



# Does the State-owned Companies Law contribute to simplify and enhance the legal certainty of bidding and contracts?

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## **ABSTRACT**

Law 13303/16 demands the execution of a prior bidding procedure for contracting made by state-owned companies, in compliance with Art. 37, XXI, of the Federal Constitution. The rule, however, is not applied in the contracting required for the business performance of these entities, such as those related to the direct sale, provision or performance of products, services or works specifically related to their respective purposes, so that the state-owned company is not at a disadvantage in relation to the agility of private business companies and competitors. Although these companies are exempt from bidding for the purchase of goods, works and services related to its respective purposes, their contracting must be honest and transparent, in accordance with the principles governing the performance of public administration, selecting their partners through an isonomic, impersonal and transparent process.

**Keywords:** State-owned companies. Bidding. Exemption. Business activities. Simplification.



## INTRODUCTION

Building a Rule of Law presupposes an agile, efficient, and effective administration in the production of results that meet the individual and social rights promised in the Brazilian Constitution. If these results are not seen for decades and do not follow a rhythm and quantity that correspond to the expectations of citizens or to the profile that society expects from the State and its agents, or worse, if they mask misapplication of resources to serve illegitimate interests, it is necessary to investigate the causes of jam or misapplication, in search for solutions that prevent and overcome them at bearable costs.

Since the end of the last century, national legal orders, justifiably dissatisfied with state inefficiency - which is universal, despite varying in degrees and dimensions - are proposing the simplification of administrative structures and practices as a means of reaching the planned results of public interest, after agreeing on choices and priorities of exercised citizenship. This strategy - which is being identified as the "simplification principle" - with a gain in efficiency and efficacy, is what was expected from the contracting model to be adopted by state-owned companies, government-controlled companies and their subsidiaries, which are, in contemporary economies, responsible for a relevant part of development.

One of the most distinctive characteristics of the Rule of Law is that the law is not exhausted by the set of formal norms. Laws and their regulations, no matter how broad and detailed they may be, fail to predict and resolve the many nuances presented in or that modify interpersonal, collective, political, economic, and social relations in contemporary societies, which are distinguished by the incredibly accelerated rhythm of proposals and changes in cultural paradigms.

The law materializes, at every step, by its conformation to the legal order and this does not comprise only legal norms, but also principles that precede the laws, guiding the system by the prevalence of the ethical values that consecrate it, making the system consistent. This is what has become known as legal certainty, that is, it is not the rules that ensure relative stability of relations, but, mainly, the principles and values with which the rules are interpreted and applied. Legal certainty presupposes a legal order and this is not only a matter of rules, but rules subject to principles, values, and norms that give integrity and consistency to the system based on the Constitution and on laws.

Eighteen years after the publication of Constitutional Amendment (EC - acronym in Portuguese) 19/98, promised Law 13.303/16 was promulgated. It provided for the legal statute of state-owned companies, government-controlled companies and their subsidiaries within the scope of the federal, state, Federal District, and city governments. This was a new law motivated by corruption scandals involving bidding and contracting carried out by some of these entities.

Title II of Law 13.303/16 provides for bidding processes and contracting of state-owned companies, the most prominent legal instrument that guides the movement of goods and services. However, it does not originate an innovative system, which we could identify with simplicity and legal certainty. On the contrary. The so-called State-Owned Companies Law embodies procedures established by Law 12.462/11, which provides for the differentiated regime of public contracting (RDC - acronym in Portuguese), Law 10.520/02, which instituted the bidding modality called the auction, and Law 8.666/93, which establishes general norms on



public bidding and administrative contracting. The new regulation of state-owned companies thus brings together normative orders whose practice shows positive and negative points, which is why it was expected that the State-Owned Companies Law would improve the positive points and eradicate the negative ones, besides referring numerous points for a future regulation. The purpose of this text is to summarize them between the past and the foreseeable future, based on the observation made by Minister Vital do Rego<sup>1</sup>, of the Federal Court of Accounts - Brazil:

In the field of bidding and contracting, the State-Owned Companies Law sought to consolidate, in a single legal instrument, provisions of Law 8.666/1993, Law of Auction (Law 10.520/2002) and the RDC (Law 12.462/2011), extracting the essence of these three norms.

Among the innovations introduced by Law 13.303/2016 in the field of administrative activity of the State, we should highlighting the “updating” of the limits for the hypothesis of exemption from bidding due to the value. The severely outdated limits that, in Law 8.666/1993, are of approximately fifteen thousand reais for engineering works and services, and eight thousand for other services and purchases, they were increased to one hundred thousand and fifty thousand reais, respectively.

However, it frustrated those who expected to see in Law 13.303/2016 the implementation of even faster and more efficient contracting procedures that would allow state-owned companies to compete effectively in the same conditions with companies that operate exclusively in the private market.

### **SELF-APPLICABILITY OF THE BIDDING AND CONTRACTING REGIME OF LAW 13.303/16**

Art. 71 of Decree 8.945/16, which regulates Law 13.303/16 within the Federal scope, establishes that the bidding and contracting regime created by this instrument is self-applicable, except regarding:

- (a) auxiliary procedures of bidding, established in articles 63 to 67 of Law 13.303/16;
- (b) procedure of manifestation of private interest in receiving enterprise proposals and projects, provided for in paragraph 4, of Art. 31, of Law 13.303/16;
- (c) exclusively electronic bid phase, provided for in paragraph 4, of Art. 32, of Law 13.303/16;
- (d) preparation of bids with risk matrix, which is addressed in item X, of the caput of Art. 42, of Law 13.303/16;
- (e) compliance with the policy of transactions with related parties, to be prepared, addressed in item V, of the caput of Art. 32, of Law 13.303/16; and
- (f) publication on the internet of the information requested in Articles 32,

<sup>1</sup> Available at: <<https://bit.ly/2w071jA>>. Visited on: August 10<sup>th</sup>, 2016.



paragraph 3, 39, 40 and 48 of Law 13.303/16.

Except for the aforementioned hypotheses, the norms on bidding and contracting of Law 13.303/16, within the Federal scope, have full effectiveness and direct, immediate, and full applicability as of entry into force of the law and are, therefore, able to produce effects regardless of regulatory norms.

As for the exceptions listed in Art. 71 of Decree 8.945/16, those are not self-applicable norms, i.e., they depend on regulation to complement their meaning. The preparation of such regulation is the responsibility of the competent state entity. The processing of the bidding for the formation of the price register also depends on regulation by the competent Executive Branch, according to Art. 66, caput, of Law 13.303/16.

### **REPEAL OF DECREE 2.745/98 (PETROBRAS BIDDING AND CONTRACTING REGULATION)**

Art. 67 of Law 9.478/97, which was repealed, established that contracts executed by Petrobras to acquire goods and services, would be preceded by a simplified bidding procedure, defined by a Decree by the President of the Republic. In compliance with the legal provisions, Decree 2.745/98 was published, with EC 19/1998 already in force.

The legal regime for bidding and contracting created by Law 13.303/16 differs from that revoked Decree 2.745/98 by enshrining the principles of procedural speed - which was already framing the legislation that governs the auction modality, enacted as of 2002. The difference is that the presentation of bids and verification of their effectiveness take place before the qualification phase, that only qualification documents of bidders provisionally classified in first place are examined, and the existence of a single administrative appeal - of the wide competitiveness - by the preferential adoption of the electronic format - and of the economy - based on the dispute that takes place through a bidding phase.

The new statute privileges the bidding of state-owned companies, and, therefore, the auctioning ritual, as seen in its Art. 51, certainly taking into account the results hitherto measured - reducing the processing time, simplifying the procedure and obtaining proposals that are more advantageous. The gains in efficiency and effectiveness of the auction seem so favorable that the guideline of Art. 32, IV, of Law 13.303/16, establishes the preferential adoption of this modality in the acquisition of common goods and services. That is to say that not using it without a full justification shall be considered illegal, since the legal preference expressed in favor of the auction would be ruled out.

### **EXECUTION OF BIDDINGS BY STATE-OWNED COMPANIES, GOVERNMENT-CONTROLLED COMPANIES AND THEIR SUBSIDIARIES THAT EXPLOIT ECONOMIC ACTIVITY OF PRODUCTION OR SALE OF GOODS OR DELIVERY OF SERVICES.**

State-owned companies and government-controlled companies are types of state companies and represent mechanisms of direct intervention by the State in the economic domain, in cases where there are national security imperatives or with relevant collective interests, as provided in Art. 173 of the Federal Constitution.



These companies may be providers of public service, such as the *Empresa Brasileira de Correios e Telégrafos-ECT* (Brazilian Postal Service), which exclusively provides postal services in a privileged regime (monopoly).

When state-owned companies exploit economic activity, they must comply with the constitutional command provided for in Art. 173, paragraph 1, III, of the Constitution. According to this command, the law defining the legal statute of state-owned companies, government-controlled companies and their subsidiaries that exploit economic activity of production or sale of goods or provision of services, shall provide for the bidding and contracting of works, services, purchases, and sales, in compliance with the principles of public administration.

Pursuant to Law 13303/16, the provisions related to bidding and contracting are applied to state-owned companies, government-controlled companies and their subsidiaries that exploit economic activity of production or sale of goods or services, even if the economic activity is subject to the monopoly regime of the Union or constitutes provision of public services. According to Art. 1, paragraph 2, of the mentioned instrument, the provisions on bidding and contracting provided for in Chapters I and II of Title II also apply to dependent state-owned company<sup>2</sup>, defined in item III, of Art. 2, of the Supplementary Law 101/00 (Fiscal Responsibility Law), which exploits economic activity, even if the economic activity is subject to the regime of Federal Government's monopoly or constitute provision of public services. Furthermore, it does not distinguish the companies subject to the new statute according to the type of activity carried out or its characteristics.

Public bidding is the rule, even for state-owned companies subject to the legal regime of private companies (Art. 173, paragraph 1, item II, of the Federal Constitution). Bidding will only be subject to exclusion when there is evidence of business obstacles (Art. 28, paragraph 3, I and II, of Law 13.303/16) that cause duly demonstrated harm to the activities of the state-owned company, making it impossible to carry out a bid, either because it makes the competition materially unfeasible (Art. 30 of Law 13.303/16), or because it could result in prejudice to the public interest present in the institutional purposes of the state-owned company (dispensability of the bidding).

The function of bidding is to make feasible, by means of a most extensive dispute possible, the search for the most advantageous proposal for the entity involving the greatest possible number of qualified economic agents.

The adoption of a procedure to procure goods, public works, and services of interest to the state-owned companies, as well as for the sale of their goods, assets and property, has the objective of conferring predictability, safety, and equal access to the competition. It also enables internal and external control agencies to investigate the administrative acts practiced in the process, supported by the rules for execution of the process.

Predictability results from the existence of a previous regulation, materialized in the call notice, by means of which the rules for participation in the bidding and for the choice of the best proposal

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<sup>2</sup> Article 2: For the purposes of this Supplementary Law, "III - dependent state -owned company: a controlled company that receives from the controlling entity financial resources for the payment of personnel expenses or general or capital costs, excluded, in the latter case, those arising from an increase in shareholding".



are disclosed. Such rule, governed by the regulative legislation, anticipates the necessary conditions for participation in the bidding, giving legal certainty to the entity and those interested in contracting.

### **DIRECT SALE, PROVISION OR PERFORMANCE OF PRODUCTS, SERVICES OR PUBLIC WORKS SPECIFICALLY RELATED TO THE PURPOSES OF THE STATE-OWNED COMPANIES.**

Law 13.303/16, without distinction, imposed the general rule of bidding on state-owned companies that exploit economic activity of production or sale of goods or services, even if the economic activity is subject to a regime of Federal Government's monopoly or provides public services. However, the same instrument granted these entities (providers of public services or exploiters of economic activities) the prerogative of not submitting to a bidding regime when performing their end activities. This procedure, if adopted, would render their coexistence unviable in relation to private companies - their competitors in the market for the production or sale of goods or services - as a result of the disconnection of the formal procedure of biddings in relation to the swift measures performed by the private sector.

The state-owned companies that exploit economic activities, although belonging to the indirect public administration, perform peculiar operations of clear economic character linked to their own purposes. These operations are called end activities. Law 13.303/16 established the inapplicability of the bidding regime to contracting related to the end activity of state-owned companies, which, pursuant to item I, paragraph 3, Art. 28, are associated with activities specifically related to the purposes of these entities, that is, those registered in the law that authorized their establishment and in their respective Articles (CF/88, Art. 37, XIX).

One can see in Law 8.666/93, particularly in Art. 17, item II, sub item "e", a provision for the removal of the bidding regime in the sale of goods produced or sold by bodies or entities of the government, by virtue of their purposes, i.e., in view of their business purpose. The removal of the bidding regime is also provided for in Law 13.303/16, especially in its Art. 29, item XVIII, according to which the bidding by state-owned companies and government-controlled companies for the purchase and sale of shares, security bonds, debt securities, and "goods produced or commercialized" is unnecessary.

These entities, as a rule, cannot evade the bidding rule, except in the exercise of acts typically linked to the immediate performance of industrial or commercial activity that they are responsible to develop as an object of the purposes for which they were created, according to the law.

Thus, the purchase and sale of basic material and inputs necessary for the production of goods and services by a state-owned company that exploits an economic activity, as well as the sale of such goods and services, are not subject to the bidding rule. To impose on them the same contracting rules applicable to public agencies when performing their end activities would undermine the guarantee of flexibility in the conduct of their business activities. Considering they dispute parts of the market with private companies, free of the formalities of the bidding regime, thus suppressing the agile performance and harming the possibility of obtaining the most advantageous deal.

It is worth remembering that the state-owned companies, especially those organized as a corporation, are bound to a duty of efficiency, pursuant to Law 6.404/76, the Business Corporation Law. Therefore:



Art. 153. In the exercise of his duties, the company administrator must use the care and diligence that every active and honest man usually uses in the administration of his own business.

Art. 154. The administrator shall exercise the attributions that the law and the statute confer upon him to achieve the ends within the interest of the company, fulfilling the requirements of the public property and the social function of the company.

[...]

Art. 238. The legal entity controlling the government-controlled company has the duties and responsibilities of the controlling shareholder (Articles 116 and 117), but may direct the company's activities in order to serve the public interest that justified its creation.

The end activities of the state-owned companies are governed by private law and are not subject to the duty of bidding. However, this obligation is required in the contracting required to carry out the ancillary activities. It is not uncommon for certain end activities to be confused with ancillary activities. The difference between them lies in the link between the contract and the object whose development constitutes the *raison d'être* of the state-owned company, as described in the law of its creation and in its Articles. The end activity is that towards which the entity is oriented. The others are ancillary activities and, therefore, are subject to the bidding rule.

Within the scope of the Federal Court of Accounts, Decision 624/2003 – Full Court faced the issue:

First, recalling the legislation applicable to the state-owned companies in relation to the bidding procedures, we had the Executive Order 2.300/1986, which, by establishing compliance with its precepts by the centralized and autonomous administration, expressed that the state-owned companies could edit their own regulations, provided the basic principles of bidding were met (Art. 86).

Such flexibility was changed, however, with the 1988 Constitution, which, in its Art. 37 (original wording) and item XXI, generally imposed on entities of the indirect administration compliance with the legal rules on bidding. At the same time, it subjected the state-owned company, the government-controlled company and other entities that exploit economic activity to the legal regime of private companies (Art. 173, paragraph 1, in its original wording).

With the enactment of Law 8.666/1993, it was determined that the provisions contained therein would be applied to the state-owned companies and, accordingly, their regulations should therefore be compatible with the legal text (Arts. 118 and 119).



Subsequently, through the Constitutional Amendment 19/1998, paragraph 1 of Art. 173 was changed to the following wording:

Art. 173

paragraph 1 The law shall establish the legal statute of the public company, the government-controlled company and their subsidiaries that exploit economic activity of production or sale of goods or provision of services, providing for:

[...]

III – bidding and contracting of works, services, purchases and sale, in compliance with the principles of public administration.

In the same year of 1998, after considering aspects related mainly to the need of granting greater managerial flexibility to the state-owned companies, given the competitive regime imposed on them, the Court decided to exclude the obligation of Petrobras Distribuidora-BR to carry out a bidding process to procure transport that are the end activity of the company, among them, transportation of products. The obligation remains for ancillary activities (Appellate Decision 121/1998-Full Court, Minutes 35).

In a more recent court ruling, the Full Court, by accepting the reasons set forth by Minister Ubiratan Aguiar regarding the unconstitutionality of Decree 2.745/1998 and Art. 67 of Law 9.478/1997, determined that Petrobras should comply with Law 8.666/1993 and its regulation until the amendment of the enactment of the Law referred to in paragraph 1 of Art. 173 of the Federal Constitution, in the wording given by the Constitutional Amendment 19/1998 (Decision 663/2002-Full Court, Minutes 21). In the vote of the reporting judge of the aforementioned resolution, the previous decision, mentioned above, came to light, and the understanding was confirmed that Petrobras should not use, in an unrestricted manner, all the commands included in Law 8.666/93 for any situation. Subsequently, it was repeated that the company could use the unenforceability of bidding for contracting services that constitute its end activity.

This being the Court's opinion on the subject, and returning to the file, it is necessary to ask whether the rural credit operations carried out by Banco do Brasil are included or not in its end activity.

By consulting the Statute of the Bank, we verified that the purpose of the institution comprises the practice of all active, passive and ancillary banking operations, the provision of banking services, intermediation and multiple forms of financial supply and the exercise of any activities of the responsibility of the National Financial System (Art. 2).

In this context, there is no doubt that the rural financing provided by Banco





do Brasil represents a typical banking operation and that the contracting of the related insurance is characterized as an ancillary banking operation, and such operations are directly linked to the end activity. In addition, it should be stressed that the responsibility for the payment of the insurance premium is exclusive to the borrower, thus not constituting an expense borne by the banking institution.

It should also be noted that Banco do Brasil, by dealing with such financing, is on equal terms with the other institutions that are part of the rural credit system, and, therefore, requires agility and flexibility to perform this activity and many others related to the performance of its business purpose.

Although Banco do Brasil is the main financial agent, responsible for 47% of the total balance of rural and agribusiness financing applied by the institutions, as mentioned in the Bank's 2002 Administration Report, this does not represent its supremacy in this range of the insurance market, even because, as seen, more than half of the operations are conducted by other banking entities.

On the other hand, it must be pointed out that state-owned companies, particularly the corporations, are subject to the duty of efficiency, according to the provisions contained in Law 6.404/1976, including:

Art. 153. The company administrator shall use, in the exercise of his functions, the care and diligence that every active and honest man usually uses in the administration of his own business.

Art. 154. The administrator shall exercise the attributions that the law and the statute confer upon him to achieve the ends within the interest of the company, meeting the requirements of the public property and the social function of the company.

Art. 238 - The legal entity controlling the government-controlled company has the duties and responsibilities of the controlling shareholder (articles 116 and 117), but may direct the company's activities in order to serve the public interest that justified its creation.

It should be noted that the control, whether internal or external, to be exercised over the activities developed by Banco do Brasil will be based on the results obtained by it, and, in this particular, from the prism of efficiency, given the managerial model introduced in the public administration by the administrative reform (EC 19/1998).

Thus, I believe that demanding that Banco do Brasil - under the conditions of acting in a competitive market, under the principle of efficiency – carry out a bidding process to procure a rural pledge insurance in the rural finance operations would be against the provisions of this Court itself, in which



those operations included in the companies' end activities were excepted from the incidence of Law 8.666/1993. Under the terms already decided, until the legal norm referred to in Art. 173, paragraph 1, of the Federal Constitution is amended, the state-owned companies must meet the dictates of Law 8.666/1993 and their own regulation, and may use the situation of unenforceability when contracting services that constitute its end activity (BRASIL, 2003).

In another Judgment, the Federal Court of Accounts established:

7. In fact, the basic issue addressed in the review request concerns the need for Petrobras Distribuidora S/A - BR, in the performance of the end activity, and on the basis of which it was constituted, open a bidding process for the transportation of liquid fuels, since all other effects sought by the applicants will arise therefrom.

8. Regarding the relevant legislation, it is worth mentioning that the then Executive Order 2.300, of November 21<sup>st</sup>, 1986, when addressing bidding, established that the enforceability of the norms contained therein was applied only to centralized and local administration, with an express provision that the state-owned companies should issue their own regulations, adapted to their peculiarities, with simplified selective procedures and fulfillment of the basic principles of bidding. At the time, the predominant guidance was that state-owned companies had a wide margin of freedom to open bidding processes, and could, in their own regulations, establish the cases of exemption and the ranges of values within which they would develop certain procedures, to a greater or lesser extent.

9. With the enactment of the Federal Constitution of 1988, this situation changed. The requirement for fulfillment of the norms on bidding by state-owned companies, in a generic way, can be inferred initially from the combination of the provisions in Article 37 (original wording), and the content of Item XXI, of this same constitutional provision: "Art. 37 - The direct, indirect, or foundational public administration of any of the Powers of the Government, of the States, of the Federal District and of the Municipalities shall obey the principles of legality, impersonality, morality, publicity and also the following:

XXI - except for the cases specified in the legislation, the public works, services, purchases, and sales shall be contracted through a public bidding process that guarantees equal conditions to all competitors. It must have clauses that establish payment obligations, maintaining the actual conditions of the bid, according to the law, which shall only allow the requisites of technical and economic qualification indispensable to guarantee the fulfillment of the obligations".

10. However, it is worth noting another constitutional provision, which concerns state-owned companies, which, because of its implications, cannot be ignored



in the examination of the present question. This is Article 173, paragraph 1, of CF/88 (original wording), verbis:

“Art. 173 - With the exception of the cases set forth in this Constitution, the direct exploitation of an economic activity by the State shall only be allowed whenever needed to the imperative necessities of the national security or to a relevant collective interest, as defined by law.

Paragraph 1. The public company, the government-controlled company and other entities that exploit economic activity are subject to the legal regime of private companies, including labor and tax obligations”.

11. Subsequently, with the enactment of Law 8.666/93, it was expressly established that the norms contained therein would also apply to public companies, government-controlled companies and other entities directly and indirectly controlled by the Federal Government. Consequently, the own regulations of these entities, before any consideration, had to be adjusted. These companies could prepare their own manuals, as long as they were compatible with legal norms, added only with details and particularities (according to Articles 118, 119 and Sole Paragraph).

12. This change of treatment, in the sense of establishing more rigid operating norms for these (parastate) entities, which operate under private law, as recognized by the Federal Constitution of 1988, can and should now, in my opinion, receive new assignment of purpose, in order to adopt a position of greater managerial flexibility for such entities.

13. As evidenced by the doctrine, no legal provision, much less of constitutional level, can be interpreted in isolation, unrelated to the context in which it is inserted. Although the legal text is often presented with evident clarity, it still implies a work of knowledge, assimilation and complementation of what the legislator intended to express, which may be more or less complex, but which cannot be neglected, so that the standards are applied without any doubt.

14. Addressing this theme, the eminent Carlos Maximiliano states (in *Heremênutica e Aplicação do Direito*, Editora Forense, 1984, p. 128-129): “Natural Law is not a chaotic conglomeration of precepts; it is a vast unity, a regular organism, a system, a harmonious set of coordinated norms, in methodical interdependence, although each one is fixed in its proper place. From more or less general legal principles corollaries are deduced; some condition or restrict each other, although they develop in such a way that they constitute autonomous elements operating in different fields. Each precept, therefore, is a member of a great whole; so the examination of the whole corpus provides a fair amount of light to the present case. The positive prescription is confronted with another from which it came, or which came from the same prescription; it results in the nexus between the rule and the exception, between



the general and the particular, and thus one can obtain precious clarifications. The precept thus subjected to examination, far from losing its own individuality, acquires greater, perhaps unexpected, enhancement. With this work of synthesis, it becomes better understood. The hermeneut raises his gaze, from the special cases to the governing principles to which they are submitted; he asks if, by obeying one, he does not violate another; he asks about the possible consequences of each isolated exegesis. Thus, by looking at the legal phenomena from above, one can see better the meaning of each vocabulary, as well as whether a provision should be taken broadly or strictly as a common or special precept. In Rome, it was already unacceptable for a judge to make a decision based only on part of the law. The norm should be examined as a whole: *incivile est, nisi tota lege perspecta, una aliqua particula ejus proposita, judicare vel respondere* – “it is against the Law to judge or pronounce an opinion, considering, instead of the Law as a whole, only part of it”.

15. Still on this subject, it is convenient to highlight part of the opinion of the 10<sup>th</sup> SECEX, which shows “... the antinomy between Articles 37, XXI and 173, paragraph 1 of the CF is only apparent, since each one of these provisions protects a particular legal interest. In this way, good hermeneutics is protected, as taught by the master Carlos Maximiliano (*in Hermenêutica e Aplicação do Direito. Editora Forense: 1998, p. 356*):

3.20.1. Absolute contradictions are not presumed. It is the duty of the applicator to compare and try to reconcile the various provisions on the same subject, and from the whole, thus harmonized, deduce the meaning and scope of each one”.

16. In this way, we can infer that one of the purposes or properties of systematic interpretation is, exactly, in overcoming apparent conflicts of norms, as stated by Juarez Freitas, one of the most brilliant publicists of the present time (*in A Interpretação Sistemática do Direito, Malheiros Editores, 1995, p. 54*):

“Thus, assuming a view that is broader and more well equipped, systematic interpretation must be defined as an operation that consists of assigning the best meaning, among several possible, to the principles, norms and legal values, hierarchizing them in an open whole, fixing their reach and overcoming antinomies, from the theological conformation, in order to solve the concrete cases”.

17. As stated above, the Federal Constitution of 1988 (original), in its Art. 37, item XXI, establishes a general rule, applicable initially to all state-owned companies. On the other hand, Art. 173 separates a kind of state-owned company, which exploits economic activity. This time to say that only this kind can and should be governed by the same rules applicable to private companies. It creates an exception to the general rule, so that exceptions must have strict interpretation, in the sense that only situations that fit perfectly in the exception rule, without extensions, can be considered as exceptional.



18. It should also be remembered that state-owned companies, especially those formed as a corporation, are subject to a duty of efficiency, according to the provisions of the Corporate Law 6.404/76:

“Art. 153 - In the exercise of his duties, the company administrator must use the care and diligence that every active and honest man usually uses in the administration of his own business.

[...]

“Art. 238 - The legal entity controlling the government-controlled company has the duties and responsibilities of the controlling shareholder (articles 116 and 117), but may direct the company’s activities in order to serve the public interest that justified its creation”.

19. In this regard, the competent Unit initially considers that BR, in the performance of its final activities, assumes a social role, since it is present in locations that do not attract the interest of other distribution companies, even accepting evident financial losses. For these reasons, it warns that the company must have mobility to quickly change its prices and offset such losses with the gains from other parts of the country, with the need to negotiate case by case with the carriers. It refers to the commercial and strategic nature of the transport contracts entered into by the entity, emphasizing that they take on peculiar and specific characteristics of the economic branch to which the distributor belongs. This makes it impossible to carry out the previous bidding process for its contracting, since these contracts are linked to the essence of the economic activity it exercises.

20. In addition, as already discussed by the 10<sup>th</sup> SECEX, “the activity of distributing in this case assumes a meaning that makes it synonymous with the activity of transport, which is its physical materialization, which can occur through trucks, boats or other means, as done by the state-owned company. Thus, it is concluded that the transportation of fuels is, in fact, one of the BR’s end activities”, which does not depend on whether or not it is outsourced.

21. Additionally, the Technical Unity follows, whose aspects are now applicable, especially: “It should be emphasized that the freight is part of BR’s direct cost, thus being inseparable from the commercial activity of the company, as much as the raw material it transports, both of which must be the subject matter of commercial contracts. The inclusion of their impact on invoices as part of the price is only a blatant consequence of this finding”.

22. This finding became clearer with the advent of Law 9.478/97, which consolidated the intensification of competition in the sector in which BR operates, constituting a new fact to corroborate the need for the company to act with agility and competitiveness in the market, as a way to preserve the



wealth that constitutes it.

23. In this sense, it is noteworthy that, in compliance with the caput and paragraphs of article 61 of the law that established the National Agency of Petroleum (ANP), Petrobras and its subsidiaries, including BR shall perform under free competition with other companies, according to market conditions, when developing economic activity related to research, mining, refining, processing, trading and transportation of oil and its byproducts, natural gas and other fluid hydrocarbons, as well as any other related activities,.

24. It should also be noted that the Representative of the Office of the Public Prosecutor before this Court, Dr. Walton Alencar Rodrigues, acknowledges that “in light of the new legal system established by Constitutional Amendment 19/98, the internal regulations do not need repairs, but the appealed decision should be repaired”, since it partially follows the opinion of the 10<sup>th</sup> SECEX.

25. For this reason, it is feasible to directly procure goods, services and products related to BR's end activity, that is, those resulting from usual market procedures in which it operates and are indispensable to the development of its normal activity, among them, transportation of products distributed by it.

26. Also worthy of note are the new justifications presented by the members of the Executive Board on the economic activity of the Entity, accompanied by the study carried out by the eminent Prof. Adilson Abreu Dallari, from which I extract the excerpt transcribed below. “Things were at this stage of development when the Federal Court of Accounts pronounced Decision 414/94, commanding Petrobras Distribuidora S/A - BR to: a) adapt its General Contracting Manual to the norms of Law 8.666/93; and, b) carry out a formal bidding procedure to procure transport services for its products. The latter provision proved to be infeasible, incompatible with the purposes for which this Petrobras subsidiary had been created. In fact, it was, and it still is, its responsibility to ensure the regular distribution of oil by-products throughout the national territory, especially in the most distant places, which are difficult to reach, where this activity does not arouse the interest of competitors, precisely because it is uneconomical. To offset the deficits thus generated, the company needed and need to be efficient, commercially aggressive, to win the market in the more densely populated urban areas, where competition is exacerbated. To have competitive prices (remembering that oil products are no longer tabulated) the company had and has to reduce costs, and transportation is a relevant item of cost composition. In other words, in order to compete, in equal conditions with other private companies distributing oil by-products (non-monopolized activity), Petrobras Distribuidora S/A - BR needs to be free to contract, in order to negotiate transportation contracts. Without it, it cannot maintain itself. The Federal Court of Accounts understood all of this when re-examining the matter, but, in Decision 240/97, it was considered only as an attenuation of the conduct of the company's officers, keeping the



understanding that the direct contracting of oil by-product transportation services is an unlawful act. This is the essential point of the question under examination. The factual necessity is not under discussion or dispute; only the illegality of that conduct is stated. However, the defendant's conduct considered as illicit had and has constitutional protection. This is what derives from the systematic interpretation of the Federal Constitution.

Art. 37 effectively establishes a general obligation of bidding process, for all entities of the indirect or decentralized administration, without exception. When read in isolation, out of context, this is its interpretation.

However, no normative provision has life outside the context in which it is necessarily inserted. The normative universe is not a chaotic heap of prescriptions, but rather an organized, articulated, and hierarchical system, in which contracting is only apparent.

Interpreted systematically, in conjunction with the provisions of Art. 173 (in its original wording), Art. 37 only establishes a general rule, which, however, is not absolute, since it finds an exception exactly in the juridical discipline constitutionally established for state-owned companies exploiting economic activity, which must act in competition with private entities, in relation to which it can neither have privileges nor disadvantages, except for those arising from the social purposes that determine its creation.

In the case under examination, Petrobras Distribuidora S/A - BR shall bear the burden of its obligation to distribute its products even where this is uneconomical, but it cannot be compelled to compete with the 85 private competitors at disadvantage, where this activity is profitable.

Therefore, the freedom to hire transport services as an essential part of the distribution activity, which is the ultimate end activity of this company, has never been illegal. In fact, the law has never been incompatible with mere common sense.

Currently, the lawfulness of this conduct has become even more pronounced. In fact, after the enactment of Constitutional Amendment 19 (Administrative Reform), which introduced in the Public Administration a management model, in which the control of administrative processes is replaced by control of results, the freedom of contracting by state-owned companies that exploit economic activity has been even more pronounced.

Paragraph 1 of Art. 173 states that those companies must be governed, in their commercial rights and obligations, by the same rules applicable to private companies and, in relation to bidding procedures, it allows the issuance of internal regulations, always in compliance with the principles of public administration.



This freedom has been offset by more adequate control mechanisms, such as the creation of regulatory agencies. In this specific case, the National Agency of Petroleum - ANP.

In summary, currently, in view of the current wording of the constitutional text, PETROBRAS Distribuidora S/A - BR may have its own General Contracting Manual, provided that the specific provisions of this regulation are compatible with the principles of Public Administration.

It may also directly contract, without bidding, the services of transportation of its products, provided that it can justify each choice and that, in so doing, it does not contradict or offend those same principles, either by privileging or prejudicing someone, either by paying exorbitant prices or remunerating unnecessary or unpaid services etc." (Judgment 121/1998 – Full Court, Reporting Minister Iram Saraiva, Case 010.124/1995-0).

The Federal Constitution, in its Art. 37, caput and item XXI, established the general rule of bidding when executing contracts for public works, services, purchases, and sale of goods, assets and property, of the direct and indirect public administration of any of the Powers of the Federal, state, Federal District and municipal Governments. That is, it extended the obligation of the bidding process also to public companies and government-controlled companies, entities that are part of the indirect public administration. In its Art. 173, paragraph 1, it assigned to the law the duty to establish the legal statute of the public company, the government-controlled company and its subsidiaries that exploit economic activity of production or sale of goods or provision of services, including concerning bidding and contracting of works, services, purchases and sales, in compliance with the principles of public administration.

Based on systematic interpretation of these constitutional provisions, it is concluded that (a) public companies, government-controlled companies and their subsidiaries are obliged to open bidding process for works, services, purchases and also the sales of their assets; (b) it is incumbent on the law, therefore excluding lower hierarchy norms, such as decrees, regulations or normative instructions, to establish the general guidelines applicable to such bidding processes.

However, when public companies, government-controlled companies and their subsidiaries operate in the market of production or sale of goods and services, they are subject to the legal regime of private companies, including civil, commercial, labor and tax rights and obligations (Art. 173, paragraph 1, II, of the Federal Constitution).

In compliance with the constitutional guidelines, Law 13.303/16 established the general rule of bidding for the contractual activities of government-owned companies that exploit economic activity of production or sale of goods or services, even if the economic activity is subject to a regime of monopoly of the Nation or is of provision of public services. However, it made an exception in Art. 28, paragraph 3, I, concerning direct sale, provision or performance of products, services or works specifically related to their respective business purposes set forth in their Articles.

This exception to the general rule of bidding aims to fulfill the legal discipline constitutionally





established for state-owned companies that exploit economic activity, which must act effectively and efficiently in the pursuit of the best results, which is why they operate in a regime of equalization with private companies, in relation to which they cannot have privileges or suffer disadvantages. By the way, paragraph 2 of Art. 8, of Law 13.303/16 establishes that any obligations and responsibilities that the public company and the government-controlled company that exploit economic activity assume in conditions different from those of any other company of the private sector in which they operate, must be clearly defined by law or regulation, as well as provided for in a contract, covenant or agreement entered with the public entity competent to establish them, in compliance with the total publicity of these instruments, and must also have their costs and revenues broken down and disclosed in a transparent manner, including in the accounting plan.

## 6. CONCLUSION

Law 13.303/16 requires a prior bidding procedure when hiring third parties to provide services to public companies and government-controlled companies. Such services include engineering and advertising, for the purchase and rental of goods, sale of goods and assets that are part of the respective wealth or the performance of works to be integrated to this wealth, as well as the implementation of the security interest on such assets.

However, the rule of prior bidding is set aside in the contracts required for the business performance of state-owned companies, such as those related to the direct sale, provision or performance of goods, services or works specifically related to their respective business purposes, as well as in cases where the choice of partner is associated with particular characteristics and linked to defined and specific business opportunities, provided that the unfeasibility of the competitive procedure is demonstrated.

Business opportunity means, according to the law, the formation and extinction of partnerships and other associative, corporate or contractual forms, the purchase and sale of interest in companies and other associative, corporate or contractual forms, and the operations carried out in the scope of the capital market, subject to regulation by the competent body.

Therefore, the general rule of bidding is imposed on contracts of state-owned companies, except in contracts where there is a specific demonstration of the existence of business obstacles to the performance of their end activity. This is illustrated with the accomplishment of previous bidding process by public financial institution to select individuals or legal entities applying for loans. The bidding, in this case, in addition to delaying the conduct of the business by the state-owned company, conflicts with the disciplinary rules of these operations by private financial institutions, placing the state-owned company in a position of disadvantage in relation to the agility available to the latter.

In addition, the state-owned companies that carry out economic activity do not enjoy tax privileges that are not extended to the private sector, being thus under the same legal regimes as those of private companies operating in the area, which confers on them competitiveness in the market for the provision of goods and services. If prior bidding was required for the performance of their end activity, these entities would be jeopardized in the efficient exploitation of their economic activity, damaging not only the free competition regime, but also the equality guaranteed by the Federal Constitution before private business entities.



Although the state-owned companies are exempt from bidding for the provision of services related to their respective business purposes (Art. 28, paragraph 3, item I, of Law 13.303/16), they must confer honesty and transparency to these contracts, in accordance with the principles governing the performance of public administration. Their partners must be selected through a competitive, isonomic, impersonal, and transparent process, as established by the Federal Court of Accounts in Judgment 2.033/2017 – Full Court, Reporting Minister Benjamin Zymler, Case 016.197/2017-8.

The proposal to simplify structures, rules, administrative procedures, and work processes to “optimize” the cost-benefit (efficiency) ratio and contribute to the achievement of results (effectiveness), thus meeting the commitments of the State with the civil society, has been developed in the public management of several Rules of Law, of both Romano-Germanic legal culture and Anglo-Saxon tradition. So much so that, in the United Kingdom, there is a repeated recitation of the ten commandments of the simplification of public services, useful both to advise managers of the direct state administration and those who run state-owned companies with their own distinct identity, separated from the State, and provided with financial and patrimonial autonomy. Their services to the Brazilian State-Owned Law stand out because it has provided to make itself dependent on its application of regulations to be edited within each company. In a free translation of the British manual of public management:

1 - Start with the user.

The simplification of the service begins with the identification of the user, his socio-family environment, his wishes, his routine, his complaints, his needs, whether explicit or implicit. If you do not know who your user is and what he needs, you will not build the right thing. Do surveys, analyze data, talk to users, get up from your chair and go out! Do not make assumptions, put yourself in the user’s shoes, try the service yourself, be empathetic, and remember that what they ask for is not always what they need.

2 - Decide with data.

In most cases, we can learn from real-world behavior by observing how existing services are used. Let the data collected in the provision of the service (time and costs of the provision for the user, level of satisfaction, among others) direct decision making rather than intuitions or conjectures. Keep doing this after your service is available and whenever you have new prototypes and tests with users.

3 - It can always be simpler.

It is very simple to do something complex, but it is very complex to do something simple. Doing something simple to use is much more difficult, especially when the underlying systems are complex. The user needs focus, he needs to be driven by a simple, clear and intuitive service, and not get lost in complexity. Do not take “it has always been this way” as response. Less is more. Try to remove functionalities, forms, options, fields, colors, etc. Finally, always use the KISS (Keep it Simple, Servant) rule.



#### 4 - Take small, steady steps, iterate.

The only way to solve a great challenge is to divide it into small actions. The best way to build good services is to start small and constantly iterate. Release the Minimum Viable Service (MVS) in advance, test it with real users, switch from Alpha to Beta to “Go Live” by adding features, excluding things that do not work, and doing refinements based on feedback. Iteration reduces risk. It makes major failures unlikely and turns small flaws into lessons. If a prototype is not working, do not be afraid of discarding it and starting over.

#### 5 - Simplicity is accessibility.

Everything we build must be as inclusive as possible. We are building for the needs, not for the public. We are designing for everyone, not only for those who are the majority, like us. The people who need our services the most are often the people who find it harder to use. Let us think about these people from the beginning.

#### 6 - Understand the present and project the future.

We are not designing for a computer screen or smartphone. We are designing for people who follow trends. We need to think hard about the context in which they are using our services. Ask yourself: are they in a library? Are they on a telephone? Are they just only familiar with Facebook? Have they used the web before? Where will they be in 3.5 or 10 years?

#### 7 - Create digital services, not websites.

A service is something that helps people do something. Our job is to discover the users' needs and build the service that meets those needs, a 100% digital service that can be consumed in a walk in the park, in the time of a stop at the red traffic light. Of course, much of what the services will be on web pages, but we are not here to build unidirectional information channels. The digital world has to connect to the real world, so we have to think about every aspect of a service, and make sure they add something that meets the needs of the user.

#### 8 - Be consistent, not uniform.

We should use the same language and the same design standards whenever possible. This helps people become familiar with our services, but, when that is not possible, we should make sure that our approach is consistent.

This is not a straightjacket or rulebook. Every circumstance is different. When we find standards that work, we should share them and talk about why we use them. However, that should not stop us from improving or changing them in the future, when we find better ways of doing things or when the users' needs



change.

9 - Create in partnership and share.

We should share what we are doing whenever we can. With colleagues, with users, with the world. Share codes, share projects, share ideas, share intentions, share flaws. The more eyes in a service, the better it gets.

If you know a way to do something that works and is efficient, you should make it reusable and shareable instead of reinventing the wheel all the time. This means building platforms and records that other bodies can use, providing resources that are easily usable and scalable to other contexts and jobs.

10 – Does it work?

Finally, and most importantly, if none of these commandments has helped, simply ask yourself the following question: “Does this solution improve the user’s life?” If it does not clearly transform the user experience for the better, simply abandon it and start again from commandment number 1.

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