

Overview on the participation and contracting of micro and small enterprises in online procurement of foodstuffs: case study of *Centro de Preparação de Oficiais da Reserva de Belo Horizonte* (Reserve Officer Training Center of Belo Horizonte) in the period from 2007 to 2015.



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ABSTRACT

The purpose of the article is to analyze the participation and contracting of micro and small enterprises (“MSE”) in online procurements of foodstuffs conducted by Centro de Preparação de Oficiais da Reserva de Belo Horizonte, the Reserve Officer Training Center of Belo Horizonte (“CPOR”) in the period from 2007 to 2015. It was also examined if the benefits of the Complementary Law No. 123, of December 14, 2006 (“CL 123/2006”) have contributed or not to increase the participation and contracting of MSE in the tender processes of the body. A survey was carried out with qualitative, descriptive and documental approaches. The analyzed data seemingly indicate that the advantages of the legislation have not contributed significantly to enhance the participation and contracting of MSE in the procurements of foodstuffs conducted by the CPOR. It was concluded that, for that purpose, micro and small enterprises have, historically, been winning the tenders, and it cannot be made any assertion that the legislation has a beneficial and significant effect in favor of such enterprises.

Keywords: Procurement; Micro-enterprises; Complementary Law 123/2006.

1. INTRODUCTION

Notwithstanding the endless debate about the functions of the Government in relation to the market,



as well as on the limits of its competence, it is widely known that governmental intervention in the economy generates considerable impact, for better or worse.

Machado (2005), while positing the classic functions of the State as described by Musgrave (1974 apud MACHADO, 2005), emphasizes the stabilizing role when the budgetary policy is used as an instrument to maintain full employment, with possibility of such resources being applied through consumption (MACHADO, 2005).

For that reason, the governmental procurement market is a formidable instrument of economic intervention. In the case of Brazil, according to data provided by the Brazilian Micro and Small Business Support Service (SEBRAE, 2011), this market moves about 400 billion Brazilian Reais annually, considering the procurements conducted by all public entities (federal, state, municipal and Federal District) and their respective bodies.

On the other hand, the same data also signal that the governmental procurement market displayed an unequal participation of businesses of different sizes: in 2011, large and medium size companies, which represented 1% of all commercial establishments in Brazil, participated in 80% of such procurements, while the slice of micro-enterprises and small size companies (MSE), which, in the said year, corresponded to 99% of the national commercial establishments, was only 20% of the public procurements conducted by the Federal Government (SEBRAE, 2011).

The unequal participation of businesses in that market gives room to the possibility of oligopolies and cartels being formed, what might raise costs and/or affect the quality of goods and services procured by the Government. It could also result in an unsatisfactory performance by the Brazilian State of its stabilizing role, considering that in 2013 the MSE offered more than half of the formal employment posts provided by private non-rural establishments in Brazil (SEBRAE, 2017).

MSE are so important to the national economy that the very Federal Constitution of 1988 determined a special treatment for those enterprises, as it may be observed in the Art. 146-III (d), in the Art. 170-IX, and in the Art. 179 (BRASIL, 1988). However, such provisions were only effectively regulated with the enactment of the Complementary Law No. 123, of December 14, 2006 (BRASIL, 2006).

Besides implementing a differentiated and more beneficial tax regime for the MSE, the CL 123/2006 innovated the legal system as it extended to public procurements the treatment that favored small businesses, with the aim to foster economic and social development in the municipal and regional scopes, improve the efficiency of public policies and encourage innovation.

With the same intent, when the Law No. 12.349, of December 15, 2010 amended the Art. 3 of the Law No. 8.666, of June 21, 1993, which is the major Brazilian law on government procurement, it expressly included the promotion of national sustainable development among the purposes of bidding processes (BRASIL, 1993).

Considering the general scene of inequality observed between MSE and companies of medium and large size in the procurement market, we wonder if the changes in the regulation that have favored micro and small enterprises did effectively enhance their participation in public procurements. To verify the results of such change of legislation, the online procurements for purchase of foodstuffs conducted by *Centro de Preparação de Oficiais da Reserva de Belo Horizonte* (CPOR) were analyzed in the period from 2007 through 2015.

Thus, the general objective of this study consists in analyzing the participation and contracting of micro and small enterprises in online procurements of foodstuffs conducted by CPOR from 2007 to 2015. It is also intended to evaluate if the benefits of the CL 123/2006 have contributed or not for increasing the participation and contracting of MSE in bidding processes of the entity in the analyzed period.

For that purpose, this article is structured in five topics, the first of which is this introduction, which is followed by a review of the literature and of the research methodology. The fourth topic contains the presentation and the results of the empirical research, while the fifth one ends the article with the conclusion and final considerations.

It is worth stressing that in the academic field, there are few empirical studies available on this subject, and, for that reason, the result of this research will be a valuable contribution, not only to the academia, but also to enterprises and public administrators.

2. THEORY REFERENCE

2.1 THE USE OF GOVERNMENTAL PROCUREMENT POWER AS AN INSTRUMENT TO FOSTER NATIONAL SUSTAINABLE DEVELOPMENT OF MSE

According to Moreira (2014), sustainable development may be analyzed through many perspectives, such as social, economic, cultural and environmental, and all approaches converge into the need to establish a balance between satisfaction of present needs, and the planning and maintenance of future resources by the society.

The said author informs that among the known diverse notions of sustainability, this is more better understood by the triple bottom line concept, created in the 1990's by John Elkington (apud MOREIRA, 2014).

Such concept, also known as the three P's (people, planet and profit), means, in a didactic way, that

the sustainable development must consider the following dimensions: 1) People: regarding the treatment given by the company to the human capital, understood as the social contribution of the enterprise by guaranteeing decent working conditions, rights and benefits to its direct and indirect collaborators, with ensuing effects on their families and their communities; 2) Planet: refers to natural capital, which consists in the adoption of measures, by the company, in favor of ecologic and environmental efficiency of its productive processes, applying cleaner and safer solutions for the environment, thus reducing the environmental impact and negative external effects of the performance of its economic activity; 3) Profit: regarding the gain, or positive economic result obtained from the performance of its economic activity (MOREIRA, 2014).

According to the author, financial sustainability may be understood as the entrepreneur's ability to cover its operating costs, to seize opportunities and to negotiate, and also to remain operating in the long-term market, as defined by Dum, Arbuckle and Parada (1998).

Therefore, the financial development does not contemplate solely the income in capital terms of the enterprise itself, but the enterprise's ability to survive in an increasingly competitive and dynamic market.

One may hint that, for the last decade, public procurements in Brazil have become an empirical example of application of the triple bottom line concept.

The General Law on Government Procurement – Law 8.666/1993 – demonstrates that the State does not only aim to enhance economic development through its demand for goods and services, but, rather, the national sustainable development, in conformity with express legal provision in its Art. 3^o. In the words of Santana (2014): “The Art. 3 gathered innumerable constitutional values and principles which, in short, induce and permit the execution of various public policies as a consequence of the governmental procurement power” (SANTANA, 2014, p. 21).

One of the purposes pursued by the Government with that measure, is to use its procurement power to foster and develop the regional economy by hiring companies, thus contributing for maintaining reasonable levels of employment.

With the increased demand for goods and services by the Government, public procurements became to be perceived not only as an instrument capable to supply the goods needed for its operation, but also as an efficient way to employ public resources to enhance



the growth of groups or segments of the society considered as vulnerable or strategic for regional development, such being one of the facets of the State's stabilizing role (ARANTES, 2006).

Meanwhile, Silva (2008) reports that the expression "use of the procurement power" represents a real power, as the availability of resources by a certain institution – in the case, the State -, confers upon it the possibility to induce others to adopt specific behaviors aimed at achieving results that exceed the purpose of simply fulfilling the needs of the Government (SILVA, 2008).

An example of that governmental induction was the promulgation of the Statute of Micro-enterprise and Small Size Company – Complementary Law 123/2006. By said law, the Government has created a series of legal mechanisms that confer upon MSE considerable competitive advantages in relation to medium and large size companies in bidding procedures.

Although the CL 123/2006 has been in effect since December 14, 2006, in the Federal Government it was only after the publication of the Decree No. 6.204, on September 5, 2007, that the tender benefits in favor of small businesses have become more effective (BRASIL, 2007). Another significant change has occurred since August 7, 2014, with the signing of the Complementary Law No. 147 /2014, which amended the CL

123/2006. As one of the main modifications, Santana (2014) highlights the obligation imposed on the Government to carry out MSE-only bidding processes for items priced at up to R\$ 80,000, identified on Comprasnetⁱⁱ as Tender Type 1ⁱⁱⁱ. In this case, micro and small enterprises compete in the bidding process only with other businesses of the same size, tendering for items that do not exceed the mentioned amount. Prior to the legislation of 2014, that benefit was optional^{iv} and the R\$80,000 were considered in relation to the total amount of the tender, and not of the item.

About this subject, it is important to say that, even before the CL 123/2006 having suffered the changes in 2014, the case law of TCU^v had already been established in the sense of interpreting that the Type 1 benefit was applicable per item, and not on the global amount of the procurement. That information is essential for understanding one of the results of this research, which found out that CPOR had already been adopting that interpretation since 2011, in the Bidding 6/2011, and so it did in the subsequent ones.

The CL 147/2014 equally mandated reserve quotas of up to 25% of the object, in case of separable goods, for competitive bidding only among MSE, identified on Comprasnet as Tender Type 3. Under that benefit, the Government is obligated to

reserve a portion of the procured object, up to 25%, for competition only among small businesses. Those enterprises may still contend for the remaining 75% of the object, competing, though, with medium and large companies.

Santana (2014) informs that the CL 147/2014 maintained as optional the subcontracting of small businesses for services and works, identified on Compasnet as Tender Type 2. That benefit enables the Government to impose on a large company that has won a tender that it subcontracts a MSE to perform a portion of the work or service.

Other innovations of the CL 147/2014 highlighted by Santana (2014) are: 1) extension of the term from two to five business days, in case the award is granted, to make any tax regularization afterwards. Accordingly, micro and small enterprises may participate in bidding processes even if they have pendency in tax documents, which must be corrected within the legal term; 2) creation of the preference for contracting a MSE, in the event of waiver of competitive bidding owing to the value of the object; 3) creation of the possibility to con-

tract local and regional small businesses whose bids have exceeded only up to 10% above the best offer made in the competition.

The author also informs that there has been no changes in the benefit known as fictitious tie, whereby the MSE may cover the best proposal, provided that its offer does not exceed it by more than 10%, in the modalities listed in the Law 8.666/1993, and by 5% in auctions (SANTANA, 2014).

At the federal level, such benefits were regulated by the Decree No. 8.538, of October 6, 2015 (BRASIL, 2015), which has been in effect since January 5, 2016 and revoked the preceding Decree 6.204/2007.

Accordingly, the amendments in the legislation seem to be promising not only to foster small businesses but also to make public procurements converge into sustainable development. The formal insertion of that principle in the Law 8.666/1993 “[...] reminds the applicers thereof to adopt practices, including in government procurements, which promote growth of the country, which is achieved with actions that encourage the manufacturing sector, commerce, formal employment,



technological and scientific development” (SANTANA; ANDRADE, 2011, p. 42).

3. METHODOLOGY

In this article, we decided to work with the methodological classifications suggested by Gil (2002). The approach of the research was qualitative, descriptive and documental. It was made an analysis of content of quantitative data, taking as parameter the systematics of government procurements in Brazil and the aspects related to the MSE- preferred program, implemented in December 2006, when the Complementary Law 123/2006 became effective.

The data was collected from the Procurement Portal of the Federal Government – Comprasnet. A database was organized, with information obtained from 11 online auctions of foodstuffs or similar objects^{vi} conducted by CPOR, of Belo Horizonte, from 2007 through 2015, covering the invitations to bid and the minutes that were available on the Portal until December 31, 2015.

The reason of the surveyed period is the promulgation of the CL 123/2006 in December 2006, what affected the first bidding processes with application of its benefits from the following year onwards.

The federal entity was chosen because it allowed easy access to analyze the necessary documents and to check, *in loco*, any diverging information that might possibly have appeared, but did not.

It was decided to work only with foodstuffs because such goods are highly probable to be contracted by MSE, as seen from the huge quantity of procured items and, among which, most of them are of small unit price, being, thus, more appropriate for competitive bidding among micro and small enterprises.

After analyzing the calls of tender and minutes of tender meetings, four invitations were removed from the sample as the auctions had been abandoned^{vii}. Of the seven remaining auctions, it was analyzed 861 items, which were successfully^{viii} contracted and totaled a procurement amount of R\$ 9,430, 631.80. We worked with the final amounts of the bidding, that is, those determined for each item after the ending of the auction bid phase, rather than with the estimated contract amounts.

The decision to analyze the procured items separately, even though pertaining to a same procurement, is grounded on the criterion established by the case law of the Federal Court of Accounts (TCU), in

the Synopsis 247^{ix}. TCU is the main external control entity of the Federal Government, responsible for monitoring the accounts of the bodies under its jurisdiction.

It was carried out an individualized analysis of each one of the benefits of the CL 123/2006, verifying if they had been prescribed in the selected invitations and if such benefits were decisive for the enterprises’ success in the biddings. It was measured the number of items, the unit and global prices, the average prices and average global [sic] of the items and the percentage of use of each benefit. Lastly, it was determined the values tendered exclusively and the bidding processes won by MSE.

4. RESULTS

The results of the research indicate that the benefits of the CL 123/2006 were not determinant to increase the participation and contracting of MSE in procurements of foodstuffs conducted by CPOR. Table 1 exhibits quantities, values and percentages of the items procured and completed with success, irrespectively of being exclusive or not.

Table 1:

Exclusivity of items procured and completed with success.

Procured items	861	100,00%	R\$ 9.430.631,80	100,00%
MSE – only items	549	63,76%	R\$ 6.239.071,16	66,16%
MSE non-exclusive items	312	36,24%	R\$ 3.191.560,64	33,84%

Source: Comprasnet (2016)

It is verified that the MSE-only procured items are significant in relation to quantity and prices. That amount exceeds R\$ 6 million and corresponds to approximately 2/3 of the procurement amount.

In Table 2, it is noted that all the average global prices of the items are smaller than R\$80,000. That data was obtained by multiplying the unit price of the item by the procured quantity. Considering the average price of the items, it is found out that all of them

could and would be embraced by the Type 1 benefit of the CL 123/2006, that is, the holding of MSE-only procurements whenever the estimated global price of the item does not exceed R\$ 80,000. However, that was not confirmed because, as previously explained, it was only since 2011 that such understanding has been oriented by TCU and was eventually incorporated by the CL 147/2014 in 2014.

Table 2:

Average unit prices of the item and global price of the item, won by MSE and by medium and large size companies.

		Average unit price of the item	Average unit global price
Procured items	861	R\$ 12,19	R\$ 10,953.11
MSE – only items	549	R\$ 13,31	R\$ 11,364.43
MSE non-exclusive items	312	R\$ 10,23	R\$ 10.229,36

Source: Comprasnet (2016)

Table 3 exhibits the quantity of items, percentages and prices won by MSE and by medium and large companies. It was observed that the small businesses have won almost all the competed items, including those for which they had competed with companies of larger size. These figures imply that micro and small enterprises have managed to compete with and win over other companies, at least in relation to foodstuffs.

Table 3:

Size of the winners of the items.

Items won by MSE	858	99,65%	R\$ 9.416.390,30	99,85%
Items won by medium and large companies	3	0,35%	R\$ 14.241,50	0,15%

Source: Comprasnet (2016)

The figures in Table 4 confirm that the average global price of all items is lower than R\$80,000. Therefore, it is noted that all the items could be restricted to competition between micro and small enterprises, considering the legislation that has been in effect since 2014.

Moreover, the relatively low unit and global prices of the procured items for that object may be determinant factors for the predominance of small businesses as winners of those items, in addition to a possible loss of interest by the medium and large size companies for such object.

Table 4:

Average unit price of the item and global price of the item, won by MSE and by medium and large companies.

		Average unit price of the item	Average global price of the item
Items won by MSE	858	R\$ 12,22	R\$ 10.974,81
Items won by medium and large companies	3	R\$ 4,47	R\$ 4.747,17

Source: Comprasnet (2016)

It was verified that the Bidding No. 2/2007 did not prescribe any of the benefits in favor of small businesses, probably because that bidding process had taken place on August 7, 2007, before September 5, 2007, when it became effective the Decree No. 6.204, which regulated the benefits for MSE. It may be speculated that, for the same reason, at that time the Comprasnet Portal had not been adapted to the benefits of the legislation. Nevertheless, it was verified that, in spite of the benefits having not been prescribed in the convening instrument and the system being out-of-date, the winners of all the items were micro and small companies. That is, the pointed-out factors, which might have interfered negatively in the MSE's rights, did not impede them to win the tender.

It was observed that the three items not won by MSE occurred at the Bidding 5/2009. Its call already contemplated the rights of untimely tax good standing and the fictitious tie. This latter benefit, as a matter of

fact, was used as a determinant criterion for boosting MSE to win 16 items of the whole sample, corresponding to R\$54,422.62, all of which of that same auction, involving five different companies.

The fictitious tie was used in only 1.85% of the procured items of the sample. However, when the benefit was applied in favor of MSE, it was a deciding factor to the victory of those enterprises.

The benefit of late tax good standing and the fictitious tie have been found in all invitations to bid since 2009. The tax good standing grant, albeit present in the invitations, was not used in any of the analyzed items. Such finding may suggest that the MSE owners participating in procurements are concerned to make their tax payments timely, as such conduct is required from suppliers for governmental bodies.

A relevant result was to find that since the Auction 6/2011, that is, prior to CL 147/2014 becoming effective, CPOR has adopted the interpretation of applying the Type 1 benefit on items whose amounts do not exceed R\$ 80,000, rather than on the global price of the bidding process. One may think that such a change in the procedures of the entity was intentional and that it was aimed at its adaptation to the case law of TCU, which opined in that sense.

Nonetheless, although provided in the calls of tender of the Biddings 6/2011, 11/2011, 1/2013 and 11/2013, it was only since the Bidding 5/2014 that we may affirm that the MSE have started entering in exclusive competitive biddings for items not exceeding R\$ 80,000 in value. That because said biddings were all abandoned. This study did not manage to identify the reason for that, which may be done in a complementary study.

On the other hand, it was observed that none of the analyzed invitations had prescribed the Type 2 and Type 3 benefits. That result is plausible because of the nature of the object chosen for analysis. Foodstuffs are goods; thus, they could not enjoy the benefit of subcontracting, which only applies to works and services. As for the Type 3 benefit, which deals with quota reservation for MSE of up to 25% of the object, the fact of not being used by the entity may be owed to two factors: firstly, for not being mandatory under the terms of the Decree 6.204/2007; secondly, in alignment with the prevailing case law of TCU in favor of Type 1 benefit, as already explained.

The analyzed data seemingly indicate that the benefits of the CL 123/2006 have not contributed significantly for increasing the participation and contract-



ing of MSE in CPOR's procurements of foodstuffs. It was noticed that, for that purpose, micro and small enterprises have, historically, been the winners of the bidding process, and it cannot be made any assertion about a beneficial and significant effect of the legislation in favor of the small businesses.

5. FINAL CONSIDERATIONS

This article analyzed the participation and contracting of MSE in online auctions of foodstuffs held by CPOR in the period from 2007 through 2015. In addition, it described how the application of said law has become an up-to-date and empirical example of governmental intervention in the economy. It has also exemplified the concept of the triple bottom line and demonstrated that such notion was incorporated to the major Brazilian law on procurements, the Law 8.666/1993, which prescribes as one of its purposes, the promotion of a national sustainable development.

Furthermore, it indicated that since the effectiveness of the CL 123/2006, there has been significant changes in the dynamics of procurements in Brazil with the specific purpose of benefiting MSE, which represent a meaningful portion of the national economy.

The research also verified that changes have been introduced into invitations to bid and into work processes of those who are engaged with public procurement, such as public servants, control agencies and entrepreneurs.

Therefore, the conclusion is that the analyzed data seemingly demonstrate that the benefits of the CL 123/2006 have not contributed significantly for increasing the participation and contracting of MSE in CPOR's procurement of foodstuffs. In the study, micro and small enterprises have been, for a long time, the winners of the bidding process, and no assertion can be made about a beneficial and meaningful effect of the legislation in favor of small businesses.

This work has some limitations, among others, the fact of having analyzed only one object and federal government body. Future researches may extend, to other objects and bodies, the herein developed methodology, as well as evaluating the participation of MSE in public procurements held by municipal and state government entities.

NOTES

- i Art. 3. Procurement is designed to assure observance of the constitutional principle of isonomy, the selection of the most advantageous bid for the government and the promotion of a national sustainable development and will be processed and judged in strict conformity with the basic principles of legality, of impersonality, of morality, of equality, of publicity, of governmental honesty, of the binding power of the convening instrument, of objective judgment and co-related ones. (BRASIL, 1993)
- ii Comprasnet is the name of the main procurement portal of the Federal Government. Data collected in 2016. Available at: <http://www.comprasgovernamentais.gov.br>.
- iii To make the reading of the article easier and to avoid repetition in full of the legal benefits of the CL 123/2006, it was adopted the usual nomenclature employed by Comprasnet, i.e., **Tender Type** (Tender Type) 1, 2 or 3, as explained previously.
- iv The benefit was optional in accordance with the CL 123/2006. However, the Decree No. 6.204/2007 stipulates that it is mandatory to the Federal Government, but the states and municipalities were out of the reach of that regulation.
- v See the Appellate Decision No. 3.771/2011 rendered by the 1st Chamber of TCU: "[...] despite the global amount having exceeded the R\$ 80,000 ceiling, prescribed in the Art. 48-I of the CL 123/2006 and in the Art. 6 of Decree No. 6.204/2007 for conducting a bidding process designed for participation of micro- enterprises and small-sized companies only, the tender was divided into 52 items to be competed, apart from one

another, thus, each item should be battled for independently from the others".

- vi To explain 'similar objects', we refer to the Online Auction No. 07/2015, which was intended for procurement of frozen bread, considered, for the purposes of this research, as foodstuff.
- vii Abandoned online auctions: No. 06/2011, No. 11/2011, No. 01/2013, and No. 11/2013.
- viii Bids for 16 items were either canceled or rejected.
- ix Synopsis No. 247 of TCU. It is mandatory admitting an award per item and not for the global price, in invitations to bid for contracting works, services, purchases and sales, the object of which is separable, provided that without prejudice of the group or complex or loss of economy of scale, considering the purpose of promoting full participation of bidders who, though lacking capability to perform, supply or purchase the whole object, may do it in relation to items or separate units, and, for that end, the requirements for qualification must adapt to such separability (BRASIL, 2004).

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