The competitive dialogue in the new law on licitations and contracts of public administration*

O diálogo competitivo na nova lei de licitações e contratos da administração pública

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ABSTRACT

Inaugurating a new legislative discipline in public contracts, Law No. 14,133 of April 1, 2021 was enacted in good time, bringing important innovations compared to its predecessor. Among the novelties of the Law, stands out the prediction of the "competitive dialogue", a bidding modality through which the Public Administration and the bidders, after negotiations, jointly develop technical solutions capable of meeting the needs of the contractor that led to the opening of the bidding procedure.

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The present work is dedicated to this institute. Seeking to examine the origins of the new bidding modality and understand the path taken until its inclusion in Brazilian legislation, the article begins by tracing an overview of administrative consensuality in contemporaneity and examining the theme in comparative law. Afterwards, the work moves on to its main objective, consisting in the specific study of the discipline conferred by the new Brazilian Bidding and Contract Law on the institute. At this moment, we investigate each respective phase of the new bidding modality and the peculiarities inherent to them. Finally, the article also examines the "competitive dialogue" compared to other existing participatory bidding modalities, highlighting the main differences that make it a truly innovative institute.

KEYWORDS

Competitive dialogue — bidding and contracts — Law n. 14,133/2021

RESUMO

Inaugurando uma nova disciplina legislativa em relação às contratações públicas, foi editada, já em boa hora, a Lei no 14.133, de 1o de abril de 2021, que trouxe importantes inovações em relação à sua predecessora. Entre as novidades da lei, destaca-se a previsão do denominado "diálogo competitivo", modalidade de licitação por meio da qual a Administração Pública e os particulares licitantes, após negociações mútuas, desenvolvem, juntos, soluções técnicas capazes de atender às necessidades do contratante que levaram à abertura do procedimento licitatório. A ela dedica-se o presente trabalho. Buscando examinar as origens do novo instituto e entender o caminho percorrido até a sua positivação no direito brasileiro, o artigo começa traçando um panorama geral da consensualidade administrativa na contemporaneidade brasileira e examinando o tema também no direito comparado. Em seguida, o trabalho passa ao seu principal objetivo, consistente no estudo específico da disciplina conferida pela nova Lei de Licitações e Contratos ao instituto, momento em que investigamos cada uma das respectivas fases da nova modalidade licitatória e as peculiaridades a elas inerentes. Por fim, o artigo também examina o "diálogo competitivo" comparativamente a outras modalidades licitatórias participativas já existentes, destacando as principais diferenças que o fazem ser um instituto realmente inovador.

PALAVRAS-CHAVE

Diálogo competitivo — licitação e contratos — Lei no 14.133/2021

1. Introduction

The State is one of the largest purchasers of goods and services, signing hundreds of contracts with private suppliers every day. Such deals obviously involve spending public money, with a high degree of responsibility and care. The best proposal must be chosen, allowing the same opportunities to all potential stakeholders, with transparent mechanisms enabling full control.

The main bidding principle for the Administration is equality of opportunity, avoiding subjectivity. If the money belongs to the community, the same opportunity must be given to all those capable of undertaking the operation. Both moral and economic considerations must be observed, enabling interested parties to compete, to ensure the best proposal available in the market.

Thus, the Public Administration opens a bidding process, announcing the intention to undertake a specific contract; choosing from the relevant parties in a position to undertake the contract; choosing the best proposal, according to the criteria previously established (art. 37, XXI, CF). The bidding is, then, the process by which the Administration chooses the best proposal for a given contract.

Its final act is not the effective conclusion of the contract, which may not be effectively completed, but the choice of the best proposal. It is a process, involving not only a fixed sequence of acts, but a plurality of subjects with potentially opposing interests.

In its art. 37, XXI, the CF imposes the need for prior bidding by all entities of the Federation and its indirect Administrative entities. Thus, bidding is not a principle, but a rule, which strengthens the principles of equality, morality, impersonality and economic efficiency in relation to the State contracts. Art. 22, XXVII, part 1 (wording in EC No. 19/1998), provides that the Union is responsible for issuing general rules for bidding and contracts for all entities of the Federation, its autonomous bodies and foundations, in compliance with art. 37, XXI.

For almost three decades, the legislation provided for in part 1 of XXVII of art. 22 was based, above all, on Law No. 8.666/93, the General Law on

the subject,[1] applicable subsidiarily to bidding types dealt with by other special national laws (tenders, oil company concession bids, public service concessions, advertising services – Law No. 12.232/10 - etc.).

Inaugurating a new legislative discipline in relation to public bids, however, Law No. 14.133, of April 1 2021, despite important missed opportunities and its maximalist approach, included important developments.

Among them, the provision of a new modality should be highlighted, inspired by the increasingly prestigious contracts, through consensus and participation of individuals in administrative decisions, known as "Competitive Dialogue". To this principle we dedicate this work.

2. Overview of consensus and individual participation in administrative decisions and the principle of lack of public interest

In accordance with the principle of lack of public interest in its conventional sense, all the powers conferred on the public administrator consider the interests of society as set out in the Federal Constitution; these attributes, though they often involve the exercise of unilateral prerogatives over individuals, are not powers proper, but functions, since they are not exercised in the interest of the State, much less the public official, but of society itself, embodying, more than powers, duties. Thus, the public administrator must exercise their competence (duty),[2] without omitting or compromising individuals in the realization of responsibilities.

This principle has been undergoing doctrinal revisions that suggest a review of its original content. The opening of administrative law to a degree of consensus does not constitute primarily the existence of public interest, since the establishment of an agreement (broadly) with the individual may, in certain cases, better serve the public interest than mere unilateral imposition.

The STF has already adopted this line of reasoning, admitting administrative agreements, even in typical tax issues, where the principle

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1 As a "general norm", despite the low density of this concept, those that, without addressing specificities, establish principles, essential instruments for their effectiveness, basic criteria and the exceptions to them.

2 BANDEIRA DE MELLO, Celso Antônio. *Curso de direito administrativo*. 17. ed. São Paulo: Malheiros, 2013. p. 87-90.

of legality is an absolute reserve: "'Individual protocol' - an instrument of economic intervention that imposes reciprocal rights and obligations. The duty of Public Administration is to achieve, in the most effective way , the public interest identified in the standard" (RE No. 403.205).

In another case, the STF, analyzing the constitutionality of a Public Administration agreement made without prior legislative authorization, in relation to which violation of the principle of legality and of lack of public interest were invoked, considered that, "in this case, the agreement served the quicker, more effective pursuit of the public interest, without being, therefore, an offense to art. 37 of the Federal Constitution". The judgment went as follows:

> Public authority. Transaction. Validity. As a rule, assets and public interest are incompatible, as they belong to the collective. Thus, the Administrator, as a manager of public affairs, has no stake in the interests entrusted to their care and realization. However, there are cases in which the principle of lack of public interest must be mitigated, especially when considering the solution adopted by the Administration is that which will best meet this interest.[3]

It is worth mentioning the series of laws that expressly admit this, highlighting the terms of conduct adjustment provided for in *Lei da Ação Civil Pública* as a negotiation option, substituting the application of legal sanctions, for all public entities, not just for the Public Prosecutor's Office (article 5, § 6, Law No. 7.347/1985). Specific provisions are included, among others, in art. 85 of Law No. 12.529/2011 and § 5 of art. 11 of Law No. 6.385/1976 for Cade and CVM, competition and capital market disciplinary entities, respectively. It must be remembered that the *Plano Diretor* law provides for areas where the private entity can negotiate with the municipality beyond legal limits through the "onerous granting of the right to construct" provided for in the *Estatuto da Cidade*.[4]

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[3] REXTR n. 253.885-0-MG, Primeira Turma, rel. min. Ellen Gracie. The only caveat we make is that, as can be seen from the abstract itself, there is no attenuation of the "unavailability of public interest", since the agreement "will better serve the fulfillment of this interest".

[4] "Art. 28. The master plan may establish areas in which the right to build may be exercised above the adopted basic utilization coefficient, against consideration to be provided by the beneficiary".

Law No. 9.873/1999 generically provides for the interruption of the prescription of punitive claims of the Public Administration in the face of "any unequivocal act that amounts to an express manifestation of an attempt to conciliate within the internal scope of the Federal Public Administration" (art. 2, IV), thereby admitting it.

This possibility of negotiation between the individual and the Public Administration to reach the best solution finds equally fertile ground within the scope of public procurement. Although materialized differently, consensus in the bidding scope opens the way for a dialogue between the state contractor and possible private contractors, whose cooperation may be very beneficial to the public interest.

Competitive dialogue, is a component long enshrined in comparative jurisprudence precisely within the scope of these procedures, which allows negotiation between the contracting state entity and the private, including the collection of information to inform better decision-making. Art. 6, XLII of Law No. 14.133/2021 concerns:

> the modality of bidding for contracted works, services and purchases in which the Public Administration conducts dialogue with prospective bidders, selected by objective criteria, with the aim of developing one or more alternatives capable of meeting their needs. Bidders must submit a final proposal at the close of the dialogue.

Through a negotiated process, therefore, the State and private entities consensually build the most adequate solution in pursuit of public objectives via the bidding procedure. Before examining the implications of the new bidding and contract law for competitive dialogue, however, we will analyze the experience, which, to a large extent, inspired the consideration of this issue by the Brazilian legislator in recent legislative reform.

3. Competitive dialogue in comparative jurisprudence

Long before it was taken over by the Brazilian legal system, competitive dialogue featured prominently in foreign law. According to Pedro Telles, the

need for flexible public procurement was addressed in the UK, two decades before the discussion arose in the rest of Europe in the late 1990s.[5]

With the success of the English *competitive dialogue* experience, the European Union embraced this less verticalized form of contracting through Directive 2004/18/EC, through what was described as the rule of "Competitive Dialogue".

The legislator defined, in art. 1, item 11, c, that "Competitive Dialogue" was

> the procedure by which any economic operator can request participation and in which the contracting authority conducts a dialogue with the candidates accepted, with a view to developing one or several solutions to respond to their needs and the basis on which selected candidates will be invited to submit a proposal.

In this competitive modality, therefore, the negotiation with the private entity would begin even before the moment of exact definition of the contract, including **internal and external bidding phases.**

After 10 years, Directive 2004/18/EC was repealed, replaced by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014, whose main scope was, according to item 2, to review and modernize Directive 2004/18/EC in order to increase the efficiency of public expenditure and enable purchasers to make better use of public contracts to achieve common social objectives.

In this sense, the new Directive not only provided for the Competitive Dialogue as a bidding alternative, as highlighted in item 42 of its "Considerations", which:

> proved to be useful in cases where contracting authorities are not able to define ways to satisfy their needs or evaluate what the market can offer in terms of technical, financial or legal solutions. This may, in particular, occur with innovative projects, the execution of infrastructure projects, large-scale integrated transport structures, large information

[5] TELLES, Pedro. *Competitive dialogue in Portugal and Spain*. Tese (doutorado em filosofia) — Universidade de Nottingham, Notthingham, 2010. p. 74.

> technology networks or projects that require complex financing and structure.

The matter is dealt with mainly in art. 30 of the Directive, which was innovative in that it had a specific component outlining the possibilities of the procedure. Contrary to the previous rule, which provided generically only that dialogue could be used in cases of particularly complex contracts, art. 26 of Directive 24/2014/EU established specific situations in which the Public Administration could use the mechanism dialogue.[6]

Explaining the procedure, Thiago Marrara points out:

> This modality includes economic agents that request and receive an invitation from the contracting entity after evaluating the initial information provided. It is possible that the dialogue will develop in successive phases with the aim of reducing the number gradually, allowing the authority to maintain one or more appropriate solutions to satisfy their needs. Once closed, the contractor asks each participant to "submit their final proposals based on the solution or solutions presented and specified during the dialogue", contemplating all the elements required and necessary for the execution of the project. Even at this stage, the authority is authorized to request clarifications, details and improvements or delays to the proposal, as long as its elements are not altered fundamentally, respecting the requirements set out at the start of the bidding and the items of the descriptive memorandum. In the selection, it is necessary to be guided by the criterion of the best quality/price. Once the judgment is made, the authority is allowed to

[6] "a) With regard to works, supplies or services that fulfill one or more of the following criteria: i) the needs of the contracting authority cannot be met without adapting readily available solutions, ii) the products or services include the concession or innovative solutions, iii) the contract cannot be awarded without prior negotiations due to specific circumstances related to the nature, complexity or legal and financial arrangement, or due to the risks associated with them, iv) the specifications techniques cannot be defined with sufficient precision by the contracting authority vis-a-vis reference to a standard, European technical approval, common technical specifications or technical reference, with regard to points 2 to 5 of Annex VII; b) concerning works, supplies or services, if, in response to an open or restricted tender, only irregular or unacceptable proposals have been submitted. In these situations, the contracting authorities are not obliged to publish a contract notice if they include in the procedure all tenderers, and exclusively the tenderers, who satisfy the criteria referred to in articles 57 to 64 and that, in the previous open or restricted tender, have submitted proposals that correspond to the formal requirements".

> undertake additional negotiations to confirm the financial commitments of the third parties or other terms contained therein in order to finalize the terms of the contract, once again respecting the essential aspects initially established and the principle of non-discrimination.[7]

In accordance with these European law guidelines, the instrument was also expressly adopted by other countries in Europe.

In Portugal, the matter was regulated in the Public Contracts Code (CCP), on January 29, 2008, especially in art. 30, which deals with the hypotheses of its application, and in arts. 204 to 218, which specifically address the issue. In addition to these provisions, we should note art. 16 of the CCP, which promoted competitive dialogue as one of the necessary procedures for the formation of public contracts; art. 33, which introduced blocks in the use of competitive dialogue; and art. 40, which specified the components of the procedure.

In Spain, the matter was regulated in Law 30/2007, the "Ley de Contratos del Sector Público". According to Explanatory Memorandum IV, 3, "competitive dialogue" was "designed for highly complex contracts whereby the final definition can be realized through the interaction between its the contracting authority and the applicants". In general, the Ley de Contratos del Sector Público prescribes competitive dialogue in arts. 163 to 167, much of which is foreseen in Directive 2014/24.

In Germany, Competitive Dialogue was introduced under the heading "Wettbewerblicher Dialog", whose basic idea, in the words of Ralf P. Schenke, was to combine elements of a flexible process with a more traditional, exact formalized system. This involves a balanced between an open and negotiated procedure.[8]

The institute was also adopted by other countries, such as Italy, in the Code of Public Procurement 2006 (*Codice dei Contratti Pubblici* — Legislative decree 163); France, in the 2006 Code (*Code des Marchés Publics*); and the United Kingdom, through the *Public Procurement Regulation* of 2006 (*Public Contracts*

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[7] MARRARA, Thiago. *Licitações na União Europeia (II)*: princípios e modalidades licitatórias. Available at: www.direitodoestado.com.br/colunistas/thiago-marrara/licitacoes-na-uniaoeuropeia-ii-principios-e-modalidades-licitatorias. Accessed on: 22 Aug. 2021.

[8] SCHENKE, Ralf P. *Der Wettbewerblicher Dialog*. p. 81.

[A]vailable at: https://publishup.unipotsdam.de/files/2776/kwi_schr01_online_2009_03_18_btr06.pdf. Accessed on: 22 Aug. 2021

Regulation), all in accordance, to a greater or lesser extent, with previous Directives set out above.

Public purchases in the US have comparable characteristics. For fuller understanding, we need a better grasp of the system.

The North American legal system accommodates, in an essential way, four types of bidding, namely:

(a) simplified procedures, for purchases, as a rule, below US$ 150,000.00; (b) closed, or sealed bidding, when the needs are clear, delimited and complete; (c) contractual negotiation, in cases exceeding US$ 150,000.00 or requiring accurate technical analysis of the product or service; (d) consolidated purchasing programs for purchases related to common needs.[9]

The rules for these modalities can be found in the Federal Acquisition Regulation (FAR).[10] Regarding the bidding procedure, with possibilities for negotiation, there are "negotiated acquisitions", contractual negotiations defined as "the type of bidding where there are procedures other than simply closed proposals",[11] resembling the competitive dialogue of the European Union.

Such a link can be seen, considering that the acquisition negotiated "enables the government to conduct discussions, evaluate the proposals and award the contract using factors other than price, such as managerial experience, technology adopted and the bidder's performance in the fulfillment of previous contracts".[12]

Thus, "the legislation provides for a process for exchanging information with interested parties both before and after receipt of proposals". This model can be approached in two ways: "through single source acquisitions or with competitive negotiations with a limited number of invitees. In the second, the

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9 OLIVEIRA, Christiaan Allessandro Lopes de. Compras públicas no âmbito federal nos Estados Unidos da América. Análise sucinta acerca das principais modalidades de compras de bens e serviços, bem como dos principais instrumentos contratuais decorrentes ou antecedentes. *Revista de Doutrina da 4ª Região*, Porto Alegre, n. 67, ago. 2015.

Available at: www.revistadoutrina.trf4.jus.br/artigos/edicao067/Christiaan_deOliveira.html. Accessed on: 5 Jul. 2016.

10 ESTADOS UNIDOS DA AMÉRICA. Federal acquisition regulation.

Available at: www.acquisition.gov/?q=browsefar. Accessed on: 5 jul. 2016.

11 MARQUES, Felipe Silveira. *Compras públicas no Brasil e EUA*: análise da concorrência segundo o paradigma estrutura-conduta-desempenho. Brasília: Esaf, 2005. Monografia premiada em 3º lugar no X Prêmio Tesouro Nacional — 2005, Tópicos Especiais de Finanças Públicas, Brasília. Available at: www3.tesouro.fazenda.gov.br/Premio_TN/XPremio/financas/3tefpXPTN/resumo.htm. Accessed on: 5 Jul. 2016. p. 41.

12 Ibid.

procedures are prepared to minimize the complexities of bidding, evaluation and the final decision".[13]

In this model, proposals can be presented orally. However, this must be documented in writing with "certifications, contingencies and exceptions to the terms of the bidding and a signed proposal sheet". In addition, the "body must keep records of oral presentations to document how the selection process took place".[14]

The system is based on a "call for proposals" (request for proposals - RFP), whereby the bidding entity requests proposals from potential contractors, with details of they intend to fulfill the contract at the target price. Furthermore, after "the proposals are presented, a negotiation phase between the agency or entity and the applicant is possible".[15]

Another specificity to be considered is the existence of a "'process of tradeoff', which allows consideration of factors other than price and technology". Thus, the legislation recognizes that the relative importance of price of the goods or service may vary according to the circumstances of each acquisition.[16]

Further, the reasons for these tradeoffs need to be documented in the bidding records[17] and must include: "all factors that will be considered and their relative importance (including whether previous performance is among the criteria), as well as the weight of each factor, other than price, will have in the evaluation".[18]

4. Competitive dialogue in Law No. 14,133/2021

In Brazil, the innovation, begun with the new Lei de Licitações e Contratos, was called "competitive dialogue". As stated, the provision of the new law inaugurated a model of bidding whereby the Public Administration and private bidders develop, through negotiation during the bidding itself, technical innovative solutions capable of meeting the needs of the contractor

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13 Ibid.
14 Estados Unidos da América, Federal acquisition regulation, op. cit. 2
15 Christiaan Allessandro Lopes de Oliveira, Compras públicas no âmbito federal nos Estados Unidos da América, op. Cit.
16 Estados Unidos da América, Federal acquisition regulation, op. cit.
17 Ibid.
18 Felipe Silveira Marques, *Compras Públicas no Brasil e EUA*, op. cit., p. 42.

that led to the opening of the bidding process. According to Alexandre da Cunha Filho and Alexandra Fuchs de Araújo,

> the Law points to the aggregation of innovation management in Public Law in general, and to Administrative Law in particular, following Freeman in the late 1980s, i.e., the idea that interactions between economic, social and political actors are relevant and may strengthen or constrain learning and research and, as a result, enhance or inhibit the development, dissemination and use national innovations.[19]

Thus, the special links competitive dialogue may have with technological innovation can even be applied through legislation for the protection and promotion of public and private programs of technological innovation.

Expressly provided for by art. 28 of Law No. 14.133/2021 as general model of public bidding, competitive dialogue was amplified by art. 179 and 180 of the new Lei de Licitações e Contratos, amending the laws 8.987/1995 and 11.079/2004, for the bidding of common concession services and public-private partnerships, respectively.

The legal discipline conferred on competitive dialogue was included, above all, in art. 32 of Law No. 14.133/2021, which, in its head paragraph, made it clear that it was exceptional bidding model, applicable only in specific well-delineated cases, in a similar sense, including the provisions already examined in Directive 2014/24/EU. According to this:

> Art. 32. The competitive dialogue model is restricted to contracts where the Administration:
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> I — offers a contract that involves the following conditions:
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> a) technological or technical innovation;
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> b) impossibility for the body or entity to have its need satisfied without adapting solutions
>
> c) impossibility for the technical specifications to be defined with sufficient accuracy by the Administration;

[19] CUNHA FILHO, Alexandre Jorge Carneiro da; ARAÚJO, Alexandra Fuchs de. Diálogo competitivo: a nova modalidade de licitação pode contribuir para melhores contratações pela nossa administração pública? In: OLIVEIRA, Rafael Carvalho Rezende; MARÇAL, Thaís. *Estudos sobre a Lei 14.133/2021*. São Paulo: JusPodivm, 2021. p. 40.

> II — verifies the need to define and identify the means that can satisfy their needs, with emphasis on the following aspects:
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> a) the most appropriate technical solution;
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> b) the technical requirements capable of implementing the defined solution;
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> c) the legal or financial structure of the contract;

Unlike floor trades, competition and other commonplace bidding models, competitive dialogue, by its nature and scope, claims a greater degree of ignorance on the part of the bidder. In summary, competitive dialogue will be appropriate in those hypotheses in which the Public Administration, aware of the objectives it wants to achieve, does not adequately know the mechanisms for achieving of its purposes. In other words, the Administration understands where it wants to arrive with the bid, but is unaware of or has doubts about the best solution to be adopted to reach its objective.

To frame the previously transcribed item I, competitive dialogue would be justified when the technical alternatives known and offered generically on the market are insufficient to achieve the contractual purpose. Thus, given the cumulative requirements involved,[20] the legislation authorizes the State to resort to the creativity of the private sector so that both, in a dynamic dialogue, build together the best solution for the promotion of the intended objectives. As the model suggests, this hypothesis entails mainly disruptive action projects that the Administration may wish to carry out, but which demand equally innovative solutions.

Item II, on the other hand, concerns cases in which the Administration, faced with two or more alternatives which may be adopted to achieve their objectives, has doubts as the most appropriate, resorting to private sector expertise to define the best technical, legal or financial contract design, for example. In this section, specifically, the expression "with emphasis on the following aspects" (highlighted with regard to innovative legal models)

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[20] According to Jessé Torres Pereira Junior, "The 'and' that precedes the third requirement means that these are cumulative requirements, i.e., for dialogue to be competitive, there must be a concomitant presence of the three requirements listed in item I, of art. 32, duly proven in the records of the respective administrative proceeding" (PEREIRA JUNIOR, Jessé Torres. Do diálogo à repressão nas contratações administrativas, em contexto de pandemia. ONLL, s.l., 2020.

Available at: www.novaleilicitacao.com.br/2020/09/30/dodialogo-a-repressao-nas-contratacoes-administrativas-em-contexto-depandemia. Accessed on: 23 Aug. 2021.

suggests that paragraphs "a", "b" and "c" do not exhaust the possibilities of competitive dialogue, to find other alternatives to the project, in addition to those illustratively brought by the law.

One way or another, despite legal attempts to restrict the appropriateness of the model, in both cases, the legal requirements for the use of competitive dialogue are described in relatively broad terms.

For this reason, the motivation for choosing this model over others, of more general application, will be the essential aspect of legality. As this is an exceptional bidding event, therefore, the Administration must be able, based not only on legal, but technical, economic data etc., to demonstrate competitive dialogue was the instrument that, concretely, best addressed public needs, due to the disruptive nature of the objective sought.

Once competitive dialogue has been confirmed, the bidding procedure takes place in three consecutive phases: (i) qualification phase; (ii) dialogue phase; and (iii) competition phase. The first and last are rigid and objective, observing the procedural rationality adopted in the already established bidding modalities, so that the significant innovation is the intermediate phase.[21] In the subtopics below, we will examine each, giving emphasis to the second stage of that procedure.

4.1 Qualification phase

Competitive dialogue begins with the pre-selection of bidders. According to art. 32 of Law No. 14.133/2021:

> § 1 In the competitive dialogue model, the following provisions should

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[21] In the words of Rafael Sérgio Lima de Oliveira, "the first phase, referring to the qualification of candidates interested in participating in the dialogue, and the last, that of judging the proposals, are rigid and transparent, since in these stages the decisions taken by the Management is based on objective criteria previously established and publicized, without the cloak of secrecy. As will be seen later, it is only in the second phase of the procedure that candidates admitted in the first stage (the qualification) are called to dialogue exclusively with the Administration, with the following flexibilities:

[a]) the need for this dialogue to be publicized; b) possibility of changing its initial proposal after discussion with the awarding authority; c) considerable degree of discretion of the Administration to decide on the appropriate solution" (OLIVEIRA, Rafael Sérgio Lima de. O diálogo competitivo do Projeto de Lei de Licitação e Contrato Brasileiro. Available at: www.licitacaoecontrato.com.br. Accessed on: 23 Aug. 2021).

> be observed:
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> I - the Administration will present, on publication of the public notice, on an official website, their needs and the pre-defined requirements and will establish a minimum period of twenty-five business days for expression of interest in participating in the bidding process;
>
> II — the criteria used for the pre-selection of bidders must be foreseen in the public notice, admitting interested parties who fulfill the established objective requirements;

In the first instance, the Administration announces the public notice and presents their objectives to the market, initiating a period of at least twenty-five working days for private agents to express their interest.[22] For complex tenders, a minimum term may and should be naturally extended, making it possible for all potential interested parties to consider the proposal and, if they wish, present their qualifications.

An important point to highlight is that the legislator does not foresee, at least at this initial moment, a qualification phase itself, linked to the specific provisions of arts. 62 et seq. of Law No. 14.133/2021. It is, in fact, seen as a prior stage, involving the discretion of the public entity in defining the selection criteria of individuals who will participate.

Although the qualification documents must be timely submitted, the pre-selection phase addresses an additional and preliminary step, guaranteed by law as a purposefully broad space of action, whereby the bidding Administration may filter interested parties.

There is, therefore, no exhaustive definition of criteria or prerequisites at this pre-selection stage. The terms and conditions necessary for guidance will form part of the bidding notification, and be, however, objectively measurable. Yet, expanding the possible qualification requirements does not mean admitting subjective analysis of candidates. Qualitative assessment at this preliminary stage must comply with the general criteria, described, as much as possible, in the public notice (art. 32, §1, II).

On meeting the prerequisites outlined, all qualified bidders will be considered.

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[22] It should be noted that, contrary to what happens in the European Union, our law allows Public Administration initiative for competitive dialogue, allowing for the right to general petition and submission of suggestions by individuals to the State.

At this point, it is important to note that, contrary, for example, to Directive 2014/24/EU, which authorizes the setting of a maximum number of candidates (art. 30, item 1), the new Brazilian Lei de Licitações e Contratos expressly established the impossibility of limiting the number of qualified participants, permitting "**all** interested parties who fulfill the established objective requirements".

Although the legislator's choice is absolutely valid, based, above all, on the principle of impersonality, which, in the final analysis, justifies the holding of public bids, Rafael Lima de Oliveira warns "what should be noted about this possibility of limiting the number of participants is that a large number of candidates may make dialogue unfeasible, since it is a complex and laborious procedure, especially in the second stage".[23]

Seeking, thus, to reconcile the constitutional principles guaranteed bidders with the procedural efficiency of competitive dialogue, the author gives as an example the limits stipulated by the 2014 European Directive:

> a) the selection and classification criteria must comply with a standard objective (article 65, item 2); b) the maximum number of candidates must be fixed in order to guarantee a sufficient number of economic operators for real competition (article 65, item 2); c) the maximum number of candidates may never be less than three, i.e., the Directive requires a minimum number of three candidates in the dialogue phase (article 65, item 2).[24]

The success or failure of this lack of limitation of the number of participants will only be seen in practice. The fact is that, in the current wording of the Law, once the prerequisites are set forth in the public notice, all qualified bidders participate in the contest, leading to the second phase of the procedure, consistent with the dialogue phase between the Administration and private entities.

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[23] Rafael Sérgio Lima de Oliveira, O diálogo competitivo do Projeto de Lei de Licitação e Contrato Brasileiro, op. cit.

[24] Ibid.

4.2 Dialogue Phase

Once the dialogue phase is inaugurated, the negotiation stage begins, in which the Administration and private entities effectively discuss the terms of the deal, with a view to reaching the best solution in terms of the intended objective. By nature, it is a more flexible phase, involving greater discretion. The contours of the object of the contract are defined at this stage, as solutions and conditions are put forward by bidders, constantly evaluated and re-evaluated by the commission.

It is important to emphasize that, unlike other bidding models, participatory activities prescribed by the Brazilian legal system, which will be addressed later,[25] the negotiation phase of competitive dialogue develops during the course of the bidding procedure. The flexibilization of possible elements and the debate around them does not, therefore, take place before or after the public event, but concomitant with it, since it is an essential condition.

Addressing the issue, the new law expressly affirmed the need for the Public Administration to respect the equality among bidders, guaranteeing them the necessary information. According to item III, § 1, of art. 32, "the disclosure of information in a discriminatory manner that may imply an advantage for any bidder shall be prohibited".

Specifying what was already foreseen, the law also established, in art. 32, § 1, IV, that "the Administration may not reveal to other bidders the proposed solutions or the confidential information communicated by a bidder without its consent". In the course of the negotiations undertaken between the public authority and the private entity, the Administration must, therefore, respect confidentiality of information, especially techniques divulged by the competitors. In other words, the negotiations between the State and each of the bidders will always be confidential. Business meetings must necessarily be recorded digitally and in formal minutes for later control purposes (art. 32, § 1, VI), and data submitted by individuals may not be passed on to other bidders without the prior and explicit consent of that bidder.

The construction of alternatives to the contract must be done individually, leveraging the ideas each bidder, through their expertise, can develop. Indeed, different to other legal systems, negotiation takes place **with each**

[25] Cf. tópico V.

of the candidates individually, not collectively, nor, much less, among themselves.

According to item V, of the same art. 32, § 1, "the dialogue phase may be continued until the Administration, through reasoned decision, identifies a solution or solutions that meet their needs". There is, therefore, no maximum time limit for the dialogue period, which may be more or less time consuming, depending on the complexity of the purpose and the capacity of the candidates to reach solutions.

Here, again, the discretion of the Administration is shown in the conduct of the procedure, which may involve as many discussion sessions as necessary for the object of the contract to be properly identified. The idea of bidding as an entirely objective, rigid procedure becomes more distant, therefore, and unfeasible.

As stated in item VII, furthermore, "the public notice may provide for the realization of successive phases, where each phase may constrain the solutions or proposals discussed". In other words, in the absence of a maximum term for the conclusion of the dialogue phase, the Administration may provide, in advance, in the convening instrument, successive negotiation stages, eliminatory or otherwise, during the dialogue phase. The public authority must not necessarily choose the best solution in a single round of negotiation. The law allows the contractor to filter the best solutions gradually.

As already mentioned, all these negotiations must be documented, in accord with the principles of transparency. According to VI of art. 32, § 1, "meetings with pre-selected bidders will be recorded in minutes and recorded using audio and video". With the minutes and, above all, the recording, regulatory officials can check possible irregularities in the procedure. Thus, **any negotiations or interlocutions between public agents and bidders not respecting this format will be illegal**.

A relevant procedural aspect is described in item XI, of art. 32, § 1, which establishes that

> competitive dialogue will be conducted by the hiring committee made up of least three public employees from the permanent staff of the Administration, allowing for the hiring of specific professionals for technical advice.

Due to its natural complexity, therefore, competitive dialogue will not be undertaken by public officials normally designated to act in the area of tenders and contracts, according to Chapter IV of Law 14.133/2021, but by a hiring commission specifically set up for this purpose. The hiring of third-party expertise is allowed, as many administrations do not have three employees with effective knowledge of a necessarily complex area.

> The evaluation of proposals presented in competitive dialogue requires highly qualified professionals. But, in theory, the absence of continuous demand discourages the maintenance of a body of civil servants with specialized knowledge.[26]

At the end of the dialogue stage with the pre-selected bidders, the Public Administration will define the technical, legal and economic model of the contract and begin the last phase, consistent with the traditional competitive model involving private entities. As per item VIII of art. 32, § 1:

> The Administration shall, having announced the conclusion of the dialogue, add to the records of the bidding process those the dialogue, starting the competitive phase with the publication of a notice containing the specification of the solution that meets its needs and the objectives and criteria to be used to select the most advantageous proposal and an open term, not less than sixty business days, for all bidders, pre-selected according to of item II of this paragraph, present their proposals, with the necessary elements to realize the project.

Then, the last phase of competitive dialogue begins, involving competition between private entities for the presentation of the best proposal.

4.3 Competitive phase

After defining the most suitable solution through broad dialogue between competitors, the state entity will select the private entity that presents, within

[26] Alexandre Jorge Carneiro da Cunha Filho e Alexandra Fuchs de Araújo, Diálogo competitivo, op. cit., p. 69.

the scope outlined in the previous phase, the most advantageous proposal. Pursuant to item IX, "the Administration will define the winning proposal according to criteria disclosed at the beginning of the competitive phase, ensuring the most advantageous contract".

It should be noted: the competitive phase, although arising from it, is independent of the dialogue phase; thus, the entity that formulated the best technical solution will not necessarily present the most advantageous or successful proposal. There may be no correspondence, therefore, between the best solution, in the dialogue phase, and the most advantageous proposal in the competitive phase.

It is important to emphasize that, although it is a more objective phase, as is normal in a tender, for example, the law, here too, does not define a closed criterion for conceptualizing the "most advantageous proposal". Management, by pre-defining the criteria, can therefore honor the best price or the technique provided such criteria are also objectively achievable. Under the law, this criterion need not necessarily be established in the public notice itself, which can be described "at the beginning of the competitive phase", after the definition of the object contracted.

According to item IX of art. 32, § 1, the Administration "may request clarifications or adjustments to the proposals presented, provided this does not imply discrimination or distort competition between proposals"; another demonstration of the legislator's concern to maintain competition dynamics at all stages of the procedure evidence of an extension, to a certain extent, of the dialogue already (also) integral.

5. Competitive dialogue and other forms of participation by individuals in public bidding administrative decisions

To clear up any doubts about the concept and appropriateness of competitive dialogue, we will briefly examine here the differences between the new model and other forms of participation in administrative decisions for public contracts already seen in Procedimento de Manifestação de Interesse (PMI); Manifestação de Interesse Privado (MIP); e Contratação Integrada.

In Brazilian law the PMI was originally regulated by the Federal Decree No. 8.428/2015 and expressly provided for by Law No. 14.133/2021 as one of the auxiliary procedures of public bidding and contracting.

Through the PMI, the Public Administration, when presenting its demands, receives studies, surveys and projects that, once filtered by the Contracting Authority, may be undertaken. It is an "important instrument that the Public Administration can use, optionally, to make up for their lack of technical knowledge, indispensable for the structuring of large enterprises".[27]

In this case, however, the Public Administration, recognizing its limited expertise, can seek private consultation **prior to the opening of the tender — which may or may not occur** — so that the latter can develop a viable solution to the state interests. Contrary to what happens in the new bidding model, in PMI the dialogue between management and individuals occurs even before the opening of any competition, which, depending on convenience and management opportunity, may not even take place.

In addition to these differences, competitive dialogue differs from PMI in terms of

> (i) the limitation of participants to bidders previously selected and effectively interested in the object of the bid; (ii) the forecast of a specific phase to deepen the dialogue between Public Administration and private initiative, which may continue until the Administration identifies the solution that meets its needs; (iii) the link between the negotiation phase and contest, which at the same time, (iii.1) stimulates the construction of solutions consistent and appropriate to the objectives pursued and (iii.2) ensures the participation, in the competition phase, only of agents who effectively studied and understood the complexity of business in question.[28]

In the case of the MPI, also regulated by Federal Decree 8.428/2015, it is the individual, who, when identifying a state need, formally prompts the Administration to analyze their project. If there is agreement on the part of the public authorities as to the usefulness of the proposal, the institution initiates the contracting process with the publication of a public notice.

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[27] DI PIETRO, Maria Sylvia Zanella. *Direito Administrativo*. 31. ed. Rio de Janeiro: Editora Forense LTDA, 2018. p. 407.

[28] RODRIGUES, Fernanda; ZAGO, Marina. O que o diálogo competitivo agrega às contratações públicas? *Consultor Jurídico*. Available at: www.conjur.com.br/2019-nov-11/opiniaodialogo-competitivo-agrega-contratacoes-publicas. Accessed on: 23 Aug. 2021.

Here, as in the PMI, the dialogue between Public Administration and the private entity is also given prior to the opening of the bidding, which only will be initiated if there is a decision by the government to that effect.

Finally, competitive dialogue also differs from integrated hiring, already provided for in other pieces of legislation such as the *Estatuto das Estatais*, and defined in art. 6, XXXII, of Law No. 14.133/2021,

> as a system for contracting engineering works and services in which the agent is responsible for designing and developing the basic and executive requirements, performing engineering works and services, supplying goods or providing special services and performing assembly, testing, pre-operation and other operations necessary and sufficient for the final delivery of the object.

According to the definition of the *Lei de Licitações*, itself, in International Contracting there is a demand for the private entity to prepare the basic and executive projects, with all their technical solutions, in the condition of the contract, after, therefore, the conclusion of the bidding. Unlike competitive dialogue, in which the interaction between the Administration and private agent occurs in the scope of the bidding, in Integrated Contracting the bidding occurs without this flexibility.

6. Conclusion

Competitive dialogue is a new bidding model provided for by Law No. 14.133/2021, which, in line with the growing trend of consensus and broad participation in administrative decisions, seeks to promote, within the scope of the bidding procedure itself, a negotiation between public authorities and individuals to create the most appropriate technical solution for a contract, which may be especially complex and innovative.

Applicable, also, to bids involving concession contracts or PPP projects, competitive dialogue is regulated in the new Lei de Licitações e Contratos, divided into three main phases: (i) pre-qualification phase; (ii) dialogic phase; and (iii) competitive phase.

The model is not to be confused with other forms of commercial bidding, such as the PMI, the MPI, or even Integrated Contracting, as, contrary to these

models, the negotiation phase inherent to competitive dialogue develops during the bidding process itself.

A ground-breaking novelty in the Brazilian context, we must consider that it is necessarily all positive. We should keep in mind some problems that the model may generate, in order to try to prevent them.

Although it is an effective mechanism for realizing innovative projects, its use will not always be advantageous, since, by its very nature, competition may be compromised. It is not hard to imagine a scenario in which the best design solution, for technological reasons may only be feasible for a bidder who proposed an alternative proposal.

The nature of the process presupposes private entities undertake complex studies without any guarantee of their success, which may limit competition to economic agents that can bear sufficient risk and enjoy economic tolerance.

Thus, any normative forecasts or public notices that seek at least to mitigate this possible competitive imbalance, even though it is already inherent in the bidding, will be highly pertinent.

As this is a new model in Brazilian law, competitive dialogue will certainly give rise to many further debates which will become clear with time; the current work is a step in this direction.

It is vital, therefore that the model is applied practically.

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