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Improving the Public Administration for the benefit of society through external oversight

Vision Statement
To be a reference in promoting an effective, ethical, agile and responsible Public Administration

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Letter to the Reader

Bruno Spada

Aroldo Cedraz de Oliveira
President of the Federal Court of Accounts – Brazil and Supervisor of the Editorial Council of the TCU Journal

Dear reader,

The current issue of the of the TCU Journal presents a theme of substantial relevance to Public Administration, considering the budget constraint environment we are experiencing in the moment, i.e., the bidding process. The procurement of goods and services in the public sector has gained increasing importance lately and society monitoring has been growing every day, which has demanded from the State ongoing concern on how to streamline the expenditures on such operations.

To that effect, we must try to make possible the acquisition of goods and services with the desired standard of quality, at the lowest possible cost and in a timely manner. To this end, it is essential to promote the efficient use of what we have available to meet adequately both the daily and the innovative demands, resulting, therefore, in minimizing losses. This is the experience in every Brazilian household and it cannot be different in the Public Administration.

If each State Agency adopt, as a top management priority, rational criteria and efficient use of resources, resulting from the taxes paid by Brazilian citizens, this will encourage actions that, in in a larger scope, will result in benefit to the whole society. According to philosopher and Economist Adam Smith, the pursuit of individual economic interests contributes to the promotion of what the community wants, a premise worth in both private and in public sectors.

With the increasing demand for services and goods, it is imperative that the State enables the economic and social development; it becomes necessary to adopt control mechanisms to ensure the regularity of the application of the available resources efficiently and effectively, following principles of transparency and equality. One of the most important steps in this direction is the bidding.

The bidding process is, therefore, a subject of highest relevance to the Public Administration and to the country as a whole. It is an instrument that allows public management to use the buying power of the State sector to generate economic and environmental benefits, increasing employment and income, fulfilling, therefore, the social role of the bidding. The acquisition of more sustainable products by the State, in turn, can stimulate the market and vendors to develop innovative approaches and to increase the competition of the national industry

In this regard, the six articles included in this issue feature important issues related to the bidding process, such as the participation of joint ventures and cooperatives in the bidding process; the designation of a brand when specifying the object of the bidding; and procedures that can lead to mischaracterization of the contractual object. Such topics will lead the reader to reflect on matters directly or indirectly associated with the economic, legal, social and innovation issues.

Similarly, the new section incorporated now to the Journal – Opinion – presents relevant considerations on the role of the Court in improving public procurement procedures, using modern information technology tools in the actions applicable to the sector

As for the highlights, I would like to mention the creation of a specific Department within the structure of the Executive Office of the Court. This department will be responsible for the oversight of the special operations in infrastructure, also the overall assessment of the actions and initiatives carried out by TCU as President of the Latin American and Caribbean Organization of the Supreme Audit Institutions - Olacefs.

Equally relevant is the interview with Minister Vital do Rêgo, he introduces relevant aspects of his public life and his perception as to the evolution of the bidding process and how much attention Public Administration is paying to the issue. More particularly, regarding the need for excellence in the legislation proceedings provided for in the law, also the technical expertise of the Court's staff responsible for conducting those procedures.

Enjoy the reading!

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Modernity and legality

Vital do Rêgo
Minister of the Federal Court of Accounts

Physician and attorney, Minister Antônio Vital do Rêgo Filho joined the TCU in early 2015. He came from the Federal Senate where, as a senator, he chaired committees that discussed important issues for the country, such as the Constitution and Justice (2012 to 2014) and Petrobras CPMI (Parliamentary Committee of Inquiry - 2014) Committees. He also participated i the external committee to monitor the program for transportation and revitalization of the São Francisco River. Before the Senate, he already had long legislative experience as a city councilor and state and federal deputy. Now at TCU, his task is to report processes of comprehensive government functions such as Social Security, Foreign Affairs and Sports. In this interview to the TCU Journal, he talks about the evolution in the Public Procurement Law, about the RDC (Differentiated Public Procurement Regime), and about audits coordinated by him of social security and the electric energy area.

1. You have a degree in Medicine and Law and began your parliamentary life (first as city councilor, then state deputy, federal deputy and senator) in 1988, the same year when our current Constitution was enacted. In the meantime, you witnessed the evolution of public services and strengthening of democracy. Taking into account your extensive political career, how do you perceive the evolution in the Federal Government in the area of bidding and contracts?

In the past, the government limited itself to assigning qualified public servants only to the bidding and contracts sectors, to carry out the tasks relating to bid committees and formalization of contracts.

It was believed that, if a procurement process had its object accomplished with timing and quality, it was thanks solely to the bidding and contracts department. If things did not go well, the blame rested solely on those employees.

Big mistake! Over time, and with a central role played by the Federal Court of Accounts (TCU) with its numerous judgments, the government realized that the procurement process actually is the result of a large mechanism with various players who have relevant roles for the success or failure of procurement.

Reinforcing this statement, I dare to say that, based on TCU's decisions themselves there are two main causes of failure in public procurement: failure or lack of planning and/or of oversight.

As a rule, procurement planning, including the preparation of the basic design or the reference document, as well as the estimated budget, should be performed by the sector that seeks a contract, since it has the technical knowl-

edge, i.e., technically knows the object to be hired.

Moreover, it is precisely in this sector demanding a contract that the government should find the employee to perform the role of contract supervisor. Surely, he/she must be one of those who know well the technical aspects related to the performance of the contractual object. Therefore, the sector that requires procurement takes on a very important role in the success or failure of a particular bidding process.

In general, the government is more aware that it is useless to have excellent floor officials or members of bid committees, with deep knowledge of procedures provided for in the law if there is no competent workforce to give a technical opinion on the contractual object. The workforce should also forward technical solutions that are appropriate to implement this object and clearly describe the market in which it is inserted.

There has been, indeed, clear advances in the administrative sector, but there still is a long path to follow, mainly because society demands from the Administration, with all legitimacy, increasing efficiency in handling the public matters.

This is the social and legal control of all those who generate public funds consisting of tax payment by society.

2. After the implementation of the Differentiated Public Procurement Regime, some critics claim that Law 8.666/93, which regulates Art. 37, item XXI of the Federal Constitution, entitled "Public Procurement Law", and needs to be amended. This claim is reinforced by the recent scandals in the country related to bidding processes. Do you believe that the Public Procurement Law should be amended?

We must not forget that the Public Procurement Law, drafted in 1993, had as its main purpose to fight fraud and collusion, in order to avoid the scandals experienced at that time, such as "CPI do Orçamento" and "*Anões do Orçamento*" among others.

Hence, the more bureaucratic bias of the new law more focused on the procedural part of bidding.

Following the legislative evolution of the matter, came the Reverse Auction Law, bringing procedural innovations that made bidding processes much faster: phase inversion, bidding phase, single appellate phase, use of information technology resources, mainly with the adoption of electronic reverse auction.

The use of electronic reverse auction has become increasingly stimulated and encouraged, even by TCU itself.

However, there was a serious problem. The reverse auction law prohibits the use of this bidding modality for public works. Perhaps this was the major innovation provided by the Differentiated Public Procurement Regime (RDC), i.e., indirectly allow the use of reverse auction for procurement of works.

Why indirectly? In fact, the RDC Law (Law 12.462/2011) introduced in the legal world a new bidding modality, which some scholars call 'RDC' mode, associating this mode to procedures virtually identical to the reverse auction, but providing for the application of these procedures to public procurement for works as well.

That is why it is said that the RDC is, in essence, "a reverse auction for public works".

In addition, the RDC legislation incorporated much of the TCU's decisions. TCU`s interpretations and directions supported by the principles in a broad way - not only those of strict legality - are implemented in the RDC.

In fact, I have only two observations regarding the legal regime of the RDC: **integrated hiring and confidential budget**.

The former due to the great difficulty of budgeting without prior preparation of a basic design by the contracting authority, causing the public procurement to be based on a blueprint.

The latter due to the lack of transparency, i.e., disclosure of the price that the government is willing to pay, which may lead to side deals in exchange for inside information.

More than a simple amendment to the Public Procurement Law, what we have now is a draft bill before the Congress (PLS 559/2013), which aims to consolidate Law 8.666/93, the Reverse Auction Law and the RDC, picking the best of each norm to prepare the so-called National Code of Public Procurement and Contracts.

Contrary to what some argue, the recent scandals that have surfaced mainly with "Operação Lava Jato" are not the mere result of gaps in our legislation. The problem is much broader and goes beyond the normative dimension.

3. How to modernize public procurement and, at the same time, always meet the principles governing the public administration (legality, impersonality, economy)?

The initiative to conciliate modernity and adherence to principles formally began in 1998 through the enactment of Constitutional

Amendment 19, with the inclusion, in the Constitution, of the principle of efficiency, which was included in the heading of Art. 37, next to the principles of legality, impersonality, transparency and morality.

One of the great merits of the reverse auction legislation was to innovate with administrative procedures that conciliate, particularly, legality and efficiency. It is important to highlight that this harmony between the principles of legality and efficiency is also present in the scope of the RDC.

The respect for the constitutional and legal principles, including the legality, impersonality, equality, efficiency and economy, does not represent any obstacle to modernity.

There is no conflict whatsoever between modernity and compliance with the principles, even because, from the perspective of strict legality, today we identify positive behavior that increasingly honors other principles, such as the anticipation of a negotiation phase under the trading floor shortly after the bidding phase.

This approach is based on the principles in all their completeness. The law enforcers abide by the principles, including in search for the best interpretation of the laws themselves.

It must be said that the principle of legality is not the most important principle nor the one that should prevail in real cases.

In many cases, as evidenced by TCU`s decisions, the principle of legality loses strength to other principles, with the purpose of finding the best solution for the real case, which, like the principle of legality, are also supported by the legal system in force.

As examples, I can mention the principles of economy, reasonableness, proportionality, administrative continuity, search for the most advantageous bid, efficiency, public interest, etc. The modernity we want for our public procurement is precisely in the harmonious coexistence of all these principles.

4. In the Congress, you proposed and discussed laws that eventually affected and improved the citizens` lives. How has this experience contributed to your performance here at the TCU?

The Congress is a great formulator of Brazilian law and there, as a Congressman and Senator, I had the opportunity to experience all the phases of a legislative construction in pursuit of improving the citizens` lives.

Now I can use what I learned in the matters under TCU`s mandate, interpreting the laws and judging with the teleological sense of the law.

As an example, I can mention my participation as rapporteur in the reform of the public procurement law, currently pending before the Federal Senate, which will be very useful for my judgments, in addition to inducing other hundreds of possible initiatives.

5. On February 4, you will complete one year as minister of this Court of Accounts. How do you evaluate your first anniversary at TCU?

It was very positive, beyond my highest expectations. It is an honor to have been brought to this house, first by God's will and through the support from my peers at the Congress, who appointed me as Minister of the TCU.

For someone who has had all legislative mandates over 26 years in the Parliament, elected by popular vote, as city councilor, state deputy, federal deputy and senator, it is very fruitful to be part of a house deeply related to the Legislative Branch, performing oversight at the service of society.

I want to thank my fellow ministers, public servants and our advisors for the extreme cordiality and friendship with which they welcomed me in the court, which greatly facilitated my adaptation to a new professional life.

6. Last November, under coordination of your office, the TCU performed a Public Debate on the social security sustainability. What were the main findings of the debate with the society?

First, it is important to highlight that this initiative by the TCU was admirable. It aimed to discuss publicly the problems of the country's social security in search for solutions that will only be possible with the participation of all the Brazilian society and, in particular, with the participation of the government authorities of the three branches.

In general, the conclusion was that social security sustainability, and consequently its impact on Brazilian tax schedule, is a chronic problem due to two aspects of high importance:

- the decrease in revenues due to economic problems related to the economic crisis, in addition to the changing demographic profile of the country, with an increasing elderly population that do not contribute to the social security and;

- the high level of misinformation of society about the current state of social secu-

rity, both in the General Regime (managed by the INSS – National Institute of Social Security) and the Specific Regimes (managed by the Federal Government, states, federal district and cities), preventing the subject from reaching the level of importance it deserves in society and, therefore, pushing governments to seek the necessary measures to fulfill their responsibilities with the social security system.

Because of the discussions in this public debate, I can highlight some measures considered to mitigate the impact of social security expenditure on public accounts:

1. the need to advance the implementation of supplementary retirement;
2. the end of retirement per time of contribution, used in only 13 countries in the world, including Brazil;
3. postponement of retirement;
4. 4) redefinition of access to the benefits;
5. the gradual reduction of the difference between genders and,
6. the convergence of rules of the general and specific regimes.

Finally, the essential service that the TCU has provided to the Congress and Brazilian society was highlighted. Since 2012, it has been providing information about the sustainability of the country's social security, in a number of judgments, such as AC 3414-2014-P, related to the systemic report of Brazil's Social Security; AC 2314/2015-P, which addresses the risk of insolvency of the social security regimes; and AC 2710/2015-P, which addresses a comparative study between the general social security system in Brazil and in some countries of the European Union and the Organisation for Economic Co-operation and Development (OECD). It also addresses the coordinated audit that is currently ongoing to assess the solvency of the social security regimes of the states and cities.

7. You were also the rapporteur of the Systemic Electricity Report (Electric Energy Oversight). What has the TCU found in this work?

We found several structural problems, notably:

- Overvaluation of the physical guarantees of the power plants,
- Lack of measures to repower and modernize the power plants;
- High level of electrical losses in the system;
- Exclusive construction of run-of-the-river hydroelectric plants.
- Systemic delays and dissonances in the completion of new ventures;
- Uncertainty related to the expiration of the old concessions.

8. Minister Vital do Rêgo, what do you expect from the TCU's performance in 2016?

It will be a year of consolidation of our progress, with audits increasingly responding to the desires of a society longing for better use of public resources.

I am certain that, in the last year, we strove to improve our decisions and modernize our work.

However, there is much to be done, and we have tools to advance further. We count on the technology and an efficient staff and, above all, general commitment to the future of Brazil.

"The Congress is a great formulator of Brazilian law and there, as a Congressman and Senator, I had the opportunity to experience all the phases of a legislative construction in pursuit of improving the citizens` lives."

Public Dialogue discusses governance of the Government's procurement

Last November 23, the Federal Court of Accounts of Brazil (TCU) held the Public Dialogue: Procurement Governance - Meeting with External Control/Government Oversight. The agenda sought to foster debates on Federal Government's procurement.

At the opening, the TCU Minister Augusto Nardes highlighted the court contributions to the improvement of governance in procurement. Nardes presented data on audits in Brazilian state-owned corporations that, in the last five years, saved approximately R$ 100 billion. "The lack of procurement planning, followed by amendments to contracts, impairs the provision of products and services to society. This can be seen in education, for example. In 2014, only 27% of services were provided", he said.

The Department of External Control - Government Procurement (Selog) presented the results obtained in the centralized guidance audit (FOC) conducted on the procurement of outsourced cleaning, security and transportation services. "The objective was to evaluate whether the procurement gover-

nance and management practices adopted by governmental bodies and agencies were in accordance with the law and best practices", explained the head of the 4th Division of Selog, Ítalo Pinheiro Figueiredo.

The FOC, coordinated by the Selog, covered the topics of procurement governance, procurement management controls, internal controls regarding the procurement process and internal controls and compliance of contracts. Court units, including audit departments in the states of Amazonas, Ceará, Pará, Pernambuco and Rio de Janeiro, performed the work.

The Empresa Brasileira de Correios e Telégrafos (*Correios* – the Brazilian postal service) attended the event and presented quality criteria for cleaning services from the company's experience in the matter. According to *Correios*' corporate manager, Mônica Ferreira, a new model of cleaning services is under implementation in the organization, focusing on quality. Under the procurement scope, one of the model's advantages is that it transfers to the contractor the obligation to measure human and material resources required, which makes it possible to rationalize the cost of services. Mônica said that the project "makes it possible to establish indicators to measure the service performance and results".

Selog's head, Frederico Júlio Goepfert Júnior, highlighted the creation of the unit and its importance for the improvement of TCU's work specifically related to public procurement and contracts. He explained the department's work process and its relationship with the court's image regarding external agents. "We are trying to show that the TCU's purpose is not to punish, but to debate", he argued. Additionally, he stressed that it is essential that the managers understand the needs of each department before starting the procurement process. "The problems identified by the TCU in many audits of procurement and contracts are mainly due to failures in planning, and, to plan, you need to know", he said.

The Selog continued its presentation talking about the risks and controls in procurement. The government auditor Renato Braga explained the importance of the process of managing and mapping risks and emphasized that it is not only about the systematic application of laws. "Procurement is not a systematic normative procedure, it is necessary to analyze each particular case and know the needs and limitations", he argued. For Braga, the development of risk management is the main key to effectively enhance the performance of any public institution, because the Selog has identified that the best mapping is done by managers who know their institutions. Braga also showed a tool developed by the TCU to assess the risks and controls in procurement (RCA) which is available for consultation on Selog's webpage on the court's portal <www.tcu.gov.br>. The auditor also gave details on the results of the governance analysis performed by the TCU at the federal level, which identified numerous flaws in the procurement mechanisms used by the Administration.

The Secretary of Logistics and Information Technology of the Ministry of Planning, Budget and Management, Cristiano Heckert mainly emphasized the State's role in the process, as it should participate in the market both as a buyer, to satisfy its needs, and as a regulator of the supply of goods and services through the use of its purchasing power. In Brazil, the State's purchasing power represents a percentage between 10 and 15% of the GDP, and may act as an instrument at the service of innovation and sustainability, to encourage the development of new supply chains. To solve the logistical problems in Brazil, Heckert proposed the creation of a specific career for the area and a national logistics plan. As a challenge, we should explore the procurement strategic potential to boost national development.

TCU concludes opinion on Government's accounts for 2014

For the 80th time, the plenary of the Federal Court of Accounts of Brazil (TCU) examined and issued preliminary conclusive opinion on the Presidency's accounts, for the year 2014, at a meeting held on October 7, 2015. The court recommended that the Congress reject the accounts due to non-fulfillment of constitutional and legal principles governing the federal administration. The recommendation to reject the accounts had not occurred since 1937.

In June, 2015, the TCU issued the first request for clarification on the 2014 accounts, with 30 days to reply. This term was extended twice, after the addition of new facts to the case. The President submitted the counterarguments, but they were not sufficient to justify the irregularities and resulted in the recommendation by the court to reject the accounts.

Among the reasons for the recommendation to reject the accounts are the omission of Federal Government`s liabilities with Banco do Brasil, and Banco Nacional de Desenvolvimento Social (BNDES) and the Severance Pay Indemnity Fund (FGTS) in the public debt statistics of 2014. Other reasons were the advances granted by Caixa Econômica Federal for expenses with the programs Bolsa Família, Unemployment Insurance and Special Salary Raise and advances granted by the FGTS for expenses with the program Minha Casa, Minha Vida.

Other irregularities found were the absence of temporary tightening of the Federal Government`s discretionary spending in the amount of, at least, R$ 28.54 billion, the improper entry of remaining accounts payable in the amount of R$ 1.367 billion related to expenses with the program Minha Casa, Minha Vida, and the setting of a monthly schedule of disbursement for 2014, disregarding the Ministry of Labor and Employment's statement on the rise of compulsory primary expenditure in the amount of R$ 9.2 billion and on the Workers Support Fund`s frustration of primary revenue in the amount of R$ 5.3 billion.

The rapporteur of the case, Minister Augusto Nardes commented that "due to the relevance of the effects of irregularities in the implementation of budgets, not removed by the counterarguments submitted by the President of the Republic, there was no full compliance with the constitutional and legal principles governing the federal administration. Neither was there compliance with the constitutional, legal and regulatory norms in the implementation of the Federal budgets and in other operations with

federal funds, which is why the accounts cannot be approved, and we recommend the rejection thereof by the Congress".

On these grounds, the court recommended that the Congress reject the accounts. During the meeting, the president of the TCU, Minister Aroldo Cedraz, said the court has strived to provide the best product to Brazilian society, seeking improvements in the most advanced control techniques and analysis methods. "The analysis of the accounts has been accumulating, year by year, modern international practices of financial audit, and improving its performance in other areas, such as surveillance related to fiscal and budget management", assured Cedraz.

CONTENT OF THE OPINION

The TCU`s opinion consists of evaluation of the report on the budgets and government's action, prepared by various agencies and consolidated by the Comptroller General of Brazil, as well as the Federal Balance Sheet, prepared and consolidated by the Department of the National Treasury. It is a systemic diagnosis on relevant aspects of the federal administration`s performance and compliance in the year to which it relates.

The report contains information on: the performance of the Brazilian economy in the year; in-

struments of planning and budgeting; fiscal management, especially regarding compliance with the limits and parameters established by Complementary Act 101/2000 - Fiscal Responsibility Act (LRF); government`s sectorial action from the analysis of indicators and targets of the thematic programs of PPA 2012-2015; and the results of the audit of the Federal Balance Sheet relating to 2014.

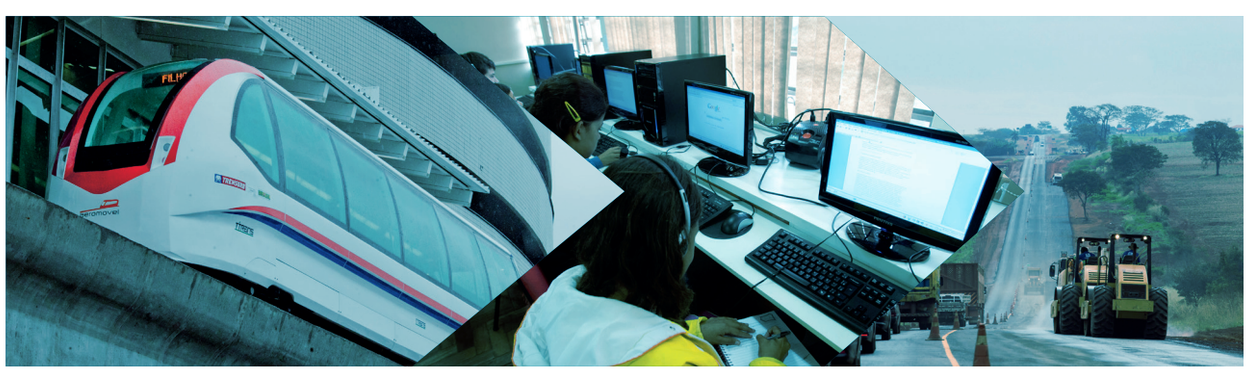
In addition to the report, the court provides comprehensive diagnosis related to 2014 on "Public Governance for National Competitiveness", based on a survey conducted in federal, state and municipal organizations.

THE PROCEDURE

Until sixty days after the opening of the legislative session, the President of the Republic must submit the Federal Government`s accounts to the Congress - which forwards them to TCU for analysis. The court then presents its preliminary opinion accompanied by a detailed report analyzing the documentation submitted.

TCU`S ROLE

The technical analysis of the Government`s Accounts is held annually by the TCU pursuant to the Constitution of 1988. The TCU`s Secretary of Government Macro Analysis (Semag), Leonardo Albernaz, explains that the documentation originated from the Presidency involves large numbers and complex reports, difficult to understand for both citizens and parliamentarians. "The TCU`s role is to ensure the transparency and integrity of these data, ensure that both society and the Congress will receive true, reliable and timely account rendering", says Albernaz. The TCU`s report and prior opinion aim to contribute to the transparency of the government`s actions, issue an opinion on the Federal financial statements, provide an overview of economic performance, analyze the planning, budgeting and fiscal management compliance and performance, analyze the compliance and reliability of information, and foster the improvement of governance and public management.



TCU assesses the actions and initiatives undertaken during OLACEFS Presidency

After three years in the presidency of the regional bloc, the Brazilian supreme audit institution passes the direction of the organization to the Superior Audit Office of the Federation, the supreme audit institution of Mexico

In the last General Assembly of the Organization of Latin American and Caribbean Supreme Audit Institutions (OLACEFS), held in Querétaro, Mexico, from November 23 to 27, 2015, the Federal Court of Accounts (TCU) passed the direction of the organization to the Superior Audit Office of the Federation, Mexican supreme audit institution (SAI). The TCU chaired the OLACEFS from 2013 to 2015.

At the end of the event, Minister Aroldo Cedraz, President of the TCU, said "I have no doubt that it was, and still is, very worthwhile to dedicate ourselves to the cooperation activities within the scope of our OLACEFS - a regional organization that has been increasingly recognized as synonymous of dynamism and commitment to the best performance and innovation. Not only in promoting large meetings like this one, but mainly in the adoption of initiatives that can promote substantial changes in our countries."

THE INSTITUTIONAL STRENGTHENING

The institutional strengthening of the OLACEFS was the mark of TCU's presidency. The average of OLACEFS' positive perception by SAIs, which ranges from 1 to 4, increased from 3.22 in 2013 to 3.60 in 2015. To ensure this continued success, in 2015 the court led a robust strategic planning process in OLACEFS, which will be completed in 2016.

Between 2013 and 2015, there were three general assemblies, nine meetings of the organization's Steering Committee and the Eurosai-OLACEFS Conferences in Quito, Ecuador. During these three years, some institutions joined the organization: in 2013, the Comptroller General of Curaçao and, in 2014, 12 courts of accounts of Brazil, one of Argentina and the Rui Barbosa Institute (IRB), of Brazil.

During this period, the OLACEFS increased integration and cooperation with the International Organization of Supreme Audit Institutions (INTOSAI) and with regional groups, such as the Caribbean Organization of Supreme Audit Institutions (Carosai), the African Organization of the Supreme Audit Institutions (Afrosai) and the European Organization of Supreme Audit Institutions (Eurosai).

In this way, it was able to increase the organization's participation in global initiatives and facilitate the exchange of experience and good practices. From 2013 to 2015, the highlight was the integration of the Presidency with international multilateral organizations, in particular with the German Technical Cooperation Agency (GIZ), the INTOSAI Development Initiative (IDI) and the Inter-American Development Bank (IDB). These strategic alliances have resulted in the performance of nine coordinated audits, using the Performance Measurement Framework (SAI PMF) and implementation of the 3i Program.

STRATEGY

The coordinated audits were part of a broad strategy of the OLACEFS' Presidency to enhance professionalization and training of the auditors in the region. Since 2013, 18 SAIs participated in coordinated audits. Among the work already concluded are the audits of water resources, oil and gas, biodiversity, and information technology governance. Coordinated audits on environmental liabilities and social housing are still ongoing. For 2016, the teams are being educated and trained for audits in the oversight of road works; in education indicators; and anti-poverty programs.

There was also an increase in online courses in this presidency. A thousand students were trained in 21 editions of ten courses, most of them focused on the preparation of coordinated audits.

The OLACEFS stood out as the INTOSAI regional group with the greatest number of application of the Performance Measurement Framework (SAI PMF) - a tool that provides a strategic vision of the SAIs' performance, based on international auditing standards (Issai) and best practices established for governmental audit. The application of the methodology and training of auditors occurred thanks to the technical and financial support of the IDI and IDB.

The OLACEFS Presidency, in strategic alliance with IDI, began to implement the 3i Program in the region, with the support of the Working Group for the Application of International Audit Standards in OLACEFS' SAIs (GTANIA). This program seeks to implement the international standards for financial, performance and compliance audit.

After the expert certification program for application of Issai, held by 18 SAIs, various institutions applied the 3i Program tool to evaluate compliance with the Issai, or with the Issai Compliance Assessment Tool (Icat), which relates to a gap detection tool in the institutions' performance.

The TCU continues its work in the international scenario, now as chair of the OLACEFS Capacity Building Committee (CCC), and as of 2017, as Chair of the INTOSAI Professional Standards Committee (PSC), to which it was elected president at the meeting of the INTOSAI Steering Committee held in Abu Dhabi, United Arab Emirates, also in November 2015.

Opinion

TCU and Public Procurement

The Federal Court of Accounts of Brazil (TCU) plays a prominent role in the area of public procurement. Public bids and contracts are one of the topics that are most examined in the sessions of the Court Collegial Body, and is a rich source of information for managers as well as for scholars on the subject. Managers from the powers of the Federal, state, Federal District, and municipal governments must obey these decisions related to the application of general bidding laws.

Why is this important? Remember that public procurement is the means through which governments materialize their public policies and that enable maintenance of the "administrative machine", which gives organizational support to the execution of the policies. Public bids and contracts make it possible to build hospitals, schools, roads and refineries. Buy medicine, vaccines, school supplies, vehicles for public security, information technology equipment and services, office supply, among others. Nothing in the Brazilian State will function without these goods and services. Hence the criticality of the issue!

However, public procurement is not as simple as it looks. It is a complex process that involves several players and that has many risks and rules created to reduce risks. In order for the administration to make good purchase, In order for the administration to make good purchases, we need to meet and follow requirements such as the ones contained in the following question. Taking into account a specific public need, what is the best solution (goods and services) to cater to public interest in a timely manner, with quality and in the right amount, with sustainability requirements, which is not directed, provides the preferences foreseen in the law, such as those directed to micro and small companies, and that is economically advantageous? We need to recall that an advantageous proposal is not the least expensive one. It is the proposal that meets the requirements above!

After choosing the solution and selecting the supplier (bid), there is another very sensitive phase, which is when goods and services are received. That is, verifying if the technical specifications and quality requirements were met, according to the contract.

These actions are not amateurish! The process is critical because it requires many studies and technical capacity on the part of managers and public servants involved. It is of no use if the Public Administration has great specifiers in the planning phase and no contract supervisors with knowledge of the good or service to be hired, for example.

It is in this scenario that TCU comes in as a change inducer, either due to its pedagogical role in disseminating good practices or through preventive and corrective actions when necessary.

In the specialization process TCU is undergoing, the topic of bids and contracts took on even more vigorous actions with the creation

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of Rede-Log. This network is composed by the Department of External Control – Government Procurement (Selog), which is in charge of oversight of public purchases, and the Departments of External Control in the sates of Amazonas, Pará, Pernambuco, Ceará, Bahia, Goiás, Rio de Janeiro and Santa Catarina, which are specialized centers in this topic.

This configuration makes the TCU have a qualified team that is specialized to oversee public procurement in the country. The control activity materializes in several ways, either when a representation and denunciations are examined or when audits are conducted. Specialization brings about uniformity of technical opinions as well as timeliness for TCU to meet external demands.

In addition to acting in concrete cases submitted within the scope of this social control, since 2013 TCU, on its own initiative, carries out audits focused on procurement. The aim of good governance in the public sector is to ensure that its organizations always perform according to the public interest, based on principles such as transparency and publicity, planning and control, morality, impersonality, legitimacy, efficiency and economy, among others.

Procurement governance is the application of these principles and practices focused on the procurement function of organizations. In these governance works, TCU uses self-evaluation questionnaires to trace a profile of governance and management of public entities. The questionnaire itself that has questions on issues such as leadership, strategy and control in the procurement sector of each agency, has a series of good practices that can be implemented right away by public administration. In addition to this "advisory", TCU build a Procurement Governance Index (IgovAquisições), calculated with statistical concepts, which gives managers a notion of the stage of maturity of the entity (beginning, intermediate and advanced), as well as a view of itself in relation to the other entities (by segment and within the universe of federal agencies and entities). The main result of this work was the issuance of structuring measures (determinations and recommendations) to superior governing bodies (Ministry of Planning, National Justice Council, among others) so they can guide and coordinate actions to improve procurement governance in the agencies that they supervise.

Another important tool made available by TCU to assist public managers is called Risks and Controls in Procurement (RCA). This tool maps a generic procurement process, listing the stages from planning to contract execution, including, for example, preliminary technical studies and price research. For each stage, the risks associated to the activities carried out are identified as well as possible controls to mitigate them. The tool is available to all on the TCU internet site (www.tcu.gov.br/selog), especially to public managers who are responsible for implementing controls to mitigate these risks.

In addition to the actions above, following the guidance of the TCU presidency, the Court currently invests in improving information technology tools to enhance its control actions regarding public procurement. There is work on developing search tools for non-structure data, identification of typologies in the area of procurement and making available a dashboard for procurement control. We highlight the creation of a probabilistic model to define samples for more precise selection of objects to be audited.

In addition to the above actions, there are also daily challenges faced by TCU, such as how to enhance the actions to identify and prevent fraud, embezzlement and corruption in public procurement. These actions involve necessarily intensive use of IT tools and intelligence actions, as well as formalization of technical cooperation agreements with other Public Administration agencies and international entities such as the Organization for Economic Cooperation and Development (OECD). Another challenge for TCU is to harmonize structuring control measures that materialize because of issuance of new norms, with actions that make the new procurement process dynamics less bureaucratic and more efficient. An example is the recommendation for OGS to reevaluate the need for mandatory use of the linked account system in outsourcing contracts.

As seen, the task of controlling public procurement is Herculean and at the same time noble. With actions in this area, TCU takes an important step to fulfill its mission, which is to "improve public administration in benefit of society through external control", contributing to the implementation of public policies through purchases made with efficiency, isonomy, transparency and economy, thus accomplishing its constitutional mission of assisting the national Congress in the oversight of public expenses in the area of bids and contracts.

Procurement from exclusive supplier or service provider by non-requirement of public bidding. Brief analysis of article 25, I of Law 8,666/93.

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ABSTRACT

Despite the fact that the possibility of contracting with exclusive service provider or supplier has been provided for in the macro regulatory system that guides the government procurement for several decades (already included in article 126 of Decree-Law No. 200/67), the agencies and entities of the Public Power still face difficulties regarding this norm. Often, the Courts of Accounts recognize imperfections and even illegalities committed by public officials when formalizing such procedures. Revisiting this norm, this study aims to shed some light on the subject, addressing practical issues that arise in the everyday life of the Public Administration, with the intention that the sectors responsible for this kind of procurement better instruct their processes.

Keywords: Bidding. Non-requirement. Exclusivity.

1. NON-REQUIREMENT FOR BIDDING – RELEVANT TRAITS

Article 37, XXI of the 1988 Constitution, establishes the principle of General Duty of Bidding as a condition for all public administration entities and bodies to sign contracts for construction, procurement, services and alienation., However, there are cases in which public interest will not be met by the

carrying out a public bid. The bid may appear unfeasible setting the stage for the non-requirement for a bidding process, mentioned in article 25 of Law No. 8,666/1993. This is different from a waiver of bidding because, in the latter, the bidding is perfectly possible, being an alternative to the bidding process strictly in the cases listed in article 24, of the same statute.

An important aspect of non-requirement is that the cases in which it can arise are endless. If, for some reason, it is not feasible to carry out the bidding, the same shall be deemed unenforceable. If a Municipality intends to[1] purchase fuel and the town has one gas station, and the nearest gas station is in the neighboring town, 25 km away, it would be absurd (and unnecessary) to perform a bid because, in case the latter gas station won, the lower price might be, the simple round trip would empty the tank. In such a circumstance, the bidding would be considered unfeasible, as the possible result would be damaging to the administration.

2. UNFEASIBILITY OF BIDDING FOR LACK OF COMPETITORS

The absence of a plurality of individuals eligible to apply to the contract intended by the Administration brings out the most classical form of unfeasibility.

However, in no way would it be reasonable to admit that the Administration would be forced to carry out all the administrative acts typical of the bidding process knowing in advance to whom the contracting would be awarded, given that this is the only individual on the market able to meet the call. Hence, the provision of article 25, I of Law No.8,666/93 which we transcribe below:

> Article 25- The bidding is unenforceable when there is competition unfeasibility, in particular:
>
> I-for the acquisition of materials, equipment, or commodities that can only be supplied by an exclusive producer, company or commercial representative. Brand preference is prohibited and the Trade Union, Federation or Confederation of Employers, or equivalent entities must prove exclusivity made through an attestation provided by the local trade registry where the bidding, the construction, or the service would be performed;

Plainly, we should point out that the hypothesis of the item transcribed above is for acquisition where the supplier, distributor or producer is unique or exclusive. That does not mean to say that in case there is need to hire a particular service, which can only be executed by a single provider, the bidding would be mandatory for lack of legal support. As seen in a lesson of the celebrated master, Jesse Torres[2], stating that the

subsection does not subject to the head of the article, but rather, the opposite. Therefore, what matters, and will always be relevant, is that the object to be hired be supplied or provided by one who is unique. It is unimportant whether exclusivity falls upon a service or purchase. If the object of the contract intended is a service, it will fit into the heading of the article, and not its item (I). This is the guidance given by the Federal Court of Accounts:

> "Refrain from contracting the services based on item I of article 25 of Law No. 8,666/1993, since this provision is specific for the acquisition of materials, equipment or commodities provided by an exclusive producer, company or trade representative. Hire services directly, by non-requirement for tender, only when there is proof of unfeasibility of competition, in line with the provisions of articles 25 and 26 of Law No. 8,666/1993 ". (Ac. 1096/2007 Plenary)

It should be highlighted that to be "unique" is different from being "exclusive". When the supplier is unique, the non-viability of competition is absolute, that is, in fact there is no other available. When the vendor is "exclusive", other suppliers provide the object but for some reason only that individual is authorized to provide it. It is said that non-requirement is relative.[3]

It is clear that the hypothesis is that competition is a factual impossibility. If the Administration intends to purchase a product that is in the hands of only one individual, there is no need to talk about the dispute even if this were desired. It is necessary to clarify that the limitation imposed by the legal provision, that it is impossible to have brand preference, means that the main point of the absence of competitors is not the product itself. It is, rather, the technical solution the product matches and the fact that this is the only one that meets the need of public interest which has arisen. This chain does not find discrepancy in the precedents. From the repository of TCU (Federal Court of Accounts), we highlight the following excerpt from the judgment:

> "Determine to the Mint of Brazil that when purchasing materials with an exclusive supplier they... check the records... to make sure there are not similar products able to meet the needs of the service. Both the assertions must be duly recorded, through attestations issued by competent bodies". (Ac. 2008 Plenary/3,645)

Therefore, it is the duty of the agent to judge convenience and opportunity of the acquisition of a product considered unique or exclusive (thus, not falling into the principle of the General Duty to Bid) to demonstrate that this technical solution is the only

adequate one to meet the need of the Administration. They should dispel the idea that there are no others on the market with similar features, application or solutions. Otherwise, we would not be facing a situation of non-requirement and holding a public bid would be perfectly possible, and, consequently, a mandatory route.

3. THE UNFEASIBILITY OF BIDDING BASED ON EXCLUSIVE COMMERCIAL REPRESENTATION.

We are not in away from the central idea that the non-requirement for tender is based on practical unfeasibility of competition, due to absolute absence of contracting alternatives. Although the cases in this matter are infinite, we must recognize that not infrequently, there will be cases in which exclusivity may even be circumstantial or transitory. The best example is the case of an exclusive commercial representation, though the lesson of Marçal Justen Filho: "... it is the commercial figure that is present when a supplier assigns to a certain economic agent the private right to mediate business in a certain region."[4]

Practice has shown that one of the most common forms of non-requirement due to a lack of competitors is when there is an exclusive commercial contract in which the product manufacturer or owner of the distribution rights or of intangible property (which is the case of book and periodicals publishers and or owners of industrial patents) grants to a certain company in his/her commercial circle (franchisees, accredited companies or their authorized network) the exclusivity of supply/distribution or of the provision of services. As mentioned before, this exclusivity can be restricted to a certain region or even to a certain period. The mentioned scholar also adds that commercial representation is regulated in Brazilian Law in various legislations, pointing out, for example, Law 4,886/65 (commercial representation); Law No. 6,729/79 (lease of motor vehicles) and law No. 8,955/94 (business franchise). Therefore, the non-requirement for tenders covers not only exclusive commercial representation, as well as "any kind of economic agent holding an exclusivity clause".[5]

To better illustrate this, suppose a publisher, which owns the rights to publishing, distribution and marketing of works it publishes, grants[6] t to a single company — a local bookstore — the right to market one or several titles in a given State. It cannot be denied that this the market reserve is a suggestion of the publisher who, in that State, chose not to have a plurality of bookstores or booksellers at the expense of exclusivity of a single company. Therefore, if the local Public Administration needs to acquire exactly those titles, there would be unfeasibility of bidding because that publisher (owner of the editing rights, distribution and sale) authorized only a certain company to market them, excluding themselves also from selling. A typical case of relative non-requirement, where, in principle, even with several individuals in other locations offering the same product, due to the circumstances where there is an exclusive commercial representation agreement, only one company would be authorized by the owner of the distribution rights to market such works in that State. It is necessary to point out that there is no controversy regarding this issue. The eminent jurist[6]

Mark Juruena acknowledges, "exclusivity can also be proved through exclusive contract (distribution, representation, licensing, etc.)[7]

The Federal Court of Accounts in its judgment No. 095/2007 – Plenary addressed an interesting hypothesis. The rapporteur was Min. Benjamin Zymler, who analyzed several purchases of pharmaceuticals made by the Secretariat of Health of the State of Paraíba, founded on non-requirement for tender with local exclusive sales representatives. In the case examined, the SES/PB(Health Secretariat of PB) relied on statements of manufacturers (holders of patents) which attributed specific exclusivity for signing contracts. By way of example, see the content of one of the declarations presented by one of the laboratories dated 04/02/2013, which is part of the records, but with proper omissions:

> "To whom it may concern, we declare that the company (*omissis*), CNPJ/MF nº (*omissis*), with headquarters at (*omissis*), will be the exclusive representative of the Pegasys product (Peginterferon alfa 2 the -40 kD 180mcg), manufactured by us, **in the amount of 3,000 vials required by SES/PB. Validity of this Declaration 90 days**"(underlined)

Note that the owner of a medicine patent delivers to a given company exclusivity for the supply of a specific medicine and only in quantities sufficient to meet the need of the Secretariat of Health of Paraiba. The laboratory itself or other representatives could

market this same drug if the customer was another. In this example, the issue is not even territorial, because since the client is an agency from another sphere of the Government, there would be no reason to talk about non-viability of competition. In particular, I bring up the manifestation of the eminent representative of the Federal Public Ministry in TCU, in that trial, in verbis:

> "there was an authorization that generated a temporary accreditation, which meant a sort of" exclusive representation ", for a certain period, place and object. To us this shows that the laboratories lacked interest in direct selling in a specific case. **We do not see obstacles for laboratories to establish a specific exclusive representation (with established time, plac e and object)**. This denotes that the laboratory did not want to participate in a determined bid of a government agency, but it did not exclude its interest in participating in future bids of that agency." (underlined)

Agreeing with the opinion of the acquisitions, the Rapporteur Minister asserted that:

Office of the Prosecutor and, at the end, acknowledging the legality of

> "the company (omissis) was in fact an exclusive representative of this laboratory. In spite of it being unusual and perhaps questionable to issue specific declarations to participate in a certain bid, the point is that the manager found himself in a situation in which there were no competitors able to make the bid. "

In the example represented by above declaration, we note that there is even a validity period of 90 (ninety) days. This means that after this time the condition of exclusivity would disperse, which would make the competition viable. However, with the Administration needing to hire immediately, unable to bear this delay, the unchangeable fact is that hiring would be, within the period of exclusivity, impossible to be concluded with the exclusive representative.

4. THE PROBLEM OF PROVING EXCLUSIVITY

One of the most controversial issues regarding exclusivity involves precisely the way in which it can be proved, rather, how to prove that a supplier or service provider is exclusive. According to the final part of paragraph 1 of article 25, proof of exclusivity should be made

> "... through attestation provided by the trade registry entity where the bidding or the construction or the service would occur, by the Trade Union, Federation or Employers' Confederation, or equivalent entities."

As understood from the legal text, exclusivity cannot be merely alleged by the competent authority or even by the "owner" of said exclusivity. The rule requires that the situation of exclusivity be indicated by some competent entity. The list of entities in the provision under study is merely illustrative, finishing ith the peculiar expression "...or equivalent entities." It is of utmost importance to establish the scope of the provision according to the factual reality of the market. To this end, we will examine in detail this part of the legal text.

4.1 THE FORMALISTIC ELEMENT OF PROOF OF EXCLUSIVITY

The first point to be clarified concerns how exclusivity can be proved. The rule indicates that the corroboration must be made "**...through attestations...**".

Conceptually, a attestation is a document signed by someone, who declares an existing fact and of which he/she has knowledge due to the position or function that one occupies. José dos Santos Carvalho Filho explains that the attestations are enunciative acts:

> "...because their contents express the existence of a certain legal fact. In the attestations and statements, the managing agents give faith, by their own condition, to the existence of that fact".

The attestation differs from the certificate because the latter is a document that affirms the existence of a fact contained in an act, entries or in processes, book or documents which are in power of the certifier.

Thus, characteristically, an attestation is nothing more than an affirmation of the agent, a judgment of the declarer, based on a fact of his knowledge. It has a lesser degree of certainty and accuracy than the certificate since the latter is the picture of what actu-

ally exists already formalized in public record. The attestation does not show something tangible. It expresses nothing more than an opinion or a narrative from the perspective of the declarer. The special importance given to the attestation, when issued by a public servant, is the fact that it constitutes an official administrative act. When all its validity assumptions are present (competence, object, form, reason and purpose). As such, it receives its typical attributes, among which we can highlight the presumption of legitimacy (competence to issue the act) and accuracy (that which has been expressed is true until proven otherwise and the burden of proving it untrue is on the one who accuses it of being untrue). However, in essence, it is still a narrative or a value judgment[9].

Therefore, it is true that **no attestation**, at least in theory, can state categorically that this or that individual is exclusive supplier of a given product. If it could, the instrument would be the certificate due to it having more strength as a proving force. In the attestation of exclusivity, the declarer only reports what he "knows", but by no means guarantees that in fact the company declared is exclusive. Not that he cannot do it, but the law does not require this exhaustive statement, because, it reiterates, it would require a certificate. It should also be stressed that the registration trade entity, that is, the Board of Trade, is an independent entity and therefore a public agency whose servants have the necessary public competence to issue certificates. Yet the legislator was satisfied with the attestation.

The Federal Court of Accounts for a long time has demonstrated concern about the content of attestations of exclusivity that instruct the direct procedures for non-requirement for tender. In view of this, it has abridged guidance to the agencies under its jurisdiction to brace themselves for the receipt of documents of this nature. Here is the entry:

> ABRIDGEMENT 255 –TCU. In procurements where a sole manufacturer, company or trade representative can only provide the object, it is the duty of the public agent responsible for contracting to adopt the necessary measures to confirm the veracity of evidential documentation of the condition of exclusivity.

The concern of the Federal Court of Accounts is precisely due to the enunciative or declaratory nature of the attestation. If it were a certificate, such insecurity would be minimized by the fact that there would be a formal record. The 633/2010-Judgment -Plenary, having as its rapporteur Min. José Jorge, and that generated the Digest transcribed above laid out the problem as follows:

> "The rule in Public Administration is public bidding, and direct procurement, especially in the event of non-requirement, should be seen as an exception. The legislator treated procurement from an exclusive supplier as an exception, imposing as a condition for this kind of procurement that exclusiveness be effectively proven, by means of attestation of exclusivity. Thus, once exclusivity is the cause of unfeasibility of competition, due to the non-requirement, we have to be careful with its characterization. However (...) the Court unfortunately faced on several occasions situations in which the attestation of exclusivity did not correspond to reality or were false, including falsification. Hence, the Court precedents evolved to require that public officers responsible for hiring not only receive and accept the attestation of exclusivity mentioned in the provision, but also confirm the existence of the condition, through either legal proceedings or even queries to manufacturers. An example is Judgment 2,505/2006-2nd Chamber, determining that an entity under the Court's jurisdiction adopt provisional measures to ensure the veracity of the statements made by the agencies and issuers. (...) In this context, the project in question is pertinent, consisting of one more effort by the Court to prevent irregularities in attesting the exclusivity of a supplier and ensuring compliance with the legal precept. It is worth stating that the role of the public officer shall not be limited to requiring the documentation specified, but also verifying the real condition of exclusivity claimed by the vendor. "(underline added)

Therefore, it is clear that the simple presentation of the attestation of exclusivity will be, in some cases, insufficient to guarantee that the no-bid contracting was legal. We not from the excerpt from the judgment transcribed above that confirmation of the veracity of the declaration can come even from the manufacturer, as seen in the second highlight.

4.2 THE ATTESTATION BY THE REGISTRY OF TRADE UNION, FEDERATION AND EMPLOYERS ' CONFEDERATION.

The provision **under review** has an incongruity. It assigns to Boards of Trade (entities of trade registry) and the employers ' unions the duty to provide attestation of exclusivity. First, issuance of this documentation is not a duty of the Trade Registry nor of trade unions. So much so that the[10] National Department of Commerce Registration issued Normative Regulation No.93 of 05.12.2002 of DNRC/ MICT(Ministry of Science and Tourism), which prescribes, in its article 11:

> "The Board Of Trade shall not attest proof of exclusivity, referred to in subsection I, article 25, of Law No. 8,66th6e, June 21, 1993, being limited to simply to issuance of a certificate of full text of the filed act. The certificate should include that the terms of the act are the sole responsibility of the company to which it refers. (emphasis added)

We recall that the **attestation is**, essentially, an act with a value judgment or a narrative of a fact known to the public servant in the exercise of his/her functions. One notices that the DNRC was concerned with the veracity of the information to be provided and, considering the fact that the Boards of Trade are not competent to attest the condition of commercial exclusivity. Therefore, in this specific context, the Boards of Trade shall limit themselves to record what someone has said about the exclusivity in favor of others or themselves. To Jacoby, only such provision "is frontally contrary to the Bidding Law, when it seeks to render ineffective the imperative thereof" 11 We dare disagree. Law No. 8,666/93 regulates article 37, XXI of the CF (Federal Constitution), namely, the procedure for hiring third parties in Public Administration, and not the business activity that is governed by its own rules. After all, it was the law of Bidding that ended up discussing a topic that is not its responsibility, surpassing its sphere of normative competence, and invading Law No. 8,934/1994, which provides for the registration of companies and related activities.

Therefore, recognizing the relevance of IN (Normative Instruction) of the DNRC/MICT No. 93/02, the challenge would be to determine the practical significance of the expression "act filed" referred to in article 11 of that Normative Instruction. Article 32 of the abovementioned Federal Law sets forth which acts and documents can be submitted to filing by the Boards of Trade:

> Article 32 – The Registry Comprises
> I ... (omissis)...
> II – The filing:
> ...
> e) of acts or documents, by legal determination, are assigned to the Public Registry of Companies and Related Activities or those that may be of interest to businessmen and commercial companies (underscore)

Therefore, if the owner of the marketing/distribution rights designates its sole representative or if it is itself the sole agent to market tits product, it would be reasonable to admit, under the logical point of view, that they would be the only ones able to "attest" their exclusivity or that of their sales representative. In short, that is what IN 93/02, of the DNRC/MICT intended to say when it mentioned "act filed". The act would be, therefore, the manufacturer's or official distributor's declaration (or the Publisher or owner of the patent) stating that So and So Inc. has exclusivity to market such and such products. The same reasoning can be applied by analogy in cases where the attestation of exclusivity is sourced from Trade Unions, Federations and Employers ' Confederations and the equivalent entities.

Considering that the Boards of Trade and also other entities listed in the provision under study, limit themselves to reproducing the content of the statements of manufacturers and distributors, and considering that the TCU believes that the proceedings which confirm the veracity of claims can be carried out by the manufacturer themselves, one cannot deny that their declaration or the commercial representation agreement itself has enormous proving force. Therefore, what would be the purpose of requiring that one of these entities issue the attestation? The answer seems relatively simple: since the granting of exclusivity is a legal act restricted to the manufacturer/distributor and supplier (exclusive), the record of the manufacturer's attestation in such entities would give the attestation publicity in the business environment related to the area of the object of exclusivity, making their legal reflexes opposable to third parties.

4.3 THE MISTAKEN IMPRESSION THAT THE ATTESTATION SHOULD BE GIVEN BY AN ENTITY OF THE LOCATION WHERE THE BIDDING WOULD OCCUR.

Another important issue concerns the place of dispatch of the attestation. In literal interpretation, obviously, the applicator from the norm would be driven to only accept as valid the attestation issued by entity headquartered "where the bidding would occur". However, it is known that no legal standard must have literal treatment under penalty of narrowing its application. Even more. The standard could take the applicator to undertake a result impossible or even damaging to the right the same standard tutored legal. That is the perfect lesson of Carlos Maximilliano in verbis:

> "The Law should be construed intelligently: not the way the legal order may involve an absurd, prescribe inconveniences, meet the inconsistent findings or impossible. This also prefers the exegesis resulting in efficient legal providence or the valid act, that makes that void, harmless, or this, legally void "(**Hermeneutics and application of the right**, Forensics, 1993, p. 180).

Firstly, one cannot demand of entrepreneurial society double record. By the constitutional principle of free enterprise, a company based in a State can exercise its activity perfectly anywhere in the Country, regardless of registration otherwise at its headquarters. Thus, it cannot be forced to keep records in all States where it operates. On the other hand, more often the attestations will have national scope, being enough to the point of proof. See the Normative Orientation 56/2010 issued by the AGU/NAJ/MG, whose understanding goes in that same direction:

The attestations shall be issued by the local entity of the contracting party headquarters, this rule being excepted in cases where the exclusive supplier has no commercial representation in the area or the exclusivity is nationwide." (highlighted)

The correct interpretation, therefore, is that only be required the attestation to be from the place where the hiring will be formalized if the holder of the exclusivity has the same local representation. However, attestation of exclusivity by an entity based in another location will be admitted if this entity has national scope, even if the holder of the exclusivity has headquarters in the hiring location, as would be the case of attestations issued by national Trade Unions or Confederations based in place different from the public agency or entity.

4.4 WHAT "EQUIVALENT ENTITIES" ARE

Finally, we must clarify the scope of the expression above to identify stone bearing the name of which entities in substitution of the entities listed in the target provision of the present work, the agencies and entities of Public Administration can receive attestations of exclusivity.

Article 25, (I) of the General Law of Bids refers to entities that bring together entrepreneurs, with the exception of the Board of Trade, which is state regulator of body corporate records, but that meet mission analogous to first. As seen previously, the central idea of the attestations to be issued by one of these entities is to promote advertising, especially within the business community that belongs to with exclusivity. It would not admit another interpretation, due to the inaccuracy of the expression. Thus, one must consider that "equivalent entities" should be associations that bring together the business community or associations representing the business community, like the Trade Unions, Federations and Confederations of Employers relating to the segment to which the object of the hiring belongs with.

For Jacoby "in addition to the trade association, to the Club of Retailers could be 12 considered equivalent entities. Cite also other entities, such as the Brazilian Chamber of the Book-CBL, for books and periodicals; the Brazilian Association of Pharmaceutical Commerce-ABCFARMA; the Association of Software Companies and Computer-ASSEPRO. It will not be possible, however, for admitting attestations issued by clubs or entities of

Social promotion although arguably qualified for lack of legitimacy to represent a particular business segment.[13]

5. CONCLUSION

In consideration of the above, the direct procurement by non-requirement for tenders by bodies and entities of the Public Authorities, when applicable to contracting with a supplier or service provider must comply with the provisions of articles 25, I, l. 8,666/93, the following:

a. the choice of the contractor had as exclusive should be due to the identification of its technical solution being the only one that meets the needs of the Administration;

b. transient or circumstantial unfeasibility is acceptable, as in cases of exclusive representation only in a territory;

c. that exclusivity shall be **attested** by one of the entities listed on the provision on the screen and that when receiving these attestations, agencies adopt measures to ascertain the veracity of what such entities declared;

d. it is not necessary for the attesting entity to have headquarters at the contracting party´s site, provided that it has national scope or that its recipient has headquarters in another location, in order to avoid forcing the company to double registration;

e. to construe as "equivalent" the entities that have a social purpose analogous to Employers Unions, only those that can be considered reputable being acceptable.

NOTES

1 For Jesse Torres, "... the chances of items have no conceptual autonomy; to understand otherwise means to subordinating the caput of the article to its items, what outrages obvious rule of hermeneutics; being, as they should be, the items of an article subject to the head of this, the non-requirement for tender materializes only when the competition is impossible." (Comments to the law of tenders and public administration contracts, 8th. Ed, Renew, p. 342).

2 See note 1 of this study.

3 This classification is adopted by José dos Santos Carvalho Filho, who, citing Gasparini defends the thesis according to which the non-requirement would be applicable only in cases where the same is absolute. Administrative law manual,LumenJuris, 11th. Ed., p. 224). Disagree, with all respect, to this theory because even with other competitors, it is possible that the supply be restricted to a particular individual, such as in cases of territorial exclusivity arising out of commercial representation, in which the owner of the distribution rights delivers a territorial range to an accredited company. Although there are other marketing the same product, by virtue of contractual exclusivity clause, they could not invade its commercial territory. A Publisher, which owns the rights to publishing and distribution of a literary work, can deliver a single bookstore right to only market it in the city where it is headquartered, notwithstanding other bookstores selling the same title in other municipalities.

4 Comments to the law of Administrative Contracts and Bids, Dialectic, 14th. Ed., São Paulo, 2010, p. 363.

5 Op. Cit.

6 It is customary in contracts of edition for the author to grant such rights to the publisher.

7 SOUTO, Mark Juruena Villela, Bids & Administrative Contracts. Rio de Janeiro, Terrace ADCOAS, 1998, p. 165.

8 Op. Cit., p. 124.9

9 MELLO, Celso Antônio Bandeira, Course on Administrative Law, 17th ed., Mackenzie, p. 382-384.

10 In this Sense: SON, Marshall, Justen Op. Cit., p. 365 and MOTTA, Carlos Pinto Coelho, citing Toshio Mukai. Effectiveness in Bids and Contracts. 10th. Ed. Belo Horizonte: Del Rey, 2005.

11 Jacoby, Jorge Fernandes, Ulysses Direct Procurement Without Bidding Belo Horizonte, ed. Forum, 9th, 2011, p. 594. It should also make it clear that in his work the author refers to art. 12 of 56/96, IN the DNRC/MICT, but which had been updated by IN above displayed, and the text was kept intact, just being renumbered to the art. 11.

12 Op. Cit., p. 597.

13 Fernandes, Jorge Ulysses Jacoby, Op. Cit., p. 598.

The participation of business consortia in bidding processes: Free choice of the Bidding Company?

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SUMMARY

The scope of this study is well delimited by its title. This article aims to discuss the participation of consortium companies in public bids. It is expected, through it, to outline some basic standards to guide the administrative decision, which allows or not the participation of consortia in bidding processes, finally identifying situations that, by hindering the administrator's discretion, impose a certain decision.

Keywords: Business Consortia. Bidding. Discretion. Limits.

1. INTRODUCTION

Consortia are unincorporated associations of companies, contractually established, aimed at performing certain joint venture, according to the legal provisions of articles 278 and 279 of Act .404/76. This institution is based on the mutual autonomy of those associated companies, to pursue a common business purpose that, quite likely, would not be reached only with the individual capability of each consortium company, whether for technical reasons or for economic-financial reasons.

Some public or private demands, due to their significant magnitude or high complexity, can only be met through this corporate instrument. Regarding Administrative Law, the Bidding Act (article 33) and

Concession Act (article 19) expressly authorize the bidding entity to allow the participation of consortia.

However, as we aim to further discuss, depending on circumstances and their implications, this facultas agenda can either be imposed or be fully suppressed.

2. A DEBATE IN PROGRESS

Case law and doctrine used to assert, without any significant temperaments and problematization, that the possibility for the participation of consortia in bidding processes would subject it to a discretionary decision of the Bidding Company.

Nevertheless, over the years, the Federal Court of Accounts and the most prominent administrators started to relativize discretion on the topic, which in other times, had, equivocally, almost absolute features.

Moreover, as a comment, it is worth mentioning that in recent years, a large part of the doctrine has been surpassing the rigid and classic, though anachronistic, dichotomy between discretionary and related administrative acts. In such manner, especially taking into account the acknowledgment of the regulatory effectiveness of legal principles, the theory of degrees of relatedness to legality[1] is being developed, and outlining the institution of justifiable discretion (MORAES, 2004, p. 34), pursuant to the need to base administrative decisions[2].

Administrative discretion, as it is known, consists of "the margin of choice left by law to the public administrator's judgment so that, in the pursuit of achievement of statutory objectives, chooses, among legitimate legally options, the measure that, in such concrete reality, it is understood as most convenient" (ARAGÃO, 2013, p. 161). In this context, according to the Democratic State, one can can not confuse discretion with a blank check or the universal excuse for several wills3.

Back to the proposed topic, it is found that, at a certain moment, the need to "demonstrate with solid grounds the choice to be made by the administrator during the bidding process, regarding the prohibition to the participation of consortia" has been established (TCU, Award 1.165/2012, Plenary Session. Reporting Judge Raimundo Carreiro).

In this same line of though, Marçal Justen Filho (2014, p. 661) warns that the discretion in evidence:

> "**it does not evidently mean authorization for arbitrary or unfounded decisions**. To allow or deny the participation of consortia is a result of an assessment process of market reality against the object to be bid and weighing of risks inherent to the performance of a myriad of entities associated for the accomplishment of a purpose. As with every decision made because of discretionary competence, control related to compatibility between reasons and reality is ad-

> mitted and regarding the proportionate adequacy between the aimed means and results".

Contemporarily, several authors, the Brazilian Superior Court of Justice[4], State Courts of Appeals and the unanimous case law of the Federal Court of Accounts indicate that, although a priori, the Administrator has a great decision margin on the point, the participation of consortia is mandatory in bids in which the magnitude, heterogeneity and unfeasibility of a material division of the bid object, restrict the universe of possible bidders quite excessively.

In this sense, Carlos Ari Sundfeld proposed that "in cases where, the object is of significant magnitude, if its division is proved to be fully inviable, for operating reasons, the invitation to bid (ITB) shall forcefully allow the pooling of companies" (1995, p. 67). Endorsing such position, Egonn Bockmann and Fernando Vernalha have expressed their views:

> "producing an expressive and demanding bid, the Bidding Company shall seek means to mitigating the high market concentration, allowing the participation of bidders under the consortium system, as set forth in article 33 of the General Bidding Act (Lei Geral de Licitação - LGL). It is evident that the consortium systematics may favor the expansion of market participation, by compensating, in a certain way, the restriction of the universe of bidders imposed by the technical or economic dimension of the bid object" (2012, p. 119)

Based on these assumptions, such authors conclude that what will determine the existence or not of discretion on the topic "will the concrete case characteristics: if competitiveness is maintained without the participation of consortium companies, the ITB may forbid the participation of consortia" (2012, p. 120).

The understanding of the State Court of Appeals of Minas Gerais is not different:

> "APPEAL – WRIT OF MANDAMUS – CHALLENGE TO INVITATION TO BID – MUTIPLE SERVICES – SIMULTANEOUS QUALIFICATION – UNLAWFUL DEMAND – COMPETITION LOSS - ACT N° 8.666/1993 – ARTICLES 15, IV AND 23, § 1° - LAWYER'S FEES – INAPPLICABILITY OF WRIT. The division or fractioning of the bid object is mandatory when, in addition to being technical viable, does not imply in financial loss to the Bidding Company.
>
> The bidding entity, on its turn, not proceeding with contract per item, has to duty to explain the reasons for global acquisition, **and provide in the ITB the possibility of participation of interested parties established as consortium, otherwise, the bidding process may be characterized as illegal, by violating the principle of competitiveness**". (TJMG - Civil Appeals 1.0024.06.098029-9/002, Reporting Judge: Associate Justice Claudia Maia, 13th CIVIL CHAMBER, judgment on Sep 30, 2010, court decision published on Oct 29, 2010)

The State Court of Appeals of Rio Grande do Sul, in addition to considering the unjustified prohibition to the participation of consortium companies in large bids illegal, it understands that the future administrative agreement is absolutely null and, more seriously, that the manager which, through this route, intentionally hinders the competitiveness of the bidding procedure, commits administrative improbity (in addition to misdemeanor, e.g. article 90, of the Bidding Act):

> APPEALS. **BIDDING AND ADMINISTRATIVE AGREEMENT**. CLASS ACTIN. PRICE SURVEY N° 16/2007 OF THE MUNICIPALITY OF SÃO LEOPOLDO. **PROHIBITION TO THE PARTICIPATION OF CONSORTIUM BIDDERS. VIOLATION OF BROAD COMPETITION. ADMINISTRATIVE AGREEMENT DECLARED VOID**. The Price Survey aimed at contracting company for the provision of surveillance services and inland waterway vessel operation. Bidding procedure with the Lowest Lump-Sum Price which is only related to legal requirements and lowest price tender. **Clause 2.1.2 of the Invitation to Bid challenging the formation of a consortium that breaches article 33 of Act 8.666/93 and does not meet public interest. Bidding procedure awarded as null and void. ADMINISTRATIVE IMPROBITY. BIDDING. COMPETITIVENESS**. INVITATION TO BID. AMENDMENT. DEMAND. ARMED SURVEILLANCE SERVICE. INLAND WATERWAY BOAT OPERATOR. **It is an act of administrative improbity of the Chair-**

> **man of the Bid Committee, without request from any Municipal Secretariat, to include in the invitation to bid, a totally inapplicable demand aiming to hinder the bidding procedure competitiveness**. In such case, in the ITB for contracting armed surveillance services, the services of inland waterway boat operator were included, which have never been provided. **CONTRACTUAL NULLITY**. SERVICE PROVIDED. NON-APPLICABLE INDEMNITY. The validity of the action for damage presupposes that the act whose nullity is declared, is harmful to public property. Since there is lack of evidence, indemnity is not due. There is no grounds for ascribing liability to the contractor, which did not perform any tort. The fees paid due to the effective service provision shall not be refunded. UNSUBSTANTIATED APPEAL OF THE MUNICIPALITY. UNANIMOUS DECISION. APPEAL OF THE PUBLIC PROSECUTION SERVICE ACCEPTED. MAJORITY DECISION. (TJ/RS, Civil Appeal N° 70052803954, 22nd Civil Chamber, Reporting Judge: Associate Justice Eduardo Kraemer, Awarded on Nov 28, 2013)

Therefore, whenever the bid object is remarkably large or complex and heterogeneous, the bidding entity shall forcefully allow the participation of pooled companies in the bidding procedure. In other words, the Brazilian legal system and its set of informative principles impose the admission of consortia in large or heteroclite bidding procedures – under penalty of hindering the principle of competitiveness and, in some circumstances, the bidding itself may turn into an improper and ineffective procedure.

Not in other sense, the Federal Court of Accounts has been repeatedly determining that, in such cases, the Bidding Company either divides the bid object in several procedures, if possible, or conducts a single bid, and in this case, it shall mandatorily allow the participation of consortia. Depicting this case law tendency, the following awards are shown:

> "9.1.1. considering article 23, § 1, of Act 8.666/93, with wording given by Act 8.883/94, and in Award 247 of the Court, **to conduct the division of the bid object aimed at the contracting of work**, services and supply required for the Implementation and Complementation of the Alcântara Launching Center and Alcântara Space Center, **it shall previously proceed with, to base the choice of the configuration of 'blocks' or 'lots' to be formed due to the division, technical studies that consider the market characteristics and that indicate the alternative division that best meets the principles of competitiveness, isonomy and achieve the most beneficial proposal for the Bidding Company, respecting the limitations of technical nature, without prejudice to the possible alternative of conducting a single bid to contract the whole complex or set of services from a single bidder, but, in this case, provided the participation of consortium companies is expressly allowed, in order to assure the material division of the object, as per the rules set forth in article 33 of Act 8.666/93**". (TCU, Award 108/2006, Plenary Session, Reporting Minister Judge Lincoln Magalhães da Rocha, with new wording given by Award 766/2006, also from the Plenary Session, Reporting Minister Judge Augusto Nardes).
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> ***
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> "The case law of this Court has already established itself in the sense that the admission or not of a pooling of companies in bids and contracts is a discretionary competence of the

bidding company, and it shall always exercise it upon a grounded justification.

Notwithstanding the participation of consortia is recommended whenever the object is deemed of high complexity or significance, such alternative is not mandatory.

The solid circumstances shall be considered that indicate if the object is significant or complex enough that restricts the access of potential bidders. Only in such case, the bidding company must authorize the participation of pooled companies in the bidding procedure, aiming to expand competitiveness and obtain the most beneficial proposal". (TCU, Award 2.831, Plenary Session, Reporting Minister Judge Ana Arraes).

In this line, it is worth noting that the TCU has already decreed as illegal, even the unjustified restriction of the number of companies integrating each consortium, in a given bidding procedure – for understanding that, in view of the characteristics of the bid object, such practice would imply excessive constraint on the procedure competitiveness. This award is mentioned below:

"**The technical report does not recommend a limited number of companies per consortium. Even if it recommended it, that would not be enough to justify limitation not provided in Law. In addition to not being provided in Law, such limitation, in this case, as exposed in the initial analysis of this occurrence, is a factor of strong constraint to the competitiveness of the bidding procedure. Given the peculiarities, size, quantity and diversity of work, services and systems, some quite specific, that make up the bid object, limit the number of companies per consortium, especially to only three, it certainly shall limit the number of consortia that will be formed with the possibility to fulfill all the technical qualification requirements**, especially with the requirements contained in ITB 002 [003]/AEB/06.

As to the Court precedents, there is not generally accepted case law in such regard yet, because there are decisions in both senses, according to the Award mentioned in the initial analysis. What the TCU has considered as fundamental is to find, in the concrete case, if the limitation causes constraints to the bidding procedure competitiveness. In this case, if the ob-

ject is not divided, certainly this constraint will occur, for the reasons aforementioned.

Furthermore, this limitation goes against the essence of the predominant understanding in Plenary Award 108/2006. It considered that the participation of consortia in the bid would supplement the legal requirement of division, because the consortium would mean a relevant division, as each participating company would be in charge of a certain part of the contractual object. But Act 8.666/93 sets forth that work, services and purchases must be divided in as many portions as proved technically and economically feasible. The division is the rule and shall be taken to the limit of technical and economic feasibility. The aim is to expand the competitiveness of each portion as much as possible. **For consortia to really meet the purposes of the Law, pursuant to the understanding expressed in such Award, it shall be allowed the participation of as many companies as the number of technically and economically feasible portions**. There is nothing in the administrative proceeding of Invitation to Bid 002 [003]/AEB/06, nor in the technical and legal reports, which demonstrates technically and economically, how many and which these portions are. **Thus, limiting the number of companies per consortium is to limit the relevant division addressed in Plenary Award 108/2006, without technical and economic grounds for such limitation**". (TCU, AC 397/2008, Plenary Session, Reporting Minister Judge Augusto Sherman).

Hence, if the TCU understands as unlawful to limit the number of companies per consortium, when the complexity and magnitude features of the object are present, a fortiori, it is undeniably illegal to also forbid the formation of in totum consortia, when the bid object is of such nature.

Conversely, although less frequent, it is possible that, in some cases, there is no other choice for the Bidding Company but to forbid the formation of consortia. Think, for example, in an extremely technical service (e.g. supply and operation of a specific modality of military satellites), which is only provided by two or three specialized companies. In such scenario, the admission of consortia can allow the pooling of companies which would be natural adversaries, in other circumstances, thus restricting the number of potential bidders and, consequently, the bidding procedure competitiveness, which, finally hinders, and sometimes rendering the contracting of the most beneficial proposal impossible for Public Administration.

In this sense, it is worth mentioning the warning of CARVALHOSA (2004, p. 393), according to which the institution of consortia can be converted into an efficient instrument "of cartel of sector activities. Different from individual monopolies – trusts – the consortium can be aimed at the establishment of a collective monopoly. This is due to the associative regulation of the market conduct of companies acting as competitors then".

It is evident in this perspective, that the administrative decision can not be based in abstract and generic considerations. It must be researched, in a concrete and individual manner, which will be the likely implications of admission or exclusion of consortium companies in each specific bidding, given the peculiar characteristics of the pertinent market segment.

3. CONCLUSIONS AND NOTES

It is possible, from the considerations developed till then, to assert that the principle of competitiveness[5] shall appear as the balance for the admission or prohibition to the participation of consortium companies in public bids. Whenever accompanied by substantial and specific grounds, said decision shall aim at the expansion of the universe of potential competitors in the bidding procedure, with a view to foster competitiveness of the bidding procedure and, thus, ensure the most beneficial contract for the Bidding Company.

In this context, the important lesson of Alexandre de Aragão (2013, p. 297) is worth mentioning:

> "As competitiveness is the own realm of the bidding process, it is also an important hermeneutical guide, so that, in view of several possible interpretations for a certain situation, the one which is more competitive should be chosen (*in dubio pro competitionem*)".

Unfortunately, we are often faced with invitations to bid defiled by a double illegality. On one

hand, a formal defect is found, consistent in the lack of grounds for decision that allows or excludes the participation of business consortia in the bidding procedure. On the other, a relevant illegality is found, as, depending on the case in question, both admission and prohibition of consortia can be characterized as a restrictive practice to the bidding procedure competitiveness.

Considering the growing dimensions and complexity of state-owned activities and, consequently, of the objects of public bids, it can be stated that consortia, within administrative agreements, consist in a current and relevant phenomenon. Its proper management, in accordance with the highlighted parameters can greatly expand the competitiveness of some bidding procedures, generating considerable gains to the exchequer. Conversely, the institution, if used in a cunning or non-technically manner, can allow the intentional manipulation of important bidding procedures or culpable constriction of broad competitiveness that must be inherent to any bidding, implying incalculable losses to the Bidding Company, to companies that may be deprived from the right to competition, and indirectly, to society.

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NOTES

1 Regarding the topic, in the Brazilian scenario, its worth mentioning the significant doctrinaire contribution of Gustavo Binenbojm, in Uma Teoria do Direito Administrativo, more specifically in Capítulo V – Da Dicotomia Ato Vinculado versus Ato Discricionário à Teoria dos Graus de Vinculação à Juridicidade, p. 195 – 241, 2008, 2nd edition, Renovar, Rio de Janeiro. In comparative law, see Georges Vedel, Droit Administratif, p. 318/319: "La Administration ne se trouve jamais dans une situation de pur pouvouir discrétionnaire ou de purê compétence liée. Il n'y a jamais purê compétence liée. (...) Mais surout, il n'y a jamais pur pouvoir discrétionnaire".

2 Therefore, in our times, not only when it comes to the issue addressed in this article, it appears to be equivocal to assign absolute features to administrative discretion - which today is limited by the constitutional principles and may, subject to certain parameters, be the subject of control of the Judiciary.

3 The term "discretion" over centuries XVI to XVIII, only had this meaning. In its origin, the word "expressed the decision-making sovereignty of the absolute monarch (voluntas regis suprema lex). At that time, the so-called Police State, where the government was fully mixed with the Public Administration, synonymy between discretion and arbitrariness was complete. "BINENBOJM, 195. In the same sense, see Paulo Magalhães Costa Coelho, Controle Jurisdicional da Administração Pública, 2002, p. 40: "Thus, there will be full identity between the will of the absolute prince and the law".

4 It is observed the following precedente: "THE DEMAND GLOBALIZED IN A SINGLE BIDDING PROCEDURE AIMED AT THE PURCHASE OF A HETEROGENEOUS VARIETY OF GOODS DESTINED TO EQUIP A HOSPITAL DOES NOT FORBID COMPETITIVENESS BETWEEN BIDDING COMPANIES, PROVIDED THAT THE INVITATION TO BID ALLOWS THE FORMATION OF CONSORTIUM WHICH, IN LAST INSTANCE, RESULTS IN THE DIVISION OF CONTRACTS IN ORDER TO EXPAND THE ACCESS OF SMALL COMPANIES IN THE BIDDING PROCEDURE, IN THE HARMONIC INTELLIGENCE OF THE PROVISIONS CONTAINED IN ARTICLES 23, PARAGRAPH 1 AND 15, IV, WITH WORDING OF ARTICLE 33, ALL OF ACT 8.666, OF JUNE 21, 1993". (RMS 6.597/MS, Reporting Minister Judge ANTÔNIO DE PÁDUA RIBEIRO, SECOND PANEL, awarded on Dec 16, 1996, DJ Apr 14, 1997).

5 On the principle of competitiveness, the following doctrines are worth of note: José Santos Carvalho Filho, Manual de Direito Administrativo, 28. Ed., 2015, p. 252; Marçal Justen Filho, Comentários à Lei de Licitações e Contratos Administrativos, 16th Ed., 2014, p. 93; Alexandre Santos de Aragão, Curso de Direito Administrativo, 2. Ed., Rio de Janeiro: Forense, 2013, p. 297; Diógenes Gasparini, Direito Administrativo, 17. Ed., 2012, p. 544.

Specification of brand when preparing description of item for onsite public biddings

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ABSTRACT

The public bidding was implemented in line with the constitutional principle of efficiency, and it proved to be the most important innovation in the Brazilian Public Administration at the turn of the century. This article seeks to demonstrate the difficulty in drawing up the purpose and identifying the brand for Onsite Public Biddings. The public bidding has proven to be an excellent tool for purchase of common goods and services, as it seeks the lowest price. However, one of the concerns is the purchase of low quality products. As all purchases of common goods and services are conducted through public bidding, not all the winning companies provide quality products, thus the public administration ends up hiring companies that fail to meet their needs. This article will highlight some points, concepts and methods for the public administration to specify the brand legally and not suffer with acquisitions based only on the lowest price. It should be noted that the days of this lowest price concept are numbered, since the intention is to acquire better quality products at the lowest price.

Keywords: Public Administration; Onsite Public Bidding; Terms of Reference; Brand.

1. INTRODUCTION

Terms of Reference, also known as TR, is a compulsory document in which the municipality administration describes the products to be acquired, in a clear, concise manner, avoiding terms that do not have an exact meaning

or that could allow ambiguous interpretations. Purchases made in onsite public biddings are bound solely to the description in the terms of reference, since the purpose of this type of purchase, although an excellent tool to acquire common goods and services, is the lowest price, differently from other bidding types that aim at better techniques, or technique and price, pursuant to law 8666/93.

The difficulty in acquiring products that satisfy the Public Administration is becoming more and more frequent, since the number of companies offering low-quality products grows every day. Paying a little more for a quality product, instead of targeting the lowest price and acquiring a product that could cause damages to the Administration, often pays out.

The concept of buying the cheapest item is becoming more and more obsolete, since quality products are expected based on the call for bid description. Given the aforementioned, this article has the purpose of briefly reporting the procedures for detailed description and mentioning of brand in the descriptions of products to be acquired through onsite public bidding.

Consequently, this article purpose is to analyze specifications of brand pragmatically, presenting criticisms and possible solutions, in order to equate the interpretations on this subject.

In this line of thought, it is expected that the study on the analyzed subject may be useful for the society in general, since this scientific article is intended to improve the understanding on specification of brand in conformity with the constitutional principles effective in the Brazilian Law.

For that purpose, the research was primarily bibliographical, and also referred to other means, based on which it was possible to discuss positions, as well as present current aspects on the matter.

2. THEORETICAL REFERENCE

2.1 HISTORY

For better understanding, the public bidding was introduced by the Executive Provisional Order No. 2026, of May 4, 2000. This Executive Provisional Order was converted into Law 10520, of July 17, 2002, which was enacted, at Federal, State, Federal District and Municipal levels, under the terms of article 37, item XXI, of the Federal Constitution.

Law 10520/02, known as "Public Bidding Law", in its article 9, mentions that this method is supported by the rules of Federal Law 8666, of June 21, 1993, which instituted rules for call for biddings and agreements of the Public Administration, and provides for other matters. In this regard, it should be noted that we referred to conclusions based not only on Law 10520/02, but also on Law 8666/93.

2.2 DEFINITION OF BRAND

For FURRIER (2004, page 01), it is: "a name, term, signal, symbol or drawing, or a combination thereof, intended to identify goods or services from a vendor or group and differentiate them from those of competitors."

From the economic point of view, a brand makes transactions easier, since it makes interpretation and processing of information by customers quicker in relation to certain experience with the product, activate or not their expectations of trust, identification, ethics, satisfaction and self-expression, serving as a criterion to reduce risk in purchase decisions.

Consequently, we could observe that the brand makes transactions easier and makes description more comprehensive, and it may even avoid unnecessary acquisitions.

Based on this context, we will study possible specification of brand in the object of an Onsite Public Bidding process. But firstly we need to understand how to prepare this object.

2.3 PREPARATION OF OBJECT

Law 10520/02 focuses only on acquisition of common goods or services pursuant to its article 1. In this regard, one should ask: what are common goods or services? "… for the purposes of this article, common goods and services are those with performance and quality standards that may be objectively defined by the call for bidding, through usual specifications in the market." (Art. 1, 2009, page 75)

Law 10520/02 also provides that: "the definition of the object must be accurate, sufficient and clear, and any specifications that, for being excessive, irrelevant or unnecessary, limit the competition are hereby prohibited". (Art. 03, 2009, page 76)

Therefore, the article itself mentions that common goods and services are those that can be objectively defined in the call for bid, and that the definition must be accurate, sufficient and clear, i.e. translate the real need of the Public Administration, containing all indispensable characteristics, and evidently avoiding irrelevant and unnecessary characteristics that could impair the competition.

Professor Benedicto de Tolosa Filho, an Attorney specialized in Public Law, in his book "*Pregão - Uma Nova Modalidade de Licitação*" (Public Bidding – A New Type of Bidding Process"), points to the importance of accurately defining the bidding object, and he further intelligently analyzes Digest No. 177, of TCU, as follows: "The accurate and sufficient definition of the object subject to bidding is an indispensable rule of the competition, even as an assumption of the principle of equal rights among bidders, to which the publicity principle is supplementary, and which involves knowledge by potential bidders of basic bidding conditions, and, particularly in the case of bidding for purchase, the quantity is one of the minimum and essential specifications of the public bidding object definition." (TOLOSA FILHO, 2005, page 08)

Using the words "accurate" and "sufficient" is a clear indication that, in the object definition, all fundamental aspects must be contemplated so as not to raise doubts in any interested parties. Furthermore, if the description is inaccurate and insufficient, it affects not only bidders, but also the public administration itself.

Benedicto de Tolosa Filho further states emphatically:

> "Nothing shall be decided in addition to what the Call for Bidding provides for. The description of the object of the bidding contained in the call for bidding cannot leave any margin of doubt, nor does it admit later complementation. Between the option of a concise description and a detailed description, there cannot be any doubt to the Public Administration. It has to choose the complete and detailed description. And the description must be certainly clear. But "detailing" does not mean "obscurity". If the description of the bidding object is not complete and perfect, there will be nullity…" If complete, it is the principle guiding the bidding to "binding to the call for bidding" and "objective judgement".[1]

It is evident that the public administration must express the real need, detailing the object so as not to raise doubts in bidders. However, after the acquisition/hiring, the bidding object cannot be changed.

The public administration is prohibited to conduct biddings whose object includes goods and services without similarities. "Biddings whose object includes goods or services without similarities or with exclusive brands, characteristics and specifications cannot be conducted, except if technically justifiable… "(Art. 7, paragraph 05 of law 8666/93)

Any description of product or service without similarities in the market is deemed as directing the bidding process, i.e. the public administration is favoring only one bidder/manufacturer, thus harming the equal rights and competition principles, except in the cases technically justifiable by the administration.

2.4 SPECIFICATION OF BRAND

After a brief comment on the importance of the object description, we reach the point that brings great

doubt. Could we specify a product brand in the bidding object, showing our preference for it?

Our memorable master Hely Lopes Meirelles, in a comment on a similar provision of the previous Bidding Regulation stated that:

> "we still understand, however, that the acquisition of a product of a certain brand, excluding similar products, is possible in three cases: to continue using a brand already used by the public service; to adopt a new brand more convenient than the existing ones; to standardize brand or type in the public service. It is essential that the Administration proves the effective advantage of a certain brand or type, for continuity, adoption or standardization in its agencies and services, exclusively."[2]

We should point out that the opportunity for preference exists, provided that the requirements are met and the actual need by the public administration is proven.

The TCU (Federal Court of Accounts) states that a way of parameterizing products is by specifying a brand, provided that it is followed by the expressions "or equivalent", "or similar" or of "better quality". "specifying a Brand as a quality parameter could be admitted to facilitate the description of the bidding object, provided that it is followed by the expression "or equivalent", "or similar", or of "better quality". (Decision No. 2401/2006).

It thus conciliates the understanding that "specifying a brand in the bidding must be preceded by the presentation of technical justifications that clearly and irrevocably prove that the adopted alternative is more advantageous and the only one that meets the bidding needs."(Decision No. 636/2006).

Therefore, we understand that by describing an item mentioning the expressions "or equivalent", "or similar", or of "better quality", and further presenting a technical justification that shows that the referred to brand is the only one that meets the public administration's needs, we will not be directing let alone limiting the competition among bidders.

In Decision No. 99/2005 TCU stresses that:

> "First of all, I point out that a detailed description or specification of a brand could lead to an unacceptable restriction to competition in the bidding. Nonetheless, specifying a brand could be accepted in cases of standardization, provided that the option is duly justified."

Evidently, the illegal specification of a brand causes inconveniences to the public administration; however, if justified, reinforces the actual need of the acquisition.

In its call for bids, TCU specifies the object as follows: "cleaning sponge, double face, measuring approximately 110x70x20 mm, ref, Scotch, 3M or similar". (IBRAP, 2009, page 142). We can see that the object was described objectively, with usual market specifications and approximate measures; in addition, the brand is mentioned and the expression "or similar" is included. In any moment whatsoever, there is guidance or specifications that limit the competition.

Another TCE/MG (Minas Gerais State Court of Accounts) specification, a little more complex: "Complete finishing for flush valve, Hydra Max line, model 2550, brand Deca." (TCE/MG, 2009). In this description, we can see that none of the expressions that we have just analyzed was mentioned. The reason is hidden in the text interpretation, i.e.: by mentioning the word "finishing", we understand that we will only acquire the finishing of the flush valve. We know then that there is already a valve, whose brand is Deca, model 2550, correct? Therefore, what is the reason for acquiring a finishing that does not belong to this brand or is incompatible with it?

Situations such as this deserve a technical justification for the reason of acquiring the referred to finishing, since the real need of the public administration is evident.

Another example that is a matter of controversy in all call for bids is the description of computer supplies, such as: "toner cartridge hp 2550l yellow ref. q3962a – original item of the equipment manufacturer". (TCE/CE, 2010). In this description, we see the expression "original item of the equipment manufacturer" making it clear that the product must be an original HP item, restricting the participation of other manufacturers of cartridges that are compatible with the item object of the bidding. Nonetheless, there is competition, since there are several authorized HP sellers.

The TCU highlights the following in its Bulletin on Case Laws on Biddings and Contracts No. 7:

> "The representation offered to TCU pointed to possible irregularities in the Electronic Public Bidding No. 113/2008 conducted by the Paraná State Regional Electoral Court (TRE/PR), whose purpose was acquiring toners for a Xerox multifunctional fax machine manufactured by the equipment manufacturer itself. Basically, the question raised was the possible restriction to the bidding competition, since the toner brand was required in the acquisition conducted by TRE/PR, opposing article 15, paragraph

7, I, of Law No. 8666/93. In his vote, the TCU reporting judge favored the exceptional possibility of specifying a brand in biddings, provided that such specification is supported by technical or financial reason, duly justified by the manager. In this case, the reporting judge understood that there was a technical and financial justification to require a brand, for the purpose of maintaining the supplier warranty. According to the justifications presented by the people in charge, based on an analysis conducted by the TRE/PR technical department, "if the contractual warranty of 36 months is lost due to use of toners from other brands, the estimated loss arising from a new maintenance agreement for the 270 recently acquired printers could exceed R$1,300,000.00 (one million and three hundred thousand reais) within a three-year period, and this information is based on prior printer maintenance contracts entered into by TRE/PR". Such justifications further consider that the documentation attached to the files attested that, despite the brand requirement, several companies took part in the bid and presented their unit prices to the toner specified in the call for bid, "making it possible to reduce the product price in relation to the price initially estimated by the TRE/PR management; therefore, there was effective competition among different suppliers of the referred to brand and cost reduction for that public body". Finally, such justifications emphasized the participation in the bidding of companies that offered toners of brands other than the referred to manufacturer's toners, with unit prices significantly above the final value contracted by TRE/PR for original Xerox toners. The First Chamber accepted the reporting judge's opinion and rejected the representation. Case laws mentioned: Decision No. 664/2001-Plenary, Court decision No. 1334/2006-1st Chamber, Court Decision No. 1685/2004-2nd Chamber and Court Decision No. 1010/2005 and 1916/2009, both from Plenary.[3]"

We can see that the description is similar to the aforementioned one; however, with a plausible justification, where the administration mentions possible improvisations in case the original toners were not acquired. Accordingly, when we mention the "phrase" we cannot forget to justify the need.

Another example:

"toner cartridge for Samsung printer, model ml3051nd, new, original, minimum capacity for 8,000 (eight thousand) pages, Samsung brand. Considering the printers are new, still covered by the manufacturer's warranty, and considering that such warranty would cease in case toners of a brand other than the manufacturer's brand are used, only quotations expressly specifying that the bidder will supply Samsung's new and original products shall be accepted."

We identified Samsung's toner brand in the description and a small justification for specifying this brand, without mentioning similar items. This case is similar to the one under analysis, but a little bolder since it mentions that "only quotations expressly specifying that the bidder will supply Samsung's new and original products shall be accepted", which is a motive for companies to challenge this call for bid.

In certain cases, suppliers of compatible products do not agree with the descriptions in calls for bid and with the justifications presented, alleging that the public administration is benefiting only the printers' manufacturers. This controversy affects several institutions, always delaying the bidding process.

In order to avoid inconveniences in computer supplies acquisition processes, it is suggested to clearly state in the item or in the text of the call for bid that bidders quoting toners of different brands must submit a technical qualification certificate issued by the printer's manufacturer, in which the latter reports that the products quality is equal to the original product quality, and that it will be held liable for any problems that may occur.

3. RESULT

As a name, term, signal, symbol or drawing, the brand facilitates the interpretation by bidders, when selling, and by the administration, when describing the object.

Today, swiftness is one of the principles inherent in the Public Bidding, which is an efficient tool used for acquisitions in the short term. And such swiftness occurs when the object description specifies the actual need by the Public Administration. This is solid evidence that, for a good acquisition, the description must be in accordance with the usual market specifications.

Seeking a brand is becoming more and more competitive, and people are associating products with successful brands, making it easier to understand the need. This line of thought defines the importance of showing similarities among brands in the descriptions, and backs the authors' opinion that it is essential for the Public Ad-

ministration to prove the effective advantage and need of a certain brand.

4. CONCLUSION

It is possible to identify several legal ways of interpreting the institution's need to acquire a product. It is important to detail the description of a bidding object, and specify the brand, if permitted by law, in order to help bidders to identify the product to be acquired. However, we found identifications that raise doubts in bidders, which are motives for clarification requests and even for challenging the call for bid.

It is evident that the Onsite Public Bidding is an excellent tool to acquire common goods or services, allowing the Public Administration's actual need and the objective to be described clearly.

The importance of the Public Bidding, as a precursor of the "New Public Administration" implementation in the public bidding area in Brazil, inspires the development of new horizons that, in the wise words of Marçal Justen Filho esq., concludes the considerations of this work.

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The mischaracterization of contract object: TCU cases

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ABSTRACT

This study aimed to present a list of arguments in Judgments of the Federal Court of Accounts – Brazil (TCU) about what this Court understands as mischaracterization of the contract object. It was motivated by the contact I had with contractual changes as an Analyst of the National Transportation Infrastructure Department (DNIT / BA), and by publication of Judgment nº 2819/2011 - of the Federal Court of Accounts – Brazil (TCU) - Plenary. Based on the judgments of the TCU, especially Judgment nº 2819/2011, which determines that the DNIT must obey the limits set and provided for in art. 65 of law nº 8.666 / 1993, some cases were highlighted as well as the observations made by the Court in contrast with the reasons presented by the corresponding audited bodies. In those cases presented, in addition to recurring disobedience to legal limits, we found forms used as reasoning as well as how important it is to understand what mischaracterization of the contract object means, in order to discourage actions that cause losses to the exchequer in this particular case, more related to investments in infrastructure.

Keywords: Mischaracterization; Contract object; TCU.

1. INTRODUCTION

As a Transportation Infrastructure Analyst of the National Transportation Infrastructure Department –

DNIT, my interest in dealing with the mischaracterization of contract objects arises from having contact with cases related to road maintenance services. Some of the cases present requests for alterations, whether exclusion or inclusion of services. My interest also arises as from the publication of Judgment No. 2819/2011 - TCU - Plenary, which enforced upon DNIT compliance with the limits provided for in art. 65 of Law nº 8.666/1993.

The purpose of this study is to present a list of arguments found in TCU's Judgements about what this Court understands by mischaracterization of the contract object. More specifically, it will describe situations of contractual amendments audited by TCU and will examine possible cases of mischaracterization of the object.

The research, which was descriptive and documentary, was held in the first half of 2015, when the main analyses performed were those of Judgments published by TCU, under the guidance of Judgment nº 2819/2011, which, in its wording, refers to several other Judgments dealing with the same subject.

Initially, we will introduce Judgment nº 2819/2011, its subject and conclusion. Then, we will present situations in which the mischaracterization of the contract object is evidenced, grouped in the following topics: real cases, quaint cases and hypothetical case. These cases did not include renovation of buildings or equipment[1].

We understand that this study is important because it enables suggestions for future researches correlated to the topic addressed. It is also important because it seeks to present a list of arguments based on TCU's Judgements about what this Court understands by mischaracterization of the contract object, it favors the implementation of improvements in the provision of public services, in our case more specifically focused on infrastructure.

2. JUDGEMENT Nº 2819/2011 – TCU – PLENARY.

Judgment nº 2819/2011 analyzes an appeal filed by DNIT, considering subitem 9.2 of Judgment nº 749/2010, partially amended by Judgment nº 591/2001 - TCU - Plenary.

Item 9.2 stands out as a result of the analysis, since it enabled a new view by DNIT of the changes introduced in some of its contracts.

> [...] ordering the National Transport Infrastructure Department, in future contracts executed from the date of publication of this Judgment in the Official Daily Gazette, for the purpose of compliance with the limits of contractual amendments provided for in art. 65 of Law 8.666/1993, to consider, the decreases or exclusions of amounts separately. That is., the set of decreases and the set of increases must always be calculated based on the original amount of the contract by applying to each of these sets, individually and without any offsetting

> between them, the amendment limits set forth in the legal provision (BRASIL, 2011b, p. 17).

A careless interpretation of this order may contribute to a mere compliance with the percentage limits imposed by law, without due attention to the understanding that led to the resolution of this Court: the mischaracterization of the object in contracts executed by the Government. Therefore, it is important to read fully the referred document, which presents real situations, their peculiarities, as well as the argumentative development that, by referring to other Judgments and current legislation; it is possible to understand the objective of the final decision. This decision is, naturally, always open to new discussions and appeals to the extent permitted by current legislation.

Without wishing to cover the entire topic addressed in the referred Judgment, as well as the details present in the argumentative dynamics, we will present some cases which may favor a broader view, although the result of a closer look, of the topic addressed in this study.

3. REAL CASES

This section will present two real cases giving rise to a TCU audit that verified the modification of the contract object through amendments.

3.1 AN INCREASE ABOVE 100%

Concerning the construction works of the Regional Center of Nuclear Science - CRCN in Pernambuco, analyzed in Judgment nº 1733/2009 - TCU - Plenary, this case will be discussed with the aid of Table 1, below.

We can observe that, considering only the first 5 amendments to the contract, the total amount excluded is equivalent to 73.4% of the original value, while the total amount included represents 90.4%. Column Financial Impact Expected, added to the table, indicates the percentages for each amendment, assuming that each amendment had no relation with the previous ones. However, it is important to note that:

- The total financial impact expected (17%) refers to the balance of increase and decrease;
- The total decrease exceeds the 25% limit;
- The total increase exceeds the 25% limit;
- Some amendments (1st, 3rd and 4th) have equal amounts for decreases and increases, which represents a total impact, per adequacy, of 0%. However, in addition to the fact that, in this particular case, the sum of increases and decreases is not separately taken into account, this situation in which the total decrease matches the total increase, although possible, is a great challenge regarding its generalization of implementation, considering the dynamics and nature of engineering services. It is observed that, in addition to being an ingenious process, literally speaking, it requires a certain amount of luck. Additionally, TCU itself has indicated situations in which some unit prices have the highest percentage of overpricing to the detriment of necessary items, excluded without inclusion of replacement items, simulating a change without financial impact, as evidenced in Judgment nº 177/2005 - TCU - Plenary and commented in the material produced for the Public Works Audit courses of this Court.

In this case, the audit reported that, after the 6th amendment, the total increase represented 27.35% of the contract value, totalizing 77.94% of exclusions against 117.80% of inclusions, resulting in an increase of 39.85% of the initial contract value. This demonstrates the mischaracterization of the object.

Regarding the audited party's argument that the amendments, up to the 5th amendment, did not exceed the 25% limit, considering that they computed 17%, the Court states that

Table 1:
Exclusions and inclusions through the first 5 amendments

ORIGINAL CONTRACT VALUE: R$ 16,186,749.95			
AMENDMENT	**AMOUNT EXCLUDED (R$)**	**AMOUNT INCLUDED (R$)**	**FINANCIAL IMPACT EXPECTED (%)**
1º	2.405.595,37	2.405.595,37	0
2º	1.222.946,71	2.872.599,10	10,20
3º	6.228.532,96	6.228.532,96	0
4º	1.977.454,68	1.977.454,68	0
5º	55.788,85	1.155.788,85	6,80
Total (R$)	11.890.318,57	14.639.970,96	2.749.652,39
Total (%)	**73,4**	**90,4**	**17,0**

Source: Adapted, by the author, from Brasil (2009)

> If we considered only the balance of the increases minus decreases to calculate the 25% limit set forth in art. 65, paragraphs 1 and 2 of Law nº 8.666/1993, it would be possible to remove 100% of the items of a contract and add other items amounting to 125%, and, although the bidding project would have been completely modified, it would still be in compliance with the limit imposed by law. Of course, this understanding cannot thrive (BRASIL, 2009, p. 18).

3.2 THE OBJECT IN LAYERS

We observe in Judgment nº 749/2010 - TCU - Plenary, which addresses the services of adjustment, duplication, improvement and restoration on Highway BR-153/MG, that the analysis of the mischaracterization of the contract object is done by stratification of the object, as if slicing, cutting into layers.

The first layer, called first level (nature of the intervention), contains the performance of the services of adjustment, duplication, improvement and restoration on Highway BR-153/MG. The second layer (service group) contains the services of earthmoving, drainage, construction of special works of art, paving, environmental protection, signaling and complementary works. In these two layers, according to the Court's analysis, the object remained the same.

However, on the third layer (specific services), it was understood that the bidding object was modified. To illustrate: in the paving group, the paving had its structure changed; in the earthmoving, the item on disposal and transport of soft soil was excluded; in the special works of art, the technique for construction of viaducts and bridges was changed; in signaling, the services of vertical signaling were excluded.

This understanding is also reinforced by references to other Judgments, such as Judgment 2.065/2007 - TCU - Plenary, in which we stress:

- Uneconomical changes of average transport distances in earthmoving services;
- Replacement of the base improved with sand and cement 4% with a soil-cement base 6%;
- Replacement of sub-base stabilized with soil and sand with a sub-base granulometrically stabilized;
- Removal of lime in the regularization of the subgrade;
- Change in the consumption of bituminous materials;
- Replacement of MFC-01 curbs with MFC-03 curbs;
- Exclusion of special works of art covered by the bidding and inclusion of other works not covered by the bidding.

Thus, the analysis presented in the document evidenced

> [...] errors and omissions in the basic project, going against art. 6, IX and art. 7, I, of Law nº 8.666/1993 [...] And the change of the object in noncompliance with art. 3 of Law nº 8,666/1993 and art. 37, heading and item XXI of the Federal Constitution, for failure to meet the binding principles of the public bid invitation and of equality (BRASIL, 2010, p. 6).

4. QUAINT CASES

In these cases, we sought to focus on the examples considered to be more didactic, although, sometimes, also quaint, present in the reasoning given by the audited bodies and also in the subsequent arguments of the TCU.

4.1 CHANGES IN TYPES OF ROADS

To better illustrate a situation that would be in conflict with the claim of DNIT's leaders, who defended the thesis that the contract changes should be evaluated only through the final financial impact on the contract price, we chose the following comparative, wherein

> [...] after hiring, for instance, the construction of a 'road with asphalt pavement', the Administration is not authorized to change the contract object to '**road with concrete pavement**', regardless of possible equivalence in the prices (BRASIL, 2011b, p. 5, bolded emphasis added).

If the argumentation was plausible, in a situation in which a **paved road** was changed into an **unpaved road**, the argument that the object was kept would fall on the fact that it remained a road.

Therefore, even if, in a case like the one shown by TCU in the aforesaid Judgment, there is no significant change in the total price of the work, the change in

quantities of services and materials originally brought to the bidding will be much higher than the limits allowed by law.

4.2 CHANGES IN CARS

In Judgment n° 1428/2003 - TCU, in opposition to the defense of the Special Department of Environment, Water and Mineral Resources of the State of Paraiba - SEMARH, the following example is presented for better understanding of the Court's indication:

> [...] I question whether it would be reasonable to authorize a certain bidder to purchase **ten popular cars** at a total price of R$ 230,000.00 and then to sign an amendment to replace these cars with **six luxury cars**, totaling R$ 280,000.00, on the grounds that both are cars and, thus, the object was not changed and the amendment has not exceeded the limit set forth in aforesaid art. 65 (BRASIL, 2011b, p. 6, bolded emphasis added).

Although this case seems enlightening in itself, according to the TCU, one cannot even treat this as a bidding process, since the object of the bid was one and another one was procured, even though both have the same generic name. This would also go against the principle of equality among bidders and would fail to ensure the best price to the Administration, as required by art. 3 of Law n° 8.666/1993.

4.3 CHANGES IN DAMS

Judgment n° 1428/2003 presents part of the SEMARH's defense, which claims that "if an earth dam, for example, has its building method changed to a roller-compacted concrete (RCC) dam, no one can state that there was a change of object" (BRASIL, 2003, p. 6, bolded emphasis added).

In its defense on the methodology chosen (BRASIL, 1999), SEMARH pointed out:

- The need to increase the quantities of works and services due to the situation found during the excavations of the foundation;
- The replacement of the massive earth, originally provided for in the basic design and the contract, with roller-compacted concrete - RCC, would bring economic and social benefits to the community impacted by the work;
- The RCC technology was hardly used in the building of dams in Brazil at the time of preparation of the basic design.

According to the Court's reasoning, it will obviously remain a dam, but can never be considered the same object of the bid. The Court itself, in Judgment n° 100/2011, points out that:

With regard to new technical solutions, it is expected that many of the technical choices be decided in the project phase, not during the works. Improvements in the road conditions should have been established in the work project, although the law allows the qualitative improvement of the project during the implementation, in the event of proven benefit to the public interest (p. 8, bolded emphasis added).

5. HYPOTHETICAL CASES

In this part, we allowed ourselves to draw up hypothetical situations that can actually occur, in order to provide further analyses and discussions on possible changes in the contract object.

5.1 SUCCESSIVE AMENDMENTS

In this part, we allowed ourselves to draw up hypothetical situations that can actually occur, in order to provide further analyses and discussions on possible changes in the contract object.

Based on Judgment n° 2819/2011 - TCU, regarding compliance with the legal limits for service groups excluded and included, imagine a situation of successive amendments to a hypothetical contract between a company of road works, the Object Factory Ltda., also hypothetical, and a government body. Find below, in Table 2, the information presented by the body.

What the table shows:

- In every amendment the amounts excluded and included are the same. Thus, there is no financial impact;
- Individually in each amendment, the amounts excluded and included are within the legal limits, i.e., up to 25% of the original contract value;
- Despite many amendments, the contract has not suffered any financial impact.

However, the table evidences that:

Table 2:
Exclusions and inclusions through the first 4 amendments

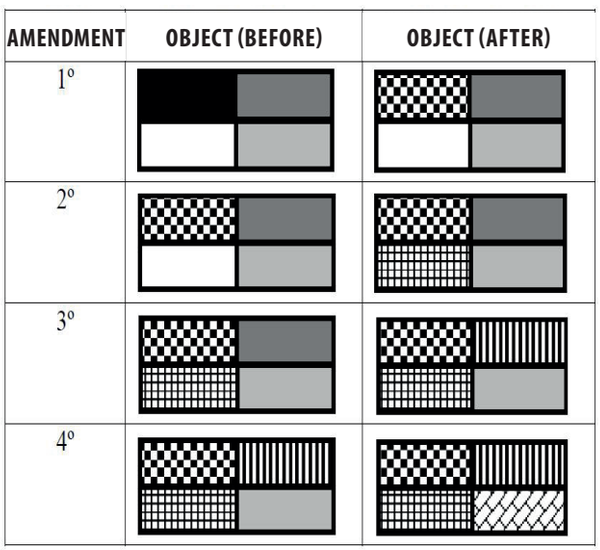
ORIGINAL CONTRACT VALUE: R$ 1,000,000.00						
AMENDMENT	**AMOUNT EXCLUDED**		**AMOUNT INCLUDED**		**FINANCIAL IMPACT**	
1º	(R$)	(%)	(R$)	(%)	0%	
	249.999,99	24,99	249.999,99	24,99		
2º	(R$)	(%)	(R$)	(%)	0%	
	249.999,99	24,99	249.999,99	24,99		
3º	(R$)	(%)	(R$)	(%)	0%	
	249.999,99	24,99	249.999,99	24,99		
4º	(R$)	(%)	(R$)	(%)	0%	
	249.999,99	24,99	249.999,99	24,99		
Total	(R$)	(%)	(R$)	(%)	(R$)	(%)
	999.999,96	99,99	999.999,96	99,99	0,00	0

Source: Original preparation

- In the 1st amendment, both exclusions as inclusions meet the legal limits of 25%;
- In the 1st amendment, since the amounts excluded and included are the same, the financial impact on the contract is zero;
- Whereas, in the 1st amendment, the changes made almost reached the acceptable limit, from the 2nd amendment on, there was no more conditions to exclude or include services;
- After the 4th amendment, it is evidenced that all the services originally contracted were excluded, giving way to new services, thus completely mischaracterizing the contract object.

In a graph, we would have the following distribution:

Chart 1: Changes to the contract object



Source: Original preparation

Where,

- Each smaller rectangle represents a group of services that characterizes the object hired (large rectangle) and is differentiated by its shade;
- Each one of them, in financial terms, also represents 24.99% of the original contract value.

This way, one can observe that, despite the assumption that, in each amendment, the limits of increase and decrease meet the law (25%), and the financial impact is zero, at the end of the 4 amendments, the object is not composed of the four original service groups (the rectangles of different shades) anymore, but rather of four other service groups represented in the scheme by the set of four hatched rectangles, thus fully mischaracterizing the object originally hired. Therefore, it is important to highlight that:

> If only the net change were considered, ultimately, it would be possible to exclude all the works, purchases and services originally hired and include new works, purchases and services that imply 125% of the value originally hired, updated. The purpose of the law, however, is not to define clear violations of the principle of mandatory bidding (BRASIL, 2011a, p. 5).

Although the use of an impact percentage of 24.99% may seem unusual or even not feasible, we stress that this is not only an educational effort to make the subject understood. To reach conclusions, we suggest consulting:

- Official Daily Gazette, of November 7th, 2013, section 3, p. 205 – Extract of the Amendment n° 4/2013 (DNIT);

- Synthetic Audit Survey Report / 2004 the House of Representatives - Bridge over Acre River (DNIT);
- Judgement nº 1502/2004 – TCU – Plenary (DNIT/ Deracre).

5.2 FREEDOM TO AMEND

Consider another hypothetical situation, according to Table 3 below.

What the table shows:

- In the 1st amendment, the amounts excluded and included are within the limits required by Law nº 8.666/1993, and the financial impact on the contract is 10%;
- In the 2nd amendment, no amount was excluded and the amount included is within the limits required by Law nº 8.666/1993, and the financial impact on the contract is 10%;
- The total amount excluded is 10%, while the total amount included is 30%, and the total financial impact is 20%.

However, the conclusion is that:

- In the 1st amendment, the amounts are legally acceptable and properly informed;
- In the 2nd amendment, individually, the amounts are also acceptable. Nevertheless, when considering the total inclusions (1st and 2nd amendments), it is found that its amount exceeds the 25% limit.

Despite having exceeded the legal limit, which evidences the mischaracterization of the object, the body was legally safe, considering Judgment nº 215/1999 TCU, according to which

> [...] the Administration is allowed to exceed said limits in the event of agreed qualitative and extraordinary amendments [...] **when the consequences of the other alternative - the termination, followed by new bidding and hiring - are too serious to the primary public interest** (Minutes 18 - Plenary VII, b, bolded emphasis added).

In other words, considering the critical situation concerning the work in question, which contributed to the aforementioned inclusions, we notice the full compliance with the treaty through the aforesaid Judgment. However, regarding the details of the critical situation commented, it is expected that, hypothetically, also, the reader can draw up the alleged event, as a way to exercise multiple analyzes on the possibility of exceeding the limits imposed by law, in this case, Law nº 8666/1993. Of course, far from the goal of only being able to exceed the limits, but rather visualizing decision making that always seeks the best for the public service.

6. CONCLUSION

Considering the motivation for this study, which was my professional contact with cases which presented changes, as well as the publication of Judgment nº 2819/2011 - TCU - Plenary, it was observed that the goal has been achieved. This can be seen in the list of arguments was presented in TCU's Judgements about the understanding of this Court on the mischaracterization of the contract objects. This is done based on the description of audited situations and examination of other cases in which the bidding object may change. Of course, without the intention to exhaust the subject addressed herein, we believe that this short study collaborated to broaden the understanding of the imperative duty to fulfill the legal directives governing the procedures in the public sphere, contributing to the improvement in the provision of services, specifically on infrastructure works.

Table 3:
Exclusions and inclusions through 2 amendments

ORIGINAL CONTRACT VALUE: R$ 1,000,000.00

AMENDMENT	AMOUNT EXCLUDED		AMOUNT INCLUDED		FINANCIAL IMPACT	
1º	(R$)	(%)	(R$)	(%)	10%	
	100.000,00	10,0	200.000,00	20,0		
2º	(R$)	(%)	(R$)	(%)	10%	
	0,00	0,00	100.000,00	10,0		
Total	(R$)	(%)	(R$)	(%)	(R$)	(%)
	100.000,00	10,0	300.000,00	30,0	200.000,00	20

Source: Original preparation

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NOTE

1 During the preparation of this study, the Senate Bill nº 25/2012 was approved at the Committee on Constitution, Justice and Citizenship – CCJ, amending paragraph 1 of art. 65 of Law nº 8.666/2003, to limit inclusions and exclusions in all the works, services or purchases, without exception, to 25% of the updated initial value of the contract.

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

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ABSTRACT

The cooperatives are considered legitimate parties to participate in public auctions. However, we cannot deny the existence of false cooperatives that in practice are companies that act as agents of subordinated workforce. To keep such entities from participating in the auctions, Normative Instruction IN nº 2/2008, of the Logistics and IT Secretariat of the Ministry of Planning, Budget and Management (SLIT/MPOG), in the Sole Paragraph of its article 4, states that during the public auction process such cooperatives need to present a document named "operational management model". The purpose of this provision is to check if such participants are autonomous, self-managed and do not carry out activities necessary for the accomplishment of the contract that can create subordination, personal nature and habituality on the part of the cooperative members.

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

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

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

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

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

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

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

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

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

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

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

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

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

In that phase, if it is verified that the cooperative members execution of the contracted object presents subordination, personal nature or habituality, a fact which shows flagrant absence of autonomy of the members in the execution of the activities needed to accomplish the agreed object, it will the possibility of its execution by a cooperative society will be removed. Thus, the prohibition of participations of these entities in the auction will be imposed.

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

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

> 1. the auction object can be executed by a work cooperative with autonomy by its members, that does not present any kind of subordination between the cooperative and its members or between the Administration and the members, a fact that, if observed, will impede the participation of these entities in the auction; and
>
> 2. if it is possible to carry out operational management of the demanded service in a shared way or in rotation by the cooperative members, in which the coordination and supervision of the activities executed, as well as the performance of the contract manager, can be done by all members of the cooperative society.

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

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

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

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

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ABSTRACT

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

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

1. INTRODUCTION

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

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

2. THE DUTY OF PERFORMING PUBLIC BIDS

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

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

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

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

3. POSSIBILITY OF THE FEDERATIVE ENTITIES LEGISLATING ABOUT PUBLIC BIDS

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

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

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

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

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

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

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

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

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

> State Court of Accounts. Prior oversight of the bids. Exclusive mandate of the Federal Government (article 22, XXVII, of the CF). Compatible federal and state legislation. Undue demand by act of the Court that imposes prior oversight without requesting that the public notice be sent before the bid is carried out. Article 22, XXVII, of the CF provides that legislating on general rules for public bids and contracts is an exclusive mandate of the Federal Government. Federal Law 8.666/1993 authorizes prior oversight when the Court of Accounts requests that a copy of the public bid notice that has already been published. The demand by normative acts of the Court to have an early copy of the notice, without any request, invades the legislative mandate distributed by the CF, already exercised by Federal Law 8.666/1993, which does not contain such requirement." (**RE 547.063**, Rapporteur **Menezes Direito**, judgment on 10/07/2008, First Panel, DJE of 12/12/2008.)

4. THE STATE OF AMAZON CASE

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

> Article 1. The bodies and entities of the state public administration that regularly acquire food goods shall use at least 30% (thirty percent) of the resources allotted for that purpose to purchase directly goods produced by family farmers or rural family entrepreneurs or from their organizations.
>
> Paragraph 1. The acquisition mentioned in article 1 can be accomplished through waiver of the bidding procedure, as long as the food goods obey the hygiene and quality requirements established by the norms that regulate the matter and the prices are compatible with those practiced in the local market.
>
> Paragraph 2. The observance of the percentile foreseen in article 1 can be reduced or waived when one of the following circumstances are present:
>
> I – impossibility of issuance of a fiscal document regarding the acquisition;
>
> II – infeasibility of regular and constant supply of the food goods;
>
> III – food goods are not adequate with respect to the pertinent hygiene sanitary conditions.

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

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

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

Figure 1
Consultation screen for the legislation of the State of Amazon in the ALEAM site

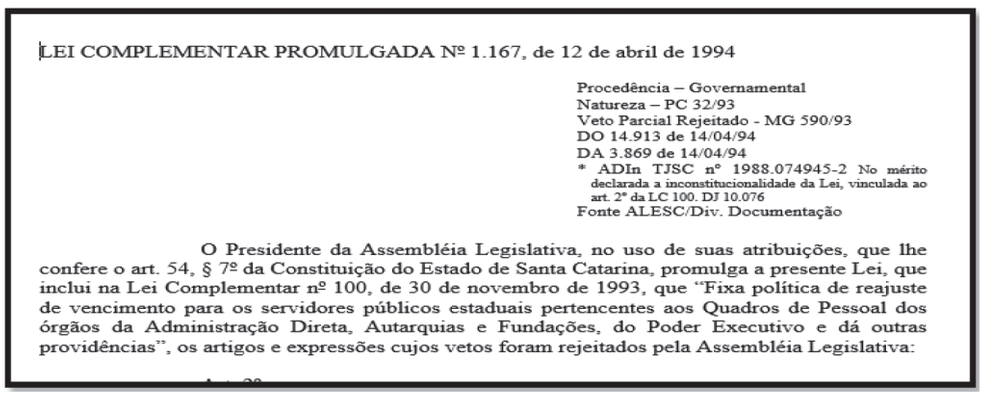
Source: Available at: <http://legislador.aleam.gov.br/LegisladorWEB/LegisladorWEB.ASP?WCI=LeiPara metro&ID =201>.Access on June 5, 2015

Figure 2:
Legislation consultation screen of the State of Santa Catarina in ALESC`s site

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

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

Figure 3:
Initial part of the Promulgated Supplementary law 167/1994 of Santa Catarina



LEI COMPLEMENTAR PROMULGADA Nº 1.167, de 12 de abril de 1994

Procedência – Governamental
Natureza – PC 32/93
Veto Parcial Rejeitado - MG 590/93
DO 14.913 de 14/04/94
DA 3.869 de 14/04/94
* ADIn TJSC nº 1988.074945-2 No mérito declarada a inconstitucionalidade da Lei, vinculada ao art. 2º da LC 100. DJ 10.076
Fonte ALESC/Div. Documentação

O Presidente da Assembléia Legislativa, no uso de suas atribuições, que lhe confere o art. 54, § 7º da Constituição do Estado de Santa Catarina, promulga a presente Lei, que inclui na Lei Complementar nº 100, de 30 de novembro de 1993, que "Fixa política de reajuste de vencimento para os servidores públicos estaduais pertencentes aos Quadros de Pessoal dos órgãos da Administração Direta, Autarquias e Fundações, do Poder Executivo e dá outras providências", os artigos e expressões cujos vetos foram rejeitados pela Assembléia Legislativa:

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

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

4.1 THE FORMAL DEFECT

Since 1945[1], the Legislative Assembly of the State of Amazon (ALEAM) has been promulgating norms classified as **promulgated laws**.

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

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

Article 59 of the CF 88 establishes which the products of the legislative process are: Constitutional Amendments, supplementary laws, ordinary laws, delegated laws, provisional executive orders, legislative decrees and resolutions.

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

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

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

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

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

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

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

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

Besides e Supplementary law 95/98, which deals with how laws should be elaborated and drafted, foresees in its article6 that the constitutional foundation or delegation of mandate to legislate must be specified in the text of the draft bill to be received in the legal system.

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

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

4.2 THE DEFECT OF SUBSTANCE

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

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

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

This interpretation takes in consideration the norm's intention, which was to reduce as much as possible the number of possibilities for waiver of bidding processes, once the constitutional rule is to hold public bids. If a list of exceptions is created for a specific process, obviously this list cannot be expanded without the due legal authorization.

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

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

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

5. CONCLUSION

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

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

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

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

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

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NOTE

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

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