Hiring training and capacity building services for Public Administration personnel: a brief analysis of Decision 439/98, issued by the Federal Court of Accounts - Brazil - Plenary Session

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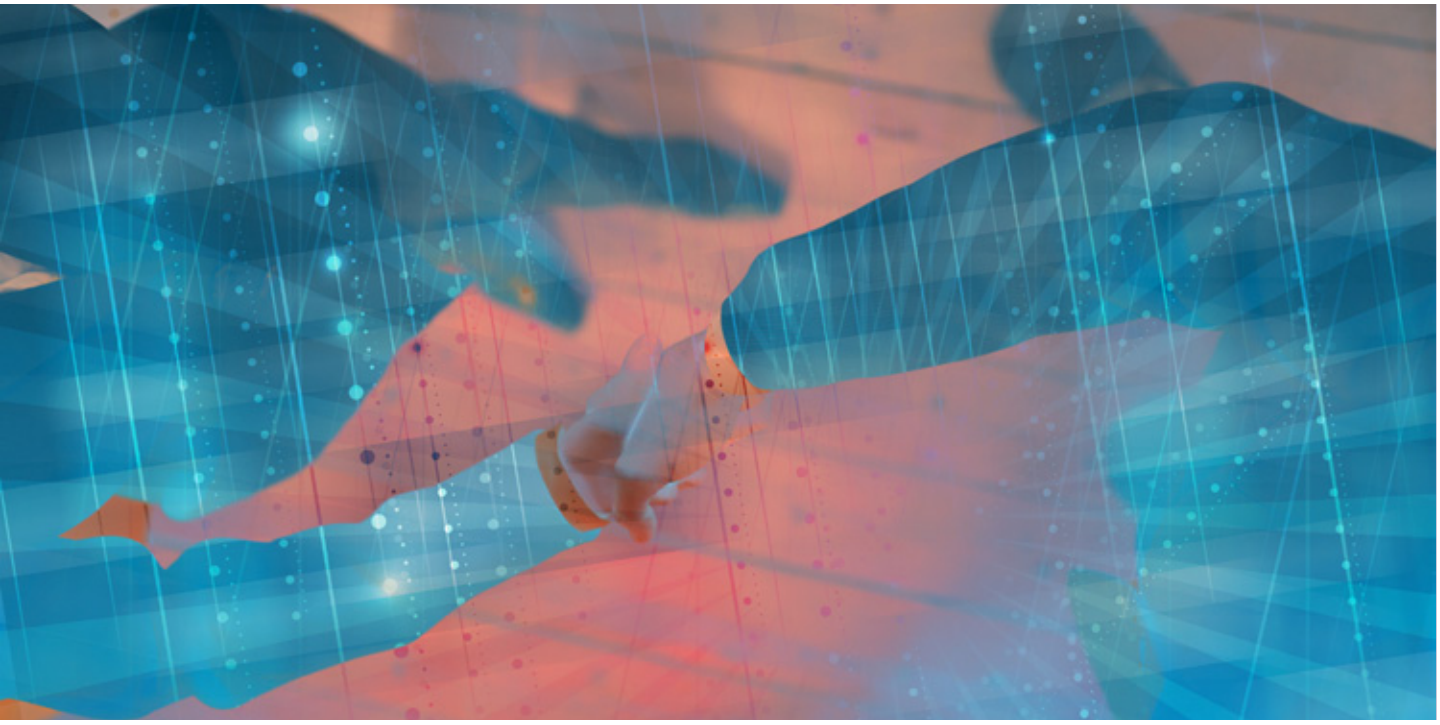
ABSTRACT

The macro regulatory system that guides government contracts presents a great difficulty to those who attempt to apply it, when the need arises to hire staff training services, leading them more often than not to hiring courses and professors that fall short of expectations regarding quality, due to the incorrect notion that such services must be acquired by means of a bid. By contrast, the largest challenge faced by those that must interpret the guidelines lies in the complexity of certain concepts, such as those of "sole source service" and of "recognized expertise", which are requirements for adopting the "no-bid contract" classification, which greatly increase the challenge of hiring the right provider for training services. Despite the fact that the Federal Court of Accounts has already closely examined this issue in its Plenary Decision 439/1998, which concluded that a bid process is not required for this type of contract, difficulties and challenges still persist. By re-examining this ruling, this paper aims to further clarify these concepts, as well as to address issues of a practical nature that arise on a daily basis at Government Schools and which have escaped the always profound examination of the Federal Court of Account's Plenary Session. The purpose of all this is to see the bidding norms always being obeyed, without deviating from their objectives, but also with no loss of efficiency or effectiveness, considering that on-going training of staff members of the Public Administration



is, without a shadow of a doubt, a way of improving the public services available to society.

Keywords: No-bid contract. Training. Uniqueness (sole source).

1. INTRODUCTION TO THE PROBLEM

The heated discussion around how Public Administration entities and bodies must proceed to hire for its staff members, undergraduate and graduate-level courses, presentations, specific trainings, speakers and instructors, while reconciling legal norms for procuring services (Federal Constitution, Article 37, XXI and Law 8,666/93) and the peculiarities inherent to this type of service provision, is not new. There are countless difficulties and several different factors that contribute to increase insecurity when such contracts are signed.

The first point relates to the requirement to call for bids. Since the **duty to call for bids** is mandatory and selection based on the lowest price is the general rule, the problem arises from the immense difficulty of establishing appropriate selection criteria that will point with certainty to the most beneficial proposal. This greatly increases the risk of a contract being unsuccessful. Experience has shown that contracts of this nature, when bid upon, more often than not result in poor performance and in the objectives of the service not being met.

Another factor, which ends up sounding negative, is the variety of professionals and companies available in the teaching and training sector. The fact that there is a large variety of solutions in the market for a given training requirement makes correct understanding of issues like **sole source** and **recognized expertise** unclear. Therefore, one characteristic from this sector, which should be considered beneficial given this scenario, ends up making it more difficult to conduct proceedings. The Federal Court of Accounts precedent mentioned above was a milestone for addressing this problem which, despite the excellent work carried out by the Serzedelo Corrêa Institute, did not close out the debates. It raised a series of doubts for public servants working in this area regarding the practical aspects of this type of contract.

With the aim of shedding a bit more light on this subject, let us reinterpret the above-mentioned precedent, starting from its bases, in order to propose some pragmatic solutions that will clear settle this subject a little more.

2. NO-BID CONTRACTS, BASED ON ARTICLE 25, II: REQUIREMENTS AND SALIENT FEATURES

As it is known, in no-bid contracts the impossibility of holding a competition is the contributing factor that cancels out the General Duty to Bid, recorded in Article 37, XXI of the 1998 Federal Constitution. This impossibility always arises from the service to be hired itself, whether because it is sole source, as in cases of an exclusive product, or because,

even if it is not exclusive, it is incompatible with the notion of objectively comparing the proposals. It is precisely here that the hypothesis under analysis fits in. It is not a case where an administrator makes the selection, as in cases where bidding is not required (Article 24).

See the wording of the legislation:

> Article 25 – A bid process cannot be required when competition is not viable, especially: (...)
> II – for hiring technical services listed in Article 13 of this Law, of a sole source nature, with professionals or companies of recognized expertise, except for publicity and marketing services for which no-bid contracts are prohibited;
>
> Article 13 – For the purposes of this Law, specialized technical professional services are considered to be work related to:
> I - technical studies, planning processes and basic or executive projects;
> II – opinions, expertise inspections, and assessments in general;
> III – technical advising or consulting and financial or tax audits;
> IV – audit, oversight or management of construction or services;
> V – legal representation in legal proceedings or administrative procedures
> VI –training and capacity building for staff;
> VII – restoration of artwork or property of historical value.
> VIII – (Vetoed)

As can be seen, Article 25, II of the General Bidding Law acknowledges that certain services, i.e. "technical, specialized" ones, when they are "sole source", cannot be compared to each other, even when there is more than one solution and/or provider available. The above-mentioned Article 13 offers a list of services considered to be "technical, specialized" ones. The issue at the heart of this concept of non-bid contracts is the following: several capable providers may be available, but an objective comparison of their respective proposals is not viable. As Celso Antônio Bandeira de Mello teaches (2004, p. 497), "only (...) homogeneous, interchangeable, equivalent goods may be bid on. Unequal things are not bid upon. The characteristics of the service must be comparable and the items to be bid on must meet the Administration's requirements."

Uniqueness (sole source) is precisely the element that makes the service distinct or special. The fact of a service being described in Article 13 is not sufficient, because that in itself does not make it special (unique). In the performance of the service or in its intrinsic characteristics, there must be something that makes it uncommon. **Uniqueness** cannot be confused with exclusivity, originality or even rarity. If a service were a one-off or original, it would be a case for non-requirement due to a lack of competitors, based on the main clause in Article 25, and not due to its unique nature. The fact of the service only being offered by a few professionals or companies does not prevent these professionals or companies from competing against each other.

Despite there being opinions to the contrary[1], another concept that we consider incorrect is that uniqueness can arise from recognized expertise on the part of the provider. For this doctrinal line of thinking, recognized expertise would involve a subjective uniqueness. However, if we were to imagine that non-viability would arise from the contractor, we would have to accept the absurd idea that a given service would be at once unique and common, depending on the person that provides it. Now, a service either is or is not, unique. An architectural design for a low-income housing development, devoid of any complexity or cutting-edge technological solutions, cannot be classed as unique simply because the contract for it fell on the desk of Oscar Niemeyer. The design itself would still be common. In a very astute way, Jacoby (2011, p. 604), points out that the contracting process for construction and services necessarily begins with the definition of the purpose of the contract, involving the preparation of the basic and/or executive project, and not with the selection of a provider. He adds that "when regulation agencies begin their analysis by the characteristics of the project, one can notice how superfluous were the characteristics that made the project so unique, to the point of making competition non-viable."

However, in order for non-viability of competition to be characterized, the facts that the services included in the contract are listed in Article 13 and that it can be characterized as unique are not enough. Additionally, it is required that the service be provided by a professional or company that has recognized expertise. Only with these three requirements in place, in this order, will non-viability of competition be characterized. Doctrine and case law are not at odds with this assertion[2].

3. SERVICES FOR" TRAINING AND CAPACITY BUILDING FOR STAFF", FROM ARTICLE 13, VI, LAW 8,666/93

To begin with, it should be pointed out that it would not be reasonable to give a restrictive interpretation that would consider that Article 13, VI meant to limit the concept of specialized technical services to only training services; the concept must be extended to all educational services, at all levels. Therefore, whatever name is given to this service (training, advanced training, development, capacity building, teaching), it will be included in Clause IV of Article 13, Law 8,666/93. Included in this context is the direct hiring of teachers, instructors and speakers (individual person); contracts for continuing education courses (short or long term), internal undergraduate or graduate-level courses; registration in extension, undergraduate or graduate programs that are open to third parties, whether in person or via distance learning.

That said, there is no doubt that for these services, the first requirement for classification under the concept of non-requirement is met, as described in Clause VI of Article 13. The next step would be to determine in which cases such services possess qualities of uniqueness such that a bid process would be non-viable. For this examination it is necessary to perform an analysis around what the core features are for the concept of "training", since these features are precisely where distinctness would be defined, such that the service is classed as unique. After all, it is these features that will be used as the bases for measuring performance.

We call the core of the service the portion that gives it its identity, and that makes its execution concrete. The main requirement for any service is a "doing". In a cleaning service, for example, the core of the service rests on the action of cleaning itself (the "doing"). The methodology, the frequency, the equipment and supplies are just one part of the specifications, but they will not be responsible for the result achieved. It is only when the worker, applying the methodology, at the determined frequency, and using the equipment and supplies described in the Terms of Reference, carries out the cleaning that the service is said to be performed and that results can be measured. This is the core of the service of "cleaning". Whoever the professional or company, whatever the place of work, in whichever region it is performed in, with the methodology and other specifications implemented, the result will be identical or approximately so, and the objectives completely met. That is why it cannot be said that a cleaning service is unique in nature. The service allows for an objective comparison between several proposals. As a general rule, the same cannot be said for training services.

For training services, the general and specific objectives, target audience, methodology and course content represent the technical characteristics of the service, but they are definitely not the core of the service. The purpose of a training service only comes about with a **class** (the "doing"). It is through this activity that an instructor, making use of educational methodology and resources, and following the course content, carries out the purpose. Therefore, the core of the service is the class itself. Now, if it is the class, as a rule this service cannot be considered as usual, nor can it be considered that it can be performed in a standardized way; it cannot be said that any provider (or instructor), while using the resources mentioned above, will achieve the same results. After all, each instructor has their own technique, their own way of dealing with groups, their own empathy, teaching method, personal experiences, cadence and tone of voice, such that they cannot be compared to each other. Additionally, each group of students has their own characteristics that make them different from each other, which demand that the professional adapt their delivery each time they give the course. Indeed, the very instructor may carry out the service in a different way each time they deliver it, even if it is on the same topic, for example in the case of a change in the vision and concept of the course. That means that classes will always be different, whether in their delivery, their content, or in their method of presentation. It cannot be denied that each class (each service) is in itself unique, uncommon, and distinct. In this scenario, it is worth transcribing an excerpt from the document in question, quoting a lesson from Ivan Barbosa Rigolin, in a published article on Decree-Law 2,300/86:

> Expert Ivan Barbosa Rigolin, speaking about the legal classification of uniqueness applied by the legislation to training and capacity building of staff (...) held that: "The methodology used, the teaching system, the educational material and resources, the different instructors, the focus of the materials, the ideological slant, as well as all other fundamental issues related to the delivery of the service and its results- which in the end are what are important- none of this can be predetermined or deliberately selected by the contracting Administration." Therein lies the unmistakable brand of the provider

> of a unique service, who doesn't just carry out common projects, but who develops techniques that are all his or her own, and which can even change from project to project, and which can be continuously improving. (from Treinamento de Pessoal - Natureza da Contratação, in Boletim de Direito Administrativo - March 1993, pages 176/79)

The same is not true of training courses whose core service does not lie in the class, but rather in the method or educational material used. In these courses, the instructor's involvement is just an accessory, and is not a determining factor in the expected results. The methodology is what is responsible for these results being achieved. The courses within the "Kumon" methodology are an excellent example. This method calls for "individual study aiming to create self-teaching students using proprietary educational material for self-teaching, thus allowing the students to do their exercises **with a minimum of involvement by the instructor**..."[3] (bold added for emphasis). The core of the service, that is, its essence, is the method and the educational material used. In this case, the requirement of uniqueness is not there, since no matter who the instructor is, as long as they are trained for this role, on account of their minimal intervention, the results achieved will be uniform and predictable, since it is the method and the educational materials which are the main factors responsible for the results obtained.

In light of this, it is correct to state that, whenever the core of a training service is the **class** (the "doing"), the instructor's efforts will be the determining factor in achieving the desired results- i.e. therein lies the uniqueness of the service. In contrast, if the method is more important than the instructor's involvement, then the training is biddable. In can be seen that the logic around the general duty to hold a bid process (Article 37, XXI, Federal Constitution), in relation to these services is turned upside down, such that uniqueness is the general rule, insofar as almost all of the training activities are integrally dependent on the instructor's involvement. It is only in exceptional cases that a training program would have characteristics so distinct that it would require minimal involvement on the part of the instructor.

To clear up once and for all the confusion around the concept of uniqueness, let us consider that case of training courses that are not specialized or originally designed for the organization that contracted them. Here is a classic example: Official Portuguese Writing or Upgrading Course. With overwhelming frequency, the argument is heard wherein this course would not be unique in nature because "the subject is not complex and there are many Portuguese teachers on the market." Once more we must insist that uniqueness is not a synonym for exclusivity or rarity. It is not the number of professionals available that indicates the uniqueness of a service, but rather the examination of the core of the service, which, in the case of teaching, is the instructor. The conclusion that is reached is that, even if it is a course on a less specialized subject, and even if there are thousands of qualified instructors, if the involvement of the teacher is the determining factor in the desired results, the element of uniqueness will be there.

4. DEMONSTRATION OF RECOGNIZED EXPERTISE

Having discussed the first two requirements for the classification of non-viability of competition for a contract for training and capacity building for staff, we now move onto the final challenge: the issue of recognized expertise. The text from the legislation would seem sufficient to us to resolve any impasses, but in practice we have seen that this isn't always the case. At first glance, there exists a false idea that a recognized expert must be widely known, almost famous. See the legal text:

> Article 25 - *Omissis*
> (...)
> § 1° - A professional or company will be considered as having recognized expertise if their reputation in their field of specialization, resulting from previous performance, studies, experience, publications, organization, apparatus, technical equipment, or from other requirements related to their activities, allows for the inference that their work is essentially and indisputably the most suitable for the fulfillment of the contract.

A recognized expert is a professional (or company) who has earned a high level of respect and admiration from his or her peers, that is "... in their field of expertise..." based on their performance record, such that ... "it can be inferred that their work is essentially and indisputably the most suitable for the fulfillment of the contract."

This provision offers guidance around which attributes or requirements are considered the best ones for determining whether a professional is a recognized

expert or not, *i.e.*: "previous performance, studies, experience, publications, organization, apparatus, technical equipment...". There is more still. The expression "... or of other..." is a good indicator that the list of these requirements is an open one. Therefore, legislators accept that other concepts and requirements, not expressly written into the legislation, may serve as a basis for the conclusion that the professional selected is the most suitable one for the fulfillment of the contract. It can also be noted that listing the requirements is optional. That means that it is not required that they all be included in the justification for selection; it is enough to name one of them. If it is desired to contract for a presentation on Ethics in the Police Approach, designed for a police troop, a civil police officer with broad operational experience and a flawless reputation may be considered to be a **recognized expert** even if he or she does not have a university degree or has not published any papers. It is their background in the profession that allows for a positive prediction on the results that may be obtained from the presentation.

4.1 DISCRETION IN THE SELECTION OF A PROFESSIONAL OR COMPANY

When conceptualizing the term "recognized expertise", the legal provision concludes with the expression "allowing for the inference that their work is essentially and indisputably the most suitable for the fulfillment of the contract." There is no doubt that this selection will depend on a subjective analysis by the relevant authority in order for the contract to be signed. It could be no other way, since if the selection could be grounded on objective criteria, the bid process would not be viable. A bid process is not possible precisely because there is no way to perform an objective comparison between proposals.

Consequently, since the selection will be done based on a subjective evaluation, that is, based on the personal judgment of someone with the ability to make the selection, based on the sum of the information about the person who will deliver the service (experience, publications, previous performance, etc.), compared to this same information for the other possible providers, it is clear that the selection is essentially discretionary. It will be the relevant authority who will select the proponent that seems to them "indisputably the most suitable for the fulfillment of the contract", while respecting the range of principles followed in administrative activities (notably: legality, impersonality, abidance by public interest and reasonableness), and in addition, weighing the options available to them, based on their discretion. Once more we refer to the excerpt from the above-mentioned court ruling 439/98 from the TCU Plenary Session, which includes the brilliant lesson by the late Eros Roberto Grau:

> On Administration's prerogative of assessing the recognized expertise of the candidate, we once again refer to the teachings of Eros Roberto Grau, in the same work mentioned above: "... It shall be the duty of the Administration - that is, the public official responsible for this -to recommend the professional or company whose work is essentially and indisputably the most suitable for the project. It should be noted that while the regulatory text uses the present tense ("they are, essentially and indisputably the most suitable for the fulfillment of the purpose of the contract"), **here there is a prediction, which is based on nothing more than the requisite of trust**. There is a large margin for discretion here, even though the public agent, through their fulfillment of their duty to recommend, must consider the attributes of recognized expertise on the part of the party being hired." (Eros Roberto Grau, in *Licitação e Contrato Administrativo - Estudos sobre a Interpretação da Lei*, Malheiros, 1995, page 77) (bolded for emphasis)

This is identical to Celso Antônio Bandeira de Mello's position (2004, p. 507), in which, with his usual precision, he clarifies that:

> "It is therefore natural that in situations of this nature, the selection of a provider (to be necessarily selected from among the proponents) with recognized expertise in the area – falls to the professional or company whose performance gives the contracting party the conviction that, for the case at hand, they will presumably be *more suitable than that of others*, and giving the confidence that they will deliver the most suitable service for the case. There is therefore an illimitable component on the part of the contracting party."

4.2 WHO HAS THE RECOGNIZED KNOWLEDGE- THE INSTRUCTOR OR THE COMPANY?

Another practical question which often arises is the issue of identifying whether it is the company

or the individual to whom the recognized expertise belongs. In general, professionals (recognized experts) are rarely contracted directly as individuals, through a Receipt of Payment to Freelancer scheme (*Recibo de Pagamento a Autônomo* - RPA); rather, they are more commonly hired through event organization companies. This is done because of the availability of structure (airfare, lodging, meals), which would be paid for by the professional if he or she were hired as an individual. The question that arises is how to justify hiring a given company, while justifying the recognized expertise of the professional? The answer may lie in Article 25 of Law 8,666/93, in Clause III.

It has already been made clear that the non-requirement to hold a bid process discussed herein is based on the notion of it not being possible to objectively compare proposals since this depends on the personal evaluation criteria of the relevant agent (a discretionary act). Teleologically, it has the same origin as for the recognition of the non-viability of competition for contracting with professionals from the art sector. For this, Clause III of Article 25 authorizes contracting an artist not only directly, but also "*... through sole proprietorship...*". By way of analogy, the same solution could be offered for the hiring of instructors, if they are hired through event organization companies. In this situation, it should be acknowledged that the instructor would work through an intermediary, just as is common in the art world. I understand that the situation is more than analogous; it is almost identical. Not that the instructor that is hired would have to demonstrate that he or she works exclusively for a certain event organization company. That is because this almost never happens in the market. But, for a specific project, the subject of the contract, he or she would undoubtedly work in a relatively exclusive way, considering that, in general, each instructor/speaker usually works with more than one company or institution.

5. THE TCU'S CURRENT UNDERSTANDING ON THE SUBJECT

The above decision generated studies that culminated in Decision 439/1998, which was reported by Minister Adhemar Paladini Ghisi, and which was a watershed for the subject. The Court's Secretariat-General for External Control, the technical arm in charge of conducting studies, arrived at the conclusion that, in the vast majority of courses, the instructor's involvement is a determining factor for achieving the desired results, and suggested, in the end, as a proposal for a ruling, that the Court establish the understanding that "*... hiring of instructors, speakers, or teachers to deliver training or upgrading courses for courses for specialized public servants falls under the concept of non-requirement for a bid process laid out in Clause II of Article 25, in combination with Clause VI of Article 13, of Law 8,666/93...*". However, when this was done, it limited the understanding only to those trainings that are developed specifically for the contracting body, or for courses designed for the specificities of the students. Furthermore, it was also understood that it is completely possible to hold a bid process for cases of courses "*...based on conventional programs or directed towards non-specialized public servants...*", since it is understood that in these cases, there is no element of uniqueness.

Still, the understanding of the writer went even farther, pointing out that

> ... the non-requirement for a bid process in the current Brazilian setting, extends to all basic and advanced staff training courses... and that the non-requirement for a bid process for contracts for basic and advanced staff training courses, currently, is a general rule, with bidding being the exception.

With a unanimous vote at the Plenary Session, the TCU established the following understanding:

> The Full Session, in light of the reasons presented by the Writer, DECIDES: 1. to consider that contracts for instructors, speakers or teachers to deliver basic or advanced staff training courses, as well as registration of public servants for courses open to third parties, fall under the concept of no-requirement to hold a bid process set out in Clause II of Article 25, in combination with Clause VI of Article 13 of Law 8,666/93; 2. to remove the confidentiality of records, and order their publication in the Proceedings; and 3. to close the current case.

Despite the strength of the arguments given over the course of this extensive and brilliant vote, as well as of the illustrious masters mentioned in the report upon which it was based, I believe, with due respect, that the understanding needs the small reforms proposed herein.

As was said earlier, also sharing the understanding that for contracts for courses, the rule is non-requirement, and bidding is the exception,

it is thought that the reference point should be the degree of involvement of the instructor to achieve the desired results of the training. Recognizing the existence (as an exception) of courses whose teaching methodology makes the instructor's involvement less of a determining factor for achieving the results, it is considered that the decision by the distinguished Federal Court of Accounts cannot be generalized. Every procedure for contracting for courses will demand a correct legal framework from the relevant authority, with a demonstration of an unequivocal fulfillment of all legal requirements (explanation of the unique nature of the service, demonstration of recognized expertise and justification for the selection of the provider from among the possible alternatives.) The acknowledged generalization of the ruling in question, which presumably considers all courses to be unique, could lead to the fragility of the procedure in that the characterization of a service as unique could be considered unnecessary.

An adjustment is also considered necessary for registration of public servants in open courses, based on Article 25, II c/c 13, VI of Law 8,666/9. Indeed, competition is not viable since that event is specific and unique. There could be a course with the same content and the same instructor, by the same company, in the same city, but even still, each one will be unique. The various courses, even if they are identical, represent objectives which are only similar, and therefore distinct. It cannot be deemed that there are various interchangeable options. It is not convincing to argue that the course under consideration will be repeated over the course of the year, since they are events which cannot be compared. Proof of this is that it is not possible to ensure that an open course will be held, since it depends on a minimum number of registrants for it to be confirmed. Therefore, they can never be compared in a competition.

It is understood that bidding for open courses is not viable, since each one is unique. Of course, in many cases, an open course could also fall under the provision mentioned above, when it is offered by a recognized expert. But whether or not it is unique, and whether or not it is delivered by a recognized expert; for example, an open course delivered to third parties using the Kumon method, could not be bid on for the many reasons upheld herein. That is why the best solution for contracts of this nature is for them to fall under the scheme of non-requirement to hold a bid process based on Article 25, main clause.

6. CONCLUSION

In summary, we have reached the following conclusions: (a) for basic and advanced staff training, the determination of uniqueness is related to the core of the service, which is the **class**; (b) since the **class** is not a standardized activity and the various instructors cannot be compared to one another, whenever their involvement is a determining factor in achieving the desired results, the service will be unique; (c) as a rule, such services are unique, except those whose methodology is more important than the instructor for achieving the expected results; (d) for contracts for courses, the selection of the provider is a discretionary act and is the exclusive duty of the relevant authority, who must cite the reasons that led them to recommend one professional or company over another; (e) courses which are open to third parties are not eligible for bids due to their unique nature, which ends with their delivery; they must be contracted for based on Article 25, main clause, of the General Bidding Law.

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NOTES

1 In this sense: MEIRELLES, Hely Lopes, *Direito Administrativo Brasileiro*. 19ª.ed. Malheiros. São Paulo, 1994, p. 258; MUKAI, Toshio, *A natureza singular na contratação por notória especialização*, RJML de Licitações e Contratos, n.26, p. 13/15

2 See: TCU, Súmula 252; JUSTEN FILHO, Marçal, *Comentários à Lei de Licitações e Contratos Administrativos*. 14ª. ed. Dialética. São Paulo, 2010, p. 367; MELLO, Celso Antônio bandeira de, *Op. Cit*., p.508; DI PIETRO, Maria Sylvia Zanella, *Direito Administrativo*. 5ª. ed., Atlas. São Paulo, 1995, p. 273; CARVALHO FILHO, José dos Santos. 11ª ed. Lumen Juris. Rio de Janeiro, 2004, p. 226; JACOBY FERNANDES, Jorge Ulisses, *Op. Cit*. p. 605; MUKAI, Toshio, *Op. Cit*.

3 Available at www.kumon.com.br