

Specification of brand when preparing description of item for onsite public biddings



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ABSTRACT

The public bidding was implemented in line with the constitutional principle of efficiency, and it proved to be the most important innovation in the Brazilian Public Administration at the turn of the century. This article seeks to demonstrate the difficulty in drawing up the purpose and identifying the brand for Onsite Public Biddings. The public bidding has proven to be an excellent tool for purchase of common goods and services, as it seeks the lowest price. However, one of the concerns is the purchase of low quality products. As all purchases of common goods and services are conducted through public bidding, not all the winning companies provide quality products, thus the public administration ends up hiring companies that fail to meet their needs. This article will highlight some points, concepts and methods for the public administration to specify the brand legally and not suffer with acquisitions based only on the lowest price. It should be noted that the days of this lowest price concept are numbered, since the intention is to acquire better quality products at the lowest price.

Keywords: Public Administration; Onsite Public Bidding; Terms of Reference; Brand.

1. INTRODUCTION

Terms of Reference, also known as TR, is a compulsory document in which the municipality administration describes the products to be acquired, in a clear, concise manner, avoiding terms that do not have an exact meaning



or that could allow ambiguous interpretations. Purchases made in onsite public biddings are bound solely to the description in the terms of reference, since the purpose of this type of purchase, although an excellent tool to acquire common goods and services, is the lowest price, differently from other bidding types that aim at better techniques, or technique and price, pursuant to law 8666/93.

The difficulty in acquiring products that satisfy the Public Administration is becoming more and more frequent, since the number of companies offering low-quality products grows every day. Paying a little more for a quality product, instead of targeting the lowest price and acquiring a product that could cause damages to the Administration, often pays out.

The concept of buying the cheapest item is becoming more and more obsolete, since quality products are expected based on the call for bid description. Given the aforementioned, this article has the purpose of briefly reporting the procedures for detailed description and mentioning of brand in the descriptions of products to be acquired through onsite public bidding.

Consequently, this article purpose is to analyze specifications of brand pragmatically, presenting criticisms and possible solutions, in order to equate the interpretations on this subject.

In this line of thought, it is expected that the study on the analyzed subject may be useful for the society in general, since this scientific article is intended to improve the understanding on specification of brand in conformity with the constitutional principles effective in the Brazilian Law.

For that purpose, the research was primarily bibliographical, and also referred to other means, based on which it was possible to discuss positions, as well as present current aspects on the matter.

2. THEORETICAL REFERENCE

2.1 HISTORY

For better understanding, the public bidding was introduced by the Executive Provisional Order No. 2026, of May 4, 2000. This Executive Provisional Order was converted into Law 10520, of July 17, 2002, which was enacted, at Federal, State, Federal District and Municipal levels, under the terms of article 37, item XXI, of the Federal Constitution.

Law 10520/02, known as “Public Bidding Law”, in its article 9, mentions that this method is supported by the rules of Federal Law 8666, of June 21, 1993, which instituted rules for call for biddings and agreements of the Public Administration, and provides for other matters. In this regard, it should be noted that we referred to conclusions based not only on Law 10520/02, but also on Law 8666/93.

2.2 DEFINITION OF BRAND

For FURRIER (2004, page 01), it is: “a name, term, signal, symbol or drawing, or a combination thereof, intended to identify goods or services from a vendor or group and differentiate them from those of competitors.”

From the economic point of view, a brand makes transactions easier, since it makes interpretation and processing of information by customers quicker in relation to certain experience with the product, activate or not their expectations of trust, identification, ethics, satisfaction and self-expression, serving as a criterion to reduce risk in purchase decisions.

Consequently, we could observe that the brand makes transactions easier and makes description more comprehensive, and it may even avoid unnecessary acquisitions.

Based on this context, we will study possible specification of brand in the object of an Onsite Public Bidding process. But firstly we need to understand how to prepare this object.

2.3 PREPARATION OF OBJECT

Law 10520/02 focuses only on acquisition of common goods or services pursuant to its article 1. In this regard, one should ask: what are common goods or services? "... for the purposes of this article, common goods and services are those with performance and quality standards that may be objectively defined by the call for bidding, through usual specifications in the market." (Art. 1, 2009, page 75)

Law 10520/02 also provides that: "the definition of the object must be accurate, sufficient and clear, and any specifications that, for being excessive, irrelevant or unnecessary, limit the competition are hereby prohibited". (Art. 03, 2009, page 76)

Therefore, the article itself mentions that common goods and services are those that can be objectively defined in the call for bid, and that the definition must be accurate, sufficient and clear, i.e. translate the real need of the Public Administration, containing all indispensable characteristics, and evidently avoiding irrelevant and unnecessary characteristics that could impair the competition.

Professor Benedicto de Tolosa Filho, an Attorney specialized in Public Law, in his book "*Pregão - Uma Nova Modalidade de Licitação*" (Public Bidding – A New Type of Bidding Process"), points to the importance of accurately defining the bidding object, and he further intelligently analyzes Digest No. 177, of TCU, as follows: "The accurate and sufficient definition of the object subject to bidding is an indispensable rule of the competition, even as an assumption of the principle of equal rights among bidders, to which the publicity principle is supplementary, and which involves knowledge by potential bidders of

basic bidding conditions, and, particularly in the case of bidding for purchase, the quantity is one of the minimum and essential specifications of the public bidding object definition." (TOLOSA FILHO, 2005, page 08)

Using the words "accurate" and "sufficient" is a clear indication that, in the object definition, all fundamental aspects must be contemplated so as not to raise doubts in any interested parties. Furthermore, if the description is inaccurate and insufficient, it affects not only bidders, but also the public administration itself.

Benedicto de Tolosa Filho further states emphatically:

"Nothing shall be decided in addition to what the Call for Bidding provides for. The description of the object of the bidding contained in the call for bidding cannot leave any margin of doubt, nor does it admit later complementation. Between the option of a concise description and a detailed description, there cannot be any doubt to the Public Administration. It has to choose the complete and detailed description. And the description must be certainly clear. But "detailing" does not mean "obscurity". If the description of the bidding object is not complete and perfect, there will be nullity..." If complete, it is the principle guiding the bidding to "binding to the call for bidding" and "objective judgement".¹

It is evident that the public administration must express the real need, detailing the object so as not to raise doubts in bidders. However, after the acquisition/hiring, the bidding object cannot be changed.

The public administration is prohibited to conduct biddings whose object includes goods and services without similarities. "Biddings whose object includes goods or services without similarities or with exclusive brands, characteristics and specifications cannot be conducted, except if technically justifiable..." (Art. 7, paragraph 05 of law 8666/93)

Any description of product or service without similarities in the market is deemed as directing the bidding process, i.e. the public administration is favoring only one bidder/manufacture, thus harming the equal rights and competition principles, except in the cases technically justifiable by the administration.

2.4 SPECIFICATION OF BRAND

After a brief comment on the importance of the object description, we reach the point that brings great

doubt. Could we specify a product brand in the bidding object, showing our preference for it?

Our memorable master Hely Lopes Meirelles, in a comment on a similar provision of the previous Bidding Regulation stated that:

“we still understand, however, that the acquisition of a product of a certain brand, excluding similar products, is possible in three cases: to continue using a brand already used by the public service; to adopt a new brand more convenient than the existing ones; to standardize brand or type in the public service. It is essential that the Administration proves the effective advantage of a certain brand or type, for continuity, adoption or standardization in its agencies and services, exclusively.”²

We should point out that the opportunity for preference exists, provided that the requirements are met and the actual need by the public administration is proven.

The TCU (Federal Court of Accounts) states that a way of parameterizing products is by specifying a brand, provided that it is followed by the expressions “or equivalent”, “or similar” or of “better quality”. “specifying a Brand as a quality parameter could be admitted to facilitate the description of the bidding object, provided that it is followed by the expression “or equivalent”, “or similar”, or of “better quality”. (Decision No. 2401/2006).

It thus conciliates the understanding that “specifying a brand in the bidding must be preceded by the presentation of technical justifications that clearly and irrevocably prove that the adopted alternative is more advantageous and the only one that meets the bidding needs.”(Decision No. 636/2006).

Therefore, we understand that by describing an item mentioning the expressions “or equivalent”, “or similar”, or of “better quality”, and further presenting a technical justification that shows that the referred to brand is the only one that meets the public administration’s needs, we will not be directing let alone limiting the competition among bidders.

In Decision No. 99/2005 TCU stresses that:

“First of all, I point out that a detailed description or specification of a brand could lead to an unacceptable restriction to competition in the bidding. Nonetheless, specifying a brand could be accepted in cases of standardization, provided that the option is duly justified.”

Evidently, the illegal specification of a brand causes inconveniences to the public administration; however, if justified, reinforces the actual need of the acquisition.

In its call for bids, TCU specifies the object as follows: “cleaning sponge, double face, measuring approximately 110x70x20 mm, ref, Scotch, 3M or similar”. (IBRAP, 2009, page 142). We can see that the object was described objectively, with usual market specifications and approximate measures; in addition, the brand is mentioned and the expression “or similar” is included. In any moment whatsoever, there is guidance or specifications that limit the competition.

Another TCE/MG (Minas Gerais State Court of Accounts) specification, a little more complex: “Complete finishing for flush valve, Hydra Max line, model 2550, brand Deca.” (TCE/MG, 2009). In this description, we can see that none of the expressions that we have just analyzed was mentioned. The reason is hidden in the text interpretation, i.e.: by mentioning the word “finishing”, we understand that we will only acquire the finishing of the flush valve. We know then that there is already a valve, whose brand is Deca, model 2550, correct? Therefore, what is the reason for acquiring a finishing that does not belong to this brand or is incompatible with it?

Situations such as this deserve a technical justification for the reason of acquiring the referred to finishing, since the real need of the public administration is evident.

Another example that is a matter of controversy in all call for bids is the description of computer supplies, such as: “toner cartridge hp 2550l yellow ref. q3962a – original item of the equipment manufacturer”. (TCE/CE, 2010). In this description, we see the expression “original item of the equipment manufacturer” making it clear that the product must be an original HP item, restricting the participation of other manufacturers of cartridges that are compatible with the item object of the bidding. Nonetheless, there is competition, since there are several authorized HP sellers.

The TCU highlights the following in its Bulletin on Case Laws on Biddings and Contracts No. 7:

“The representation offered to TCU pointed to possible irregularities in the Electronic Public Bidding No. 113/2008 conducted by the Paraná State Regional Electoral Court (TRE/PR), whose purpose was acquiring toners for a Xerox multifunctional fax machine manufactured by the equipment manufacturer itself. Basically, the question raised was the possible restriction to the bidding competition, since the toner brand was required in the acquisition conducted by TRE/PR, opposing article 15, paragraph

7, I, of Law No. 8666/93. In his vote, the TCU reporting judge favored the exceptional possibility of specifying a brand in biddings, provided that such specification is supported by technical or financial reason, duly justified by the manager. In this case, the reporting judge understood that there was a technical and financial justification to require a brand, for the purpose of maintaining the supplier warranty. According to the justifications presented by the people in charge, based on an analysis conducted by the TRE/PR technical department, “if the contractual warranty of 36 months is lost due to use of toners from other brands, the estimated loss arising from a new maintenance agreement for the 270 recently acquired printers could exceed R\$1,300,000.00 (one million and three hundred thousand reais) within a three-year period, and this information is based on prior printer maintenance contracts entered into by TRE/PR”. Such justifications further consider that the documentation attached to the files attested that, despite the brand requirement, several companies took part in the bid and presented their unit prices to the toner specified in the call for bid, “making it possible to reduce the product price in relation to the price initially estimated by the TRE/PR management; therefore, there was effective competition among different suppliers of the referred to brand and cost reduction for that public body”. Finally, such justifications emphasized the participation in the bidding of companies that offered toners of brands other than the referred to manufacturer’s toners, with unit prices significantly above the final value contracted by TRE/PR for original Xerox toners. The First Chamber accepted the reporting judge’s opinion and rejected the representation. Case laws mentioned: Decision No. 664/2001-Plenary, Court decision No. 1334/2006-1st Chamber, Court Decision No. 1685/2004-2nd Chamber and Court Decision No. 1010/2005 and 1916/2009, both from Plenary.³”

We can see that the description is similar to the aforementioned one; however, with a plausible justification, where the administration mentions possible improvisations in case the original toners were not acquired. Accordingly, when we mention the “phrase” we cannot forget to justify the need.

Another example:

“toner cartridge for Samsung printer, model ml3051nd, new, original, minimum capacity for

8,000 (eight thousand) pages, Samsung brand. Considering the printers are new, still covered by the manufacturer’s warranty, and considering that such warranty would cease in case toners of a brand other than the manufacturer’s brand are used, only quotations expressly specifying that the bidder will supply Samsung’s new and original products shall be accepted.”

We identified Samsung’s toner brand in the description and a small justification for specifying this brand, without mentioning similar items. This case is similar to the one under analysis, but a little bolder since it mentions that “only quotations expressly specifying that the bidder will supply Samsung’s new and original products shall be accepted”, which is a motive for companies to challenge this call for bid.

In certain cases, suppliers of compatible products do not agree with the descriptions in calls for bid and with the justifications presented, alleging that the public administration is benefiting only the printers’ manufacturers. This controversy affects several institutions, always delaying the bidding process.

In order to avoid inconveniences in computer supplies acquisition processes, it is suggested to clearly state in the item or in the text of the call for bid that bidders quoting toners of different brands must submit a technical qualification certificate issued by the printer’s manufacturer, in which the latter reports that the products quality is equal to the original product quality, and that it will be held liable for any problems that may occur.

3. RESULT

As a name, term, signal, symbol or drawing, the brand facilitates the interpretation by bidders, when selling, and by the administration, when describing the object.

Today, swiftness is one of the principles inherent in the Public Bidding, which is an efficient tool used for acquisitions in the short term. And such swiftness occurs when the object description specifies the actual need by the Public Administration. This is solid evidence that, for a good acquisition, the description must be in accordance with the usual market specifications.

Seeking a brand is becoming more and more competitive, and people are associating products with successful brands, making it easier to understand the need. This line of thought defines the importance of showing similarities among brands in the descriptions, and backs the authors’ opinion that it is essential for the Public Ad-

ministration to prove the effective advantage and need of a certain brand.

4. CONCLUSION

It is possible to identify several legal ways of interpreting the institution's need to acquire a product. It is important to detail the description of a bidding object, and specify the brand, if permitted by law, in order to help bidders to identify the product to be acquired. However, we found identifications that raise doubts in bidders, which are motives for clarification requests and even for challenging the call for bid.

It is evident that the Onsite Public Bidding is an excellent tool to acquire common goods or services, allowing the Public Administration's actual need and the objective to be described clearly.

The importance of the Public Bidding, as a precursor of the "New Public Administration" implementation in the public bidding area in Brazil, inspires the development of new horizons that, in the wise words of Marçal Justen Filho *esq.*, concludes the considerations of this work.

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1 <http://licitacao.uol.com.br/artdescricao.asp?cod=65>

2 Jorge Ulisses Jacoby Fernandes' text, inserted in *Jus Navigandi* No. 38 (01.2000)

3 Matter published in Decision No. 1122/2010-1st Chamber, TC-033.420/2008-5, Deputy Reporting Judge Marcos Bemquerer Costa, 03.09.2010.