

Creation of hypothesis of waiver of public bids through “promulgated” law: a case of unconstitutionality in the state of Amazon



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ABSTRACT

This paper has the purpose of analyzing the legitimacy of Promulgated Law n. 254/2015 of the State of Amazon, which creates the hypothesis of waiver of public bids within the State of Amazon, using the deductive method and qualitative approach. The conclusion is that the law should be considered unconstitutional with respect its form and object.

Key-word: Release; Unconstitutionality; Public Bid; Promulgated Law.

1. INTRODUCTION

Due to the need to give support to small rural farmers in the State of Amazon, the local leaders, through an inappropriate method, attempted to create legislation for the acquisition of their produce by waiving the public auction process, aiming to promote the local economy.

Although the law came from a good intention of taking care of the Amazon people, we live in a Rule of Law. Because of this, the Legislative Power must establish, within legality, mechanisms to promote production and regional development, respecting the effective laws in our country.



2. THE DUTY OF PERFORMING PUBLIC BIDS

The general rule that makes public bids mandatory for public procurement contracts is provided for in the Federal Constitution (CF) of 1988, item XXI of article 37 of the. The same provision shows the hypotheses of waiver will be established in law.

The constitution also determined that the general rules for public bids and procurement contracts would have national scope and would be established by the Federal Government, which has the exclusive mandate to define the rules of this matter, according to item XXVII of article 22 of the Federal Constitution.

This exclusive mandate means that only the Federal Government has the mandate to legislate on the subject, that is, to determine the applicable legal norms for itself, States, Municipalities and Federal District. This was provided for in several laws, among which we emphasize the General Statute of Public Bids (Law n. 8666/93.)

The waiver of bids was ruled in this law, articles 17 (waived bid), 24 (dispensable bid) and 25 (unenforceable bid). They are, actually, exceptional situations, once the constitution points to performing public bids.

3. POSSIBILITY OF THE FEDERATIVE ENTITIES LEGISLATING ABOUT PUBLIC BIDS

We note that, although the mandate to legislate about the subject belongs to the Federal Government, we must remember that the rule is applied to general norms.

Maybe the legislator thought of creating a standard of public procurement that would be followed throughout Brazil, in order to privilege competition because, as a principle, the same rule would cater to States and Municipalities, somehow making it easier for bidders to understand the process.

However, the expression **general rule** in item XXVII of article 22 of the CF, implies there is a possibility of having a **specific rule** about the subject.

Consequently, the sole paragraph of article 22 of the Constitution expressly established the ways that the States could exercise the mandate: through a supplementary law of the Federal Government. Thus, if there were a supplementary law authorizing a specific rule about bids, it would be possible for some State to make its own legal norm. Notice that in the text of the law, Municipalities were not granted such mandate. However, there is much discussion in the legal environment about the best way of interpreting the provision.

We emphasize that the legislator opened the possibility, but also established a more rigorous legislative rite for its exercise. A supplementary law requires differentiated quorum for its approval. While

an ordinary law demands approval by simple majority, the supplementary law needs absolute majority of the parliament. That makes us infer that there is greater difficulty, a need for more support for the accomplishment of the State's objective which, through legal channels, can present its request to the National Congress. It means that, legislating about a specificity regarding bids and contracts requires greater legislative effort within the scope of the Federal Government. We can say that the rule was made deliberately to create the highest possible level of difficulty for the other entities.

This exclusive legislative mandate of the Federal Government to regulate public procurement, differs from the concurring mandate ruled by article 24 of the CF. They differ once in the scope concurring mandates there is no need for a supplementary law for States, Federal District and Municipalities to legislate. Jorge Ulisses Jacoby Fernandes (2013; p. 28) affirms that: "This rule is a suspensive condition imposed by the sole paragraph of article 22, which clearly demonstrates that the mandate of a member State to legislate on the issues of that article is not rule, but an exception.

Thus, in face of specific issues and after the approval and entrance into effect of the complementary law, the state shall exercise a supplementary mandate, when the law is silent, according to the best interpretation of article 118 of Law 8.666/93.

Once the Federal Government establishes a norm on the topic of bids, it will no longer be possible for States to do so, as determined Federal Supreme Court:

State Court of Accounts. Prior oversight of the bids. Exclusive mandate of the Federal Government (article 22, XXVII, of the CF). Compatible federal and state legislation. Undue demand by act of the Court that imposes prior oversight without requesting that the public notice be sent before the bid is carried out. Article 22, XXVII, of the CF provides that legislating on general rules for public bids and contracts is an exclusive mandate of the Federal Government. Federal Law 8.666/1993 authorizes prior oversight when the Court of Accounts requests that a copy of the public bid notice that has already been published. The demand by normative acts of the Court to have an early copy of the notice, without any request, invades the legislative mandate

distributed by the CF, already exercised by Federal Law 8.666/1993, which does not contain such requirement." (RE 547.063, Rapporteur **Menezes Direito**, judgment on 10/07/2008, First Panel, DJE of 12/12/2008.)

4. THE STATE OF AMAZON CASE

The State of Amazon established through Promulgated Law 254, of March 31, 2015, a new hypothesis of waiver of bids. The terms are the following:

Article 1. The bodies and entities of the state public administration that regularly acquire food goods shall use at least 30% (thirty percent) of the resources allotted for that purpose to purchase directly goods produced by family farmers or rural family entrepreneurs or from their organizations.

Paragraph 1. The acquisition mentioned in article 1 can be accomplished through waiver of the bidding procedure, as long as the food goods obey the hygiene and quality requirements established by the norms that regulate the matter and the prices are compatible with those practiced in the local market.

Paragraph 2. The observance of the percentile foreseen in article 1 can be reduced or waived when one of the following circumstances are present:

- I – impossibility of issuance of a fiscal document regarding the acquisition
- II – infeasibility of regular and constant supply of the food goods;
- III – food goods are not adequate with respect to the pertinent hygiene sanitary conditions.

That is right: through a **PROMULGATED LAW**, a new hypothesis of waiver of public bids was established. The State of Amazon has been using this norm to deal with several issues, including this one, as we can verify in the Figure 1.

We searched in the official sites of the Legislative Assemblies of the other States and the Federal District to check if only the State of Amazon was using this type of rule.

We found only in the State of Santa Catarina similar illustrations: Promulgated Ordinary Law and Promulgated Supplementary Law, according to the ALESC legislation consultation screen (Figure 2).

Figure 1

Consultation screen for the legislation of the State of Amazon in the ALEAM site



Source: Available at: <<http://legislador.aleam.gov.br/LegislatorWEB/LegislatorWEB.ASP?WCI=LeiPara metro&ID=201>>. Access on June 5, 2015

Figure 2:

Legislation consultation screen of the State of Santa Catarina in ALESC's site

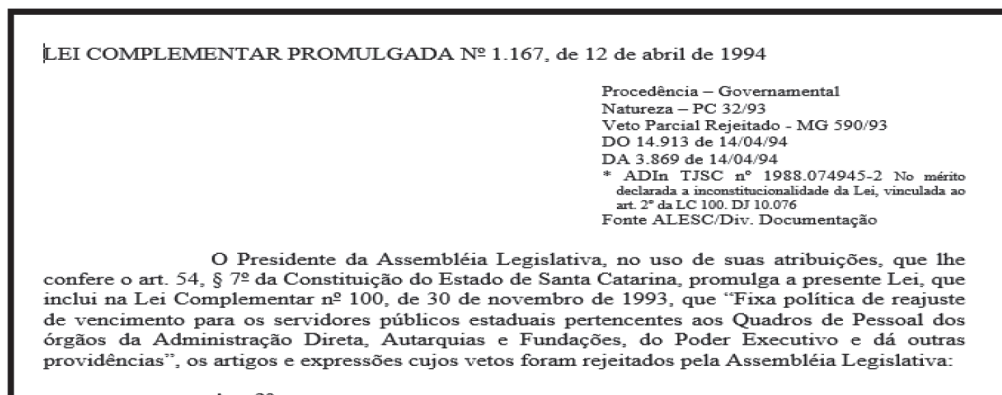


Source: Available at: <<http://200.192.66.20/alesc/PesquisaDocumentos.asp>>. Access on June 5, 2015

We bring as example a Promulgated Supplementary law of the State of Santa Catarina:

Figure 3:

Initial part of the Promulgated Supplementary law 167/1994 of Santa Catarina



Source: Available at: <<http://200.192.66.20/alesc/PesquisaDocumentos.asp>>. Access on June 5, 2015

It is worth noting that the site of the Legislative Assembly of the State of Paraíba showed in its consultation screen the option Promulgated Ordinary Law, although only with the purpose of consultation to the promulgated laws.

4.1 THE FORMAL DEFECT

Since 1945¹, the Legislative Assembly of the State of Amazon (ALEAM) has been promulgating norms classified as **promulgated laws**.

In this study, we will only deal with the legislative process established by the 1988 Constitution, whose norms are mandatory in all of the States, according to precedents set by the STF:

“Among the basic rules of the federal legislative process, whose observance are mandatory for the States, due to its implication with the fundamental principle of the separation and Independence of the Powers, there are those foreseen in items a and c of article 61, Paragraph 1, II, of the CF, which determine that the elaboration of laws that provide for the legal regime and the provisions of positions of civil and military public servants, are the reserved initiative of the head of the Executive Power. Precedents: ADI 774, Rapporteur Sepúlveda Pertence, DJ of Feb. 26, 1999; ADI 2.115, Rapporteur Ilmar Galvão; and ADI 700, Rapporteur Maurício Corrêa. This Court established the understanding that the rule foreseen in State Constitution prohibiting an age limit for entering the public service has a requirement regarding filling positions and regarding the legal regime of the public servant. The regulation of this matter depends on issuance of an ordinary law, by initiative of the Head of the Executive Power. Precedent: ADI 1.165, Rapporteur Nelson Jobim, DJ of June 14, 2002; and ADI 243, Rapporteur for/ the ac. Marco Aurélio, DJ of Nov. 29, 2002. Direct Action whose request was judged to be correct.” (ADI 2.873, Rapporteur **Ellen Gracie**, judgment on Sep. 20, 2007, Plenary, DJ of Nov. 9, 2007.) **In the same sense: ADI 2.856**, Rel. Min. **Gilmar Mendes**, judgment on Feb. 10, 2011, Plenary, DJE of March 1, 2011; **ADI 3.167**, Rapporteur **Eros Grau**, judgment on June 18, 2007, Plenary, DJ of Sep. 6, 2007.

Article 59 of the CF 88 establishes which the products of the legislative process are: Constitutional

Amendments, supplementary laws, ordinary laws, delegated laws, provisional executive orders, legislative decrees and resolutions.

As the norm is mandatory, the same legislative products, except for the provisional executive orders (without discussing why in this moment), were established in the Amazon legislative process, according to article 31 of the Constitution of the State of Amazon. Notice that this last legal provision does not foresee the possibility of approval of law of a “**promulgated**” nature.

The fact is that there are several laws of the **promulgated** laws in effect in this State norm.

It is probable that the title **promulgated law** refers to a situation in which the Governor of the State of Amazon has not sanctioned or vetoed a Draft Bill approved by ALEAM, according to the deadlines defined by article 36 of the Constitution of Amazon and that, consequently, has been returned to the President of ALEAM to be duly promulgated, according to Paragraph 6 of the same article 36.

When reading the text of the promulgated law studied, we notice the following introduction: “The BOARD OF DIRECTORS OF THE LEGISLATIVE ASSEMBLY OF THE STATE OF AMAZON, according to item e, I, of article 17, of Legislative Resolution 469, of March 19, 2010, Internal Regiment, makes it known to all that read this that the following law is promulgated”.

In the Internal Rules of the abovementioned ALEAM, we notice that it is the duty of the ALEAM Board of Directors “to promulgate [...] laws or parts of laws not promulgated by the Governor, within the term determined in Paragraph 6 of article 36 of the Constitution of the State.”

Notice that the latter text brings a definition of law in a broad sense, for which Brazilian Law admits three types Supplementary, Ordinary and Delegated.

We do not think it is possible to propose a law that does not fit into one of those types specified above. It is absurd to think of a draft bill that cannot be presented to the Head of the Executive for sanction or veto in the end of its legislative process, in face of the provisions of article 36 of the Constitution of the State. Therefore, it is not even possible to admit that there can exist a **Draft Bill for a Promulgated Law**, due to the absence of Constitutional provisions.

Another very important factor is the number used for the **promulgated laws** by ALEAM, which has its own series of numbers. This can be verified in the website of this legislative house.

Besides e Supplementary law 95/98, which deals with how laws should be elaborated and drafted, foresees in its article 6 that the constitutional foundation or delegation of mandate to legislate must be specified in the text of the draft bill to be received in the legal system.

In the text of Promulgated Law 254/2015 of the State of Amazon, that the delegation of mandate to legislate about this subject is not evidenced, which, as shown above, must happen through a supplementary law. Even admitting the hypothesis of error in the composition of its text, in searching the Federal Government legislation, this researcher did not find a law that would delegate the mandate necessary to deal with the matter.

Today, in Brazil, only the national law can establish a hypothesis of waiver of bids. This was done through an exhaustive list in the text of Law 8.666/93.

4.2 THE DEFECT OF SUBSTANCE

The waiver of bids are possible when the exceptions to the rule of bidding, foreseen in the Constitution and guaranteed by National Law of the Federal Government, are present.

The best lessons of legal hermeneutics indicate that interpretation to be obtained in texts related to the legal exceptions must be done in a restrictive way, a fact several times reaffirmed by the STF's precedence. We believe it is useful to mention one of those judgements:

Direct Unconstitutionality Action: District Law 3.705, of Nov. 21, 2005, that creates restrictions for companies that discriminate when hiring workforce: declared unconstitutionality. Offense to the exclusive mandate of the Federal Government to legislate about general rules for bids and administrative contracts, in all modalities, for all public administrations, autonomous agencies and foundations of all administration entities (CF, article 22, XXVII) and to decide on labor law and inspection , article 21, XXIV, and article 22, I)." (ADI 3.670, Rapporteur. Min. **Sepúlveda Pertence**, judgment on April 2, 2007, Plenary, DJ of May 18, 2007.)

This interpretation takes in consideration the norm's intention, which was to reduce as much as possible the number of possibilities for waiver of bidding processes, once the constitutional rule is to hold public bids. If a list of exceptions is created for a specific pro-

cess, obviously this list cannot be expanded without the due legal authorization.

We conclude with this that the hypotheses of waiver, dispensability and unenforceability must be understood in a restricted way. It would not be possible to understand in a different way the list of situations foreseen in Law, unless another law determines this. It is opportune to remember an excellent doctrinal lesson:

Due to an issue that is more logical than properly juridical, it would not be reasonable that the legislator regulate the matter leaving to the discretion of the other spheres of government the convenience of opening exceptions. To illustrate, it is enough to say that the hypotheses of waiver of bids tried by some municipal districts resulted in a frontal violation in relevant constitutional principles, such as the free initiative, when they tried to establish privileges to mixed capital companies or favor them, and when they created a registry for direct hiring, in which only entities located in the municipal district could participate, among other unfortunate cases. (JACOBY FERNANDES; 2013; page 35)

Thus, in principle, a new hypothesis of waiver of bids will only be possible if the National Law were changed and if the lists foreseen in articles 17 and 24 of Law 8.666/93 would continue to be classified as decisive. This is the understanding of Jessé Torres Pereira Filho (2003; p. 258), Jorge Ulisses Jacoby Fernandes (2013; p. 35), Maria Sylvia Zanella Di Pietro (2013; p. 394), and Lucas Rocha Furtado (2013; p. 82, 84), among many other doctrine masters.

5. CONCLUSION

In concluding this rationale, we understand that it would only be possible to establish a new hypothesis for waiver of bids within the scope of states if a supplementary Federal Government law so allows and if the state legislative process is legally accomplished.

As i seen, we are sure that the Federal Government has already exercised its legislative mandate about this subject. We do not see the possibility of States, Federal District and Municipalities trying to innovate in law creating, through their own legislation, other hypothesis of waiver of bids. Therefore, ALEAM once it understands that such hypothesis of waiver of bids is necessary, , must make a proposal to the National Congress regarding the inclusion of the hypothesis in the decisive list of article 24 of Law 8.666/93.

Thus, Promulgated Law 254/2015 of the State of Amazon is unconstitutional formally and in substance.

Currently, it is causing restrictions to competitiveness in public bids and is possibly bringing damages to the State Treasury due to a loss in their scale of purchases.

Finally, all the other promulgated laws of the State of Amazon are also formally unconstitutional, because of the impossibility of using this legislative species, unless decided otherwise.

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NOTE

- 1 Consultation made on ALEAM's site. Available at: < <http://legislador.aleam.gov.br/LegislatorWEB/LegislatorWEB.ASP?WCI=LeiParametro&ID=201>>. Access on: June 4, 2015