# Bitter Pills to Swallow: Enforcement Costs of Health Litigation

Darcio Genicolo-Martins[1,2]

Paulo Furquim de Azevedo[3]

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Preliminary Version (Comments Welcome)

## Abstract

Public health procurement is shaped not only by administrative choices but also by judicial decisions that enforce the law on public buyer units. Judicial enforcement is costly for two reasons. First, as mandatory purchases are invariably urgent, judicial enforcement undermines procurement planning. Second, as judicial sanctions for noncompliance are severe, auctioneers have higher incentives to maximize tender success at the expense of higher prices, which we call the "under the gun" effect. Unique data on health litigation and procurement of prescription and nonprescription drugs allow us to estimate the overall enforcement costs and the "under the gun" effect. Judicial enforcement implies (i) higher negotiated prices (from 30.73% to 44.37%), (ii) fewer participant firms (from 28.63% to 32.21%), (iii) fewer bids (from 39.40% to 45.93%), and (iv) a lower probability of success (from 38.56% to 48.66%) in urgent tenders in comparison with ordinary tenders. To estimate the "under the gun" effect, we utilize urgent administrative tenders that are not subject to judicial sanctions. We estimate that judicial sanctions increase prices between 8.83% and 9.97%. Thus, judicial enforcement compels the executive branch to carry out the purchases, which generates high costs to the public budget. These results suggest that judges should consider the social costs associated with the enforcement of court decisions when the judiciary acts as a policymaker.

*Keywords: public procurement, health-related goods, efficiency, health litigation, enforcement*

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[2] Assistant Professor at Insper, and Research Associate at the Center for Regulation and Democracy, Insper. E-mail: darciogm1@insper.edu.br.

[3] Senior Fellow Research and Director of the Center for Regulation and Democracy at Insper. E-mail: paulofa1@insper.edu.br.

## 1 Introduction

The interaction between the judiciary and policymaking is controversial. For instance, in the regulatory context, courts and agencies might be seen as opposing agents in terms of markets' social control (Glaeser and Shleifer 2003). Agencies may be more efficient at resolving conflicts than courts, which are often viewed as more expensive, unpredictable, and biased.

The execution of contracts in the context of public procurement has led to some results related to conflict resolution. The judiciary may, directly or indirectly, influence public tender outcomes. For instance, inefficient courts may induce public buyers to apply penalties instead of solving the conflict through litigation, leading to longer delays in public works deliveries and payments in litigated contracts (Coviello et al. 2017).

Health litigation is another example of the judiciary's interference in the executive branch (Wang 2015). This paper aims to estimate the enforcement costs of health litigation and administrative requests. In other words, the main objective is to assess the government waste generated when the judiciary directly affects public policy.

The Brazilian Constitution states that all citizens have the "right to life," and the state has the explicit public health objective of "providing universal coverage" for everyone. Available or potential budget resources must be considered across time for these objectives to be materialized and sustainable in the long run.

The Unified Health System (SUS) is precisely the materialization of this statement: a coordinated set of financially viable actions, public programs, and infrastructure, aiming to achieve the objectives established in the Constitution. Based on aggregate social preferences, the government chooses priorities and implements public policies subject to budget restrictions.

However, the judiciary has a strict interpretation of the Constitution that generally ignores the budgetary dimension. This means that in Brazil, it is possible to obtain any medication or medical procedure through litigation regardless of the costs involved. Court orders have granted a range, for example, from acetylsalicylic acid (aspirin or similar) to galsulfase, indicated for treating rare and severe joint disease (mucopolysaccharidosis type VI). Individual treatment with galsulfase has an estimated annual cost of US$400 thousand[4].

This rigid interpretation of law leads to significant distortions in implementing health policies, such as public procurement of prescription and nonprescription drugs. Court decisions are enforced as preliminary injunctions that require the government to make purchases within one-third of the time planned acquisitions are made, hampering all public buying processes.

The way the planning procedures for the acquisition of these goods are carried out may substantially affect the procurement conditions or outcomes and

[4] See https://www.ncbi.nlm.nih.gov/books/NBK409825/#:~:text=The%20annual%20acquisition%20cost%20of,recommended%20dosing%20regimen%20is%20%24399%2C100 for additional information.

ultimately might influence the results of public policies. Public bureaus should have the appropriate time to identify all needs and ends, analyze market conditions, and set relevant tender parameters (item specifications, quantities, and reference prices, for instance).

Favorable planning circumstances may increase the likelihood of achieving public policy goals efficiently and effectively. On the other hand, under unfavorable planning conditions, purchases might be inadequate to meet public needs and more expensive, undermining public policies' final impact.

There is a vast literature on the waste of resources in public services, including public procurement. A prominent approach separates the causes of waste into two primary sources: corruption and mismanagement (Bandiera, Prat, and Valletti 2009).

The involvement of officials in corruption (i.e., active waste), such as favoring private firms in public tenders in exchange for bribery, has received much attention in the literature and from policymakers for its impact on public procurement efficiency (Mironov and Zhuravskaya 2016; Basheka 2011).

On the other hand, mismanagement (passive waste) might lead to higher prices for various other reasons, such as inadequate civil servant skills (Best, Hjort, and Szakonyi 2017), lack of incentives to minimize costs (Cullen et al. 2016; Ashraf, Bandiera, and Lee 2016; Bandiera et al. 2017) or improper management practices (Williams 2018; Bloom et al. 2015; Kvasnička, Staněk, and Krčál 2015;

Lewis-Faupel et al. 2016; Rasul and Rogger 2018), which may increase the probability of collusion or bid rigging (Clark et al. 2018; Moore 2012).

Mismanagement and corruption are often associated mainly with internal aspects of public administration. However, the external dimension is quite relevant to understanding the functioning and distortions of the procurement process. Restrictions imposed and behaviors shown by control agencies and other stakeholders acting as watchdogs might strongly influence public officials' decisions and, as a result, undermine efficiency (Brewer and Walker 2010).

Accordingly, this paper contributes to the vast literature on public procurement efficiency (Bandiera, Prat, and Valletti 2009; Ashraf, Bandiera, and Lee 2016; Lewis-Faupel et al. 2016) by providing evidence that external shocks may affect procurement outcomes by harming the *ex ante* process of planning. Notably, this policy experiment allows the inefficiency due to the judicial review of public procurement to be estimated.

Health litigation and administrative requests are exogenous shocks that affect how the government buys prescription and over-the-counter drugs. Thus, those shocks can be separated into *urgent* (litigated and administrative requests) and *ordinary* (standard procedure) types of purchases, treatments, and control groups, respectively.

We estimate the impact of health litigation and administrative requests (planning and executing a tender) on public procurement efficiency, comparing

urgent and ordinary purchases. The objective is to assess the effects of those court orders' enforcement costs and administrative demands on public tender efficiency.

Additionally, we compare litigated and administrative purchases to identify the "under the gun" effect. Administrative and litigated purchases are similar in all adverse planning and execution conditions. However, if the government fails to comply with a court order to purchase medicines, public bureaus are subject to severe punishment. Thus, the "under the gun" effect is an attempt to isolate the possibility of severe penalties as an additional cost to the government.

We construct unique administrative data on bid-level public procurement transactions of litigated, administrative, and ordinary health-related item purchases in the state of São Paulo, Brazil, from January 2009 to December 2019.

The main findings indicate higher reference prices for urgent than ordinary purchases (from 60.4% to 68.93% higher). This result suggests that unfavorable conditions for compliance with court orders or administrative requests (shorter delivery time, lower quantities, and the threat of punishment) significantly increase expectations regarding acquisition costs.

Moreover, the (over)enforcement costs consist of (i) higher negotiated prices (from 30.73% to 44.37% higher), (ii) fewer participant firms (from 28.63% to 32.21% fewer), (iii) fewer bids (from 39.40% to 45.93% fewer), and (iv) a lower

probability of success (from 38.56% to 48.66% less probable) in urgent tenders than in ordinary purchases.

Finally, we estimate the "under the gun" effect: a litigated purchase is between 8.83% and 9.97% more expensive than an administrative request, a difference attributed to the possibility of a judicial punishment of government members in the first and not in the second case.

In summary, judicial decisions compel the executive branch to carry out purchases that generate high public budget costs.

The remainder of the paper is organized as follows. Section 2 characterizes the institutional background of health litigation, administrative requests, public procurement, and the policy experiment in São Paulo, Brazil. Section 3 describes the relevant datasets and sample definitions. Section 4 presents the empirical analysis. Section 5 concludes the paper.

## 2 Institutional Background

This section provides a brief institutional background on litigation related to prescription drugs in the context of public tenders in Brazil.

First, we briefly introduce some relevant elements of Brazil's health litigation issue and its direct impacts on the public budget. We focus on the impacts of judicial decisions and administrative requests on the planning process of public

tenders. Finally, we briefly describe the bidding process for prescription drugs, underlining the bidding negotiations' difficulties resulting from court orders and administrative demands.

## 2.1 Health: "Right of All and a Duty of the State"

To promote universal health coverage, the 1988 Brazilian Federal Constitution created Brazil's Unified Public Health System (SUS), which consists of a massive set of actions and programs jointly subsidized and implemented by the federal government, states, and municipalities. Although the SUS still has some issues and distortions, in general, it has brought excellent results for public health in Brazil (Castro et al. 2019; Soares 2019).

One of the SUS's main goals is to facilitate access to prescription and nonprescription drugs and other health items. However, this objective must meet public budget constraints, especially in emerging economies with a chronic fiscal deficit such as Brazil. In that respect, the SUS provides a list of procedures, medicines, and other health-related products that the government is committed to offering the population through its programs.

The SUS list works as a "social contract." It is how Brazilian society deals with the trade-off between universal health coverage and public budget costs. Periodically, the SUS list is updated to keep up with technological changes in

the health area and treatments of new and known diseases. The ultimate goal is to serve as many people as possible as long as the government maximizes new therapies' cost-efficacy.

However, judges in Brazil tend to interpret the constitutional text literally and disregard costs in their analyses and decisions. Among many articles in the Constitution is a specific one (Article 196) that states: "*Health is a right of all and a duty of the state and shall be guaranteed utilizing social and economic policies aimed at reducing the risk of illness and other hazards and at the universal and equal access to actions and services for its promotion, protection, and recovery*." [5] This article is a general article that gives rise to a wide range of interpretations that bring significant distortions to the health system and proper public resources use.

Since mid-2000, the common understanding of judges has been that the government must provide all health items and procedures for the population at any time. This strict interpretation creates a detrimental scheme of incentives for different groups of agents. Individuals often sue the Brazilian state "[...] claiming that they have the right to receive the treatment they need or to be funded by the public health system" (Wang 2015), whether or not the treatment is on the SUS list.

It is relatively easy and inexpensive to access the legal system in this context:

[5] Constitution of the Federative Republic of Brazil in http://english.tse.jus.br/arquivos/federal-constitution.

individuals need only a prescription for the desired drugs and a private lawyer or public defender. In addition, the success rate of health litigation is very high: in the state of São Paulo, for example, approximately 85% of first-instance claims prosper (CNJ/INSPER 2019), and the rates in superior courts are even higher.

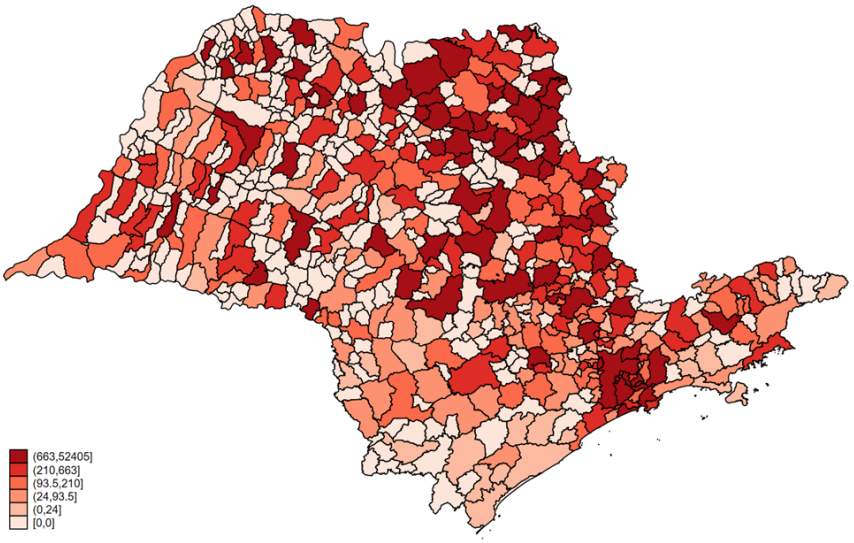
The combination of the low cost of accessing the legal system and high success rates leads to strong incentives to obtain medicines through the courts. There has been a steady upward trend in judicial claims for health-related products in Brazil in recent years; first instances of this type of court order totaled almost 96,000 in 2017, increasing almost 130% over 2008 (CNJ/INSPER 2019). In the same period, the growth in the total number of lawsuits in the lower courts was only approximately 50%.

In the state of São Paulo, the growth pattern was even higher. An approximate increase of 913% occurred between 2008 and 2017, increasing from 2,317 to 23,465 yearly lawsuits for health products (CNJ/INSPER 2019).

The lawsuits occur in many municipalities with wide dispersion throughout the state of São Paulo (Figure 1). A higher concentration of cases occurs in the most populous municipalities in absolute terms.

Figure 1. Distribution of Health Litigation Cases – Municipalities in the State

of São Paulo (2008-2017)




Source: S-CODES (SES/SP) and CNJ/INSPER (2019).

In addition to wide spatial dispersion, court orders consist of a massive variety of different items across time, including differences in dosages and drug presentations. Between 2009 and 2018, approximately 2,760 different items were ordered at least once a year on average.

The large and increasing number of successful judicial requests strongly affects the public health budget. The state government of São Paulo has a total annual budget of $58 billion, of which approximately 10% ($5.9 billion) goes to funding the Public Health System in the state. In 2018, public spending only for litigated health items was nearly 5% of the annual budget (US$300 million) of the Department of Public Health of São Paulo state (SES/SP).

The SES/SP is responsible for managing public resources and implementing policies and programs to promote public health in the state of São Paulo. It consists of 99 decentralized public buyer units (PBUs) distributed throughout the state (Figure 2). Every year, each PBU receives funds directly from the SES/SP headquarters and can manage its budget with a high degree of autonomy.

Figure 2. Public Buyer Units (SES/SP)

Source: S-CODES (SES/SP).

Most of the SES/SP's annual budget goes to purchase common goods and services, especially prescription drugs and other health-related items, to support

all public health programs in São Paulo state[6]. PBUs are directly responsible for planning and making those purchases.

The purchase process is greatly affected when there is a court order to acquire a specific item. The court order obliges PBUs to buy quickly, with massive restrictions on the planning process and heavy sanctions against public officials if they do not comply with the judicial order.

## 2.2 Planning under Pressure: Judicial Decisions and Administrative Requests as Restrictions for Planning

As in many other countries, Brazilian law establishes as a general rule that all purchases, services, and works hired by the public administration are subject to a public tender. Federal Law 8,666/1993[7] institutes the general framework applicable to all public bids in the country, which must be observed by all three government branches.

According to Law 8,666/1993, a public purchase comprises three distinct, mandatory, and subsequent phases: (i) the *internal phase* (planning and publication of the notice), (ii) the *external phase* (negotiation between

[6] The state of Sao Paulo is the wealthiest state among the 26 states of Brazil, with a population of approximately 44 million people.

[7] Entities directly or indirectly controlled by the federal, state, or municipal governments (PBUs), such as federal, state and municipal governments; autonomous government entities; public foundations; regulatory agencies; state-owned companies; and mixed capital companies controlled by the government, must comply with the government procurement rules.

purchasing units and suppliers, and (iii) *delivery of items*.

The *internal phase* of an ordinary purchase consists of the public administration carrying out careful procurement preparation and planning. At this stage, PBUs first identify their needs and select what types of goods or services might be appropriate to meet those demands. Guided by the SES/SP headquarters, the purchases made by each PBU take into account local and regional demands. However, the most important requirement is that the SES/SP exclusively purchase items that appear on the SUS list.

The tender preparation commission then creates a purchase order defining the main parameters of the bidding process. These parameters consist of the number of items to be purchased and their specifications, the bidding schedule for all participants, the bidding procedure[8], the auctioneer in charge, quantities, reference prices[9], delivery addresses, and minimum bidder requirements for participation, payment method, and possible fines. All of these parameters, except reference prices, are brought together in a document called a public notice[10].

Choosing suitable bid parameters, such as quantities and reference prices, increases the chances of an efficient purchase. PBUs need enough time to

[8] In Brazil, different types of competitive tendering formats are available to procurers, such as invitation (sealed-bid tendering) and reverse auction.

[9] The maximum price a PBU is willing to pay for the item. It is private information.

[10] The notice must be published in the Official Gazette.

accurately organize a proposal and take advantage of the government's ability to buy items on a large scale at better prices. Nonetheless, in some situations, planning time is scarce.

When court decisions reach the government, they force PBUs to buy items in very adverse conditions. First, these healthcare-related court decisions are almost exclusively enforced through injunctions (99.94% of all court decisions). The injunctions' application makes the deadlines for planning purchases and delivery of items very tight (between 1 and 10 days) compared to the deadlines for *ordinary* purchases (from 30 to 180 days). Consequently, the *internal phase* of *litigated purchases* is accomplished, on average, in one-third of the time of that of *ordinary* purchases, which undermines the process of setting the essential tender parameters.

Additionally, court orders have specific features that bring difficult and unpredictable elements to the purchase planning process. For example, since PBUs generally do not buy items that are not on the SUS list, they have less experience planning the purchase of these items. Most litigated products (almost 75%), mainly high-cost products and those intended for severe or rare diseases, such as cancer and amyotrophic lateral sclerosis (ALS), are not listed in the SUS.

However, the courts also order prescription drugs that are on the SUS list. Most court orders require the whole treatment of a specific disease for an individual:

a set or package of different prescription drugs. Almost 65% of claims consist of items on the SUS list ordered along with non-SUS items. Although some of these items are on the SUS list, they also have a material impact on the public budget and purchase planning: litigated purchases use resources that would have been used for other purposes or were outside the initially planned budget.

Other relevant reasons for litigation are "off-label" uses of SUS-list items (approximately 20%) and "jumping the line"[11] in public programs (nearly 11%). Additionally, judges heed complementary justifications such as individuals' insufficient financial resources and imminent risk of death without requiring detailed evidence of these conditions in their decisions. Only 4% of judicial claims are due to lack of stock or inability to provide service. Thus, this situation indicates that the "litigation shock" is poorly correlated with a possible unobservable characteristic of PBUs, such as mismanagement.

Only in rare cases can the government execute a court order using existing stock since (i) planning is performed to meet the demands of existing programs, and (ii) it is challenging to maintain and manage strategic stocks due to drugs' high degree of perishability and the massive variety of items. For these reasons, health litigation acts as an exogenous shock, a severe restriction to be addressed in the planning process. It is not possible to anticipate exactly where when, what, and what quantities the SES/SP might have to purchase. PBUs have little control

[11] Cases in which the individual is entitled to receive the medication through a public program but does not want to wait to undergo the standard procedures to obtain it.

over planning under these conditions. Additionally, health litigation has very little to do with the quality of the public policies implemented.

There are also other costs to the government resulting from the judiciary monitoring and actively participating in nonprescription purchases. Penalties are extremely severe for public officials if they do not comply with a court order. This potential threat constitutes an additional restrictive element to tenders generated by court orders. The primary forms of punishment for noncompliance are (i) fines (sometimes reaching significant and disproportionate amounts); (ii) administrative, civil and criminal liability; and (iii) blocking and "hijacking" public funds.

Since 2009, the SES/SP has tried to mitigate the monitoring and punishment costs generated by court orders. The mechanism used is negotiating an item's supply directly with an individual before a court order occurs. This procedure is known as an *administrative* request.

Administrative requests are evaluated by a scientific committee that can judge whether a request is valid. This commission uses the scientific literature with a healthy level of evidence, using evidence-based medicine criteria and protocols recognized by the medical community.

One main difference between a judicial and an administrative request is that the latter undergoes a scientific examination and tends to represent a better use of the resource and the drug. As it is a more rigid and scientific process, it tends

to be less sought after and to generate fewer purchasing processes. The purchases generated by administrative orders totaled 9,700 between 2009 and 2019, representing approximately 6.5% of the total purchases from court orders.

Administrative requests bring another benefit to public administration. There are no penalties for the public officials involved in the event of a failure in the requested item's purchase process. Nevertheless, there is no difference between a court order and an administrative request in terms of planning purchases. Like a court order, an administrative request generates a purchase order with immediate delivery and using budget resources not designated for this purpose.

In general, purchases of prescription and nonprescription drugs can be classified into three groups: (i) ordinary, (ii) administrative, and (iii) litigated. Table 1 summarizes the types of purchases and their characteristics.

Table 1. Types of Purchases

| **Features** | **Type of purchase** | | |
|---|---|---|---|
| | **Ordinary** | **Administrative** | **Litigated** |
| **Source of funds** | Planned budget | Extra-budget | Extra-budget |
| **Quantity** | Higher quantity | Lower quantity | Lower quantity |
| **Delivery time** | Usually from 30 to 180 days | From 1 to 10 days | From 1 to 10 days |
| **Threat of punishment** | No punishment | No punishment | Potential punishment |

Health litigation and administrative requests significantly impair the public procurement process, forcing public administration to respond to these demands promptly and without proper planning. The purchase and negotiation process itself is severely hampered.

## 2.3 Buying under Pressure: Urgent Purchases as Public Information

The *external phase* covers the time lapse between the publication of the public notice and the contractual signature. This phase involves interaction between the government and firms through a previously chosen competitive tendering procedure and other parameters defined in the *internal phase*.

The main objective of a bidding process conducted by a PBU is to seek the best possible contract for the government, taking into account the parameters defined in the planning phase. The public official responsible for negotiating with suppliers cannot change any previously defined parameters such as quantities, delivery time, reference prices, and tendering procedures.

The way the *internal phase* routines are performed may substantially affect the bidding process results. Given that urgent purchases (litigated or administrative purchases) are planned under very restrictive conditions, they can make negotiations very difficult. Therefore, the expected outcomes of these urgent

purchases tend to be much worse than the outcomes when purchases are made under ordinary planning conditions.

In addition, informing all that a tender is an urgent purchase can amplify these effects. It is mandatory by law to provide information in the public notice that the purchase originated from a court order or administrative request; this is public information[12]. For example, participating suppliers know that the SES/SP and its officers responsible for the bidding may be punished if a negotiation for a litigated purchase is unsuccessful. Making this situation public information thus can be a relevant imbalance factor in the bargaining process between the government and firms.

Despite the differences in planning conditions, ordinary and urgent purchases are made through the state e-platform under the same operational conditions. Each PBU purchases in a decentralized way through the Bolsa Eletronica de Compras (BEC), the e-procurement platform of São Paulo state. Since 2007, it has been mandatory to use the BEC to purchase common goods and services in São Paulo state, including all 99 SES/SP units.

The BEC figures of SES/SP buying are expressive. In 2018, approximately US$1.7 billion were traded, and since 2009, the electronic platform has handled more than R$7.4 billion in SES/SP negotiations (approximately 34% of all state purchases).

[12] See Appendix for examples of public notices containing explicit disclaimers for urgent purchases.

Almost 55,000 item purchase offers were negotiated, comprehending approximately 6,350 different traded items. The BEC has an extensive catalog of standardized items and services that are described in great detail[13].

The SES/SP uses the same two types of competitive tendering procedures available at the BEC to make *ordinary* and *urgent* (litigated and administrative) purchases: (i) sealed-bid tendering (*convite*) and (ii) multiround descending auctions (*pregão*).

In sealed bids, firms send their proposals to the government by a specific date specified in the notice. At a later date, the proposals and participants become public information when the auctioneer "opens" the envelopes. The winning firm is the one among those with appropriate documentation that submitted the lowest bid. *Convite* is allowed up to the purchase value limit of R$176,000 (approximately US$35,200).

*Pregão* has no limit on the purchase value. This mode is a combination of a modified sealed-bid tender and reverse auction. In this case, PBUs rank the qualified proposals only under the conditions set out in the sealed-bid phase's notice. Then, the auctioneer publicly reveals all valid proposals, keeping firms' identities anonymous.

Next, the descending auction begins: for 20 minutes, each qualified firm submits

[13] See details in section 3.1.

its bids, knowing the current lowest valid bid. If there is a valid bid between 16 and 20 minutes, the auction will be extended for another 4 minutes. It ends only if 4 minutes passed with no valid bid. The final criterion[14] for winning the tender is presenting the lowest bid price, which must be lower than the reference price.

One of the main differences between the *convite* and *pregão* modes is that the latter allows for a negotiation phase after the reverse auction during which companies and the government can negotiate the lowest final price previously obtained. On the other hand, since *convite* has a single phase, it tends to be a more straightforward procedure to perform and monitor.

Planning and executing tenders consist of a very costly public administration process that demands relevant financial and human resources. An acquisition made by *pregão* or *convite* can have administrative costs from US$500 to US$5,200[15], depending on the bid complexity. Thus, if a public tender fails to obtain a supplier, it creates relevant waste for the government.

## 3 Data and Sample Definition

This section describes each data source and details the sample characteristics used in the empirical section. First, we present the bidding-level data on common

[14] "Best price" criterion.

[15] https://www.cgu.gov.br/noticias/2017/07/cgu-divulga-estudo-sobre-eficiencia-dos-pregoes-realizados-pelo-governo-federal/nota-tecnica-no-1-081-2017-cgplag-dg-sfc.pdf/view

goods and services purchased by the São Paulo state government through the BEC with a particular interest in what health-related products the SES/SP purchased and how from 2009 to 2019.

Second, we describe the dataset at the individual level for all lawsuits associated with requests for free health-related products that occurred in the state courts of São Paulo during this period. This dataset includes information on individual court requests and judges' decision texts.

We utilize a unique combination of administrative databases in public procurement bidding processes, health litigation registers, and judicial decision texts in São Paulo, Brazil, from January 2009 to December 2019.

## 3.1 Public Procurement Data: Health-Related Products

We use administrative data on bidding-level public procurement tenders of common goods and services in the state of São Paulo, Brazil, from January 2009 to December 2019. These transactions took place under the BEC electronic procurement platform, which is available to all PBUs across the state. The Department of Finance of São Paulo state (SEFAZ/SP) is responsible for the operational management and centralization of BEC bidding data.

In total, 1,344 PBUs make regular purchases through the BEC, including state-level executive, legislative, and judiciary bureaus in the state of São Paulo as

well as other affiliated entities, such as some municipalities located in the state of São Paulo and a group of private organizations. PBUs purchased 169,607 different types of items (goods and services), totaling 3,866,407 transactions from 19,007 distinct firms in this period.

The BEC has a very detailed catalog of standardized goods and services organized in three levels: group, class, and item. For instance, health items are classified as group 65 (Medical, dental and hospital equipment and supplies). Thus, the item coded 110639 is the drug "Furosemide 40 milligrams, coated tablets, units," belonging to class 6531 (Medicines prescribed with or without ANVISA notification/registration) and group 65.

Table 2. Descriptive Statistics: Public Tenders

Data are organized by purchase offer (*PO*), the electronic document issued by the PBU that identifies and quantifies the goods and services that will be purchased. A *PO* is defined by a 22-character code and may contain one or more listed items, but each item has its own purchase process. Thus, the purchase of an item is uniquely identified by the combination of the *PO* and the purchased item codes (*POI*).

Each *POI* provides information about the *internal phase* parameters, such as

item quantities and reference prices, and *external phase* outcomes, such as bid prices (winners and losers), number of participant firms, number of bids, whether the public tender was successful or not, and the identification of the PBU and the auctioneer, among other variables.

In the empirical section, we restrict attention to SES/SP purchases of prescription and nonprescription drugs. It is possible to identify government acquisitions as *ordinary*, *administrative,* and *litigated* purchases using *bidding notices*.

In the public notice, there is a section called "Object of the Contract" that consists of a description of what is being purchased and the reason for the purchase. We use a regular expression algorithm (REGEX) to process the public notice texts and identify which POIs correspond to *litigated purchases*[16].

## 3.2 Health Litigation Data

Data about health litigation come from two sources: the S-CODES database and texts of court decisions.

Managed by the SES/SP, S-CODES is an administrative database that contains a detailed record of all health claims against the state of São Paulo from 2009

[16] First, we randomly selected 1,203 purchase orders, separating expressions that could identify the type of bid for each purchase order. Then, we ran an algorithm that checked the "Object of the Contract" field of all POs for the selected expressions, creating a binary variable for each type of bid.

to 2019.

The main variables that we derive from the S-CODES database for each litigated item are[17] (i) the *SUS list*: a dummy variable with the value of 1 if the item belongs to the SUS list and 0 otherwise; (iii) the *Package*, with a value of 1 if the item was jointly litigated with other products and 0 otherwise; and (iii) the *Preliminary injunction*, with a value of 1 if the court decision was enforced through a preliminary injunction and 0 otherwise.

Table 3. Descriptive Statistics: Health Litigation

Moreover, we use the texts of all court decisions against the state of São Paulo about health-related products from 2009 to 2019 to identify two aspects of health litigation: (i) individuals' main reasons for litigating and (ii) the main arguments used by judges to grant or reject a judicial claim. We use a supervised machine learning method to process all text decisions and search for litigation and judges' decision patterns.

## 4 Empirical Strategy

[17] S-CODES has the same primary key (item code) as the BEC database.

The empirical analysis is organized into two distinct parts.

First, using judicial decisions and administrative requests that obligate the government to provide free prescription and nonprescription drugs to individuals and restrict the government's ability to plan and bargain with suppliers as a policy experiment, we compare *ordinary* and *urgent* purchases to estimate differences in the tender outcomes.

Finally, we estimate the "under the gun" effect, which, controlling for all other variables, consists of efficiency loss in public purchases due to the threat of punishing public official in litigated tenders. In this case, we compare *litigated* and *administrative* purchases, two distinct types of *urgent* tenders, to identify the effect.

## 4.1 The Enforcement Costs of Health Litigation

As mentioned before, when there is an injunction or an administrative request that forces the government to make an urgent acquisition, the SES/SP has significantly less time to plan it and a lower degree of discretion in setting key procurement parameters than in an *ordinary* purchase. This first estimation aims to illustrate the impact of these exogenous and anomalous requests on the critical parameters of tenders.

First, it is essential to note that both judicial and administrative requests

constitute shocks that are not correlated with any unobserved factors in the purchase process. Although a judicial or administrative order's success depends on individuals' characteristics, the order purchase process does not.

The principle of impersonality[18] in public administration makes the planning and execution of the purchase utterly independent of the requesting individual's characteristics. Thus, the purchase results do not depend on who placed the order or who will benefit from it. The tender outcomes depend on the purchase characteristics, such as the items to be purchased, planning, and market conditions.

Who makes the purchase, i.e., public officials of the PBUs, judicial orders, or administrative requests, functions as an exogenous restriction on the way they make purchases. Primarily, in this particular case, the shocks separate the purchases into two types according to planning conditions and required delivery time: ordinary and urgent purchases. Since planning conditions and delivery time are very similar between purchases based on judicial orders and administrative requests, they are both classified as *urgent*.

Thus, we identify the effects of these exogenous shocks on the tender results, comparing ordinary and urgent purchase types. Differences in reference prices between *urgent* and *ordinary* purchases of purchase order $i$, with a good $g$ and

[18] The principle of impersonality establishes that the public administration must be impartial in defending the public interest in any administrative action. This principle avoids discrimination or privileges for specific individuals. Therefore, bids must be planned and executed regardless of who requests them.

in time *t*, for instance, are estimated in the following specification for the log of reference price:

$$\ln Ref\_Price_{igt} = \beta Urgent_{igt} + \alpha_g + \lambda_t + \mathbf{x}\boldsymbol{\delta} + \epsilon_{igt} \quad (1)$$

where $\alpha_g$ and $\lambda_t$ are item fixed effects and time trend dummies, respectively, and $\mathbf{x}$ is a vector of control variables. The variable $Urgent_{igt}$ has a value of 1 if it is a *litigated* or *administrative purchase* and 0 if it is an *ordinary purchase*.

We use data of all public bids related to SUS-list medicines from January 2009 to December 2019. The data include only items with at least one urgent purchase and at least one ordinary tender. The results are shown in Table 4.

Table 4. Reference Prices: Urgent vs. Ordinary Purchases

| | (1) OLS | (2) FE | (3) FE | (4) FE |
|---|---|---|---|---|
| urgent | .4988*** | .5243*** | .4967*** | .4725*** |
| | (.0379) | (.0383) | (.0377) | (.0373) |
| type_mgmt | .6535*** | | .6488*** | .553*** |
| | (.0516) | | (.051) | (.0521) |
| sealed-bid | | | | -.1708*** |
| | | | | (.0184) |
| _cons | .33*** | .2554*** | -.3851*** | -.2307*** |
| | (.0607) | (.0699) | (.0807) | (.0809) |
| Observations | 59708 | 59708 | 59708 | 59708 |
| R-squared | .7767 | .0702 | .0781 | .0816 |
| Item dummies | YES | YES | YES | YES |
| Year dummies | NO | YES | YES | YES |
| PBU dummies | YES | NO | YES | YES |

*Standard errors are in parentheses.*
**** p<.01, ** p<.05, * p<.1*

It is possible to observe that reference prices are consistently higher in *urgent purchases*, considering all specifications: items are, on average, from 60.40% to 68.93% more expensive than in *ordinary purchases*.

The positive difference in reference prices captures the effects of worse conditions for planning purchases: smaller quantities, shorter delivery times, and the potential risk of punishment. As shown in Table 5, the quantities chosen are indeed lower for urgent purchases.

Table 5. Quantities: Urgent vs. Ordinary Purchases

| | (1) OLS | (2) FE | (3) FE | (4) FE |
|---|---|---|---|---|
| urgent | -.8128*** | -.8811*** | -.8272*** | -.9402*** |
| | (.0625) | (.0623) | (.0626) | (.0635) |
| type_mgmt | -1.2808*** | | -1.2642*** | -1.7127*** |
| | (.1076) | | (.107) | (.1082) |
| sealed-bid | | | | -.8*** |
| | | | | (.0428) |
| _cons | 7.412*** | 6.1144*** | 7.3626*** | 8.0859*** |
| | (.1117) | (.1003) | (.1458) | (.1492) |
| Observations | 59708 | 59708 | 59708 | 59708 |
| R-squared | .4141 | .1606 | .1702 | .195 |
| Item dummies | YES | YES | YES | YES |
| Year dummies | NO | YES | YES | YES |
| PBU dummies | YES | NO | YES | YES |

*Standard errors are in parentheses.*
*** p<.01, ** p<.05, * p<.1*

Usually, governments seek to buy goods and services from the private sector on a large scale to obtain higher discounts on negotiated prices. This "bulk

procurement" effect might be maximized if PBUs could adequately plan the acquisition process of goods and services.

The results suggest the following general mechanism: court orders or administrative orders create worse conditions for planning a given public tender. This shock impacts the capacity to define the amount to be purchased and the maximum prices PBUs are willing to pay.

Given that budgetary resources are scarce, especially for urgent orders, PBUs choose smaller quantities and pay higher prices to comply with court orders in the proper time. Thus, PBUs lose bargaining power and the possibility of substantial bulk discounts.

The effective fulfillment of court orders or administrative requests occurs in the external phase, consisting of the negotiation itself. Compliance with these external requests directly impacts the total amount of public spending. Unplanned, extrabudgetary resources are used to meet these external requests.

In urgent purchases, the negotiated quantities are, on average, nearly 53% smaller than in ordinary purchases. Both reference prices and negotiated prices may be affected: the lower the quantities purchased, the higher the prices are.

We use a specification similar to that presented above, as a baseline to model differences in outcomes $y$ between *urgent* and *ordinary* purchases of purchase order $i$ with good $g$ and in time $t$:

$$\ln y_{igt} = \beta Urgent_{igt} + \alpha_g + \lambda_t + \mathbf{z}\boldsymbol{\delta} + \epsilon_{igt} \quad (2)$$

where $\mathbf{z}$ is a vector of controls, including the purchased quantities defined in the internal phase. This is a way to capture possible bulk discounts. The estimations for negotiated prices are presented in Table 6.

Table 6. Negotiated Prices: Urgent vs. Ordinary Purchases

| | (1) OLS | (2) FE | (3) FE | (4) FE |
|---|---|---|---|---|
| urgent | .3672*** | .3526*** | .3568*** | .268*** |
| | (.0414) | (.0429) | (.0417) | (.0432) |
| lquantity | -.3081*** | -.3011*** | -.3025*** | -.3301*** |
| | (.036) | (.0334) | (.034) | (.034) |
| type_mgmt | -.1814** | | -.1422* | -.4735*** |
| | (.0801) | | (.0742) | (.0863) |
| sealed-bid | | | | -.5403*** |
| | | | | (.0344) |
| _cons | 2.4156*** | 1.2356*** | 1.3862*** | 2.0863*** |
| | (.2934) | (.206) | (.2665) | (.2892) |
| Observations | 38440 | 38440 | 38440 | 38440 |
| R-squared | .879 | .3393 | .3396 | .3798 |
| Item dummies | YES | YES | YES | YES |
| Year dummies | NO | YES | YES | YES |
| PBU dummies | YES | NO | YES | YES |

*Standard errors are in parentheses.*
**** p<.01, ** p<.05, * p<.1*

As shown, the government buys the same product under different planning situations: *ordinary* and *urgent* conditions. Negotiated prices are consistently

higher for *urgent purchases*. On average, items purchased in adverse conditions are from 30.73% to 44.37% more expensive than those purchased in ordinary tenders.

Higher prices for urgent purchases suggest that adverse trading conditions strongly affect government bargaining power. On the other hand, tight deadlines and small quantities can alienate firms potentially interested in selling to the government. Table 7 presents estimations for the number of participant firms in urgent vs. ordinary purchases.

Table 7. Participant Firms: Urgent vs. Ordinary Purchases

| | (1) OLS | (2) FE | (3) FE | (4) FE |
|---|---|---|---|---|
| urgent | -.3887*** | -.3831*** | -.3811*** | -.3373*** |
| | (.019) | (.0191) | (.0191) | (.02) |
| lquantity | .148*** | .1475*** | .1468*** | .1604*** |
| | (.0068) | (.0068) | (.0068) | (.0079) |
| type_mgmt | -.0463* | | -.0672** | .096*** |
| | (.0267) | | (.0281) | (.0293) |
| sealed-bid | | | | .2661*** |
| | | | | (.0184) |
| _cons | -.3167*** | -.0293 | .0419 | -.303*** |
| | (.0632) | (.0563) | (.0701) | (.0841) |
| Observations | 38430 | 38430 | 38430 | 38430 |
| R-squared | .4691 | .2645 | .2647 | .2886 |
| Item dummies | YES | YES | YES | YES |
| Year dummies | NO | YES | YES | YES |
| PBU dummies | YES | NO | YES | YES |

*Standard errors are in parentheses.*
*** p<.01, ** p<.05, * p<.1*

There is a consistent drop in firms that participate in urgent purchases, varying

from 28.63% to 32.21%, compared to ordinary ones. This result may indicate that the screening process is impaired in urgent purchases, as PBUs are not able to attract as many suppliers as usual.

A possible consequence of attracting a smaller number of interested suppliers is less competitive bidding. Few companies do not necessarily mean less competition. For instance, very few companies offer certain specific medicines, but they consist of oligopolies with very competitive dynamics. However, Table 8 supports the first idea in the case of the tenders studied here.

Table 8. Number of Bids: Urgent vs. Ordinary Purchases

| | (1) OLS | (2) FE | (3) FE | (4) FE |
|---|---|---|---|---|
| urgent | -.509*** | -.5009*** | -.5166*** | -.6148*** |
| | (.0366) | (.0325) | (.0322) | (.0342) |
| lquantity | .2162*** | .2208*** | .2261*** | .1956*** |
| | (.0158) | (.0134) | (.0137) | (.0127) |
| type_mgmt | .478*** | | .5265*** | .1602*** |
| | (.0446) | | (.0409) | (.04) |
| sealed-bid | | | | -.5973*** |
| | | | | (.0337) |
| _cons | -.2387* | -.1271 | -.6847*** | .0893 |
| | (.1362) | (.1025) | (.1281) | (.1311) |
| Observations | 38430 | 38430 | 38430 | 38430 |
| R-squared | .4232 | .2181 | .2232 | .2703 |
| Item dummies | YES | YES | YES | YES |
| Year dummies | NO | YES | YES | YES |
| PBU dummies | YES | NO | YES | YES |

*Standard errors are in parentheses.*
**** p<.01, ** p<.05, * p<.1*

Although the number of participants for urgent purchases is approximately 30%

lower, the number of bids is even smaller. On average, the number of valid bids falls from 39.40% to 45.93% in urgent purchases compared to ordinary ones.

This firm behavior may reflect the lack of incentives to be more aggressive in the context of urgent purchases. Since there are fewer participating companies and less bargaining power for PBUs, suppliers make less effort to lower prices.

Moreover, adverse conditions for purchasing medicines can generate another problem related to firm screening processes. When conditions are precarious, the bidding process might fail. There may be a lack of interest among suppliers, or the PBUs cannot obtain a reasonable price. Urgent purchases tend to be significantly more likely to fail than ordinary purchases, as shown in Table 9.

Table 9. Successful Tenders: Urgent vs. Ordinary Purchases

| | (1) LOGIT | (2) LOGIT | (3) LOGIT | (4) LOGIT |
|---|---|---|---|---|
| urgent | -.4871*** | -.4871*** | -.6667*** | -.5471*** |
| | (.0252) | (.0252) | (.029) | (.0301) |
| lquantity | .2378*** | .2378*** | .2508*** | .2803*** |
| | (.006) | (.006) | (.0063) | (.0065) |
| type_mgmt | | | .1628** | .756*** |
| | | | (.0695) | (.073) |
| sealed-bid | | | | .9603*** |
| | | | | (.0305) |
| _cons | -1.8201*** | -1.8201*** | -2.1149*** | -2.9174*** |
| | (.3403) | (.3403) | (.3536) | (.3615) |
| Observations | 59672 | 59672 | 59672 | 59672 |
| r2_p | .1238 | .1238 | .1328 | .1572 |
| Item dummies | YES | YES | YES | YES |
| Year dummies | NO | NO | NO | YES |
| PBU dummies | NO | NO | YES | YES |

*Standard errors are in parentheses.*
**** p<.01, ** p<.05, * p<.1*

Urgent purchases are from 38.56% to 48.66% less likely to succeed than ordinary purchases. Failure to bid has relevant implications in terms of budgetary costs. First, when a court-ordered purchase is not made, it generates relevant punishment costs, such as fines and blocking of budgetary resources for the PBU. In addition, as mentioned in section 2.3, planning and executing a purchase have high costs. Therefore, resources are wasted in case of failure.

## 4.2 The "Under the Gun" Effect

As already mentioned, urgent purchases consist of those arising from court orders and administrative orders. Both litigated and administrative purchases are made under challenging conditions in terms of planning and execution. However, there is a single significant difference between them: a litigated tender likely results in a punishment for public officials if they fail to complete the purchase.

Making public the information that a tender is of a litigated type might have an additional effect on the results of bidding processes. Since all participants learn that the government is under even higher pressure to purchase, firms have

additional advantages over PBUs in the bargaining process.

This section's main objective is to estimate this "additional effect"; we call it the *"under the gun" effect*. We use all public bid data, including SUS-list and non-SUS-list medicines, from January 2009 to December 2019.

We restrict the analysis to items with at least one litigated purchase and at least one administrative tender; data on ordinary purchases are excluded from those estimations. The idea is to compare litigated and administrative purchases exclusively. Using the same identification strategy presented in section 4.1, we adopt the following specification as the baseline equation:

$$\ln y_{igt} = \beta Adm_{igt} + \alpha_g + \lambda_t + \mathbf{z}\boldsymbol{\delta} + \epsilon_{igt} \quad (3)$$

where $Adm_{igt}$ has a value of 1 if it is an *administrative purchase* and 0 if it is a *litigated purchase*. Table 10 presents the estimation of the results for negotiated prices. Negotiated prices are lower for *administrative purchases*. On average, administrative tenders are 8.11% to 9.06% less expensive than litigated tenders.

Table 10. Negotiating Prices: The "Under the Gun" Effect, Litigated vs. Administrative Tenders

| | (1) OLS | (2) FE | (3) FE | (4) FE |
|---|---|---|---|---|
| administrative | -.095*** | -.0859*** | -.0859*** | -.0846*** |
| | (.0238) | (.0243) | (.0243) | (.0242) |
| lquantity | -.4003*** | -.3942*** | -.3942*** | -.3981*** |
| | (.0233) | (.0236) | (.0236) | (.0234) |
| type_mgmt | -.1564 | | -.184 | -.4322* |
| | (.181) | | (.1879) | (.2519) |
| sealed-bid | | | | -.5173*** |
| | | | | (.0401) |
| _cons | 2.4521*** | 3.9031*** | 4.0871*** | 4.5326*** |
| | (.2431) | (.1344) | (.2391) | (.3013) |
| Observations | 51013 | 51013 | 51013 | 51013 |
| R-squared | .9293 | .3718 | .3718 | .3837 |
| Item dummies | YES | YES | YES | YES |
| Year dummies | NO | YES | YES | YES |
| PBU dummies | YES | NO | YES | YES |

*Standard errors are in parentheses.*
**** p<.01, ** p<.05, * p<.1*

In other words, litigated purchases are between 8.83% and 9.97% more expensive than administrative purchases. This difference is the "*under the gun*" effect. With similar planning and execution conditions between administrative and litigated purchases, the estimated price difference can be attributed exclusively to the possible punishment of PBUs in case of failure to purchase.

## 5 Conclusion

Implementing public policies demands various types of resources, such as common goods and services. It is crucial that the process of purchasing these goods and services be well planned and executed so that the government may use its budget efficiently and achieve public policy goals effectively.

This paper investigates the enforcement costs of health litigation and administrative requests for the public budget. We evaluate the government waste generated when the judiciary directly affects public policy. In this case, health litigation imposes multifold restrictions on the public procurement process, harming tender outcomes.

From a policy perspective, this research indicates that judges should consider the public budget implications and administrative costs of purchasing health items under pressure in their decisions. An institutional arrangement integrating the judiciary and the executive branches, enabling joint actions, might mitigate waste in the health litigation context.

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# Appendix

## A.1 Public Notice Disclaimers

### A.1.1 Administrative Purchases

**EDITAL DE PREGÃO ELETRÔNICO CGA n.° 156/2019**

**SPDOC SES n.° 1322708/2019**

**OFERTA DE COMPRA N° 090102000012019OC00321**

**ENDEREÇO ELETRÔNICO: www.bec.sp.gov.br**

**DATA DO INÍCIO DO PRAZO PARA ENVIO DA PROPOSTA ELETRÔNICA: 05/07/2019**

**DATA E HORA DA ABERTURA DA SESSÃO PÚBLICA: 24/07/2019 as 10h00min**

A **SECRETARIA DE ESTADO DA SAÚDE DE SÃO PAULO – COORDENADORIA GERAL DE ADMINISTRAÇÃO**, por intermédio do(a) Senhor(a) **ADHEMAR DIZIOLI FERNANDES**, RG nº **10.129.374-4** e CPF nº **130.456.788-58**, usando a competência delegada pelos artigos 3° e 7°, inciso I, do Decreto Estadual n° 47.297, de 06 de novembro de 2002, torna público que se acha aberta, nesta unidade, situada a **Avenida Doutor Enéas de Carvalho Aguiar, 188, Cerqueira César, São Paulo/SP**, licitação na modalidade **PREGÃO**, a ser realizada por intermédio do sistema eletrônico de contratações denominado "Bolsa Eletrônica de Compras do Governo do Estado de São Paulo – Sistema BEC/SP", com utilização de recursos de tecnologia da informação, denominada **PREGÃO ELETRÔNICO**, do tipo **MENOR PREÇO**, objetivando a **AQUISIÇÃO DE ITENS DE ENFERMAGEM EM ATENDIMENTO ÀS DEMANDAS ADMINISTRATIVAS,** que será regida pela Lei Federal nº 10.520/2002, pelo Decreto Estadual n° 49.722/2005 e pelo

### A.1.2 Litigated Purchases

**EDITAL DE PREGÃO ELETRÔNICO n.º0157/2019**
**PROCESSO n.º1887851/2019**
**OFERTA DE COMPRA Nº 090133000012019OC00172**
**ENDEREÇO ELETRÔNICO: www.bec.sp.gov.br**
**DATA DO INÍCIO DO PRAZO PARA ENVIO DA PROPOSTA ELETRÔNICA: 10/09/2019**
**DATA E HORA DA ABERTURA DA SESSÃO PÚBLICA: 20/09/2019 – as 09H10MIN**

O Departamento Regional de Saúde de São João da Boa Vista-DRS XIV, por intermédio do Senhor Diretor, Dr. Benedito Carlos Rocha Westin, RG nº 4.849.352 e CPF nº 901.204.188-00 , usando a competência delegada pelos artigos 3° e 7°, inciso I, do Decreto Estadual n° 47.297, de 06 de novembro de 2002, torna público que se acha aberta, nesta unidade, situada a Praça Dr. Boa Vista, 221 – Centro em São João da Boa Vista, licitação na modalidade **PREGÃO**, a ser realizada por intermédio do sistema eletrônico de contratações denominado "Bolsa Eletrônica de Compras do Governo do Estado de São Paulo – Sistema BEC/SP", com utilização de recursos de tecnologia da informação, denominada **PREGÃO ELETRÔNICO**, do tipo menor preço, objetivando a **AQUISIÇÃO DE MEDICAMENTOS PARA PACIENTES QUE INGRESSARAM COM AÇÕES JUDICIAIS,** que será regida pela Lei Federal nº 10.520/2002, pelo Decreto Estadual n° 49.722/2005 e pelo regulamento anexo à Resolução CC-27, de 25 de maio de 2006, aplicando-se, subsidiariamente, no que couberem, as disposições da Lei Federal