The participation of business consortia in bidding processes: Free choice of the Bidding Company?

João Paulo da Silveira Ribeiro
is member of the Administrative Law Committee of OAB/RJ, professor at FGV *Direito Rio* and partner of the Adalberto Ribeiro Advogados law office.

João Pedro Accioly Teixeira
is an academic of the Law School of the *Universidade do Estado do Rio de Janeiro* (UERJ) and an associate of the law office Adalberto Ribeiro Advogados.

SUMMARY

The scope of this study is well delimited by its title. This article aims to discuss the participation of consortium companies in public bids. It is expected, through it, to outline some basic standards to guide the administrative decision, which allows or not the participation of consortia in bidding processes, finally identifying situations that, by hindering the administrator's discretion, impose a certain decision.

Keywords: Business Consortia. Bidding. Discretion. Limits.

1. INTRODUCTION

Consortia are unincorporated associations of companies, contractually established, aimed at performing certain joint venture, according to the legal provisions of articles 278 and 279 of Act .404/76. This institution is based on the mutual autonomy of those associated companies, to pursue a common business purpose that, quite likely, would not be reached only with the individual capability of each consortium company, whether for technical reasons or for economic-financial reasons.

Some public or private demands, due to their significant magnitude or high complexity, can only be met through this corporate instrument. Regarding Administrative Law, the Bidding Act (article 33) and

Concession Act (article 19) expressly authorize the bidding entity to allow the participation of consortia.

However, as we aim to further discuss, depending on circumstances and their implications, this facultas agenda can either be imposed or be fully suppressed.

2. A DEBATE IN PROGRESS

Case law and doctrine used to assert, without any significant temperaments and problematization, that the possibility for the participation of consortia in bidding processes would subject it to a discretionary decision of the Bidding Company.

Nevertheless, over the years, the Federal Court of Accounts and the most prominent administrators started to relativize discretion on the topic, which in other times, had, equivocally, almost absolute features.

Moreover, as a comment, it is worth mentioning that in recent years, a large part of the doctrine has been surpassing the rigid and classic, though anachronistic, dichotomy between discretionary and related administrative acts. In such manner, especially taking into account the acknowledgment of the regulatory effectiveness of legal principles, the theory of degrees of relatedness to legality[1] is being developed, and outlining the institution of justifiable discretion (MORAES, 2004, p. 34), pursuant to the need to base administrative decisions[2].

Administrative discretion, as it is known, consists of "the margin of choice left by law to the public administrator's judgment so that, in the pursuit of achievement of statutory objectives, chooses, among legitimate legally options, the measure that, in such concrete reality, it is understood as most convenient" (ARAGÃO, 2013, p. 161). In this context, according to the Democratic State, one can can not confuse discretion with a blank check or the universal excuse for several wills3.

Back to the proposed topic, it is found that, at a certain moment, the need to "demonstrate with solid grounds the choice to be made by the administrator during the bidding process, regarding the prohibition to the participation of consortia" has been established (TCU, Award 1.165/2012, Plenary Session. Reporting Judge Raimundo Carreiro).

In this same line of though, Marçal Justen Filho (2014, p. 661) warns that the discretion in evidence:

> "**it does not evidently mean authorization for arbitrary or unfounded decisions**. To allow or deny the participation of consortia is a result of an assessment process of market reality against the object to be bid and weighing of risks inherent to the performance of a myriad of entities associated for the accomplishment of a purpose. As with every decision made because of discretionary competence, control related to compatibility between reasons and reality is ad-

> mitted and regarding the proportionate adequacy between the aimed means and results".

Contemporarily, several authors, the Brazilian Superior Court of Justice[4], State Courts of Appeals and the unanimous case law of the Federal Court of Accounts indicate that, although a priori, the Administrator has a great decision margin on the point, the participation of consortia is mandatory in bids in which the magnitude, heterogeneity and unfeasibility of a material division of the bid object, restrict the universe of possible bidders quite excessively.

In this sense, Carlos Ari Sundfeld proposed that "in cases where, the object is of significant magnitude, if its division is proved to be fully inviable, for operating reasons, the invitation to bid (ITB) shall forcefully allow the pooling of companies" (1995, p. 67). Endorsing such position, Egonn Bockmann and Fernando Vernalha have expressed their views:

> "producing an expressive and demanding bid, the Bidding Company shall seek means to mitigating the high market concentration, allowing the participation of bidders under the consortium system, as set forth in article 33 of the General Bidding Act (Lei Geral de Licitação - LGL). It is evident that the consortium systematics may favor the expansion of market participation, by compensating, in a certain way, the restriction of the universe of bidders imposed by the technical or economic dimension of the bid object" (2012, p. 119)

Based on these assumptions, such authors conclude that what will determine the existence or not of discretion on the topic "will the concrete case characteristics: if competitiveness is maintained without the participation of consortium companies, the ITB may forbid the participation of consortia" (2012, p. 120).

The understanding of the State Court of Appeals of Minas Gerais is not different:

> "APPEAL – WRIT OF MANDAMUS – CHALLENGE TO INVITATION TO BID – MUTIPLE SERVICES – SIMULTANEOUS QUALIFICATION – UNLAWFUL DEMAND – COMPETITION LOSS - ACT N° 8.666/1993 – ARTICLES 15, IV AND 23, § 1° - LAWYER'S FEES – INAPPLICABILITY OF WRIT. The division or fractioning of the bid object is mandatory when, in addition to being technical viable, does not imply in financial loss to the Bidding Company.
>
> The bidding entity, on its turn, not proceeding with contract per item, has to duty to explain the reasons for global acquisition, **and provide in the ITB the possibility of participation of interested parties established as consortium, otherwise, the bidding process may be characterized as illegal, by violating the principle of competitiveness**". (TJMG - Civil Appeals 1.0024.06.098029-9/002, Reporting Judge: Associate Justice Claudia Maia, 13th CIVIL CHAMBER, judgment on Sep 30, 2010, court decision published on Oct 29, 2010)

The State Court of Appeals of Rio Grande do Sul, in addition to considering the unjustified prohibition to the participation of consortium companies in large bids illegal, it understands that the future administrative agreement is absolutely null and, more seriously, that the manager which, through this route, intentionally hinders the competitiveness of the bidding procedure, commits administrative improbity (in addition to misdemeanor, e.g. article 90, of the Bidding Act):

> APPEALS. **BIDDING AND ADMINISTRATIVE AGREEMENT**. CLASS ACTIN. PRICE SURVEY N° 16/2007 OF THE MUNICIPALITY OF SÃO LEOPOLDO. **PROHIBITION TO THE PARTICIPATION OF CONSORTIUM BIDDERS. VIOLATION OF BROAD COMPETITION. ADMINISTRATIVE AGREEMENT DECLARED VOID**. The Price Survey aimed at contracting company for the provision of surveillance services and inland waterway vessel operation. Bidding procedure with the Lowest Lump-Sum Price which is only related to legal requirements and lowest price tender. **Clause 2.1.2 of the Invitation to Bid challenging the formation of a consortium that breaches article 33 of Act 8.666/93 and does not meet public interest. Bidding procedure awarded as null and void. ADMINISTRATIVE IMPROBITY. BIDDING. COMPETITIVENESS**. INVITATION TO BID. AMENDMENT. DEMAND. ARMED SURVEILLANCE SERVICE. INLAND WATERWAY BOAT OPERATOR. **It is an act of administrative improbity of the Chair-**

man of the Bid Committee, without request from any Municipal Secretariat, to include in the invitation to bid, a totally inapplicable demand aiming to hinder the bidding procedure competitiveness. In such case, in the ITB for contracting armed surveillance services, the services of inland waterway boat operator were included, which have never been provided. **CONTRACTUAL NULLITY**. SERVICE PROVIDED. NON-APPLICABLE INDEMNITY. The validity of the action for damage presupposes that the act whose nullity is declared, is harmful to public property. Since there is lack of evidence, indemnity is not due. There is no grounds for ascribing liability to the contractor, which did not perform any tort. The fees paid due to the effective service provision shall not be refunded. UNSUBSTANTIATED APPEAL OF THE MUNICIPALITY. UNANIMOUS DECISION. APPEAL OF THE PUBLIC PROSECUTION SERVICE ACCEPTED. MAJORITY DECISION. (TJ/RS, Civil Appeal N° 70052803954, 22nd Civil Chamber, Reporting Judge: Associate Justice Eduardo Kraemer, Awarded on Nov 28, 2013)

Therefore, whenever the bid object is remarkably large or complex and heterogeneous, the bidding entity shall forcefully allow the participation of pooled companies in the bidding procedure. In other words, the Brazilian legal system and its set of informative principles impose the admission of consortia in large or heteroclite bidding procedures – under penalty of hindering the principle of competitiveness and, in some circumstances, the bidding itself may turn into an improper and ineffective procedure.

Not in other sense, the Federal Court of Accounts has been repeatedly determining that, in such cases, the Bidding Company either divides the bid object in several procedures, if possible, or conducts a single bid, and in this case, it shall mandatorily allow the participation of consortia. Depicting this case law tendency, the following awards are shown:

"9.1.1. considering article 23, § 1, of Act 8.666/93, with wording given by Act 8.883/94, and in Award 247 of the Court, **to conduct the division of the bid object aimed at the contracting of work**, services and supply required for the Implementation and Complementation of the Alcântara Launching Center and Alcântara Space Center, **it shall previously proceed with, to base the choice of the configuration of 'blocks' or 'lots' to be formed due to the division, technical studies that consider the market characteristics and that indicate the alternative division that best meets the principles of competitiveness, isonomy and achieve the most beneficial proposal for the Bidding Company, respecting the limitations of technical nature, without prejudice to the possible alternative of conducting a single bid to contract the whole complex or set of services from a single bidder, but, in this case, provided the participation of consortium companies is expressly allowed, in order to assure the material division of the object, as per the rules set forth in article 33 of Act 8.666/93**". (TCU, Award 108/2006, Plenary Session, Reporting Minister Judge Lincoln Magalhães da Rocha, with new wording given by Award 766/2006, also from the Plenary Session, Reporting Minister Judge Augusto Nardes).

***

"The case law of this Court has already established itself in the sense that the admission or not of a pooling of companies in bids and contracts is a discretionary competence of the

bidding company, and it shall always exercise it upon a grounded justification.

Notwithstanding the participation of consortia is recommended whenever the object is deemed of high complexity or significance, such alternative is not mandatory.

The solid circumstances shall be considered that indicate if the object is significant or complex enough that restricts the access of potential bidders. Only in such case, the bidding company must authorize the participation of pooled companies in the bidding procedure, aiming to expand competitiveness and obtain the most beneficial proposal". (TCU, Award 2.831, Plenary Session, Reporting Minister Judge Ana Arraes).

In this line, it is worth noting that the TCU has already decreed as illegal, even the unjustified restriction of the number of companies integrating each consortium, in a given bidding procedure – for understanding that, in view of the characteristics of the bid object, such practice would imply excessive constraint on the procedure competitiveness. This award is mentioned below:

"**The technical report does not recommend a limited number of companies per consortium. Even if it recommended it, that would not be enough to justify limitation not provided in Law. In addition to not being provided in Law, such limitation, in this case, as exposed in the initial analysis of this occurrence, is a factor of strong constraint to the competitiveness of the bidding procedure. Given the peculiarities, size, quantity and diversity of work, services and systems, some quite specific, that make up the bid object, limit the number of companies per consortium, especially to only three, it certainly shall limit the number of consortia that will be formed with the possibility to fulfill all the technical qualification requirements**, especially with the requirements contained in ITB 002 [003]/AEB/06.

As to the Court precedents, there is not generally accepted case law in such regard yet, because there are decisions in both senses, according to the Award mentioned in the initial analysis. What the TCU has considered as fundamental is to find, in the concrete case, if the limitation causes constraints to the bidding procedure competitiveness. In this case, if the ob-

> ject is not divided, certainly this constraint will occur, for the reasons aforementioned.
>
> **Furthermore, this limitation goes against the essence of the predominant understanding in Plenary Award 108/2006. It considered that the participation of consortia in the bid would supplement the legal requirement of division, because the consortium would mean a relevant division, as each participating company would be in charge of a certain part of the contractual object.** But Act 8.666/93 sets forth that work, services and purchases must be divided in as many portions as proved technically and economically feasible. The division is the rule and shall be taken to the limit of technical and economic feasibility. The aim is to expand the competitiveness of each portion as much as possible. **For consortia to really meet the purposes of the Law, pursuant to the understanding expressed in such Award, it shall be allowed the participation of as many companies as the number of technically and economically feasible portions**. There is nothing in the administrative proceeding of Invitation to Bid 002 [003]/AEB/06, nor in the technical and legal reports, which demonstrates technically and economically, how many and which these portions are. **Thus, limiting the number of companies per consortium is to limit the relevant division addressed in Plenary Award 108/2006, without technical and economic grounds for such limitation**". (TCU, AC 397/2008, Plenary Session, Reporting Minister Judge Augusto Sherman).

Hence, if the TCU understands as unlawful to limit the number of companies per consortium, when the complexity and magnitude features of the object are present, a fortiori, it is undeniably illegal to also forbid the formation of in totum consortia, when the bid object is of such nature.

Conversely, although less frequent, it is possible that, in some cases, there is no other choice for the Bidding Company but to forbid the formation of consortia. Think, for example, in an extremely technical service (e.g. supply and operation of a specific modality of military satellites), which is only provided by two or three specialized companies. In such scenario, the admission of consortia can allow the pooling of companies which would be natural adversaries, in other circumstances, thus restricting the number of potential bidders and, consequently, the bidding procedure competitiveness, which, finally hinders, and sometimes rendering the contracting of the most beneficial proposal impossible for Public Administration.

In this sense, it is worth mentioning the warning of CARVALHOSA (2004, p. 393), according to which the institution of consortia can be converted into an efficient instrument "of cartel of sector activities. Different from individual monopolies – trusts – the consortium can be aimed at the establishment of a collective monopoly. This is due to the associative regulation of the market conduct of companies acting as competitors then".

It is evident in this perspective, that the administrative decision can not be based in abstract and generic considerations. It must be researched, in a concrete and individual manner, which will be the likely implications of admission or exclusion of consortium companies in each specific bidding, given the peculiar characteristics of the pertinent market segment.

3. CONCLUSIONS AND NOTES

It is possible, from the considerations developed till then, to assert that the principle of competitiveness[5] shall appear as the balance for the admission or prohibition to the participation of consortium companies in public bids. Whenever accompanied by substantial and specific grounds, said decision shall aim at the expansion of the universe of potential competitors in the bidding procedure, with a view to foster competitiveness of the bidding procedure and, thus, ensure the most beneficial contract for the Bidding Company.

In this context, the important lesson of Alexandre de Aragão (2013, p. 297) is worth mentioning:

> "As competitiveness is the own realm of the bidding process, it is also an important hermeneutical guide, so that, in view of several possible interpretations for a certain situation, the one which is more competitive should be chosen (*in dubio pro competitionem*)".

Unfortunately, we are often faced with invitations to bid defiled by a double illegality. On one

hand, a formal defect is found, consistent in the lack of grounds for decision that allows or excludes the participation of business consortia in the bidding procedure. On the other, a relevant illegality is found, as, depending on the case in question, both admission and prohibition of consortia can be characterized as a restrictive practice to the bidding procedure competitiveness.

Considering the growing dimensions and complexity of state-owned activities and, consequently, of the objects of public bids, it can be stated that consortia, within administrative agreements, consist in a current and relevant phenomenon. Its proper management, in accordance with the highlighted parameters can greatly expand the competitiveness of some bidding procedures, generating considerable gains to the exchequer. Conversely, the institution, if used in a cunning or non-technically manner, can allow the intentional manipulation of important bidding procedures or culpable constriction of broad competitiveness that must be inherent to any bidding, implying incalculable losses to the Bidding Company, to companies that may be deprived from the right to competition, and indirectly, to society.

REFERENCES

ARAGÃO, Alexandre Santos de. *Curso de Direito Administrativo*, 2 a ed. Rio de Janeiro: Forense, 2013;

BINENBOJM, Gustavo. *Uma Teoria do Direito Administrativo.* 3a ed. Rio de Janeiro: Renovar, 2014;

BOCKMANN, Egon. Os Consórcios Empresariais e as Licitações Públicas. *Revista Eletrônica de Direito Administrativo Econômico*, Salvador, Instituto de Direito Público da Bahia, nº 3, ago-set-out, 2005. Disponível na internet: <http://goo.gl/A2oL4U>. Acesso em: 31.08.2015.

_____; VERNALHA, Fernando. *Licitação Pública – A Lei Geral de Licitações e o Regime Diferenciado de Contratações*, 2012, p. 119.

CARVALHO FILHO, José Santos. *Manual de Direito Administrativo*, 28. Ed., 2015;

GAPARINI, Diógenes. *Direito Administrativo*, 17. Ed., 2012;

JUSTEN FILHO, Marçal. *Comentários à Lei de Licitações e Contratos Administrativos*, 16ª Ed., 2014;

MODESTO CARVALHOSA. *Comentários à Lei de Sociedades Anônimas*, 4º vol., t. II, 2ª ed., São Paulo: Saraiva, 2003.

MORAES, Germana de Oliveira. *Controle Jurisdicional da Administração Pública.* 2ª ed. São Paulo: Dialética, 2004

SUNDFELD, Carlos Ari. *Licitação e Contrato Administrativo*, 2ª ed., São Paulo, Malheiros Editores, 1995, p. 67.

NOTES

1 Regarding the topic, in the Brazilian scenario, its worth mentioning the significant doctrinaire contribution of Gustavo Binenbojm, in Uma Teoria do Direito Administrativo, more specifically in Capítulo V – Da Dicotomia Ato Vinculado versus Ato Discricionário à Teoria dos Graus de Vinculação à Juridicidade, p. 195 – 241, 2008, 2nd edition, Renovar, Rio de Janeiro. In comparative law, see Georges Vedel, Droit Administratif, p. 318/319: "La Administration ne se trouve jamais dans une situation de pur pouvouir discrétionnaire ou de purê compétence liée. Il n'y a jamais purê compétence liée. (...) Mais surout, il n'y a jamais pur pouvoir discrétionnaire".

2 Therefore, in our times, not only when it comes to the issue addressed in this article, it appears to be equivocal to assign absolute features to administrative discretion - which today is limited by the constitutional principles and may, subject to certain parameters, be the subject of control of the Judiciary.

3 The term "discretion" over centuries XVI to XVIII, only had this meaning. In its origin, the word "expressed the decision-making sovereignty of the absolute monarch (voluntas regis suprema lex). At that time, the so-called Police State, where the government was fully mixed with the Public Administration, synonymy between discretion and arbitrariness was complete. "BINENBOJM, 195. In the same sense, see Paulo Magalhães Costa Coelho, Controle Jurisdicional da Administração Pública, 2002, p. 40: "Thus, there will be full identity between the will of the absolute prince and the law".

4 It is observed the following precedente: "THE DEMAND GLOBALIZED IN A SINGLE BIDDING PROCEDURE AIMED AT THE PURCHASE OF A HETEROGENEOUS VARIETY OF GOODS DESTINED TO EQUIP A HOSPITAL DOES NOT FORBID COMPETITIVENESS BETWEEN BIDDING COMPANIES, PROVIDED THAT THE INVITATION TO BID ALLOWS THE FORMATION OF CONSORTIUM WHICH, IN LAST INSTANCE, RESULTS IN THE DIVISION OF CONTRACTS IN ORDER TO EXPAND THE ACCESS OF SMALL COMPANIES IN THE BIDDING PROCEDURE, IN THE HARMONIC INTELLIGENCE OF THE PROVISIONS CONTAINED IN ARTICLES 23, PARAGRAPH 1 AND 15, IV, WITH WORDING OF ARTICLE 33, ALL OF ACT 8.666, OF JUNE 21, 1993". (RMS 6.597/MS, Reporting Minister Judge ANTÔNIO DE PÁDUA RIBEIRO, SECOND PANEL, awarded on Dec 16, 1996, DJ Apr 14, 1997).

5 On the principle of competitiveness, the following doctrines are worth of note: José Santos Carvalho Filho, Manual de Direito Administrativo, 28. Ed., 2015, p. 252; Marçal Justen Filho, Comentários à Lei de Licitações e Contratos Administrativos, 16th Ed., 2014, p. 93; Alexandre Santos de Aragão, Curso de Direito Administrativo, 2. Ed., Rio de Janeiro: Forense, 2013, p. 297; Diógenes Gasparini, Direito Administrativo, 17. Ed., 2012, p. 544.