

The New Government Contracting Law and Mitigating Carbon Emissions

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Brazil's new government contracting legislation, which governs public bidding processes and government contracts (Law 14.133/2021), came into force on April 1, 2021, and brought with it a number of innovations that touch on social and environmental issues. The Law provides, for example, that sustainable national development is one of its guiding principles, and it requires all government contracting processes to take into consideration environmental impacts, and mitigation measures related to the nature of the contract.

Another interesting provision under the Law is that bidders which adopt mitigation practices under National Climate Change Policy (Law 12.187/2009) will have preference over those that do not (article 60§1(IV), Law 14.133/2021). Mitigation practices are technological changes and substitutions that reduce the use of resources and emissions per unit of production, and implementation of measures that reduce greenhouse gas emissions and expand carbon sinks.

The legislator opted not to impose a legal requirement to adopt mitigation practices on companies that wish to contract with the government. Instead, the Law creates incentives for them to do so, since in competitive bidding processes bidders that offer mitigation practices will have an advantage over competitors that do not.

Despite the praiseworthy aims of the rule, the incentive for mitigation practices under Law 14.133/2021 is not great. In point of fact, in order for the Law's preference criteria to come into play, there must be a tie at the decision-making phase between proposals submitted by competing bidders. The chances of a tie are fairly remote, however, given that most government contracting is through an open bidding process, where bidders submit successive bids and cannot simply meet the best proposal.

And if a tie does occur, Law 14.133/2021 establishes no fewer than four tie-breaking criteria, which are applied successively:

- submission of a final bid between the tied bidders;
- (assessment of previous contractual performance;
- development of actions to promote equity between men and women in the workplace, and
- adoption of compliance programs (article 60 (I) to (IV), Law 14.133/2021).

Only if the tie persists after the application of the four tie-breaking criteria will the preference criteria under paragraph §1 of article 60 come into play. What's more, article 60§1 also has four criteria, which are also applied successively, and adoption of mitigation practices is the last of the four.

Before mitigation practices are considered, preference will be given to

- companies located at the place of the contract,
- Brazilian companies, and
- companies that invest in research and development in Brazil.

Thus, the chances that one day the selection of the successful bidder in a government contracting process might come down to whether the bidder had adopted mitigation practices is slim, to say the least. The unfortunate conclusion, therefore, is that however well-intentioned the legislator may have been in including this incentive for environment-friendly practices, the method chosen does not have the potential to make a real contribution to broader adoption of mitigation practices among the business community.

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