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**HOW TO CONTRACT
WITH THE
GOVERNMENT? AN
ANALYSIS OF THE
BIDDING PROCEDURE
AND THE FAILURES IN
THAT PROCESS THAT
FAVOR THE INCREASE
OF CORRUPTION
WITHIN THE PUBLIC
ADMINISTRATION**

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Abstract: From the study of contracting with the Public Power through biddings in the Brazilian legal system, through an analysis of who/which bodies can participate in the bidding procedure, it is possible to identify flaws in the bidding procedure that favor the occurrence, in practice, of crimes against the Public Administration, which contribute to the increase of corruption in the country. In view of this, the objective of this work is, through a bibliographical research of a qualitative nature, to objectively transmit to the community the necessary procedures to contract with the public power, identifying the weaknesses in the bidding process that favor crimes against the Public Administration, in addition to presenting ways in which society can have more information about the bidding procedure in its community and what its benefits are.

Keywords: Administrative law. Society. Extension Activity. Bids. Administrative Crimes.

INTRODUCTION

It is important to address this topic that is so relevant to society because it is related to the structure of public resource management, how public money is being invested, depending on how the bidding process is done, it can affect the community positively or negatively. Who can contract with the public service?

The issue is important not only for those who hire the public service but for society as a whole, that is, bidding is everyone's business, since the number of bids with contracting in the year 2022 moved R\$ 408.35 billion, according to the transparency portal of the Union's Comptroller General's Office. Relevant value for the economy, but if poorly managed it can be the target of misuse, as in the case of the biggest corruption scandal in the country, which caused a loss of BRL 88.8 billion only to Petrobras, only with regard to

fraudulent bidding processes.

Therefore, the effective inspection of amounts invested by public entities is a right and duty of all of us, either through the transparency portal, or through on-site inspection of works or by any other possible means based on the law on access to information and general principles of public law such as the principle of publicity, for example.

It must be noted that the creation of the new bidding law aimed to outline aspects of relevance in relation to the bidding process, culminating in the presence of positive and negative points of this new rule in force.

Law n° 14.133/2021 came to optimize the country's bidding processes, ensuring more agility for the purchase or contracting of goods and services, as well as more transparency for all bidding. Regarding the benefits provided by this new regulation, we have business opportunities, guarantee of contracts with government entities, in addition to expanding the client portfolio based on the principles of transparency and equivalence. All performance is controlled by specific rules and regulations, as they apply to public infrastructure construction and maintenance contracts, such as highways, bridges, schools and hospitals. Ultimately this leads to economic development as every internship generates jobs and income for the entire society.

It is known that, on the other hand, it is extremely important to analyze the negative factors such as complex processes, which make it difficult for some people to obtain contracts and the high cost of participation. The latter, for example, requires preparation, which includes the costs of professionals specialized in bidding, such as lawyers and technical analysts.

In addition, there is also the issue of delays in payments, which can affect the financial

capacity of the parties involved. However, after analyzing the positive and negative points, it is important to emphasize that there are people who try to circumvent the system, the so-called "front companies".

They are often overpriced, do not meet the requirements indicated in the notice. As a result, they do not have the structural, technical, financial and operational capacity to fulfill their contested contracts, but they were created precisely to obtain an undue advantage in the bidding process, mainly resulting in the commission of money laundering crimes and, among others, governed by bidding scope.

THE BIDDING PROCEDURE

It is known that the laws are constantly changing so that they can meet all the needs of society, in this the bidding came to contribute to the advancement of Public Administration and in the social environment, since it is the combination of several administrative procedures (being administrative because they are part of the public administration) related to purchases or services contracted by the Federal, State or Municipal governments.

In addition, bids can be understood as:

[...] the linked administrative procedure through which the entities of the Public Administration and those controlled by it select the best proposal among those offered by the various interested parties, with two objectives - the execution of a contract, or the obtaining of the best technical, artistic or scientific work (FILHO, 2022, p. 240).

Thus, the Federal Constitution of 1988 mentions that:

Art. 22. The Union is exclusively responsible for legislating on: [...] XXVII - general rules for bidding and contracting, in all modalities, for direct, autonomous and foundational public administrations of the Union, States, Federal District and Municipalities, in compliance with the provisions in art. 37, XXI, and for public

companies and government-controlled companies, pursuant to art. 173, § 1, III; (BRAZIL, 1998).

In this sense, Filho (2022) also mentions that Tenders can be understood as a sequence of activities by the Government and interested parties to reach a common goal, in a formalized way, used for acquisition.

In other simple terms, it can be said that the government has to buy and rent services as per the legal rules, the bidding serves as a formal process and with the presence of competition between the interested parties.

Tenders may be requested by all federated entities, Union, States, Municipalities and Federal District. Thus, those who must not participate directly or indirectly in the bidding are: the author of the project, the company alone or in a consortium, the civil servant and/or head of the contracting entity's body. Because in the process, the processing of bids by administrative means, their development becomes large during which the administration chooses the cheapest, most favorable and highest quality proposal possible for the purchase, lease or transfer of a contract, service and product.

This way, we can define the procurement process as engineering, service, acquisition and disposal contracts. In other words, auctions are how general government buys and sells. Recently there are two active bidding laws: Law 8.666/1993 and Law 14.133/2021 - the new law on bidding and contracts.

During the transition period, the public servant may choose to apply one of the rules of both laws, but they cannot be agreed on the same device, that is, in the competition for the application of another rule in a procedure that is provided for in Law n. 14,133/2021 applies to the direct and basic autonomous public administration of the Federation, States, Federal District and Municipalities, covering:

the bodies of the Legislative and Judicial

Powers of the Union, the States and the Federal District and the bodies of the Legislative Power of the Municipalities, when performing an administrative function; special funds and other entities controlled directly or indirectly by the Public Administration.

Public companies, mixed-capital companies and their subsidiaries do not fall within the scope of this law, as Law Number: 13,303/2016 (State-Owned Companies Law) has its own rules, which can be summarized in the following steps: elaboration; publication of the notice; if necessary, submitting tenders and tenders; Judicial decision; competence; declaration; approval.

This way, the contracting procedure defines special rules depending on the essence of the object of the offer. With this, management must follow certain instructions depending on what is being done or delivered. Law 14,133 of 2021 defines six bidding procedures:

[...] 1) competition: Procedures for contracting special goods and services and works and services for general and special projects, whose evaluation criteria may be: lowest price; better technical or artistic content; technical and price; higher economic yield; bigger discounts; 2) competition: Bidding procedures for selecting technical, scientific or artistic works, evaluating the best technical or artistic content and awarding prizes or distinctions to the winners; 3) competitive dialogue: The contracting, service and bidding process, during which the public administration establishes a dialogue with bidders previously selected for objective reasons with the objective of developing one or more alternatives to their needs, must be concluded at the end of the process bidding process to make final recommendations. dialogue; 4) auction: bidding procedure for the sale of unused or legally confiscated real estate to the highest bidder; 5) auction: Mandatory bidding for the acquisition of general goods and services, whose evaluation criterion may be the lowest price

or the highest discount (BRAZIL, 2021).

In specific cases provided for by law, proposals may be: waived exhaustive list (Law Number: 14.133/2021, Art.75); unenforceable (Law Number: 14.133/2021, Art. 74). In addition, it is necessary to keep in mind the stages of the bidding in view of the procedures that must occur for an exact execution and with that we will soon discover how to contract through the Public Power.

Therefore, understanding what these phases of the bidding are is of paramount importance for any company that later wants to apply for a sale to the government. With this, let's see that the bids are divided into two phases: the internal phase and the external phase.

Internal phase, also known as the preparatory phase and has the bidding process as its primary stage, focusing on the bidding proposal and its judgment, also obtaining the type of bidding that will be used for the construction of the public notice.

On the subject, Palavéri (2022) highlights the innovation of Law 14133 of 2021:

[...] From this point of view, Law 14.133/21 advances in relation to previous laws, especially Laws 8666/93 and 10.520/02, giving increased importance to the preparatory phase, bringing, with the outstanding prestige, unfortunately, evident bureaucratic content. Thus, if on the one hand it is to be praised that, by giving importance to the preparatory phase, the law made its prominence within the process clear and evident, it is undeniable that it could do so with greater objectivity, without detailing the requirements that follow. will be studied, or at least reserve the excess (detailing) of these requirements for larger and larger tenders, simplifying those intended for small purchases, small contracts for the provision of services or ordinary works.

Therefore, this phase will basically be a study for companies through retroactive public data and thus researching the market,

after these procedures, just be aware of the bids that may be compatible with your business and that way you can proceed with sales when a new government notice opens.

The second phase, which is called external or the procedure where the public authorities will launch the public notice and thus accept applications from future suppliers, in the external phase with the publication of the public notice, it indicates the representation of the beginning of this stage of the bidding process, which are occurring in the following steps: qualification, judgment, homologation and adjudication.

The public power corresponds to all the powers that compete with the State before society, the legislative power (responsible for enacting laws, etc...), the judiciary power (responsible for judging disputes in accordance with the rules of the legal system) and the executive power (responsible for administering and looking after the public interest) act in different spheres, performing inherent activities and, therefore, defined by the legal system as typical. In this sense, Hely Lopes Meirelles (2015) states that:

[...] The concept of public power is not uniform in doctrine, sometimes it presents us with an organic conception, considering only what public institutions provide; sometimes it presents us with a formalized conceptualization, tending to identify it by external characteristics; now he shows us a material concept, in order to define it by its object.

But anyway, how to contract with the government? Since the contract is direct, it can be given in the form of a waiver, or in the form of a waiver, or in the form of an unenforceable bidding process, the latter due to impossibility of occurrence and the former for a small value, due to the object or due to person.

Either due to illegibility or due to waiver of competition as a form of direct hiring, it

was concluded that direct hiring is a means introduced by public administrations to increase the effectiveness of public hiring, but the best possible way of hiring and dealing with all potential contractors with equality, always respecting the principles of legality and proportionality in order to serve the interests of the community.

FRAUD IN THE BIDDING PROCEDURE

Faced with the bidding process already mentioned in the previous paragraphs, how to avoid fraud? What is bid fraud? What types of frauds? Bidding fraud is an illegal or malicious scheme designed to tamper with or disrupt the competitive process for the benefit of oneself or a third party (individual company or group).

Such behavior harms bidding public institutions and society itself, there are at least 13 more common types of fraud in bids such as: overbilling; collusion; Exemption from bidding and unenforceability; phantom services; spreadsheet game; fraud in the preparation of the notice; bond between participants; participation of affiliated companies; lack of publicity for the event; formation of cartels; lack of need for hiring; contract to cover deviations of public funds; contractual changes. As Jessé Torres Pereira Júnior and Marinês Restelatto Dotti (2017, p. 207) assert that:

[...] The Federal Court of Auditors, through Judgment nº 64/04, Second Chamber, established the understanding that the estimated prices and the price acceptability criterion are fundamental for the future judgment of the proposals, and that contracting with values higher than the budgeted, without justification or proof, is a serious, attractive lack of sanction. Once the estimated value for contracting has been established, as a result of extensive market research, the examination of compatibility

between the estimated and proposed price, duly justified by the Management, is allowed. Estimated price, according to the Federal Court of Accounts, is the parameter available to the Administration to judge bids and carry out contracts, as long as it reflects the market price.

In this, maladministration occurs when public agents and/or participating companies prohibit competition, violate the principle of isonomy among other participants, fail to give due publicity to events or abandon bidding procedures without due conduct legally supported and pollute the bidding process.

But, as there are ways to defraud bids, there are formulas to detect fraud such as: examining documentation; physical inspection; crossing data from public sources and combining with solutions that could prevent bidding fraud involving planning, knowledge regarding public procurement processes, maintaining control and monitoring to strengthen the contractual measures exercised by the public administration; audits, as it aims at evaluating and consolidating that administrative acts are capable of being carried out; electronic auction, because in electronic transactions, the calls are made over the internet, a practice that tends to make fraud more difficult because no one has access to the information of those involved in the bidding and finally, the sanctions for those who fail to comply with the rules must be punished in accordance with the law, including fines and withdrawal from the bidding process.

The doctrine has positioned itself as follows, Marçal Justen Filho teaches that it is a legal duty of Public Administration:

[...] Create the most consistent spreadsheet possible. This means the need to estimate all cost items, take into consideration, all direct and indirect expenses and achieve a result that is supported by objective information. There will be a violation of administrative duties (if not a crime) when the administrative authority produces a

spreadsheet without concrete and objective data. This guidance applies not only in relation to spreadsheets that reach values higher than those supported by knowledge. It is also unreasonable for the Administration to predict a result lower than that necessary for the execution of the purpose. (JUSTEN FILHO, 2023, p. 161).

If there is corruption or fraud in the bidding, the objective must be to find out if that “bad manager” of public money manages to divert public money, because it is precisely these people who are the real element that bear the consequences.

Given the above, it is clear that bid fraud is an illegal and malicious scheme that aims to modify or sabotage a competing system for its own benefit or that of third parties. Such practices harm public bidding bodies and society itself with 13 of the most common types of fraudulent bidding, examples: overbilling; collusion; Exemption from bidding and unenforceability; phantom services; spreadsheet game; fraud in the preparation of the notice; bond between participants; participation of affiliated companies; lack of publicity for the event; formation of cartels; lack of need for hiring; contract to cover deviations of public funds; contractual changes.

The benefited companies are mostly commanded by relatives of corrupt politicians who create false companies to benefit a real company that does not fulfill the object of purchase and directs resources towards an objective previously agreed in the purchase contract.

CONCLUSION

It is essential for the addressed theme to reach civil relevance, because it concerns the framework of public resource management, the way in which public resources are applied, the figure in which bids are carried out and manages to affect society assertively or

painfully.

As evidenced, the laws are constantly changing to meet all the needs of society, and bidding contributes to the evolution of the administrative and civic environment, because it incorporates a combination of administrative procedures as part of the administration.

Thus, the acquisition of federal, state and municipal government services tends to be argued in such a way that the bidding must be understood as a series of activities by the Public Power and interested parties to achieve common objectives in a formalized way, and can be used for acquisitions.

Therefore, contracting with the Government can be a complex task due to the required bidding procedures. Although these processes are intended to ensure transparency and competitiveness in contracting services or acquiring goods, failures in this process may favor the increase of corruption within public administration.

It is important that the authorities responsible for conducting bidding processes are attentive and committed to ensuring fairness and legality at all stages of the process. In addition, it is essential that citizens are aware of their role as inspectors, monitoring and denouncing irregularities in public procurement. Only with everyone's collaboration will it be possible to effectively combat corruption and ensure that public money is used efficiently and transparently.

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