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PUBLIC BIDS AND THE REVERSE AUCTION MODALITY IN THE VERSION OF THE NEW NORMATIVE FRAMEWORK

LICITAÇÕES PÚBLICAS E A MODALIDADE PREGÃO NA VERSÃO DO NOVO MARCO NORMATIVO

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Abstract
This study aims to analyze the possibility of using the auction modality to acquire common goods and services by state-owned companies, after the new bidding law comes into force. This research used a dialectical-descriptive methodology and a deductive method, taking as a reference the concepts of Marçal Justen Filho and terminologies used by Brazilian legislators and expressed in judicial decisions published on the website of the Federal Supreme Court. This qualitative profile study was supported by the theoretical concepts established in applied social sciences. The addressed problem relates to the revocation of the legal norm that governs reverse auctions, pursuant to Law No. 14,133/2021, and, consequently, the derogation of state

Resumo
O artigo tem por objetivo analisar a possibilidade de emprego da modalidade pregão para aquisição de bens e serviços comuns, por empresas estatais, após a entrada em vigor da nova lei de licitações. A metodologia empregada é de natureza dialético-descritiva e o método utilizado tem caráter dedutivo, tomando como referência os conceitos de Marçal Justen Filho, além de terminologias usadas pelo legislador brasileiro e expressas em decisões judiciais publicadas no sítio do Supremo Tribunal Federal. Trata-se de um estudo de perfil qualitativo, amparado em concepções teóricas já consagradas nas ciências sociais aplicadas. A problemática está relacionada com a revogação da norma jurídica que dispõe sobre o pregão, por força da Lei n. 14.133/2021, e, consequentemente,

and municipal statutes that govern the matter surrounding public companies and mixed-capital companies. The hypothesis of this study refers to the inadmissibility of the subsidiary application of the general bidding law on contracts intended by state-owned companies, in accordance with Law No. 13,303/2016, as per the understanding established by the Federal Court of Auditors in its ruling 739/2020. The preliminary result of this study shows that the regulatory gap opened by the new law on bidding and contracts would render the auction modality in state-owned companies unfeasible.
Keywords: advantage; bidding; efficiency; experimentalism; reverse auction.

derrogação de estatutos estaduais e municipais que regem a matéria em torno das empresas públicas e sociedades de economia mista. A hipótese refere-se à inadmissibilidade da aplicação subsidiária da lei geral de licitações sobre as contratações pretendidas por empresas estatais, na forma da Lei n. 13.303/2016, conforme entendimento fixado pelo Tribunal de Contas da União, no acórdão 739/2020. O resultado preliminar deste estudo revela que a lacuna normativa aberta pela nova lei de licitações e contratos inviabilizaria a utilização da modalidade pregão nas estatais.
Palavras-chave: *eficiência; experimentalismo; licitação; pregão; vantajosidade.*

Introduction

The New Law on Bidding and Administrative Agreements (Law no. 14.133/2021) has been raising questions and doubts within state and municipal prosecutors' offices and causing perplexity among public managers and administrative agents as a result of the normative requirements that can make the process of contractual choices more onerous, affecting the efficiency of the services offered to citizens.

In view of the uncertainties regarding the compliance with the bidding rules under the terms provided for in the general rule instituted by the Union, this study aims to describe the aspects most questioned by the Brazilian doctrine regarding the practical application of the aforementioned law by states and municipalities that face structural difficulties in their administrative organizations. Furthermore, we highlight the problem involving the repeal of Law no. 10.520/2002 due to the suppression of relevant aspects of the auction modality, especially in the sphere of state-owned companies.

Another controversial point refers to the incoherence between the understanding of the Brazilian Federal Supreme Court (STF) regarding the legal regime applied to state-owned companies that perform economic activities or offer public services on a non-competitive basis and the provision set out in Art. 1, Paragraph 1, of Law no. 14.133/2021, thus questioning the uncertainty about

the mandatory use of this new statute in bids formalized by public and mixed-economy companies that operate in economic sectors in a monopoly system.

This hypothesis raises doubts as the STF has a consolidated understanding of the jurisprudence on extending the legal regime of public law to legal entities of private law framed in the profile of entities that exclusively provide services (i.e., not subject to competition). From this perspective, it remains to be seen whether Law no. 13.303/2016 will serve as a reference for the bidding processes initiated by state-owned companies that have this characteristic or whether such companies will fall under the precepts and principles determined by Law no. 14.133/2021.

The first analysis will establish the problem about the auction modality in bidding processes within the scope of state-owned companies. This topic will address this matter under the perspective of the Federal Court of Accounts (TCU) to understand the inadmissibility of the subsidiary application of Law no. 8.666/93 on the contracts intended by private legal entities, which compose indirect Public Administration.

Next, this study will describe the new paradigms of the administrative law, especially the concept of experimentalism to improve public choices. Thus, this study will focus on the managerial and governance aspects that may favor greater advantage and results regarding investments to meet social demands and fulfill fundamental rights.

Finally, this research will highlight the discussion on the limits of the legislative competence attributed to the Union and to other federative entities to assess the convenience of certain requirements imposed by Law no. 14.133/2021 on states and municipalities in economic, political, social, and cultural scenarios that greatly differ from federal Public Administration.

In view of these approaches, all those potentially interested in legal certainty related to business involving the government will have an overview of the challenges to be faced by municipalities with few resources to comply with the general rules introduced by Law no. 14.133/2021 and a closer view of the utilities extracted from the reverse auction modality in the concrete plan.

1 Reverse auction modality in bids and administrative contracts of state-owned companies

As of July 1, 2016, state-owned and mixed-capital companies and their subsidiaries are governed by the State-Owned Companies Law (Law no. 13.303), which provided for the specific rules on bidding and administrative contracts,

establishing a preference for the reverse auction modality regarding the acquisition of common goods and services, in accordance with Law no. 10.520/2002.

Especially, the municipality of Rio de Janeiro issued Decree no. 44.698 on June 29, 2018, to adapt the legal regime of state-owned companies linked to its federative entity (as highlighted in its Art. 43, IV) establish the obligation of the reverse auction modality for bidding procedures regarding those objects whose performance and quality standards can be objectively defined by public notice and the usual market specifications.

The reverse auction modality follows the criterion of evaluation by the lowest price or highest discount. Thus, a first case assesses the lowest financial amount to be paid to potential suppliers and a second case calculates the most attractive discount percentage, in comparison to the reference value disclosed by the Administration. However, it is required that the minimum quality parameters of the tendered product or activity be achievable by the contractor as delimited in the notice instrument.

It is worth noting that the evaluation of the costs of the adjustments signed with the private sector must consider the risks inherent to the need for periodic maintenance, environmental and social impacts, the availability of spare parts, among others.

1.1 Reverse auction and the understanding of the Federal Court of Accounts on the subsidiary application of the general law on bidding and contracts within the scope of state-owned companies

Due to the absence of a specific rule on the matter of bids and agreements in the sphere of private legal entities linked to the Public Administration, Law no. 8.666/93 extended its incidence to public companies, mixed-capital companies, and other entities directly or indirectly controlled by the Federal Government, states, the Federal District, and municipalities.

In 2016, the State-Owned Companies Law entry into force enshrined, in compliance with the dictates of Art. 173, Paragraph 1, item III of the 1988 Constitution of the Republic, the precepts delimiting the bidding procedures and the legal transactions related to engineering, advertising, acquisition, leasing and disposal of goods or assets that belong to its assets, the execution of works, and the agreement of real encumbrance on such assets.

After establishing the specific rules for establishing contractual links between private entities and individuals interested in offering their services or products to

instrumentalize the state machinery, the Federal Court of Accounts decided that the subsidiary application of Law no. 8.666/1993 to any gaps in Law 13.303/2016 would constitute an affront to the constitutional arrangement alluded to in the previous paragraph and, therefore, a violation of art. 22, XXVII, of CRFB/88. That view was set out in Judgment no. 739/2020, under the opinion of Justice Benjamin Zymler (Brasil, 2020).

According to Justen Filho (2016), there would be no peremptory restriction on the extension of the effectiveness of the general bidding law to meet contractual conjunctures that lied beyond the normative boundaries of the State-Owned Companies Law, giving precedence to the criterion of specialty in any antinomy. However, the doctrinal point of view guided by statement no. 17 of the First Conference on Administrative Law of the Federal Justice Council (*I Jornada de Direito Administrativo do Conselho de Justiça Federal*), which covered the understanding of the TCU concerning the preponderance of the rules and principles of private law in the absence of provisions of that statute, prevailed in the contractual field, in compliance with the decision set out above.

The problem of this position would arise from the revocation of the Reverse Auction Law due to the new regulation of bidding and administrative agreements in 2021 (scheduled to take effect in early 2024) in view of the extension of the *vacatio legis* period determined by Provisional Measure no. 1,167 and published in the Brazilian Federal Official Gazette on March 31, 2023.

The matter, previously regulated by Law n. 10.520/2002, began to be directly addressed in the normative system introduced by the most recent regulation of public tenders in Brazil, but the extent of the application of this legislation remained limited to legal entities governed by public law, without opening room for incidences regarding state-owned companies according to the text described in its Art. 1, Paragraph 1: "public companies and mixed-capital companies and their subsidiaries, governed by Law no. 13.303, of June 30, 2016, except for the provisions of art. 178 of this Law" (Brasil, 2021; our translation).

Considering the TCU and CJF interpretations above, impeding the subsidiary application of the New Law of Bidding and Administrative Agreement to entities framed as state-owned companies would create a gray area around the use of the auction modality to acquire common goods and services since all related content would now fall under the general rule. Furthermore, it is worth noting that Art. 32, item IV, of Law no. 13.303/2016, would have been tacitly revoked due to the express provision in art. 193, II, *b*, of the New Law of Bidding and Administrative Agreement.

One must mind the fact that, at the time, the TCU ruled out the application of Law no. 8.666/93 for legal transactions directed to public and mixed-capital companies and aimed to bar any bureaucratic requirements that could harm economic activities or the provision of their offered services. This perspective finds that the flexibilities the specific statute brought about would be incompatible with the rigidity of the general rule, which is why the subsidiary application was unjustified.

1.2 Auction as an appropriate bidding modality to the ideals of debureaucratization and the purposes intended by private institutions

Administrative procedures, even in contemporary society, are marked by rigidity, formality, and subjection to legality and exorbitant clauses, which evince the asymmetries that affect the individual rights and guarantees inherent to citizens and private legal entities operating in the market. However, the Public Administration acts not only on the traditional fields of regulation and asset and financial management of State bodies and autarchies but also in the business environment with government-controlled entities to obtain profit (regarding the interests of private shareholders in the context of mixed-capital companies), as well as undertaking the management of scarce time and resources (Sundfeld, 2008).

State-owned companies launch balance and intervention ballasts on the economy to safeguard the national security and matters of relevant collective interest, in allusion to the constitutional guidelines established in art. 173 of the CRFB/1988. In view of these aspects, Aragão (2013, p. 122) understands that the State "can only act as an economic agent when it is absolutely necessary, in view of the fact that the public interests at stake can be served by the private initiative" (our translation), and that acting on equal terms must be observed in the face of the parity of arms of competing organizations, in accordance with the principle of subsidiarity.

Mixed-capital companies deserve greater flexibility regarding the bureaucratic constraints of the Public Administration due to the lucrative facet that makes up their strategic plans toward financial results that are more attractive to private investors without losing sight of public purposes[1].

State-owned enterprises must quickly make decisions, minimize costs, and

1 Law No. 6.404/76, art.238. "The legal entity that controls the mixed-capital company has the duties and responsibilities of the controlling shareholder (arts. 116 and 117) but may guide company activities in such a way as to meet the public interest that justified its creation" (Brasil, 1976; our translation).

assume risks that may benefit organizations in the future, especially institutions that directly compete with private organizations in the market for economic services or activities. Even so, those that operate in the non-competitive environment aimed at serving the public interest also lack efficient, fast, and effective processes to avoid jeopardizing the results citizens expect and that affect their primary purposes.

Even in the presence of these particularities, all state-owned companies must use the bidding procedure to hire third parties and use their services, including engineering; advertising; and asset acquisition, leasing, and disposal; in addition to hypotheses that aim at asset transaction, work execution, and real liens implementation in the form of Art. 29 of Law no. 13.303/2016 (Brasil, 2016). However, in the case of a legal transaction that involves an obligation to give, to do or not to do, and of a common nature (whose performance and quality standards can be objectively defined by public notice and the usual market specifications), legislators would have preferably recommended the reverse auction modality but enabled companies to use competition.

A peculiarity of reverse auction is its association with the "inversion of improvement and judgment phases" and with the "possibility of renewal of bids by all or some of the bidders until the most advantageous proposal is reached" (Justen Filho, 2000, p. 11; our translation). Another point that deserves to be highlighted corresponds to the feasibility of a written proposal and the verbal or electronical opening of opportunities for new proposals by bids during the development of the event. Moreover, the bidding procedure is accessible to all those interested in agreements with Public Administration, regardless of whether its register includes them. The judging criterion adopts the evaluation of the lowest price, unlike the standard auction modality, which considers the highest bid.

Notwithstanding the reverse auction being indicated as the preferred model for acquiring common goods and services, Law no. 13.303/2016, Art. 32, item IV, Decree no. 44.698, of June 29, 2018, of the municipality of Rio de Janeiro, in force at the time of the development of this study, made this type of bidding mandatory[2]. Thus, depending on characteristics of the agreement object, some alternatives of bidding procedures via price taking, invitation, or competition were

2 Decree No. 44.698/2018, Art. 43: "In the bids and contracts referred to in this Decree, the following guidelines will be observed: […] IV – mandatory adoption of the bidding modality called auction in its electronic form, as established by Law No. 10.520, of July 17, 2002 and regulated by Municipal Decree No. 39.538, of March 17, 2009, except in cases of proven unfeasibility, to be justified by the competent authority, for the acquisition of common goods and services, thus considered those whose performance and quality standards can be objectively defined by the public notice, by the usual market specifications" (Rio de Janeiro, 2018, p. 29-30;our translation).

excluded. Therefore, a normative act issued by the head of the municipal executive power would have suppressed the optional nature of the legal rule.

These underlined norms failed to distinguish between state-owned companies providing public services under a non-competitive regime and those focused on exploiting economic activities, which launch themselves in the market and compete for space with the private sector. This perspective shows that the formalities required for public procurement also included state-owned companies (essentially regarding their support activities) in view of the flexibilities conferred on auction management. Even so, those statutes aimed to reduce the costs and the speed of the purchasing process, whose products would be easy to identify and evaluate (alluding to quality and performance) by objective criteria, such as consumer goods, fuel, office supplies, language translation/interpretation services, surveillance, typing, transportation, life insurance, among others.

For these reasons, the New Law of Bidding and Administrative Agreement (Law no. 14.133/2021) adhered to the mandatory auction modality, preferably in an electronic format. Its in-person configuration would now require prior motivation, "and the public session must be recorded in minutes and recorded in audio and video" (Brasil, 2021; our translation). The exceptionality of the rule was delimited to apply to "contracting of specialized technical services of a predominantly intellectual nature and engineering works and services", except for those of a common type (Torres, 2022, p. 218; our translation).

Although legislators have ignored the differences that justify applying the legal regime of public law to state-owned companies that were established to provide economic services, the matter would deserve thorough examination due to its equivalence to autarchies, as per the STF's understanding[3]. From this point of view, in theory, such entities would be subject to the normative precepts regulated by Law no. 14.133/2021, even if they were supported by the definition of legal entities under private law, in congruence with Arts. 3 and 4 of Law no. 13.303/2016. However, the new statute on bids and contracts deprived public and mixed-capital companies and their subsidiaries of using its rules, in appreciation of the principle of specialty to avoid antinomies, except for hypotheses framed as criminal practices.

3 Private entities in the organizational structure of the State Administration, whose object lies in the sphere of non-competitive public services, would be subject to the legal regime of public law, according to the understanding enshrined in the STF, having as reference the Extraordinary Appeal (RE) no. 407.099 (Brasil, 2004) and the judgment of General Repercussion in RE 599.628 (Brasil, 2011). It would extract from this the understanding that the New Law of Bidding and Agreements would fall on the legal transactions signed by the state-owned companies under these characteristics.

Once the judgment that incorporates the STF jurisprudence on the subjection of non-business state-owned companies to the dictates of Law no. 14.133/2021, companies subjected to the private law regime would be prevented from using the auction modality by virtue of the repeal of Law no. 10.520/2002, as of December 30, 2023, and the inadmissibility of the subsidiary interpretation of the general rule.

2 Minimalism and experimentalism to induce the auction modality in public bids of state-owned companies subject to the legal regime of Private Law

The growing challenges to improve and offer efficient public services and promote public policies that can meet contemporary social demands require adequate planning based on predictions about future events and recorded data, considering the circumstances known to the state management bodies.

The Executive Branch, by managers, civil servants, and public agents (in a broad sense), must find practical solutions to address daily contingencies and mitigate risks in its sphere of predictability to obtain quantitative and qualitative effective and efficient to better accommodate the public interest in the light of constitutional values.

In this perspective, Sabel and Simon (2011) describe a model of public governance associated with the concepts of democracy and responsive regulation that value local autonomy to define general objectives and expand the possibility of improvisation supported by information and performance monitoring tools.

Considering the dynamics of public choices, technological evolution, and the volatile nature of the markets for products and services, it is understood that the normative barriers established by Law n. 14.133/2021 must be interpreted as to guarantee the use of the auction modality to state-owned companies if they are subjected to the legal regime of public law.

The criterion to define bidding modalities is now based on the object to be bid, which is why the aim to purchase and/or use goods and services, respectively, would constitute the only alternative to the reverse auction procedure, whose judgment would be fixed to the lowest price or highest discount. Thus, it would make no sense to exclude the incidence of the rule referring to these aspects on the choices of potential contractors with public companies, mixed-capital companies and their subsidiaries, public consortia (constituted in the form of a legal entity under private law), and public foundations under private law.

2.1 New paradigms for public choice and the principle of benefit

The concept of strict legality on administrative action proved to be ineffective since the Legislative needed to identify the relevant facts for society and deliberate on the institution of norms that could inhibit harmful behaviors to the public interest in allusion to the rules of conduct. Moreover, the elaboration of codes focused on internal processes, corresponding to the management and resolution of demands, failed to find the exact dimension of the individualized problems and the circumstances inherent to concrete cases[4].

A more efficient public management would have to ensure a space for administrative discretion under penalty of ossifying institutions and compromising the effectiveness of fundamental rights, especially for citizens who depend on welfare policies. Therefore, thinking about decision-making processes in the managerial context of the State and in the light of strict legality would threaten constitutional values.

The 1988 Constitution of the Republic instituted new paradigms and guidelines on administrative practices to provide the Executive Branch with the necessary instruments to ensure the fundamental right to good administration, even serving as a primary source for the control of legality, a circumstance that, rather than ruling out legality, subjects its applicability to the legal values enshrined in the constitutional norm (Hachem, 2014).

It is worth mentioning that administrative legality has its expression and relevance to promote legal certainty but lies subject to an interpretation permeated by democratic and republican ideals in accordance with the principles of proportionality, reasonableness, necessity, and adequacy. It is impossible to dissociate the Brazilian legal system from the civil law system, which still prevails in the regulation and limitation of the exercise of power to restrain competency arbitrariness, excess, deviation, and usurpation by rules instituted by the Legislative Branch.

Notwithstanding the recognition of the importance of legal frameworks to minimize the risks inherent to distortions of administrative discretion or resulting from despotic practices concealed by other prerogatives (typical of public functions), the expansion of managerial freedom extends frontiers to new opportunities, strategies, and planning aligned with the concept of innovation, creation, and improvement of methods to meet social demands[5].

4 These aspects elicit the concept of facticity, which, according to Grondin (2012, p. 38), consists of a "concrete and individual existence that is initially not an object for us, but an adventure in which we are projected and to which we can awaken expressly or not" (our translation).

5 For Schumpeter (1997), the definition of innovation is associated with the commitment to the possibility of creating goods or their respective qualities by increasing production methods to give rise to a new market, with the use of modern inputs in the process of formatting products or services.

Attracting private initiative to the strategic and decision-making environment of the Public Administration and its integration, communication, and deliberation with various sectors of society and the State itself crystallizes the legitimacy of public choices and satisfies the dictates of the democratic Constitution, conceiving a differentiated format of governance aimed at balancing economic and social development[6].

The technological transformations experienced by the state apparatus gained prominence after the year 2000, with the implementation of the online income tax declaration system and the creation of the Digital Government portal, followed by the Transparency Portal, the Digital Inclusion Portal, and the National Electronic Process. Continuing these managerial innovations, Law no. 14.129/2021 constituted the Digital Governance Policy, the Digital Transformation Strategy, and the Digital Government Legal Framework (Cristóvam; Sousa, 2022).

To optimize the internal processes of contemporary Public Administration and reduce opportunity costs, legislators established the principle of benefit as a fundamental objective to choose contract proposals with state agencies considering the life cycle of the hired object. Therefore, what would be the claim of benefit intended by Law no. 14.133/2021?

The semantic conception defining "advantageous proposals" can be defined according to economic (the values described in the offer) and/or operational criteria (utility, durability, maintenance costs, and production efficiency). Moreover, it is necessary to assess whether the benefit should be related to meeting the interest of the Administration, the potential interested parties, or even both. In general terms, the New Law of Bidding and Administrative Agreement apparently brought the idea of the lesser burden on public interest and contractors' better and more complete provision (Justen Filho, 2023).

Following this line of thought, the principle of benefit requires that bids focus on choosing contracts that offer the lowest cost and the greatest possible benefit. Thus, one should not only take economic parameters as a reference (i.e., the lowest price paid by the State or the highest bid it receives) since the desired profit must be ascertained with the support of administrative rationality and the indispensable observance of new business opportunities under the prism of proportionality, reasonableness, and sustainable choices.

The most diverse facets of benefit deserve a thorough analysis so the State

6 This gives rise to the concept of Concerted Administration, characterized by valuing institutional dialogues between public authorities and individuals and the instruments of social agreement, thus configuring a new management style marked by participation, consensus, and flexibility (Bitencourt Neto, 2017).

avoid incurring in asymmetries that may damage biddings. Lack of attention to cost-benefit variables of the bidding process and the contract itself can exclude potential contractors who are better prepared or qualified to fulfill government objectives and goals.

2.2 Limitation of the Union legislative competence on tenders and administrative agreements

The Constitution of the Republic granted the Union the power to privately legislate on general rules alluding to the matter inherent to the bidding and public procurement processes in the form of art. 22, XXVII. On the other hand, it included the possibility of the other federative entities instituting their own specific rules according to their peculiarities.

General norms aim to minimize possible contradictions between normative acts issued on the same subject in different spheres of power. However, they safeguarded the autonomy of states, the Federal District, and municipalities according to their constitutional competences under penalty of admitting situations equivalent to a kind of unjustified interventionism.

Each federative entity has its organizational structure to act in favor of the public interest, promote and maintain fundamental rights, and preserve human dignity. However, the new regulatory framework has no clear and objective delimitation on the limits on bidding and administrative contracts in accordance with the provisions of Law no. 14.133/2021.

The STF faced the issue of delimiting these general norms in the Direct Unconstitutionality Action n. 3735/Mato Grosso do Sul, signaling that state and municipal laws could only innovate their legal systems regarding the disparity between competitors and the restriction of the right to participate in biddings to establish the conditions related to a class of objects to be hired or inherent to circumstantial peculiarities of local interest (Brasil, 2016).

Extraordinary Appeal no. 1,188,352 RG/DF also discussed the matter in view of questions about the constitutionality of a district law, which admitted the inversion of phases in public bids held in the spheres of government of the Federal District (for agencies and entities) in the face of Law no. 8.666/93 and the provisions of Art. 22, XXVII, of the Constitution of the Federative Republic of Brazil. This judgment, under the opinion of Justice Luiz Fux, highlighted that, despite the existence of a general rule instituted by the Union, maintained the room for

other federative entities to edit their specific rules regarding bidding procedures[7], thus enshrining the legislative, political, and managerial autonomy of the other legal entities that belong to the federative pact[8].

Although such judgments are not directly and immediately related to the New Law of Bidding and Administrative Agreement, it is possible to draw a line of reasoning that conceives the interpretation, according to the Constitution of the Republic, to admit the issuance of specific statutes within the limits of the legislative competences of each federative unit under penalty of disregarding the pluralism that symbolizes the Brazilian society.

These new Administration procedures also encompass local experimentalism, which focuses on expanding administrative efficiency and sustainability in public choices. Notably, the bids are also subject to compliance with the Sustainable Development Goals (SDGs), in view of the commitment Brazil made to achieve the goals of the United Nations 2030 Agenda[9] (United Nations, 2023).

One must not lose sight of the principle of benefit, which is related to the singularities of states and municipalities and the attributions of their respective bodies and entities. In general terms, requiring small Brazilian cities to adapt to the bidding rules issued by the Union can be excessively burdensome for their public coffers. Some inner municipalities suffer the impact of low per capita income and thus budget limitations due to low tax collection.

Taking as a reference the research extracted from the "New Poverty Map"

7 "The main effects of the general norms are the general homogeneous legislation, not particularizing for political persons, the fulfillment, also, of the express and implicit constitutional principles, the restriction of the legislation of the federative entities in what must be preserved homogeneously in order to obtain legal certainty and certainty" (Figueiredo, 1997, p. 10; our translation).

8 Part of the vote of Justice Luiz Fux in the judgment of Extraordinary Appeal No. 1.188.352 RG/DF – "It is desirable that the federative entities enjoy a certain freedom to regulate matters in a different way not only because each of them has local peculiarities that justify adaptations of federal legislation, but also because the use of different regulatory strategies allows comparisons and improvements regarding the effectiveness of each of them" (Brasil, 2019; our translation).

9 In the final document of the Rio+20 Conference in 2012, entitled "*O future que queremos*" (The Future we Want), and again in "*Transformando nosso mundo: a Agenda 2030 para o Desenvolvimento Sustentável*" (Transforming Our World: The 2030 Agenda for Sustainable Development) in 2015, United Nations Member States decided that the High-Level Political Forum on Sustainable Development would be informed by the Global Sustainable Development Report. In its 2016 Ministerial Declaration, Forum member states decided that the report would be produced every four years by an independent group of scientists appointed by the United Nations/Secretary-General, consisting of 15 experts representing a variety of backgrounds and scientific disciplines and institutions, with geographical and gender balance. Thus, the report "Times of Crisis, Times of Change: Science to Accelerate Sustainable Development Transformations" was published according to the quadrennial Global Sustainable Development Report composed of an independent group of scientists. The first report, "The Future is Now: Science for Achieving Sustainable Development", was published in 2019 (United Nations, 2023).

(Neri, 2022), the municipality of Borba in the state of Amazonas is cited as one of the cities with the lowest average population income (R$ 101.10)[10]. In view of this finding, hindering municipalities from issuing norms of a specific nature regarding bidding processes for public procurement will place that municipality in a state of unconstitutionality due to the inability of complying with the premises established by the general rule under the terms of Law no. 14.133/2021.

This issue directly impacts the application of arts. 7 to 10 of the aforementioned legislation since the matter portrayed in these provisions falls on public agents and the administrative organization, including detailing hiring agents and contracting commissions and management by competencies, a circumstance that highlights the unconstitutionality of these rules based on the invasion of the administrative autonomy of federative units.

Final considerations

Every great legislative change agitates the various sectors of society that suffer the effects of its regulatory impact, as was the case of the edition of the New Law of Bidding and Administrative Agreement, especially due to legislators' correct and incorrect decisions regarding the derogation of certain provisions belonging to sparse norms.

The main issue this study highlighted refers to the revocation of Art. 32, item IV, of the State-Owned Companies Law due to the legal effects from the contemporary version of the statute that will govern the next public auctions as of January 1, 2024. The impetus of federal legislators to formulate a single rule for bidding processes within the scope of the direct administration left aside the care of verifying the possible consequences resulting from the absence of auction regulation in the scope of public companies and mixed-capital companies.

In view of this scenario, the TCU should admit the subsidiary application of Law no. 14.133/2020 for bids formulated by private legal entities (members of the Direct Public Administration) to ensure the use of the reverse auction modality, even if preferentially. Such an interpretation fails to infringe the separation of powers or contract the legislative competence since it aims to adapt the effectiveness of the new legal diploma to the constitutional symmetry in the form of Art.

10 "The contingent of people with per capita household income up to 497 Reais per month reached 62.9 million Brazilians in 2021, about 29.6% of the total population in the country. This number in 2021 corresponds to 9.6 million more poor people (almost the population of Portugal) during the pandemic than in 2019. Poverty has never been as high in Brazil as it was in 2021 since the beginning of the time series in 2012" (Neri, 2022, p. 3).

173, paragraph 1, item III, of the Constitution of the Republic.

Normative excesses that delay administrative efficiency lie at odds with the constitutional values aimed at obtaining the right to good administration. Moreover, it hinders the phenomenon of experimentalism, which bars the formation of new alternatives to favor the resolution of growing social demands, which, in turn, gain more complex contours at each dawn of reflexive modernity, marked by risks, contingencies, and uncertainties.

Too many legislative constraints, in addition to dysfunctional control, generate a regime of fear, insecurity, and ossification of Public Administration. Such circumstances alienate decision-makers, who act on behalf of citizens but suffer the pressure by the latent punitive power of the State. Between innovating and responding to an administrative or judicial process, sensible subjects prefer to reproduce the traditional practices courts endorse to maintain their reputational image and avoid the media attacking their private lives.

Thus, the cost of innovation is very high for managers and public agents since eventual failures can bring an immeasurable and possibly perpetual unpleasantness. The simple establishment of investigations and/or inquiries can propagate effects on the health of these individuals and affect their social relationships, i.e., their family, relatives, friends, contractors, and institutional peers, not to mention patrimonial consequences.

Another problem this study described is associated with applying Law n. 14.133/2021 as a general rule due to the repercussions on the managerial autonomy of states and municipalities regarding their local and regional specificities. The legal requirements that affect the organizational level of these federative units that are unsubordinated to the Union harm the executive constitutional competence, founded on the principle of political pluralism, the federative pact, and the separation of powers.

The Brazilian Supreme Court recognizes general federal laws as framework norms so they can serve to shape the limits imposed on the state, municipal, and district Legislative Power to reserve additional competence to improve the rules established according to local and regional peculiarities.

Thus, extending national effectiveness (in allusion to the provisions of Law no. 14.133/2021) would cover the general guidelines provided for in Arts. 1 to 5 and 11 and the rules related to the bidding modalities, judgment criteria, preference and differentiated treatment, maximum qualification requirements, challenge to the summoning acts, decisions subject to appeal, appeal deadlines, and exemption hypotheses.

On the other hand, there remain the matters related to the definition of deadlines and additional requirements for the issue of notices and contracts; order of bidding stages; forms and deadlines for filing administrative appeals (according to the limits established by the general rules); procedures and conditions for the sale of public assets of the states, municipalities and the Federal District; and regulation of registries, standardization catalogs, and auxiliary procedures.

All the points this study highlighted are endowed with legal, social, political, and economic relevance in view of the possible consequences around fundamental rights, the new businesses intended by the Public Administration, and the control systems and asymmetries that drive inequalities in their various facets, flattening the population with lower per capita income and fixed in cities devoid of resources compatible with local demands.

To avoid injustices, controlling bodies will need to take a deferential stance toward public choices in accordance with Arts. 20 to 30 of the Introduction Act to Brazilian Law, which aim to mitigate the risks produced by the phenomenon of control dysfunctionality, which forms a managerial environment marked by organizational wrongdoing, which can be assimilated not only to the inertia of public manager but also to the fear of innovation, the low efficiency of the services offered to citizens, the paralysis of public works, the lack of interest in politics, and the retraction of development projects.

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