

The participation of the cooperatives in public auctions and the function of the presentation of the document titled “Model of Operational Management”



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ABSTRACT

The cooperatives are considered legitimate parties to participate in public auctions. However, we cannot deny the existence of false cooperatives that in practice are companies that act as agents of subordinated workforce. To keep such entities from participating in the auctions, Normative Instruction IN n° 2/2008, of the Logistics and IT Secretariat of the Ministry of Planning, Budget and Management (SLIT/MPOG), in the Sole Paragraph of its article 4, states that during the public auction process such cooperatives need to present a document named “operational management model”. The purpose of this provision is to check if such participants are autonomous, self-managed and do not carry out activities necessary for the accomplishment of the contract that can create subordination, personal nature and habituality on the part of the cooperative members.

Keyword: Auction – Cooperatives – Operational Management Model – Autonomy – Self-management.



The cooperatives are legitimated to participate in public auctions and can win the auction if they fulfill the qualification requirements established in the public notice, and present the most advantageous price for the Administration.

This is so true that item I, Paragraph 1 of article 3, of the Federal Law n 8.666/1993, altered by Federal Law 12.349/2010, sets forth several prohibitions for public agents. Among other things, they are not allowed to admit, foresee, include or tolerate clauses or conditions in the public auction notices that compromise, restrict or frustrate its competitive character, including in the cases of cooperative societies.

In fact, the participation of cooperatives in the public auctions is not only **allowed** but also **encouraged** by the Public Power. This can be inferred when reading article 34 of Federal Law 11.488/2007, whose content establishes that the benefits given to the micro and small companies shall be extended to the cooperatives as a way to encourage this type of organizations.

We cannot deny, however, the existence of false cooperatives that in practice are companies that act as agents of subordinated workforce. In this sense, it should be underlined that Federal Law 12.690/2012, which provides for the organization and operation of these societies, established, in its article 5, that the "work cooperative cannot be used as an agent of subordinated work". Later, in its article 17, the law

defines what it means to act as an agent of workforces and establishes a sanction in case of noncompliance.

In order to impede the functioning of false cooperatives, the caput of article 2 of Federal Law 12.690/2012 establishes that those societies are constituted by workers for the exercise of their labor or professional activities with **common** gains, **autonomy** and **self-management** to obtain better qualification, income, socioeconomic situation and general work conditions.

To ensure such purposes, the § 1st of the legal device above mentioned, establishes that the **autonomy** given to the cooperative societies must be exercised in a collective and coordinated form by the members themselves, through a determination, in general assembly regarding the functioning rules of the society and the way work should be executed. In addition, Paragraph 2 of the same law considers **self-management** as the democratic process in which the general assembly defines the guidelines for the functioning and the operations of the cooperative, and the associates decide how work should be executed, in the terms of the law.

Article 5 of Law 12.690/2012, in turn, establishes expressly that the work cooperatives cannot be used to act as agents of **subordinated** workforce, emphasizing that Paragraph 2 of article 17 defines (legal presumption) "intermediation of workforce".

As seen in the subject above, the law attempts to extinguish “shell” cooperative societies, which only act as workforce agents, in so far as it establishes that the decisions of that legal entity must be made by most of its members and that all the rules regarding its functioning must be established by its general assembly. Thus, such rule try to avoid concentration of power in the hands of few cooperative members in charge of the entity management.

However, considering that the existence of cooperatives, which act as workforce agents, is a reality, one observes that there are decrees, which prohibit the participation of cooperatives in public auctions when the execution of the object demands subordination, and specify some of the services that cannot be executed by cooperatives. For example São Paulo State Decree 55.938/2010, altered by Decree 57.159/2011, and Municipal Decree of the City of São Paulo 52.091/2011.

In this step, in order to legalize the participation of cooperatives in public auctions, at first it will be essential that their activity be directly linked to the bidding object, as taught by Professor Marçal Justen Filho. In verbis:

“These considerations allow us to affirm that is possible and feasible for a cooperative to participate in a public auction when the bidding object is direct related to the core and specific activity for which the cooperative was constituted. If, however, the execution of the contractual object escapes the dimension of the ‘social object’ of the cooperative or characterizes speculative activity, there will be irregular performance on the part of the cooperative” (2012. p. 471).

Moreover, since it is impossible to use the work cooperative with the scope of intermediating subordinated workforce, during the internal phase of the auction, one should check if the object demanded by the Administration could be executed by the coop members autonomously. That is, the performance of the referred collaborators cannot have subordination – be it between the cooperative and its members, or between the Administration and the cooperative members -, personal nature, nor habituality.

In that phase, if it is verified that the cooperative members execution of the contracted object presents subordination, personal nature or habituality, a fact

which shows flagrant absence of autonomy of the members in the execution of the activities needed to accomplish the agreed object, it will the possibility of its execution by a cooperative society will be removed. Thus, the prohibition of participations of these entities in the auction will be imposed.

On the other hand, if it is realized opportunely the possibility of the bidding object being executed autonomously by the cooperative members, and if there is no subjection, personal nature or habituality in the accomplishment of the agreed object, the cooperatives will be able to participate in public auctions.

To enable the Administration that is promoting the public auction to prove the existence of such requirements, and to remove any doubt regarding legality of hiring the cooperative within the Federal Public Administration, the entities that answered the Administration’s call must present a document named operational management model. This document is mentioned in article 4, Sole Paragraph, of IN 2/2008 (SLTI/MPOG), whose content says:

1. the auction object can be executed by a work cooperative with autonomy by its members, that does not present any kind of subordination between the cooperative and its members or between the Administration and the members, a fact that, if observed, will impede the participation of these entities in the auction; and

2. if it is possible to carry out operational management of the demanded service in a shared way or in rotation by the cooperative members, in which the coordination and supervision of the activities executed, as well as the performance of the contract manager, can be done by all members of the cooperative society.

It must be underlined that the referred document will prove that the cooperative which has answered the Administration’s call, does indeed, (1) have autonomy, in other words, it is guided collectively and in a coordinated form by a general assembly and has rules for its operation and for the way work should be executed, (2) it possesses self-management, in the measure that the decisions of the entity are made using a democratic process in which the general assembly defines the guidelines for the functioning and operation of the cooperative, and the partners

decide how the work is executed, according to article 2 (items and heading) of Law 12.690/2012 and, finally, (3) it does not exercise the necessary activities for the accomplishment of the agreed object in a way that creates subordination, personal nature and habituality.

Thus, it is observed that the model of operational administration, which must be required in the auctions processed by the Federal Public Administration, to classify the proposal, according to the sole paragraph of article 4t of IN 2/2008, is an efficient instrument to avoid participation of false cooperatives in public contracts. This, therefore, allows that only the organizations aligned with the cooperative spirit celebrate contracts with the Public Power.



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