Notes about the integration of the RDC (Differentiated System of Contracts) with the constitutional macro system and to the general system of the public bidding process by means of the principles

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ABSTRACT

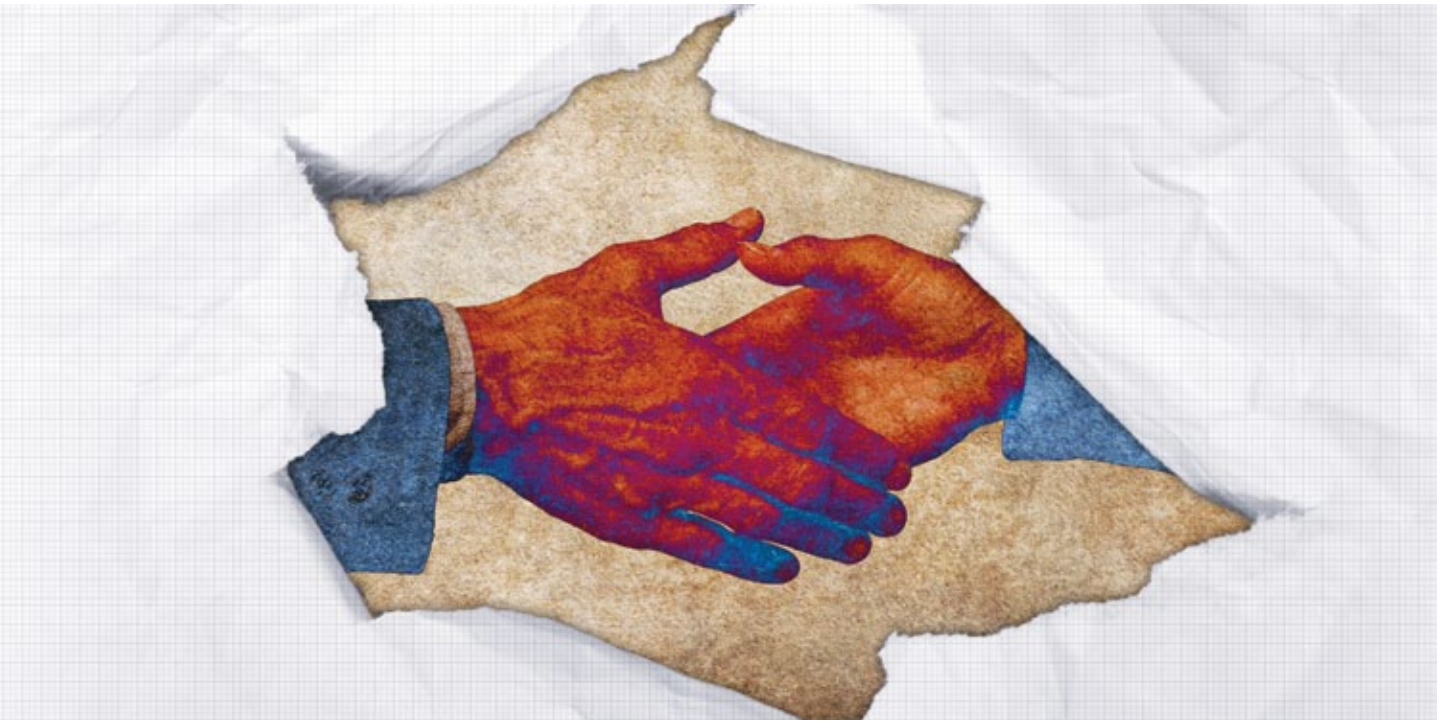
Law No. 12462/11, as a subsystem for administrative contracts for the acquisition of certain objects, enunciates the principles that guide its implementation. All Brazilian Public Administration is subject to this law. When analyzing these principles in order to clarify them, this paper proposes to integrate the principles with the legal administrative constitutional macro system of public contracts and public bid processes, as well as with the system of the federal legislation that deals with the issue (Law No. 8666 of 1993).

Key words: Differentiated system. Principles. Public Contracts.

1. INTRODUCTION

Article 3 of Law No. 12462/11 states:

> Art. 3 - The bids and contracts carried out in accordance with the RDC (Differentiated System of Contracts) shall follow the principles of legality, impersonality, morality, equality, publicity, efficiency, administrative probity, economy, and sustainable national development. They shall also be binding to the bid public notice and follow the principle of objective judgment.



The heading of article of the Federal Constitution states that the direct and the indirect Public Administration of every Branch of the Federal Government, of the States, of the Federal District and of the Cities shall follow the principles of legality, impersonality, morality, publicity and efficiency. Thus, we observe that the 3rd article transcribed above reproduces the principles listed in the constitutional text and adds the principles of equality, administrative probity, economy, sustainable national development, the binding nature of the bid public notice and the principle objective judgment, which, in turn, are also listed in article 3 of Law No. 8666/93.

Rafael Carvalho Rezende Oliveira teaches that "The legal principles combine the core values of the legal order. Due to the fact that they are fundamental and linguistically open, the principles affect all of the legal system, thus providing it with harmony and coherence" (*Princípios do Direito Administrativo*. Rio de Janeiro, Método, 2nd ed., p. 45, 2013).

The RDC (Differentiated System of Contracts) Law, when it refers, in its 3rd article, to the general principles that apply to all the Brazilian Public Administration and when it adds sectoral or special principles to them, proposes to integrate the RDC system (Differentiated System of Contracts) with the legal administrative constitutional macro system of public contracts and public bids - despite its temporal and special limited scope, as it was conceived to govern bids and contracts aimed at acquiring objects related to specific or transitional purposes. The RDC Law also proposes to integrate the differentiated system with the federal legislation system that deals with this issue, which is mandatory nationally, according to the exclusive mandate of the Federal Government established in article 22, item XXVII of the Constitution. Whether the intent is self-sufficient or whether the harmony and coherence between the RDC (Differentiated System of Contracts) subsystem, the system of Law No. 8666/93 (the general terms law) and the constitutional macro system will depend on interpretation, is what will be discussed in these brief notes.

2. INTEGRATIVE PRINCIPLES OF THE DIFFERENTIATED SYSTEM OF PUBLIC CONTRACTS

This topic refers to the principles that are likely to promote the integration of the RDC (Differentiated System of Contracts) with the constitutional macro system and with the system of Law No. 8666/93. This is why the principles expressed in the Constitution and those contained in the General Law of the Bids and Contracts are republished.

2.1 LEGALITY

The agents participating in bids or in any other processes that may result in a direct contract cannot grant or remove any rights, nor create any obligations or impose any prohibitions that are incompatible with the law. In contemporary administrative law we are moving from strict legality towards juridicity, which is understood as something that binds the Administration not only to the formal law, "but to an entire block of legality that incorporates the greater values, principles and legal objectives of society. In this scenario, several Constitutions (for example, the German and the Spanish Constitutions) have clearly begun submitting Public Administration to the legislation and to Law This can also be implicitly inferred from our Constitution and expressly inferred from the Law of the Federal Administrative Process (article 2, sole paragraph, item I). This concept is called the principle of juridicity or principle of legality in a broad sense" (Aragão, Alexandre Santos de. *A concepção pós-positivista do princípio da legalidade*. RDA, Rio de Janeiro: Renovar, No. 236, p. 63, apr.-jun. 2004).

The broad normative framework of juridicity, in which the principles are also mandatory legal norms and whose lack of enforcement subjects the violator to sanctions, aims to prepare the public agents to realize what they must or what they can do (discretion), in view of the effects and consequences imputable to their actions under the law that include both principles and valid rules. This framework provides management that is technical and that has high level of predictability, subject to evaluation by internal and external control systems, as defined in article 75 of the Federal Constitution.

2.2 IMPARTIALITY

This principle obligates all agents to consider public interest objectively. Concerning the public bids, it means that all bidders will receive equal treatment, disregarding the irrelevant differences.

Rafael Carvalho Rezende Oliveira highlights the two sides of the principle isonomy and the ban on personal promotion. The first meaning refers to "the relationship between the Administration and the ones administered… and it is the implementation itself of the principle of equality in the Administrative Law. This is why we say that the impartiality principle merges with the idea of public purpose… the State shall attempt to make material equality real, instead of being content with mere formal equality… equality shall be interpreted and understood according to the concept of proportionality: equality requires isonomic treatment to all the people that find themselves in the same legal situation, and differential treatment to all the people that find themselves in a evident situation of inequality. Equality therefore means equal treatment of equal people and unequal but proportional treatment of unequal people. The criteria for discrimination among people ("obscure criteria") will only be legitimate if they are proportional" (*op. cit*, p. 98). In the second meaning, the author considers that the "public achievements are not personal results of their respective agents, but, on the contrary, a result of the administrative entities themselves… The action of the agent shall be guided by the realization of the public interest and it shall be imputed to the State" (p. 99).

Application of the RDC (Differentiated System of Contracts) when acquiring by contract relevant objects for major international sporting events that have a considerable media impact, or when implementing health, education and transport programs that are likely to cause intense social mobilization, once can imagine how difficult it can be to control the agent, especially a politician holding an administrative position, so that he/she stays within the limits of the impartiality, considering its second meaning.

2.3 MORALITY

Bids and direct contracts shall be conducted according to the respected ethical standards. This imposing to both the Administration and the bidders to "act according to the ethical standards of probity, decorum and good faith", as provided for in article 2, sole paragraph, item IV, of Law No. 9784/99 (federal administrative process).

Morality and legality do not necessarily exclude themselves, as if every act in accordance with legality should also be submitted to the concept of morality. Odete Medauar illustrates that the purchase of luxury vehicles to be used by administrative authorities in an environment of economic and social crisis would be immoral, even if all the due legal process had been observed (*Direito administrativo moderno*. São Paulo: RT, 12th ed., p. 126, 2008). And there are two evident reasons for this, as follows: this purchase does not benefit the public interest and represents an outrage to the government priorities considering the crisis and its consequences to the population.

The respect to the principle of morality would authorize, for instance, questioning the costs of public works that are increased considerably in order to meet the requirements of the international organizations that promote the sporting events, and the repercussions about the use of the built facilities after the events, as they should constitute a relevant legacy to the population.

2.4 EQUALITY

In the context of public bids and contracts, the principle of equality consists in two obligations imposed to the public agent: the first one is the obligation to not accept, foresee, include or tolerate clauses and the conditions that are likely to frustrate, to restrict or to bias the competitive nature of the bidding process (Law No. 8666/93, article 3, Paragraph 1, item I), as well as excessive, irrelevant or unnecessary specifications (article 5 of Law No. 12462/11 states that "The object of the bid shall be clearly and precisely defined in the public bid notice and excessive, irrelevant or unnecessary specifications are hereby prohibited"); the second one is the obligation to treat equally all bid participants. In cases of direct contracts, there could also occur an eventual illegal bias if the choice of the contractors, despite its discretionary content, would contradict the requirements expressed in article 26, sole paragraph, of the Law No. 8666/93, which are: price justification, reason for choosing the contractor and, if applicable, characterization of an emergency situation. In any case, isonomic treatment is the conduct imposed directly and explicitly to the Administration by article 37, item XXI, of the Federal Constitution.

2.5 PUBLICITY

This principle is the right any interested party has to information regarding the acts carried out in bids (as of the publication of the bid invitation) and direct contracts, as per article 5, item XXXIII, of the Federal Constitution/88 ("everyone is entitled to receive from public agencies information that is of private, collective or general interest and such information shall be provided within the legal deadlines, subject to liability, except in cases where secrecy of the information is essential to the security of the State and society ") and item LX ("the law may only restrict the publicity of the procedural acts when the protection of privacy or social interest requires this").

In the bids and in direct contracts, publicity plays two roles: it increases access of the interested parties to the competition, which raises the level of competitiveness considerably, and it ensures control of the juridicity of the acts performed. Publicity is not a requirement to validate the administrative act, but it constitutes an efficacy measure. It should be noted that contract rights and obligations will only be mandatory upon publication of the contract summary (Law No. 8666/93, article 61, sole paragraph). However, irregular acts are not validated upon publication and the regular acts depend on it in order to be enforced (when the act or the statute requires it).

According to the insightful synthesis of Rafael Carvalho Rezende Oliveira, the "visibility (transparency) of the administrative acts is closely related to the democratic principle (article 1 of the Brazilian Federative Republic Constitution): the people, sole and true holder of power, shall be aware of the acts of their representatives. The greater public transparency is, the greater the social control of the acts by the Public Administration and by private entities that exercise delegated or public relevance activities will be. Obscure and secretive administrative acts are typical of authoritarian states. In a Democratic State, publicity of the state acts is the rule and their secrecy, the exception" (*op. cit*, p. 102).

It is not noticed that purchases, works or services that are the object bids or contracts under the RDC (Differentiated System of Contracts) could eventually have any margin of secrecy that could, justifiably, exempt them from publicity.

2.6 EFFICIENCY

The principle that was included in the heading of article 37 of the Constitution/88, by means of the Constitutional Amendment No. 19/98, requires that the Public Administration follow some parameters that were previously outlined and that assure an appropriate cost-benefit relationship, as well as a great probability of achieving the planned public interest results. In the RDC (Differentiated System of Contracts), efficiency is the object of the contract that is defined in a specific rule in order to encourage the economic performance by the contractor, matching with those procedures and objectives:

> Article 23. When judging by the criterion of greater economic return, which is used

> exclusively for efficiency contracts, the proposals will be considered so as to select the one that will provide the greatest savings for the public administration as a result of contract execution.
>
> Paragraph 1. The object of the efficiency contract is the provision of services, which may include the execution of works and the supply of goods, aiming to provide savings to the contracting party in the form of reduced current expenses, while the contractor will be paid based on a percentage of the savings generated.

The notion of result is introduced in contemporary public management by means of the efficiency principle that Juarez Freitas translates as "a fundamental right to good administration", observing that "efficient and effective public administration, in addition to being economic and theleologically responsible, reduces intertemporal conflicts that only increase transaction costs" (*Discricionariedade administrativa e direito fundamental à boa administração*. São Paulo: Malheiros, p. 21, 2007). The state administrative reform that was introduced by Constitutional Amendment No. 19/98 and that emphasized the premise that "While the bureaucratic Public Administration cares about the processes, the managerial Public Administration is geared to achieving results (efficiency), being characterized by the decentralization of activities, specialization of functions and performance evaluation" (Pereira, Luiz Carlos Bresser. *Gestão do setor público: estratégia e estrutura para um novo Estado. Reforma do Estado e Administração Pública gerencial*. Rio de Janeiro, FGV, 7th Ed., p. 29, 2008).

2.7 ADMINISTRATIVE PROBITY

This principle requires loyalty and good faith of the public agents when dealing with bidders and third parties that are participating in the contract processes, whether they are preceded or not by bids. Law No. 8429/92, in its chapter II, classifies administrative improbity acts as the ones that result in illicit enrichment of the agent, that cause loss to the public treasury or attack the principles of Public Administration (articles 9, 10, and 11). The tendency of precedents has been to consider existence of improbity only when there is proof of guilt of the agent in the cases of losses to the public treasury and of noncompliance with principles, and proof of intent the cases of illicit enrichment. Therefore, it distinguishes improbity from irregularity or illegality resulting from ignorance or arbitrariness.

In this regard, please check out the precedent of the Superior Court of Justice:

> IMPROBITY SUIT. LAW 8429/92. SUBJECTIVE ELEMENT OF CONDUCT. INDISPENSABILITY.
>
> 1. The administrative improbity case, of a constitutional nature, (article 37, paragraph, regulated by Law 8429/92) has a very special nature and is qualified by the singularity of its objet which is to impose penalties to dishonest administrators and to any other people – individuals or legal entities – that join them as accomplices in order to act against the Administration or to benefit from the improbity act. Therefore, it is a case that has a repressive character, similar to criminal cases and different from other cases of a constitutional nature, such as: the Popular Action, whose typical object (Federal Constitution, article 5, item LXXIII, regulated by Law No. 4717/65) has essentially a nature of cancellation and the Public Civil Action (annulment of illegitimate administrative acts) for the protection of public property, whose typical object has a preventive, cancellation or remedial nature. (Federal Constitution, article 129, item III and Law No. 7347/85).
>
> 2. We cannot confuse illegality up with improbity. Improbity is illegality that is typified and qualified by the subjective element of the agent's conduct. This is why the dominant precedent of the Superior Court of Justice considers it imperative that the agent's conduct be intentional in order to characterize improbity, to typify the conducts described in articles 9, and 11 of Law 8429/92 or, at least culpable to typify the conducts described in article 10 (v.g.: Special Appeal 734,984/SP, 1 T., Minister Luiz Fux, Electronic Justice Gazette of 06.16.2008 Regimental Appeal in the Special Appeal 479.812/SP, 2nd Chamber, Minister Humberto Martins, Justice Gazette of 08.14.2007; Special Appeal 842,428/ES, 2nd Chamber, Minister Eliana Calmon, Justice Gazette of 08.03.2006; Special Appeal 626.034/RS, 2nd Chamber Minister João Otávio de Noronha, Justice Gazette of 06.05.2006; Special

Appeal 604.151/RS, Minister Teori Albino Zavascki, Justice Gazette of 06.08.2006).

3. It's reasonable to presume the vice of conduct of the public agent that commits an act that is contrary to what was recommended by the technical agencies, by legal opinions or by the Brazilian Federal Court of Accounts. But it's not reasonable to recognize or to presume this vice precisely in the opposite conduct: to have acted according to those manifestations, or of not having promoted the revision of acts that were performed as recommended in those manifestations, especially if there is no doubt about the integrity of the legal opinions or the good standing of those who issued them. In these cases, if there isn't any conduct motivated by recklessness, malpractice or negligence, there is no guilt and much less improbity. The illegality of the act, if any, will be subject to sanction, a sanctions of a differentnature, outside the scope of the case of improbity.

4. Partially granted Special Appeal of the Public Ministry. (Special Appeal 827,445 – SP).

SPECIAL APPEAL. ADMINISTRATIVE. IMPROBITY CASE. LAW No. 8429/92. ABSENCE OF INTENTION. UNFOUNDED CASE.

1. In order to characterize an act of improbity, as usual, the existence of the subjective element of intention is required, in light of the sanctioning nature of the Administrative Improbity Law.

2. The legitimacy of the legal object and the objective absence of a formal contract that is recognized by the local instance constitute the improbity.

3. So "the objective of the Improbity Law is to punish the dishonest public agent, not the incompetent one. Or, in other words, in order to judge the public agent according to the Improbity Law, it is necessary to find intention, culpability and loss to the public entity, characterized by the action or the omission of the public agent". (Mauro Roberto Gomes de Mattos, in "*O Limite da Improbidade Administrativa*", Edit. América Jurídica, 2nd ed. pp. 7 and 8). "The purpose of the administrative improbity law is to punish dishonest administrators" (Alexandre de Moraes, in "*Constituição do Brasil interpretada e legislação constitucional*", Atlas, 2002, p. 2,611). "In fact, the law reaches the dishonest administrator, not the unprepared, incompetent and clumsy one" (Special Appeal 213,994-0/MG, First Chamber, Rapporteur Minister Garcia Vieira, Official Gazette of Brazil of 09.27.1999)." (Special Appeal 758,639/PB, Rapporteur Minister José Delgado, First Chamber, Justice Gazette 5.15.2006)

4. The scope of Law No. 8429/92 of the Administrative Improbity Action, provided for in article 37, paragraph 4 of the Federal Constitution, was to impose sanctions to the public agents that were involved in improbity actions, when such acts resulted in: a) illicit enrichment (article 9); b) loss to the public treasury (article 10); c) attack against the Public Administration (article 11.), including moral injury to the administration.

5. Special Appeal Granted. (Special Appeal 734984/SP).

2.8 ECONOMY

This principle found in Decree-law No. 200 of 1967 the first signs of its configuration.

Article 14 of the decree-law stated that: "The administrative work will be streamlined by simplifying processes and suppressing controls that are purely formal or whose cost is clearly higher than the risk". It acquired constitutional status when it was included among the elements that shall be object of the external control by public management which is assigned, in the heading of article 70 of the Federal Constitution of 1988, to the Brazilian Congress with the support of the Brazilian Federal Court of Accounts, in face of the duty of accountability imposed to every individual or legal entity, public or private, that uses, collects, keeps or manages monies, properties or securities that are public or for which the Federal Government is responsible or, any individual or legal entity who, on behalf of the Federal Government, assumes obligations of a financial nature (sole paragraph).

Economy is evident both in the strictly administrative sphere – when it promotes streamlining and simplification – as in the financial sphere, as a product of cost reduction in the administrative contracts,

resulting from effective planning, prior extensive and serious research of the market value of the bidding object, and from searching for the proposal that is most advantageous to the Administration, which is not necessarily the one with the lowest price, if the lowest-priced proposal clearly does not meet the requirements justifiably established in the specifications of the material to be purchased and in the basic projects of public works and services, during the internal preparatory stage of the bid and contracts processes (Law No. 8666/93, articles 7 and 14). In this regard, the RDC (Differentiated System of Contracts) introduced a substantial innovation by allowing the bidders themselves to prepare the basic and executive projects, according to the profile generically determined by the Administration in the bid process and it as long as they take full and exclusive responsibility for possible imperfections.

2.9 SUSTAINABLE NATIONAL DEVELOPMENT

This principle is inserted in the article 3 of Law No. 8666/93. It is the instrument for promoting the domestic market, supported by the purchasing power of the public sector, in all powers of the three branches of the federation (around 16% of the GDP, in other words, approximately 300 billion Brazilian reais/year) and its effect on the generation of employment and income. But that is not all. This principle intends to commit the bids and contracts with environmental protection principles and rules, according to the content of the article 225, paragraph 1, item V, of the Federal Constitution/88 ("In order to assure the effectiveness of this right [ecologically balanced environment, common good of the people and essential to a healthy quality of life], it is the responsibility of the Public Power to: V – control production, commercialization and use of techniques, methods and substances that may present risks to life, to the quality of life and to the environment").

There is a huge and challenging task to be accomplished in order to comply with this new general clause in everyday bids and contracts which is to explicit the requirements of sustainability – the social, economic and environmental – in in the public bid invitations and contracts and correlate the specifications of the object with the norms issued by the authorized entities (vg., INMETRO – Brazilian Institute of Metrology, Quality and Technology, ABNT – Brazilian Association of Technical Rules, CONAMA – Brazilian Environmental Board). At the moment, this is the only way to avoid the adoption of specifications and criteria that may go against the principles of isonomy and objective judgment.

2.10 BINDING NATURE OF THE BID INVITATION

This principle forces the Administration to respect the rules stipulated to organize the bidding process. The profile of postmodern public law does not confer absolute force to the principle of the binding nature of the bid invitation. The fact is that the requirements of a merely instrumental or formal is that nature, and which do not harm the essence of the competition, can be interpreted in favor of the public interest purpose to be achieved. What cannot be accepted is the vice that might compromise the result of public interest or that might be harmful to the legal security of the bid, to its competitiveness and isonomy. This is why one should be careful in order to avoid including useless, irrelevant, unnecessary or ambiguous requirements in the bid invitation.

Decree No. 7581/11 that regulates the RDC (Differentiated System of Contracts), specially in its article 7, paragraph 2, confers to the bidding committee, at any stage of the bidding process - and provided the substance of the proposal is not modified - the faculty to adopt sanitation measures to clarify information, to correct improprieties in the qualification documents or to complement the process, keeping in mind the rule provided for in article 43, paragraph 3, of the Law No. 8666/93. Therefore, flexibility regarding the interpretation of provisions that can be met otherwise is allowed, provided there is no diversion of purpose and without affecting the substance of the proposal and competition.

Sanitation of vices in the proposals is also admitted, as long as the principles of objective judgment and equality of the bidders are honored. That's what can be understood, on the other hand, based on the reasons for the disqualification of the proposal that listed in article 24 of the RDC (Differentiated System of Contracts): "The following proposals will be disqualified: I – those that have irremediable vices; […] V – those that show any kind of inconsistency with any requirements of the bid invitation, if they are irremediable". So, the vices that, due to their nature, can be solved by the Administration without hurting the principles of isonomy and objective judgment, will not be considered as disqualifying vices of the proposal.

2.11 OBJECTIVE JUDGMENT

This principle aims to avoid that decisions regarding the bidding process be made based on subjective ideas, in other words, feelings, impressions or personal interests of the members of the judging committee. It is true that judgment is closer to maximum objectivity when it is based solely on price. But, aware that price can hide some deviations – such as miscalculation of the market value of the object for instance, inducing the committee to believe that there is compatibility between the quoted price and the market price -, either will it suffice to consider quality, technique and performance that are usually taken into account in when examining the proposals. When the object of the bid is based on these attributes, the primacy of one or another proposal will depend on evaluations that have a certain level of subjectivity, which shall be minimized as much as possible but will never disappear. In order to fulfill the principle of objective judgment, in these cases, the bidding committee shall take into account the reports or the technical opinions that will help it make a well-founded decision, explaining its reasons in the respective minutes. In any case, the evaluation parameters shall be included in the bid invitation in order to allow, upon its publication, requests for clarifications and objections (Law No. 8666/93, articles 40 and 41, item VIII, and its paragraphs). The RDC (Differentiated System of Contracts) dealt with this subject in two provisions:

> Article 20. When judging the best combination of technique and price, the technical proposals and prices that were submitted by bidders shall be evaluated and weighted, according to objective parameters that are mandatorily inserted in the bid invitation.
>
> Article 21. When judging according to the best technique or artistic content will only consider the technical or artistic proposals that were presented by the bidders, according to the objective criteria that were previously established in the bid invitation. The prize or the remuneration that will be awarded to the winners will be defined in the invitation.

3. OTHER PRINCIPLES THAT ARE APPLICABLE TO THE RDC (DIFFERENTIATED SYSTEM OF CONTRACTS)

Other general or sectoral principles bind the Public Administration performance in the bidding processes and contracts that are governed by the RDC (Differentiated System of Contracts): motivation, reasonability, competitiveness and security of contracts.

3.1 MOTIVATION

It consists in the duty every agent has, while performing his/her functions, of justifying the administrative acts that arise from each stage of the contract process as well as during the execution of the contract, whether or not there was a bidding process (preparation and instruction, elaboration and approval of drafts of bid invitations and other instruments, judgment of documents and proposals, decision about accepting and evaluating administrative appeals, awarding of the object and confirmation of the procedure).

Motive is understood as the set of assumptions de facto or de jure that determine the decision, as well as the correlation between events and pre-existing situations and the choice made. It is not enough to indicate the legal text on which the decision is based. The public agent shall strictly and clearly enunciate the grounds for his/her actions, being aware that article 113 of the Law No. 8666/93 obligates him/her to demonstrate the legality and the regularity of the expenses and its execution, a rule that is applicable to the RDC (Differentiated System of Contracts) by force of its article 46 ("The provisions of article 113 of Law No. 8666 of June 21st 1993 applies to the RDC - Differentiated System of Contracts ").

In the Democratic Rule of Law, society has the right to know the reasons why the decisions of the public agents in general are made, except if the information is related to their own security and to the security of the State (article 5, item XXXIII, of the Federal Constitution).

Besides violating one of the most cherished principles of administrative law and compromising the validity of the performed act, that may be annulled due to vice of motive the absence of motivation regarding administrative acts raises doubts regarding the exemption of the agent and his/her commitment to the public interest. According to the article 11 of

Law No. 8429/92, subverting the principles of public administration or violating the duties of honesty, impartiality, legality and loyalty to institutions constitutes an administrative improbity act.

3.2 REASONABILITY

The fact that the law, in some situations, bestows discretion to the public agent means that the law transferred to the public agent the responsibility of adopting the measures that are appropriate to each circumstance and to the means at hand, in face of the diversity of situations to be faced, in harmony with the priorities and objectives of public interest. This relationship between appropriateness, necessity and proportionality is what should be understood as reasonability in Brazilian Public Law (both constitutional and administrative), which is advancing in this matter. The decision that violates this tends to infringe other values and principles. So, for instance, excessive requirements in the bid invitation are unreasonable and offend the principles of isonomy and competitiveness. Depending on the scope and purpose of the requirement, it will also violate the principles of morality, impartiality and economy.

Granting of the administrative discretion seeks to identify, in each situation, the measure that better caters to the public interest, according to the determined and weighted circumstances. Reasonability is based on the same precepts that support the principles of legality and finality in the Constitution (article 5, items II and LXIX, and heading of article 37, of the Constitution/88). In the infra-constitutional norms, reasonability is mentioned in the article 2 of Administrative Procedure Law (No. 9784/99.) It ultimately urges the public manager to always ponder the means and the ends in the time-space equation of public interest, and it is also a tool for legal of administrative discretion. There are abundant precedents in our courts, for which management of discretion helps to choose the best solution among the ones available. Any other choice goes against juridicity. This is why the reasonability principle values the activities that support managers in the decision-making process, such as the elaboration of studies, reports and opinions that show, rationally and objectively, which would be the best solution. In summary, the public manager is not bestowed discretion to choose any solution, but to choose always the best solution under the given circumstances.

3.3 COMPETITIVENESS OR EXPANSION OF THE DISPUTE BETWEEN THE INTERESTED PARTIES

Competitiveness is strictly related to the principles of legality, equality and impartiality, thus non inclusion of excessive conditions in the bid invitation, that bias or restrict the competitive nature of the process, enables the expansion of the number of participants in the bidding process which, in turn, promotes competition among those interested in having contracts with the Public Administration and, consequently, favors the pursuit of the most advantageous proposal. That's why Law No. 8666/93 does not require a bidding process when competition is not feasible (heading of article 25); whether the infeasibility results from the absence of competitors to compete with the exclusive producer or supplier or whether it is due to the impossibility of establishing objective evaluation criteria, due to the nature of the object.

3.4 SECURITY OF CONTRACTS

The Law establishes the legal order to promote civil stability, to create an atmosphere of security that, according to the point of view of Celso Antonio Bandeira de Mello, coincides with one of the most profound aspirations of the human being: certainty regarding the phenomenology and the inequalities that surround him/her. The legal security principle cannot be consolidated in a specific constitutional provision. It is the essence of the Law itself, especially in a Democratic State that is founded on human dignity, justice and solidarity of relations (Federal Constitution/88, 1st art.). This is why it models the entire constitutional system (*Curso de Direito Administrativo*. São Paulo: Malheiros, 14th ed., p. 106).

Among the things that ensure the stability of the legal order, including in the bidding processes and administrative contracts, we also find estoppel and statute of limitations.

Article 45 of Law No. 12462/11 establishes that the public administration acts, arising from the application of the RDC (Differentiated System of Contracts), are subject to: (a) requests for clarifications and objections regarding the bid invitation, at least two business days before the opening dates of the proposals, in the case of bidding process for acquisition or disposal of assets, or five business days before the proposals' opening dates, in the case of bids for public works or service contracts; (b) hierarchic appeals,

within 5 working days from the date of the notice or drafting of the minutes, in face of: (i) the act that grants or rejects the request for the pre-qualification of the interested parties; (ii) the act of qualification or disqualification of the bidder; (iii) the bid judgment of the bid proposals; (iv) the cancellation or revocation of the bidding process; (v) the rejection of the request for registration in the registry, its alteration or cancellation; (v) the termination of the contract in accordance with the provisions in item I of the article 79 of Law No. 8666/93; (vi) the application of the penalties such as warning, fine, certificate of good standing, temporary suspension from participating in bidding processes and prohibition of signing contracts with the public administration; and (c) the representations, within five business days from the date of the notice, regarding the acts that are not subject to hierarchic appeal.

Once these deadlines expire and there is no manifestation from the interested parties, or after the appeals, objections and representations presented are decided, the law lies on something recognized as stable, with the preclusion of every inquiry and the exclusion of the right to evoke it in the administrative sphere. In other words, the legal relationships based on these acts and decisions become stable and independent of the supervenience of future events, without preventing those who considered themselves harmed or threatened with harm from exercising the subjective right of invoking judicial protection.

4. CONCLUSION

"A rule does not (only) lack interpretation because it is not 'unambiguous', 'evident', because it is 'devoid of clarity' – but, above all, because it should be applied to a (real or fictitious) case", according to the lesson of Friedrich Muller (*Métodos de trabalho do direito constitucional*. Rio de Janeiro: Renovar, 3rd ed., p. 48, 2005).

This means that interpretation is always needed, whether the writing of the norm is not clear, whether it seems to be unambiguous and evident. The wording of the norm, whether it is clear or obscure, will always need to be interpreted according to the reality. The aphorism "*interpretatio cessat in claris*" was established in Rome and it is followed by many people, however, it is not exact. The wording of norms may seem to be unambiguous and evident and, even so, the best solution for the case to which we will be applying it can be misunderstood. And this solution can even differ from the apparent clarity of the norm. An excellent example to illustrate this can be seen in article 22, paragraph 3, of Law No. 8666/93, whose norm is apparently clear when it establishes, in defining the invitation modality, that the Administration must invite a minimum of three bidders, while the Brazilian Federal Court of Accounts, according to its recent precendent[1], interprets that this minimum number does not refer to bidders but to the number of valid or appropriate proposals for selection, on reasonable grounds that the loss of competitiveness should be compensated if the modality were to accept the direction that states that only three be chosen by the administrative unit and that this would be enough to validate the invitation.

In summary, every "case" is contextualized and shall be identified and understood as such. The literal meaning of the created norm has always been and will always be insufficient to foresee all the possibilities of factual relations and interests that it intends to reach. Hence the importance that the valid norms in the legal system be interpreted according to the standards, called principles, that guide and enrich the system, which will perceive the case, giving direction and discipline to it.

The RDC (Differentiated System of Contracts), as a subsystem of administrative contracts of certain objects, did the right thing when it enunciated its guiding principles. However, it is the responsibility of the interpreter of these principles – the competent public agents - to articulate the RDC (Differentiated System of Contracts) principles with the other principles that constitute the constitutional macro system and the infra-constitutional general system of contracts and bidding processes of Brazilian law. This articulation will, in each case, answer for the achievement or not of the results of public interest that will justify the existence of the subsystem. If this subsystem succeeds, it may replace the current general system and become the general system. Thus, the subsystem would no longer be applicable only to certain objects but would govern all contracts and bids within the national legal system. The social and institutionalized controls of the Public Administration will evaluate it, when appropriate, in order to consecrate it or to reject it according to the results obtained.

NOTE

1 Precedent No. 248: If a minimum of three proposals apt for selection is not obtained, in a bid under the Invitation modality, the process has to be repeated, inviting other possible interested parties, except in the cases listed in paragraph 7, article 22, of Law No 8666/1993.