf>.

<sup>227</sup> *ComprasNet Bulletin*, December 2007. Viewed at: <http://www.comprasnet.gov.br/publicacoes/boletins/12-2007.pdf>.

priority for Brazil, and that Brazil aims first to strengthen MERCOSUR by implementing the Public Procurement Protocol, which has not yet been validated by the parties involved (Chapter II).

310. Administrative units and state enterprises may conduct their own purchasing activities independently. However, entities directly and indirectly administered by the Federal Government are subject to general norms regarding tenders and administrative contracts (for goods and services) established by the Ministry of Planning, Budget and Management. All procuring agencies are audited by the Federal Accounts Tribunal (TCU).

311. The main legislation regulating government procurement is contained in Law No. 8,666 of 12 June 1993 (Tendering Law), as amended by Law No. 8,883/94, Law No. 9,648 of 27 May 1998, and Law No. 9,854 of 7 October 1999. Purchases of telecommunications equipment, digital electronics products, computers, computer software and related services are exempt from Law No. 8,666; they are governed by Law No. 8,248 of 1991 and Law No. 10,176 of 11 January 2001. All federal, state, and municipal agencies and foundations, as well as all public companies, including those with private participation, are subject to the Tendering Law.

312. According to Article 37, item XXI of the Federal Constitution, government purchases must be regulated by a specific law, and with the exception of the cases specified in the law, public works, services, purchases, and disposals must be contracted by public bidding proceedings that ensure equal conditions to all bidders, with clauses that establish the technical and economic qualifications required to guarantee the fulfilment of these obligations. This is reflected in the Tendering Law, which mandates that all procurement of goods, works, and services must be tendered, except in cases listed in Article 24 of the Law. Article 175 of the Constitution, requires tenders for concessions and licences to provide public services. This has been implemented through Law No. 8,987/95, as amended by Law No. 9,648/98.

313. Advertisement and other transparency issues regarding tenders and related procedures are governed by Articles 20 and 21 of Law 8,666 and Article 4 of Law No. 10,520 of 2002. All federal tenders must be published in the *Official Journal*; tenders are also published on the agencies' respective websites and on Comprasnet (see below). In the case of tendering at the state or municipal level, tender notices must be published in the State's *Official Gazette*, and in a large newspaper of the state or municipality.

314. In accordance with the Tendering Law, the determining factors in selecting suppliers are the lowest price, best technical offer, and the best technical and price offer. Any preference for domestic suppliers or firms was revoked by Constitutional Amendment No. 06/95, which establishes that no discrimination between companies incorporated under Brazilian law is allowed on the basis of the degree of foreign participation in their capital, except in the information technology sector. However, the nationality of the bidders may be considered as a tie-breaking criterion.

315. Preference may be given to goods and services produced in Brazil in three cases: as a criterion for deciding between identical offers; in the information technology sector, including telecommunication and informatics products, in the case of a tie; and, as of 2006, for micro, small and medium-size companies (see below). Under Law No. 10,176 of 2001, the Federal Public Administration must give preference to information technology goods and related services developed within Brazil in the case of identical offers.

316. Suppliers must be legally established or represented in Brazil to qualify for government contracts; foreign firms without operations in Brazil and involved in international tenders need legal representation in the country or to be associated with a Brazilian firm (at least 51% Brazilian capital participation and operational control by Brazilian nationals). Procurement funded by international

financial institutions is open to international bidding and subject to the rules of the financing institution.

317. The tendering procedures are: open tendering (*concorrência*); selective tendering, involving price quotes or price enquiry from officially registered firms (*tomada de preços*, generally for small purchases); limited tendering or invitation by the administration to suppliers that meet specific requirements (*convite*); contest (*concurso*), for technical and artistic works; the best-priced goods meeting minimum evaluation requirements are selected; public auction (*leilão*) for specific goods; and inverse auction or bid (*pregão*) for common goods and services irrespective of value.<sup>228</sup>

318. The legislation does not state a preference for the use of any procedure; the main factor to be considered is the estimated value of the contract to be signed. There are, however, situations in which the complexity of services or works lead to other considerations prevailing over value. In all cases, the procedure must seek to obtain the most efficient result for the Government.

319. The Tendering Law foresees three situations in which the requirement to tender may be waived (*Dispensa e Inexigibilidade*): (i) low value of the object of bidding; (ii) emergency or public disaster situations, war and/or serious disorder; or (iii) purchase or lease of real estate, which for specific reasons (e.g. geographic location of the property) make competitive bidding unfeasible. These three, and 21 other exceptional situations listed in Article 24 of Law 8,666/93, justify direct contracting under the law. Article 25 of the same law states that waivers may be justified by impossibility of tendering where only one supplier is able to fulfil the tender requirements, or in cases of renowned expertise on the part of the professionals or companies providing specialized technical services, or of a publicly acclaimed professional.

320. The Tendering Law specifies the value limits for each type of procurement. The Ministry of Planning, Budget and Management reviews and revises these thresholds periodically. The last revision is contained in Law No. 9,648 of 27 May 1998. The thresholds for limited tendering (invitation) are R\$80,000 for goods and services, and R\$150,000 for construction; and for selective tendering are R\$650,000, for goods and services, and R\$1.5 million for construction; open tendering must be used above these thresholds. There are no thresholds for the other modalities.

321. In 2007, 38% of federal administration procurement contracts did not require bidding (*Dispensa e Inexigibilidade*), compared with 51% reported for 2003 in Brazil's last Review. Also in 2007, 29% of government contracts were awarded using open tendering; and another 29% using inverse auction, which is a simplified process done mainly through Internet. Price quotes or price enquiries accounted for 2% of the value of contracts; and invitations and public auction represented 2% and less than 1% respectively. Contest (*consulta e concurso*) was not used for procurement during the year.

322. The General Services System (SIASG), a computerized system under the responsibility of the Ministry of Planning Budget and Management, is used for procurement by all central government entities except the Public Ministry and the Ministry of Defence. The SIASG has a system for pre-registration of suppliers (SICAF); registration, which is done online, allows participation in any tendering process.<sup>229</sup> In the procurement process, the time allowed for preparation and receipt of proposals varies by regime: 45 days for contest and competition; 30 days for competition and price enquiries where the lowest price is not the only criterion; 15 days for price quotes for selection on lowest price; eight days for reverse auctions; and five days for limited tendering.

<sup>228</sup> Brazil Trade Net (2007).

<sup>229</sup> For information on SICAF see ComprasNet online information. Viewed at: [http://www.comprasnet.gov.br/ajuda/siasg/faq\\_sicaf.pdf](http://www.comprasnet.gov.br/ajuda/siasg/faq_sicaf.pdf).

323. General information on tendering procedures and on contracts is available in the Ministry of Planning, Budget and Management's Comprasnet website, which is the federal government procurement portal.<sup>230</sup> All tenders are advertised in Comprasnet, which also provides information on offers and awards, submissions from suppliers, signed contracts, and other areas of the procurement process. Comprasnet also publishes monthly bulletins of procurement activities. Apart from the SICAF, the Comprasnet system includes subsystems that: allow purchases and contracts to be posted online, the electronic forwarding of documents, searching by public sector managers of prices previously paid by the Federal Government; and provide information on specifications for supplies. Tenders at the State level may be found on the official websites of most Brazilian States.

324. Complementary Law No. 123, of 14 December 2006 (General Law of Micro and Small Businesses) established a 10% margin of preferences in public procurement tendering processes for micro and small enterprises, except in the case of inverse auctions, where the margin is 5%. The Law also allows for set-asides for micro and small enterprises: participation in a bid for a contract of up to R\$80,000 may be limited to this type of enterprise. These set-asides may not exceed 25% of the total tendering of an agency in any calendar year. To benefit from these preferences, in any bidding process there must be at least three competing micro or small enterprises. Decree No. 6.204, of 5 September 2007 contains the regulations for the preferential treatment for micro and small enterprises in the procurement process.

325. Under Article 3 of the Tendering Law, all bidders must be informed, in advance, of the terms of the contract and of the relevant bidding procedures. They must also be informed of the award decision. The Law allows for appeals based on different administrative activities, such as disqualification of a bidder, modification of a registration request, contract termination or fines. The authorities indicate that there were 22,232 such appeals over the 2004-07 period. Hearings may be requested during any phase of the bidding process. Once the means of administrative recourse are exhausted, there is the possibility of judicial recourse.

✓ 326. Public enterprises must follow the general procurement law and guidelines; however, the petroleum company PETROBRAS has its own procurement regulations. PETROBRAS has a "closed" procurement system, whereby it can choose and invite three companies to participate in a tender. The authorities indicate that a new law specific to procurement by public enterprises is being drafted and is expected to be sent to Congress by mid-2009. Companies with non-controlling state participation do not have to follow general procurement rules.

327. In a 2004 report on Brazil's procurement practices, the World Bank noted that the constraining environment imposed by the 1993 legislation did not prevent Brazil from moving forward to modern practices, such as developing an Internet-based system to implement the electronic version of ComprasNet, which was rated as satisfactory. However, the report also noted that the legal framework laid no foundation for a dispute resolution system for government contracts, and that exhaustively detailed legal provisions discouraged flexible interpretations, and allowed the disqualification of proposals for reasons that were not substantial. It also observed the lack of a policy-making agency responsible for developing procurement norms, leaving a gap filled at times by law enforcement units not specialized in government procurement. The report recommended the establishment of a normative entity, standard bidding documents, Web-based planning, and an effective dispute resolution system.<sup>231</sup>

328. The authorities note that, with regard to this report, the Ministry of Planning has implemented significant changes in the Federal Government Procurement System, making the electronic reverse

<sup>230</sup> ComprasNet online information.. Viewed at: <http://www.comprasnet.gov.br/>.

<sup>231</sup> World Bank (2004).

auction (*pregão*) the main procedure used, and making e-procurement systems safer, more transparent, efficient, and competitive. Congress is examining an extensive amendment to the Tendering Law (in October 2008), focused on increasing efficiency and promoting the use of information technology resources in tenders. Simultaneously, the Government is working on a draft for a new General Tenders and Contracts Law, aimed at developing a more efficient, simple, transparent, faster, and modern procurement system.

329. Moreover, all electronic tenders can be monitored online, in real time, and are saved by the system. The Department of Logistics and General Services, of the Ministry of Planning, is responsible for the development of norms, the management of e-procurement systems, and standardization of documents and procedures.

**(vi) Intellectual property rights**

**(a) General features**

330. Brazil is a net importer of IPR-intensive goods; its royalties and licence fee deficit was US\$1.94 billion in 2007, the product of US\$2.25 billion in imports and US\$319 million in exports.<sup>232</sup>

331. Brazil is a member of the World Intellectual Property Organization (WIPO) and a signatory to a number of intellectual property rights (IPRs) agreements.<sup>233</sup> Brazil has also made IPR commitments under bilateral or regional agreements entered into as a part of MERCOSUR. It has been negotiating (alone and as part of MERCOSUR), bilateral and regional agreements involving IPRs, based on IPR agreements it has ratified, e.g. the WTO TRIPS Agreement and the Convention on Biological Diversity. Brazil has not joined any IPR treaties since its previous Review. It has not entered into any agreements on the protection of designations for spirit drinks.

332. The TRIPS Agreement was incorporated into Brazilian legislation in December 1994, together with the other Agreements resulting from the Uruguay Round.<sup>234</sup> Brazil notified its main intellectual property laws and regulations to the TRIPS Council in 2000.<sup>235</sup> Brazil's IPR legislation was reviewed by the TRIPS Council in late 2001.<sup>236</sup> Brazil has submitted a number of proposals and communications to the TRIPS Council and the TNC during the review period, on issues such as: technical cooperation and capacity building<sup>237</sup>; the draft amendment to TRIPS Article 29*bis*<sup>238</sup>; draft modalities for TRIPS related issues under the Doha work programme<sup>239</sup>; the Relationship between

<sup>232</sup> Central Bank of Brazil online information. Viewed at: <http://www.bcb.gov.br/ftp/notaecon/balpaya.exe>.

<sup>233</sup> The Berne Convention for the Protection of Literary and Artistic Works; the Paris Convention for the Protection of Industrial Property; the Patent Cooperation Treaty (PCT); the Patent Law Treaty (PLT); the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations; the Geneva Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms; the International Convention for the Protection of New Varieties of Plants (UPOV); the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods; the Nairobi Treaty on the Protection of the Olympic Symbol; and the Strasbourg Agreement Concerning the International Patent Classification.

<sup>234</sup> WTO document IP/Q/BRA/1, IP/Q2/BRA/1, IP/Q3/BRA/1, IP/Q4/BRA/1, 24 February 2004.

<sup>235</sup> WTO document IP/N/6/BRA/1, 24 March 2000; IP/N/1/BRA/2, 10 April 2000; IP/N/1/BRA/C/1, IP/N/1/BRA/C/2, IP/N/1/BRA/I/1, IP/N/1/BRA/P/1, IP/N/1/BRA/P/3, and IP/N/1/BRA/P/4, 19 September 2000; IP/N/1/BRA/I/1/Add.1, 4 October 2001; and IP/N/REV.6/ADD.1, 24 July 2002.

<sup>236</sup> WTO document IP/Q/BRA/1, IP/Q2/BRA/1, IP/Q3/BRA/1, IP/Q4/BRA/1, 24 February 2004.

<sup>237</sup> WTO document IP/C/W/513, 20 June 2008.

<sup>238</sup> WTO document IP/C/W/475, 26 July 2006.

<sup>239</sup> Joint communication with Albania, China, Colombia, Croatia, Ecuador, the European Communities, Georgia, Iceland, India, Indonesia, the Kyrgyz Republic, Liechtenstein, the Former Yugoslav Republic of



providing this type of services, and all its lawyers must be authorized by the OAB to provide foreign-law consultancy services.

(c) Accounting and auditing services

242. The Federal Accounting Council (CFC) regulates the accountancy profession in Brazil. The CFC is responsible for issuing the Directives that govern the profession as well as for overseeing professional conduct. The CFC, created by Decree-Law No. 9,295 of 27 May 1946 and regulated by Resolution CFC No. 960/03, of 6 May 2003, is a private law institution providing a public service.<sup>216</sup> The Regional Accounting Councils (CRCs), subordinate to the CFC, are responsible for administration of the CFC Directives, as well as for the registration of accountants and general supervision of the profession.<sup>217</sup>

243. Brazil participated in the preparation of guidelines for mutual recognition agreements in the accountancy sector in the WTO Working Party on Professional Services and submitted responses to the questionnaire on this sector.<sup>218</sup>

244. Brazilian law recognizes two kinds of accounting professionals: accountants, who require university study; and accounting technicians.<sup>219</sup> In accordance with Resolution CFC No. 496 of 5 October 1979, the relevant diploma must be registered with the CRC. This applies to nationals and foreigners.<sup>220</sup> Auditors wishing to act in the area of securities must also register at the Securities Exchange Commission, either as independent auditors/natural persons, or as independent auditors/juridical persons, in accordance with Law No. 6,385/76. There are 207,000 registered accountants in Brazil (June 2008), 192,000 accounting technicians, and 67,000 accounting firms.<sup>221</sup>

(d) Architectural and engineering services

245. Law No. 5,194/66 and Law No. 6,496/77, and Resolution 1,010/05 regulate the professions of architect and engineer. The Federal Council of Engineering, Architecture and Agronomy (CONFEA) regulates and oversees the exercise of these professions. Architects and engineers must be registered with CONFEA; as at August 2008, some 900,000 were registered.<sup>222</sup> For registration, a recognized

<sup>216</sup> Federal Accounting Council online information. Viewed at: <http://www.cfc.org.br/>.

<sup>217</sup> University of São Paulo's Technology and Information Systems Laboratory online information. Viewed at: <http://www.tecsi.fea.usp.br>.

<sup>218</sup> WTO document S/WPPS/W/7/Add.22, 5 November 1996.

<sup>219</sup> WTO document S/WPPS/W/7/Add.22, 5 November 1996.

<sup>220</sup> Federal Accounting Council online information. Viewed at: <http://www.cfc.org.br/exame/detalhes.asp?cod=1013>.

<sup>221</sup> CFC online information. Viewed at: [http://www.cfc.org.br/uparq/Ativos\\_200806.pdf](http://www.cfc.org.br/uparq/Ativos_200806.pdf).

<sup>222</sup> CONFEA online information. Viewed at: <http://www.confes.org.br/publico/cgi/cgilua.exe/sys/start.htm?sid=140&pai=4&sub=21>.

professional title is required; in the case of foreign titles, professional must undergo the validation process described in section (a) above. Law No. 5,194/66 does not specify any areas that are limited for the exercise of foreign or foreign-trade professionals. However, commercial presence depends on foreign service suppliers joining Brazilian service suppliers in a specific type of legal entity (*consórcio*), where the Brazilian takes the burden of civil liability. Foreign architects and engineers may work in Brazil only after proving that there are no Brazilian professionals capable of carrying out the work.

✓ 246. Under the CONFEA there is a regional council (CREA) in each state, in charge of overseeing the exercise of the professions and the implementation of CONFEA regulations in its jurisdiction. Professionals must be registered in the CREA of the state in which they exercise their profession.