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SUSTAINABLE BIDDING

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SUMMARY

The monograph deals with sustainable bidding. The general objective was to analyze how the changes in the Bidding Law contribute to sustainable public practices in bidding procedures. In relation to the specific objectives, we sought to: describe the concept, the characteristics, that is, the aspects of the bidding procedure; analyze what sustainable bidding and its procedures mean; and demonstrate how sustainable bidding takes place in bidding procedures. The methodology adopted was bibliographic research of a descriptive nature and with a qualitative approach. The results show that Brazil, from the creation of a specific chapter on the environment in CF / 88, started to appreciate its balance and preservation as a collective right. And that from the results of global meetings (Eco-92, Rio + 5, Rio + 10, Rio + 15 and Rio + 20), advances have occurred in sustainable urban development and the green economy. In the context of the emergence of sustainability in terms of bidding in Brazil, Law No. 8.666 / 93 governs the matter and was recently modified by Normative Instruction No. 1/2010, Decree No. 7,546 / 2011 and Decree No. 7,746 / 2012, which provides for the sustainability criteria in the acquisition of goods, contracting services or works by the direct, autarchic and foundational federal Public Administration. It was concluded that green bidding has transformed the State's purchasing power into a strong inducer of sustainable development. Therefore,

Key words: Bidding. Sustainability. Procedures.

1. INTRODUCTION

This monograph deals with a literature review on the topic of sustainable bidding. The study is important because it demonstrates that in the last decades several public policies have been represented aiming at the protection of socio-environmental aspects, such as those adopted through sustainability in purchases through public tenders.

This matter in the last decade has proliferated due to the intricacies of creating procedures and technical aspects to guarantee transparency in bidding processes, as well as to expand social control and reduce risks that may promote the occurrence of fraud.

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Thus, the monograph sought to answer the following problem: How do the changes in the Bidding Law contribute to sustainable public practices in bidding procedures?

It is believed, as a hypothesis of studies, that they contribute objectively to the public power to adopt the insertion of socioenvironmental criteria, aiming to protect the ecologically balanced environment.

The general objective of the monograph was to analyze how the changes in the Bidding Law contribute to sustainable public practices in bidding procedures.

The specific objectives were: to describe the concept, the characteristics, that is, the aspects of the bidding procedure; analyze what sustainable bidding and its procedures mean; and demonstrate how sustainable bidding takes place in bidding procedures.

The first chapter deals with the concept, the characteristics, that is, the aspects of the bidding procedure in the public sphere. In the second chapter of this monograph, sustainable bidding is analyzed as the objective of the bidding procedure, that is, the doctrinal interpretations regarding sustainable practice in public administration and in the bidding procedure were described.

And finally, in the third chapter, we sought to demonstrate the change in Article 3 of Law 8.666 / 93 in the applicability of green bidding, addressing aspects inherent to the procedure described.

2 DEFINING ASPECTS OF THE PUBLIC BIDDING PROCEDURE

In this first chapter, the approach that the doctrines take in relation to the concept of public bidding is presented. The characteristics of the public bidding procedure are also emphasized.

Thus, the theoretical approach consists of an appreciation of the legal doctrines that highlight the public bidding procedure in its core, not only presenting its constitutional basis, but its relationship with other legal norms and how is the process in their practices.

2.1 CONSTITUTIONAL BASE OF BIDDING

The Federal Constitution of 1988 in its Art. 37 addresses the public administration: “Art.37. The direct and indirect Public Administration of any of the powers of the Union, the States, the Federal District and the Municipalities, will obey the principles of Legality, Impersonality, Morality, Advertising and Efficiency ”.

The principle of legality, adopts that the public administration may practice acts that are provided for by law, that is, the principle of legality is the foundation of public administration, the public agent must act in accordance with the law (PEREIRA, 2012).

The principle of impersonality follows the rules of public bidding and is guided by objective criteria, under the assumption that everyone is equal before the law, making the public administration interpret the law in the best way to guarantee the ultimate public interest (CAMPOS, 2012).

Morality cannot be excused from the ethical precepts that need to be present in its conduct, such as honesty, good faith and loyalty. Therefore, this principle also unifies that of legality (FONSECA, 2008).

Advertising, proposes that the government should act with transparency, for knowledge, control and beginning of its effects, requiring the publication of administrative acts, through the effects of effectiveness. Finally, the principle of efficiency establishes the common good, through the exercise of its competences in a neutral, uncomplicated way, in search of quality, satisfying the necessary legal and moral criteria (MONTEIRO, 2011).

The 1988 constitution adopted in the Brazilian state the form of Republican government, characterized by federalism as a state, which in Dalmo Abreu Dallari's conception is an “alliance or union of states”, based on a constitution where “the states that join the federation they lose their sovereignty at the time of entry, preserving, however, limited political autonomy ”.

The principle of indissolubility in our Federal State has been enshrined in our republican constitutions since 1891 (art. 1), and has two basic purposes, which are national unity and the need for decentralization.

Art. 1 of the Major Law states that the Federative Republic of Brazil is formed by the indissoluble Union of States and Municipalities and the Federal District, and is

completed by art. 18, which provides for the political-administrative organization of the Brazilian Republic, comprising the Union, the States, the Federal District and the Municipalities, all autonomous and possessing the triple capacity for self-organization and proper regulation, self-government and self-administration.

The Form of Government according to Alexandrino and Paulo (2007) is related to the way in which the institution of power takes place in society and the relationship between the governed and the governed. If the form of government is characterized by the elective and temporary nature of the Chief Executive's mandates, we will have the Republic; if we are facing a government characterized by its heredity and vitality, we will have the Monarchy. Brazil adopts the republican form.

The Government System is understood by Alexandrino and Paulo (2007) as the way in which the relationship between the Legislative Power and the Executive Power takes place in the exercise of governmental functions constitutes another important aspect of the state organization. Depending on how this relationship is established, if there is greater independence or greater collaboration between them, we will have two systems (or regimes) of government: the presidential system and the parliamentary system. Brazil adopts the presidential regime, whose president commands the Union, the governors command the states and the mayors command the municipalities.

Because of this, it was decided to adopt the multi-party political system several political parties representing the ideological diversity of the people. Our Constitution was enacted in 1988 after 25 years of military dictatorship. This Constitution was elaborated along the lines of the Spanish and Italian constitutions, that is, countries where the system of government is parliamentarism.

The elaboration of this parliamentary constitution was implemented in the Brazilian government system, which instituted presidentialism, after the Brazilian population actively participated in a national plebiscite, which defined the collective and democratic choice of preference for this system of government. On that occasion, the Brazilian population was able to choose between three systems of government: parliamentarism, presidentialism and monarchism.

In this system, the president administers state affairs, while the prime minister chosen by the president administers government affairs. Along with the presidential system, established is the republican system, organized by Montesquieu in three

distinct spheres, called "Power": "Executive Power" (executes laws), "Legislative Power" (builds and drafts and applies laws) and " Judiciary Power "(judges / operates the laws).

The characteristics of the Republic are basically plurality of functions, temporality, electivity and responsibility. The republican regime is based on equality between people and every government governs by virtue of a grant from the governed. This ruler remains a citizen who has received a mandate to perform a certain function. And if you are not faithful to the mandate received, you can be held responsible, you can be jailed from power, and you may also be subject to other sanctions.

The term public administration admits more than one meaning. In the objective sense, it expresses the idea of activity, task, action, in short, the administrative function itself, constituting itself as the target that the government wants to achieve, concrete and immediate activity that the State develops to achieve collective interests. In the subjective sense, on the contrary, the expression indicates the universe of bodies and people that perform the same administrative function as the State.

Public administration is governed by several principles that, as mentioned above, are expressed in the constitution, and still others that are inserted in the various laws that take care of the organization of federative entities.

At the constitutional level, it is important to note that the principles are imposed on all federal spheres, including direct and indirect administration.

2.2 NORMATIVE BIDDING DISCIPLINE IN BRAZIL: CONCEPTUAL ASPECTS

The term bidding is derived from the Latin word licitatio, which means bidding. In Portuguese, this term came to be used in the sense of offering a certain amount at the time of auction, adjudication, public auction or judicial sharing (CRETELLA JR., 1999).

Thus, as in the federal constitution in its article 37, there are principles expressed, in the Bidding Law we also have principles such as that of Administrative Probity that reports the conduct of public agents and bidders, who must satisfy good customs, ethics, morals and rules administration.

The principle of Binding to the Calling Instrument that obliges the bidder or the administration to analyze the rules and requirements established in the call for action. Therefore, at the beginning of the Objective Judgment, the administrator must analyze the objective criteria defined in the call for proposals, judging the prerogative of the administrator to judge the subjective factors or criteria not provided for in the call for action. Around these principles, there must be secrecy when submitting a proposal, if the principle of equality is not violated.

Finally, the Compulsory Adjudication, defines that the loser in the bidding, the administration will not be able to indicate another one that is not the winner, except if this one came to give up or not to sign contract, without just reason.

The bidding process aims to select the most advantageous proposal, which best serves the public interest, using the administrative procedure as an instrument, through the modalities provided for in Law 8.666 / 93.

Competition is the modality that any interested party, in the initial preliminary qualification phase, proves to have minimum qualification requirements required in the notice for the execution of its object (Article 22, § 1, of Law 8.666 / 93), which has a broad characteristic advertising or principle of universality, qualification of the interested party at the beginning of the procedure, use in large contracts, works and services of values greater than 1,500,000.00, purchases and services of values greater than 650,000.00.

Price taking is from interested parties duly registered or who meet all the conditions required for registration by the third day prior to the date of receipt of proposals, subject to the necessary qualification (Article 22, § 2, of Law 8.666 / 93), before the characteristics of registered or previously qualified interested parties, advertising requirements in the Official Gazette, works and services of up to 1,500,000.00, purchases and services of up to 650,000.00.

The Invitation is for interested registrations or not, chosen and invited in a minimum number of 3 (three) by the administrative unit, which will affix, in an appropriate place, a copy of the inviting instrument and extend it to the others registered in the corresponding specialty who express their interest with up to 24 (twenty-four) hours before the presentation of proposals, provided for in article 22, paragraph 3, of Law 8.666 / 93, with characteristics of at least 3 (three) guests, registered or not, no public notice and use of the invitation letter of 5 (five) working

days, works and services with values up to 150,000.00, purchases and services with values up to 80,000.00.

As for the contest modality, the interested party for the choice of technical, scientific or artistic work, through the institution of prizes or remuneration to the winners, according to criteria in the notice published in the official press at least 45 (forty-five) days in advance. (Article 22, § 4, of 8.666 / 93).

The Auction modality is for any interested party for the sale of unserviceable assets for the administration or for products legally seized or pledged, or for the sale of real estate provided for in article 19, of 8,666 / 93, to whom he offers the highest bid, equal or higher than the assessment value. (Article 22. § 5 of the Bidding Law).

The Auction is a modality, created by Law 10.520 / 02 and regulated at the federal level, by decree 3.555 / 00 that defines “the bidding modality in which the dispute for the supply of common goods or services is made in public session through proposals for written prices and verbal bids ”, as it has the characteristics of holding a public session, hiring common goods and services, faster, the stage of submitting written proposals and verbal bids, admitting only the lowest price type, renewal of bids verbal, auctioneer and support team.

Emphasizing that the auction cannot be used to contract engineering works or services, disposals and real estate leases. Decree No. 5.504 / 05 made it mandatory to use the trading session, preferably in electronic form, for the contracting of common goods and services.

Bidding is common to public and private law. The bidding institute is studied by the general theory of law, which allows it to adapt to its two fields. Private bidding (can be waived and is subject to the will of the dominus), and public bidding (subject to the laws of the State that places it outside the purview of the administrator, making it mandatory, except in certain cases). Therefore, the Public Bidding is the mandatory competitive procedure precedent to the conclusion of contracts between public legal entities on the one hand and private, whether physical or legal, on the other (MEIRELLES, 1993).

Justen Filho (2009) teaches that bidding can be defined as the administrative procedure whereby a public entity, in the exercise of its administrative function, opens to all interested parties who are subject to the conditions established by the calling instrument, the possibility of formulating proposals, among the which it will

select and accept the most convenient for the conclusion of the contract. Anyway, the object of the bidding is what the Administration wants to contract.

> Administrative procedure whereby the Public Administration selects the most advantageous proposal for the contract of interest. As a procedure, it develops through a succession of binding acts for the Administration and for the bidders, which provides equal opportunity to all interested parties and acts as a morality factor in the administrative business (MEIRELLES, 1993, p. 123).

According to the concepts commented above, we can notice that the bidding, even having as its object the most advantageous proposal, the highest quality and the lowest cost benefit to serve the public interest, uses administrative principles that guide the bidding procedure, both in the internal phase as in the external, always with procedural speed, the object of the bidding is the work, the service, the purchase, the sale, the lease, the concession and the permission that, in the end, will be contracted with the individual.

There are several principles that guide Bids in all its phases. Thus, from the receipt of the proposals to their judgment, the Bidding Commission will proceed in strict accordance with the various rules and principles on which the bidding rules are based. Brazilian law is very clear with respect to the above. Article 37, XXI, of the 1988 Federal Constitution emphasizes that:

> Except for the cases specified in the legislation, the works, services, purchases and disposals will be contracted through a public bidding process, which ensures equal conditions for all competitors, with clauses that establish payment obligations, maintaining the effective conditions of the proposal, under the terms of the law, which will only allow the requirements of technical qualification and economy indispensable to guarantee the fulfillment of the obligations (BRASIL, 1988).

The law 8666/93 provides in its article 32, caput, that the purpose of the bids is to guarantee the observance of isonomy and select the best proposal, obtaining equality before, during and after the bidding procedure.

The identification of bidding fraud requires due observance of the formalization of the process, through the analysis of the bidding documents, the documents submitted by the bidders and all the documentation related to the procedures carried out, paying special attention to the irregularities detected, such as the existence of

unsigned, unauthenticated, identical documents from different bidders, non-observance of deadlines, etc. (MOURÃO; VIANA FILHO, 2010).

Fraud in the public administration is very common and easy to happen, because it is possible to manipulate a bidding process, in the participation requirements, many are used to taking illicit profits, disrespecting the principles on which the bidding is based. Fraud can be avoided when those responsible respect the legislation and the basic principles of the bidding process.

In addition, it is necessary to pay attention to the real context of the bidding process, that is, to verify aspects such as the demonstration of the need to contract by the administrative authority, the value of the contract in comparison with market values, the fulfillment of the contracted object (MOURÃO; VIANA FILHO, 2010).

In this sense, it is the lesson of Affonso (2015) when discussing the elements that must be verified for the detection of bidding fraud:

> They are essential elements in the detection of fraud, and the Planning Matrix should include the audit questions related to:
> - the formal and real regularity of bidding procedures;
> - the physical and legal situation of the bidders;
> - the signed terms and values;
> - the status of the works; and
> - the identification of those responsible.

It is essential to prepare a verification script, covering the entities involved, in the transferring body to identify the agreements, object of analysis, and to raise the amounts transferred, the dates of the transfers, verifying the accountability situation.

In the Integrated System of Public Administration (Siafi) and Integrated System of Human Resources Administration (Siape), checking the status of the agreements and raising the list of responsible managers (name, CPF, address and management period), certifying the record of the situation agreements and identifying those responsible and the respective management periods. The intervening entity (Caixa Econômica Federal or other), request for onlending contracts, copy of the processes and reports for monitoring the works, certifying the registration of the status of the agreements and identifying those responsible and respective management periods.

While in the executing agency: a) formally analyze the bidding procedures; b) check the contracts signed, listing the data of the performing company; c) list, in a spreadsheet, the data of the participants in the tenders, relating to: name of the

participating companies; address and area of operation; d) collect the complete identification of the members of the Bidding Committee and the person responsible for the Term of Acceptance of the Work; e) compare the contracts with the basic and executive projects and the physical situation of the work; f) list the payments made and the beneficiaries of the payments.

Banking establishments request copies, front and back, of the related checks, analyzing the pertinence of the beneficiaries and, also, possible endorsements for other companies or individuals. In the state commercial board, it is necessary to request an extract of the legal status of the listed companies, with changes in partners, address and area of activity, verifying the regularity of their constitution and functioning at the time of bidding and execution of works.

However, go to the addresses of the companies, indicated in the documents presented in the bids and in the Commercial Registry (paying attention to the possibility of changing addresses), and, in case of physical absence in the indicated place, request information from residents and photograph the places indicated as addresses, documenting the physical absence or operational incapacity of the companies.

The Federal, State or Municipal Revenue, entail the request for the date of registration of the companies in the respective registers and the operating situation, in the period analyzed, verifying the suitability of the Invoices.

Always at the construction site, there is an identification of the real executors of the works, the construction stage, the material used and the compatibility of the execution with the approved projects, checking whether the physical presentation corresponds to the payments made, the contractual terms and the clauses of the agreements . Together with the beneficiaries, interviews on the use of the works will be carried out, assessing the fulfillment of the object of the agreements.

The principles applied to tenders are reflections of the principles of Administrative Law, essentially standardized in its structure. When selecting individuals to provide services, the administration can never excuse itself from observing the principles explained above, whether for reasons of morality or for the sake of legality, since the principles of bidding, more than a moral issue, are a legal issue, in view of its provisions in the Federal Constitution of 1988 and infraconstitutional legislation (Federal Law No. 8.666 / 93, among others).

2.3 INTERNAL PHASE AND EXTERNAL BIDDING PHASE

It is intended in this item to present the main aspects addressed in the legal doctrines on the internal and external phases of the bidding.

2.3.1 Internal Bidding Phase

The internal phase corresponds to the acts practiced by the public administration bidding, initiated by the factual verification of a given public need, that is, with the reason. The reason is external to the situation in the real world, which must be taken and observed by the public administration (SPIAZZI, 2001).

The internal phase brings together the acts that will give rise to the definition of the bidding, that is, the planning for its execution.such as the drafting of the notice, the definition of the type and modality to be followed. Therefore, the public administration will need to be directed by qualified technicians to specify the object that will be hired.

Thus, the execution of the bidding must be based on the reason that led to the initiation of the procedure, so that there is a perfect match between the procedure and the reason, since the need for bidding depends on the existence of the reason in the real world (SPIAZZI, 2001).

Then, in the internal phase, all the necessary and preparatory acts are carried out to trigger the bidding procedure. The first act of this phase is the so-called requisition, which consists of the request made by the unit interested in contracting a service or certain asset. Once the requisition is issued to the competent authority, which is the ordering authority or equivalent authority, it analyzes the existence (or not) of sufficient resources to sustain the expenses and authorizes (or not) the opening of the procedure. With the issuance of the authorization, the drafting of the summoning instrument starts to be elaborated, which, once it is analyzed and approved by the legal body, is taken to publication (SPIAZZI, 2001).

The internal bidding process begins with the request of the interested sector, this request must have the object with its specifications (Term of Reference), the

sector responsible for bidding will be in charge of evaluating the description of the object, after the evaluation of the specifications, the hiring must be carried out by the resource manager, after these steps, the mode will still be defined (Invitation, Price Taking, Competition, Auction, Contest or Auction), and then the agent responsible for finance will inform you whether or not budget credits are available for budget expenditure.

However, the internal phase determines the rules, defines the limits and directs the execution of the bidding procedure, before making it public. The publication of the event, which takes place with the call of interested parties, determines the beginning of the external phase of the bidding (SPIAZZI, 2001).

2.3.2 External Bidding Phase

The beginning of the external phase occurs, therefore, with the publicity of the intention of the Public Administration, which is regulated in the form and intensity of art. 21 of Law 8.666 / 93. This is called the bidding opening phase.

The external phase comprises five phases chronologically ordered and named according to their purpose, namely:

a) opening of the bidding process;

b) qualification of bidders;

c) classification of proposals;

d) approval of the procedure;

e) award.

It is worth mentioning that the law 8.666 / 93 in its art. 43, item VI, establishes the homologation as the final act of the bidding, which attributed to the superior authority the competence both to approve and to adjudicate the good object of the bidding. For the distinguished jurist Pietro, Maria Sylvia Zanella Di, the provision of the aforementioned article reversed the practice of the final acts of the procedure, since, "Previously to this law, the award was the final act practiced by the bidding committee itself, after which approval by the competent authority ". This new legal commandment attentive to reality, since, one should not be adjudicated before knowing if the procedure is legal, and more, if it is still relevant to the public interest.

Dissident with the inversion of the final acts, the opinion of Dallari, Adilson Abreu, is worth mentioning, for whom, the adjudication must precede the

homologation, since, in his view, the approval phase is an act external to the procedure, which constitutes a mere form of attribute effectiveness to the event. It does not have the ability to modify the manifestation of the concretized will, which is consistent with or repelled.

Having made these considerations, the matter concerning the stages of the external phase of the bidding is resumed, following what has been mentioned elsewhere. After the opening of the bidding process, which takes place with its publication, a public session is opened for the qualification envelopes of those interested in contracting with the Public Administration. In this session, interested parties, for the purposes of qualification, must present the documentation required by the invitation to bid, which in turn must be guided by the guideline of art. 27 of Law 8.666 / 93. Art. 43, § 1 of Law 8.666 / 93 expressly requires that, "The opening of the envelopes containing the documentation for qualification and the proposals will always be carried out in a public act previously consigned (...).

With the submission of proposals, a mandatory link is established between the administration and those who were previously interested, since, at that moment, they become bidders.

As already mentioned, the documents required for the qualification must be based only on the criteria established by law 8.666 / 93, in its art. 27. In other words, when examining the situation of those who participate in the event, management will only analyze the fulfillment (or not) of the requirements established in the invitation to bid. Such requirements must exclusively refer to the legal, technical and economic-financial capacity, in addition to fiscal regularity. In the lesson of master Dallari, Adilson Abreu, “The triple: legal, technical and financial capacity formulates the idea of the bidder's suitability, to bear the burdens and responsibilities that he intends to assume, when signing a contract with Public Administration”.

Whoever is disabled will receive his / her sealed proposal envelope. This decision is subject to a hierarchical appeal (art. 109, § 1 of law 8.666 / 93), which, given its suspensive effect, determines its prior assessment, that is, before starting the phase of judging the proposals. Convenient here, the following question: What if all interested parties are disabled? Law 8.666 / 93 in view of this situation, provides in § 3 of its art. 48, to the Public Administration, the opening of a new term for those interested to submit new documentation.

The time to mention that the bidding law contemplates, in a definitive manner in its art. 22, the bidding modalities, namely, competition; price making; invitation; contest and auction. Such comment proceeds to emphasize that, in the price taking modality, the qualification phase, results from previous registration, and in the invitation modality, it is assumed, through the invitation.

Once the qualification phase has been resolved, the proposals are analyzed, which takes place at two different times. The first step is aimed at verifying whether the proposals fulfill the conditions required in the invitation to bid. The second is the trial itself. Most of the time, what prevails for the classification of the proposal is the price, because what is sought with the bidding is to guarantee to the Public Administration the selection of the best proposal, capable of meeting its needs, which has the greater purpose of meeting the public interest (MONTEIRO, 2011).

After the qualification and classification phases have been passed, it follows according to art. 43, VI of Law 8.666 / 93, to the approval and adjudication of the object of the bidding. For approval, the higher authority must analyze the acts that were performed during the event. At the time of this examination, the authority may approve the bidding, that is, it may grant legitimacy to all acts performed during the event. This is a way of controlling the bidding procedure.

At this moment, the authority must, in addition to verifying the regularity of the acts, evaluate the questions regarding the opportunity and convenience of the bidding for the Public Interest.

When the authority understands that the bidding has complied with the legal requirements and that it serves the Public Interest, it must award the winner the object of the bidding.

Mister stress that the bidding procedure can have another destination, that is, it can be revoked or annulled. Its annulment can occur through the identification of an addiction, that is, an insurmountable illegitimate act, capable of giving rise to the annulment of the procedure. Therefore, the effect of the annulment affects the illegal acts that were practiced during the event, and consequently seal the bidding destination.

The act of revocation, on the other hand, does not aim to examine the legality of the act, but rather, to verify the occurrence (or not) of two legal presuppositions that legitimize it, namely, the occurrence of a supervening fact to that authorization

issued by the superior authority for start bidding, and for reasons of Public Interest. These two legal assumptions must be assessed under the criteria of opportunity and convenience.

To finalize the notes concerning the bidding procedure, it is essential to note that a new modality was introduced in the field of bidding, namely, trading through provisional measure 2.108-10, dated January 26, 2000, regulated by Decree no. 3,555 , of 08/08/2000.

This is a peculiar type of bidding, applied exclusively to the Federal Administration. It is important to mention it, because in this modality there is an inversion of the phases, that is, in contrast to the other bidding modalities, the auction modality starts with the opening of price proposals, to later proceed to the opening of the qualification envelopes.

This inversion is valid since, when the bidding process is initiated, the Public Administration is always interested in selecting the lowest price.

3 SUSTAINABLE BIDDING AS A PURPOSE OF THE BIDDING PROCEDURE

In this chapter, it is intended to address sustainable bidding as an objective of the bidding procedure. Explaining its main purposes about its applicability in the scope of bidding aspects in Brazilian territory.

In addition, it addresses the main benefits of this instrument for protecting the environment in the country in the short, medium and long terms.

3.1 THE ENVIRONMENTAL ISSUE AND ITS PROTECTION

As understood in the studies by Bobbio (2011), it is known today that it was of paramount importance that men create ways to protect life and everything that surrounds it, through the creation of fundamental human rights. Because they are historical, they are mutable rights, susceptible to transformation and expansion.

> The development of technique, the transformation of economic and social conditions, the expansion of knowledge and the intensification of the means of communication may produce such changes in the organization of human life and social relations that create favorable occasions for the birth of new needs and, therefore, for new demands for freedom and powers (BOBBIO, 2011, p. 39-40).

Regarding the emergence of new rights, it is observed that in ecological movements, almost a right of nature is emerging to be respected or not explored, where the words 'respect' and 'exploitation' are exactly the same ones traditionally used in the definition and justification human rights.

The emergence of a new right to a balanced environment, linked to a healthy quality of life, is said to correspond to the overcoming of an anthropocentric vision, to consider the human being as an integral part of nature and all its life forms.

In all bidding procedures, the approach is to preserve the requirements of the bidding document, ecological and sustainable values, aiming at the preservation of the environment as a preventive measure.

Nowadays, when discussing the terms of the Earth Charter, as a new Universal Declaration of Human Rights with regard to the environment, it is advocated the breaking of the anthropocentric paradigm to adopt a cosmocentric

view, in which the Earth would be the mother of all beings, human or not, and the place of all who inhabit it. Hence, the characteristics of the principles of respect, solidarity and care emerged as foundations of life itself (BOBBIO, 2011).

It can be said that the protection of nature was carried out by means of private law rules, these protecting neighborhood relations, and sometimes criminal or administrative law, always aiming to sanction the misuse of natural resources in ways that cause harm. to third parties.

The expression environment, according to Silva (2013, p. 102), apart from criticisms about the apparent redundancy, serves to designate the "interaction of the set of natural, artificial and cultural elements that provide the balanced development of life in all its forms ".

It is understood, according to Wandalsen (2012, p. 28-29), that sustainable bidding aims to “win a more beneficial proposal to the environment through requirements consisting of sustainable practices, techniques aimed at preserving and recovering the targets of environmental impacts ”. Therefore, it is understood that it is necessary to observe the environmental principles related to sustainable bidding, since these principles have normative force.

The Principles of Environmental Law, more than instruments of systematic relation, establish norms destined to legal protection of the environment, the Precautionary Principle of the Rio / 92 Declaration on Environment and Sustainable Development was proposed at the Conference in Rio de Janeiro, in June 1992, which defined it as an action aimed at anticipating the risk or danger of damage to the environment, once that in its precepts there are concerns to preserve and protect it.

The Prevention Principle determines that measures are taken to remove or, at least, minimize the damage caused to the natural environment due to human activities, therefore, through this principle the Public Administration can guarantee the effectiveness in caring for the environment (BITTENCOURT, 2006).

The Polluter Pays Principle motivates the economic agent to use preventive actions, to reduce less polluting activities, and, furthermore, the agent must bear the burden of preventing and repairing the losses caused by the production process, that is, the Sustainable Bidding, in the understanding of this Principle, seeks in its

requirements the guarantee that the agents prove the capacity to deal with the impacts caused on the environment (COLOMBO, 2006).

The Principle of Balance is plink which must be weighed all the implications of an intervention in the environment, seeking to adopt the solution that best reconciles a globally positive result. A balance must be drawn between the different repercussions of the project to be implemented, that is, the economic, environmental and social consequences must be analyzed (FARIAS, 2011).

It is an environmental version of the well-known cost / benefit exam that, in the final analysis, informs all and any human activity carried out consciously. Finally, the principle that bases environmental preservation for present and future generations, acting in a sustainable way, so that future generations can take advantage of natural resources is the Principle of Intergenerational Solidarity or Equity (FARIAS, 2011).

The artificial environment, the cultural environment, and the natural environment. Therefore, consistent with the concept expressed by Law No. 6,938 / 1981, which considers the Environment the “set of conditions, laws, influences and interactions of the physical, chemical and biological order, which allows, shelters and governs life in all its forms ”.

Environmental law, as an instrument of intervention in the economic order, has an undeniable content of economic law. The interference of the norms of environmental law in the economic activity aims, however, to ensure the elevation of the quality of life of human beings, which requires the preservation of the diversity of environmental resources as a guarantee of human life itself.

The formation of an environmentalist conscience gave rise to the emergence in several countries, of environmental protection laws that are gradually being improved. In Brazil, the first norms for protecting the quality of the environment are those inserted in the Civil Code, which are privatistic, therefore, aimed at resolving neighborhood conflicts and the right to build. After the Civil Code, successive legal diplomas came that circumstantially disciplined the legal protection of the environment, which will not be mentioned because there is no coherence with the thematic proposal.

In the most recent Constitutional Charter, the protection of the environment is inserted mainly in terms of fundamental rights and the Economic Constitution. Thus, from 1988, Article 225 emerges, proclaiming to everyone the right to an ecologically

balanced environment, a common use and essential to a healthy quality of life, imposing on the Public Power and the community the duty to defend and preserve it. it for present and future generations.

In this context, those who act against the protection of the environment, according to Diniz (2015), are committing a crime of violation of the protected collective property, under the formal aspect, a typical and anti-legal fact. Anti-legality is the relationship of contrariety between the typical fact and the legal system.

Thus, environmental crime is any damage or loss caused to the elements that make up the environment, protected by legislation. In this context, the question of the legal reserve arises, which according to the dictates of art. 16 of the Forest Code, the choice of the place to be considered as a legal reserve is the responsibility of the State Department for the Protection of Natural Resources.

3.2 BIDDING OBJECTIVES AND DOCTRINAL VIEW OF SUSTAINABLE PRACTICE IN PUBLIC ADMINISTRATION

Sustainability in administrative relations, as explained by Freitas (2012) is a practice that within the scope of public administration has two conflicting paradigms:

The. The old-fashioned or patrimonialist insatiability paradigm: still dominant, due to the inertial weight of the status quo, it enthrones inertia, short-term tyranny and emotion in decisions. Cultivates authority for authority and relies on the erratic powers of discretion. Inflates asymmetric information. It does nothing to solve - and still aggravates - the problems of adverse selection and moral hazard (FREITAS, 2012);

B. The sustainability paradigm, which has a different view and goes in the opposite direction, as it is based on dialogical, pluralistic and prospective rationality, with plasticity coupled with the requirements of reasoning and stability, in the decision-making process. It does not serve simplistic economic growth through growth, since it supposes policies conducive to the universalization of well-being and social cohesion, with protective regulation against market dysfunctions and, whenever necessary, with the timely assimilation of lessons from failures (FREITAS, 2012).

In the competition between both paradigms, it is observed, the search of the public manager for the immediate pleasure versus the lasting well-being. In this clash, there is no room for abstention: the Administrative Law of sustainability is chosen.

It is necessary to adopt in the Public Administration a new cognitive and decision-making model, in the realization of fundamental objectives of the Constitutional State, not of the whims of political agents, nor omissive actions to benefit few, but a public administration redesigned under the influence of fundamental rights is desired. good public administration and the constitutional principle of sustainability (whether in the theoretical sphere or in operational practice), in order to make it efficient and effective in inducing well-being.

That is why it is necessary to impose incisive protection of the right to efficient and effective administration, proportional to the fulfillment of its duties, with transparency, motivation, impartiality and respect for morality, social participation and full responsibility for its omissive and commissive conduct.

Guardianship that, in several cases - such as the duty to provide medicines for continuous use or the prohibition of lethal products - makes the difference between life and its complete denial. In other words, it aims at the progressive constitutionalization of administrative relations. Constitutionalization, in the sense of conferring a pronounced expansion for the effectiveness, direct and indirect, of the right to sustainable public management.

The premise was explained by Freitas (2012) when stating that Constitutionalization in this context is related to bringing constitutional principles and the world of facts closer together. In short, making Administrative Law constitutionalize management relations, forcing the transition to the new cycle of sustainable management (with the improvement of available tools and incentives), aiming at aggregating benefits and results of proven quality.

It is necessary to develop the quality of decisions and how they will be executed in organizational terms, with the adoption of a checklist for major administrative decisions, in accordance with the goals transparently established, above the mandates.

In this line, the systematic reframing of Administrative Law, based on the exchange of pre-understandings, means that, in the current days, sustainability can

be incorporated as a nerve vector. Therefore, it is mandatory, in administrative relations, that development capable of producing lasting well-being, individually and collectively. Other than that, there is a deviation in purpose (FILHO, 2009).

Based on these assumptions, it is necessary to list the main characteristics of the prescribed state regulation (within the scope of the Brazilian regulatory authorities, without excluding the self-correlation and the regulation that operates within the Administration. Thus, it begins by stating that, for Freitas (2012), sustainable regulation needs to be more of the State than "governmental", in the sense that the regulator exercises typical activity of the Constitutional State, unmistakable with partial views of the Executive Power, therefore, it is necessary to leave the impartiality as tonic, without place for passivism.

It is understood, therefore, that sustainable regulation can be performed by entities that do not bear the name of regulatory agencies, but it is important that they are autonomous, technical and interdisciplinary, or in other words, not subordinated to pressure, and taking the management relations necessarily in a long-term horizon.

According to Moreira (2003), sustainable regulation aims to reduce the asymmetries between combating the problems of adverse selection and the performance of moral hazard. Therefore, its implementation may promote the correction of market and government failures. In other words, it will correct administrative malfunctions in a reasonable time (curb fraud, assess and report on market risks).

In this sense, this sustainable regulation must observe the principle of maximum transparency, that is, it must act in such a way as to remove, entirely, the opacity of the regulatory process and to stimulate social participation. In addition, regulators must not neglect the intelligible character of their work, that is, they cannot abuse undecipherable language in the decision-making process.

Thus, efficient and effective conflict-reducing regulation is sought in decision-making and characteristics of public standards. However, adopting a decision strong enough to demand emergency measures to assume goals outlined by the law, but, before that, by the Constitution, aware that the noncompliance with constitutionalized policies can give rise to liability, for omissive or commissive conduct (BARBOSA , 2007).

Sustainable regulation has deference to the management reserve and the law reserve, except in cases of violation of fundamental principles, objectives and rights. Regulatory innovation, if any, will have to restrain itself within the limits of systematic legality. That is to say, regulation cannot litigate against the reservation of the law. Sustainable regulation must act in a concatenated and synchronous manner with control, under penalty of continuing bidding deadlocks and paralysis, for example, in environmental matters.

Sustainable regulation should exercise a public arbitral role: regulators, in the face of possible conflicts, may deal, in terms of their own competence, with available rights.

And it must observe the adequacy between means and ends, with the use of the interpretation of the administrative norm that best guarantees the fulfillment of the public purpose to which it is directed. Sustainable regulation must act in a systemic manner (example: agreements between regulators are feasible, without prejudice to agreements between regulation and self-regulation, as long as, as underlined, they do not escape from the undeniably state character, nor do shadow zones be created). Therefore, it must adopt the concept of administrative discretion expressly linked to the primacy of fundamental rights, including those of future generations (BARBOSA, 2007).

Therefore, the primary insertion of constitutional objectives in the regulatory agenda is mandatory in view of art. 3. of the Constitution, but also to realize sustainability in all normative application (of principles and rules) and in all process management. In this respect, systemically relevant economic activities and public services should be guided by an adequate weighting of costs and benefits, direct and indirect, as well as by an accurate assessment of risks, in order to provide proportional returns to the regulated sectors, but avoiding the undesirable effect of regulatory flight, which keeps strategic sectors out of any control.

According to Freitas (2012), sustainable regulation motivates, in a congruent and explicit manner, all its decisions that affect the rights or interests of current and future generations. Sustainable regulation, in the face of the high complexity of certain processes, must understand reverse causality and depart from the fallacy of false causes. In addition, it must overcome the culture of excessive weight lent to the Executive Branch, given that, especially in presidentialism, this trend generates

instability and volatility in the rules of the game, driving away or freezing productive investors, instead of providing legal security for beneficial investments of long-term, typical of the low-carbon economy.

3.3 PROCEDURES FOR CARRYING OUT SUSTAINABLE BIDDING

The adoption of a bidding procedure aimed at promoting environmental sustainability does not yet have a specific legal discipline in the Brazilian legal system, however, certain federal states have been dedicating themselves to the regulation of this matter, having as example Acre, Amazonas and Sao Paulo; which stand out in relation to the observance of environmental criteria in their administrative contracts.

Among these, the State of São Paulo today presents a significant standardization, with Decree n. 41,629 / 97, which provides for environmental and consumer protection, listing restrictions on the purchase of products or equipment by the state public administration that contribute to the destruction of the ozone layer, and Decree no. 49,674 / 05 which regulates the environmental control of the use of native wood and its by-products in works and engineering services contracted by the State.

The mobilization in search of the effectiveness of environmental sustainability through the performance of the Public Power also passes through the native Judiciary, with the action of the Federal Regional Court of the 4th Region which established the following ordinance:

> Ordinance No. 145, OF SEPTEMBER 12, 2003.
> THE PRESIDENT OF THE FEDERAL REGIONAL COURT OF THE 4th REGION, in the use of his legal and regimental attributions, in view of what is contained in Administrative Process No. 03.30.01049-2, resolves:
> Art. 1 - ESTABLISH the progressive adoption of non-chlorinated paper within the scope of this Court.
> Art. 2 - The acquisition of non-chlorinated paper will correspond to 20% (twenty percent) of the total amount of A4 format paper (210mm x 297mm), 75g / m2, in the bidding processes.
> Art. 3 - Non-chlorinated paper will be used primarily in correspondence and documents addressed to the Court's external public.
> §1 - It should be printed on the right (longitudinally) or bottom margin of the non-chlorinated paper, in Arial font, size 8 and centralized the expression "Original printed on non-chlorinated paper. The environment thanks you.".

> Paragraph 2 - Invitations, business cards and other printed items of an occasional nature should be made on non-chlorinated paper whenever possible, according to financial availability.
> Art. 4 - The Material Recycling Commission should promote other feasibility studies on the use of non-chlorinated paper in other routines and services.
> Art. 5 - This Ordinance will come into force on the date of its publication.
> PUBLISH YOURSELF. REGISTER. FULFILLS.
> Des. Federal Vladimir Passos de Freitas
> President ”

In this sense, as the Public Administration observes independently of the performance of governmental bodies or sectors, it has mechanisms that enable the process of socioeconomic development without compromising the quality of the environment, however, as pointed out, there is not yet a federal diploma that supports this need .

On this issue, the existence of a proposal that is being processed in the national congress with the scope of positively broadening the adoption of sustainable bidding as the main instrument to be used in the national public administration is highlighted.

Thus, currently there is the Federal Senate Bill no. 07/25 which aims to modify Law no. 8,666 / 93 through the insertion of environmental sustainability criteria to the tenders promoted by the Public Power, for this project two normative modifications are foreseen, the first in Article 3, § 2, item IV, which proposes as preference for the tiebreakers environmental certification, issued by an entity with competence recognized by the federal agency for metrology, standardization and industrial quality; the other change is in article 30, which proposes the requirement of technical proof by the bidder of respect for environmental sustainability when the work involves potential environmental damage, containing the following wording:

> Art.30. (...)
> V - proof of compliance with environmental sustainability requirements, as defined in the call notice in accordance with the object of the bidding, whenever the work, service or product being bid involves potential environmental damage, either by its nature or by the location of the facilities necessary for its execution or supply. (...)
> § 13. Proof of compliance with the environmental sustainability requirements required in the invitation to bid will be made by technical reports or certifications provided by legal entities qualified to grant them and will deal with different indicators of technical and environmental training of the bidder for the execution of the object of the bid. bidding, such as:
> I - use of techniques and procedures that favor reduced environmental degradation or product recycling;
> II - respect for the applicable technical standards on the preservation of biodiversity and the ecosystem;

> III - proof of previous experience in the elaboration of projects or in the execution of environmentally sustainable works or services;
> IV - proof of having in its professional staff technicians who have specific training or qualification to develop environmentally sustainable activities;
> V - proof of use of inputs produced or extracted in an environmentally sustainable manner;
> VI - existence of a management plan for the use of natural resources and the handling of waste;
> VII - no sanction applied for environmental damage pending compliance;
> VIII - inexistence of a commitment term of an environmental nature that has been entered into and not complied with. (PL No. 25/07)

Thus, it appears that there is an attention of the legislator to the environmental preservation promoted by the State, given that it has the same participatory strength of the community to effect the preservation of the environment, however, the approval of a legal document that in a coherent and comprehensive manner imposes on the Public Administration the observation of sustainable measures and practices.

Thus, the public administration must adopt the constitutional and legal obligation to carry out sustainable administrative bids and contracts, in all Powers and by all Powers. In other words, the duty to carry out sustainable public contracts requires the reconformation of behaviors: guided by the fundamental imperative of sustainability, the manager must, in all management relations, promote the well-being of the present generations, without making the well-being unfeasible. future generations, whose fundamental rights are, from the start, fully recognized by the legal system.

In public tenders and contracts, the State Administration must be immediately diligent in actively protecting the right to the future. Having considered this point, it should be noted that the most significant control over administrative acts, procedures and procedures is that of effectiveness (CF, art. 74), instead of simple efficiency or mere legality (CF, art. 37).

As seen, efficiency, in paradoxical situations, can even quickly produce the unsustainable. For this reason, the densification of the principle of effectiveness (understood as the achievement of results and processes compatible with the fundamental objectives of the Charter, not only the ability to produce effects in the legal world is what matters to sustainability).

The State Administration can continue to be insufficient and ineffective in actively protecting the fundamental rights of present and future generations.

4 GREEN BIDDING AND THE CHANGE REGARDING ART. 3rd LAW 8,666 / 93

In this chapter, we intend to address the role of the state in the defense of sustainability, that is, it is intended to address the main contributions to the public resources system the existence of green pro-sustainability tenders that benefit from the protection of rights for future generations.

Still in relation to the aspects to be addressed, it is also intended to explain the change in art. 3 of Law 8.666 / 93 regarding the criterion of promoting sustainable national development.

4.1 THE ROLE OF THE STATE IN THE DEFENSE OF SUSTAINABILITY

Brazil, from the creation of a specific chapter on the environment in CF / 88, started to appreciate its balance and preservation as a collective right, which should use it with the purpose of generating quality of life. It should be noted that CF / 88 also imposed the co-responsibility of the citizen and the Public Power for its defense and preservation (art. 225). According:

> When proclaiming the environment as a good for the common use of the people, its nature of subjective public law was recognized, that is to say, demandable and exercisable in the face of the State itself, which also has the mission to protect it (MILARÉ, 2005, p. 148).

Prior to the constitutionalization of the matter, the matter was dealt with through infraconstitutional rules. As was the case in several other countries, including the so-called developed ones, Brazilian legislation was slow to expressly address the issuesustainability, which only occurred in 1988.

The main legal provisions in order to protect the environmental heritage and limit its exploitation, according to Machado (1998) were in sparse legislation. In 1965, Law No. 12,727 / 12, of September 15th, amended by Law No. 7,803 / 89 that instituted the Forest Code. In 1967, with Decree-Law No. 221, of 28 February, which instituted the so-called Fisheries Code. In 1980, with Law No. 6,803, of July 2, which refers to the Environmental Impact Study.

In 1981, with Law No. 6,938, of August 31, which provided for the National Environment Policy, its purposes and mechanisms for formulation and application. It

established its objectives (art. 4) and the constitution of the National Environment System (art. 6, amended by law No. 8,028 / 98); (ANTUNES, 1998).

Still according to Fuentes (1999), other laws were of fundamental importance for the Environment to have legal value and the autonomy desired by CF / 88. In 1997, Law No. 9,433, instituted the National Water Resources Policy and in 1998 Law No. 9,605 called the Environmental Crimes Law. On July 18, 2000 Law 9,985 was created, providing for the National System of Nature Conservation Units (SNUC), ordering the legal and managerial treatment of protected areas, at the federal, state and municipal levels.

Sustainable production can be summarized in two basic points: economy and rational use of energy and raw material, conserving natural resources. The principle of sustainable development is not intended to prevent economic growth, but seeks to determine that activities are developed using all the means made available for the least possible degradation (CARRAZA, 1998).

In pursuit of this ideal, it should be noted that, in recent decades, important steps have been taken:

a) The Conference on Environment and Development, Eco-92, in Rio de Janeiro, for example, was a historic moment in which sustainable development gained relevance. The event resulted in practical results, since, from there, Canada, the United States and Japan, as well as some countries in Europe, adopted policies against unsustainable production patterns.

Agenda 21 has as its objectives the promotion of consumption and production patterns that reduce environmental pressures and meet the basic needs of humanity; the development of a better understanding of the role of consumption and of how to implement more sustainable consumption patterns, also stipulating that governments should encourage the emergence of an informed consumer public, including by exercising leadership through their acquisitions, as governments also play a role in consumption, especially in countries where the public sector occupies a dominant position in the economy;

b) The Rio + 5 Conference, in 1997, held in Rio de Janeiro, in order to assess the progress of Agenda 21;

c) The Rio +10 World Summit on Sustainable Development, held in Johannesburg, South Africa, in 2002, evaluating the Agenda 21 guidelines and strengthening local initiatives;

d) the Rio + 15 Conference, held in Rio de Janeiro, in 2007, with the objective of discussing the consequences of Eco-92, appreciating the advances and what needed to be strengthened or changed;

e) the United Nations Conference on Sustainable Development (Rio + 20), in Rio de Janeiro, in 2012, which advanced the ideal of sustainable urban development and the green economy.

Therefore, there is a transformation in society based on the science of the need to implement ways that allow sustainability. This aspect demonstrates changes in the concept of pure and simple development up to the concept of sustainable development, according to the application of the so-called dimensions of sustainability (social, spatial, cultural, political, economic and environmental).

When all dimensions of sustainability are taken into account in the hiring carried out by the Public Administration, there is what is conventionally called sustainable bidding, which, given all that has been exposed, can be conceptualized, according to Bittencourt (2014):

> Like public competitions aimed at contracting by the Government that consider social, spatial, cultural, political, economic and, above all, environmental criteria at all stages of its process, transforming the State's purchasing power into a strong inducer of sustainable development (BITTENCOURT, 2014, p. 8).

It is understood that governments are influential consumers, their purchasing decisions can affect companies' decisions regarding the quality of their goods and services, as well as those of other consumers. Therefore, public tenders and contracts can act as a powerful incentive for sustainability, providing incentives for investment, innovation and expansion of sustainable companies, goods, services and infrastructure in the public and private sectors.

Regarding the adoption of good bidding practices for resource optimization / waste reduction / less pollution, the evaluation by Silva (2010) is appropriate, which concludes that the obligation points to the need to create a new collective conscience, regarding sustainability , adopting means of instructing public agents

and introducing the new concept, which arises from the simple adoption of ecologically acceptable attitudes to the definition of the object of the bid:

> It is observed that for the effective implementation of the [...] actions, it is necessary to develop new internal rules that regulate, for example, the rational use of water and energy, [...] and the purchase of lamps of greater efficiency and sustainable production process, procedures for the disposal of small electronic materials, implementation of recycling, among others. In addition, provide the means for the contracted company to carry out the selection of the collected waste, train public agents to manage the contracts concluded, from the simple execution of the object itself, to the monitoring of the final actions for the disposal of materials (SILVA, 2010, p. 60).

Silva (2010) explains that even before the insertion of the new bidding objective, the Ministry of Planning, Budget and Management (MPOG), through its Secretariat of Logistics and Information Technology of the Ministry of Planning, Budget and Management (SLTI), In a precursor initiative, it published Normative Instruction No. 1, of January 19, 2010, providing for the sustainability criteria in the acquisition of goods, contracting services or works by the direct, autarchic and foundation federal Public Administration, Prudently, despite informing that the bidding instruments (notices and invitations) should contain requirements in this sense, the Instruction emphasizes that impositions can never frustrate the competitiveness inherent to the bidding procedure.

Despite the clear signs that the conduct is absolutely beneficial, there will be many challenges for the implementation of sustainable bidding in Brazil. One is to convince decision makers of the importance and positive impacts that these actions can bring. And, in this pitch, the adoption of public policies and standards as a fundamental issue for the creation of an enabling environment for such actions (BETIOL, 2013).

In this context, on June 5, 2012, President Dilma Rousseff signed a series of measures to develop sustainability policies in Brazil. Among them, Decree nº 7.746 / 2012 stands out, which regulates art. 3 of Law 8,666 / 93, to establish criteria, practices and guidelines for the promotion of sustainable national development in the hiring carried out by the federal public administration, and establishes the Interministerial Commission on Sustainability in Public Administration (CISAP), consolidating and expanding the Sustainable Contracting Program of the Ministry of Planning, Budget and Management (MPOG).

Sustainable Bidding.

Interestingly, the new regulation did not impose the adoption of sustainable bids, since it establishes that public administration bodies and entities may purchase goods and contract services and works considering sustainability criteria and practices, which must be justified and established in the bidding notice (BITTENCOURT, 2014).

4.2. THE CHANGE REGARDING ART. 3rd LAW 8,666 / 93

The incorporation of the externalities of the productive process into the accounting of these processes has brought a new perspective on the economy. These paradigm shifts are reflected beyond the productive sector and the neoclassical economy. The extent of these transformations in several areas of human activity is notorious. As a consequence, legal norms are also aimed at incorporating these new elements into the exercise of the right. A relatively new category is incorporated into the legal principles of the Brazilian State: Sustainable Development (FERREIRA, 2016).

As noted in the change in art. 3 of Law 8.666 / 93, which when dealing with the purposes, adds to the classic view of the criteria of bidding choice, such as isonomy, and a greater advantage to the Public Administration, a new element and linked to socio-environmental aspects, when directing these processes to the promotion sustainable national development, as transcribed below:optics. productive sector and the neocl economy

> 3rd. The bidding process is designed to ensure compliance with the constitutional principle of isonomy, the selection of the most advantageous proposal for the administration and the promotion of sustainable national development and will be processed and judged in strict accordance with the basic principles of legality, impersonality, morality, equality, publicity, administrative probity, connection to the calling instrument, objective judgment and those related to them (BRASIL, 1993) (emphasis added).

On December 15, 2010, the National Congress approved the law sanctioned by the President of the Republic of No. 12,349, resulting from Provisional Measure No. 495 that amended provisions of Law 8,666 / 93. Among these changes, we highlight the inclusion of the concern with environmental preservation:

> [...] It is the case of the change occurred in art. 3 of Law 8,666 / 93, more precisely in its caput, which now starts to explicitly mention as one of the purposes imposed by the diploma now on screen to guarantee sustainable national development, which in a crystalline way brings to light the importance of protect the country's economic and social evolution, without, however, forgetting the environment, also when carrying out bidding procedures (ÂMBITO LEGAL, 2016).

In this way, Environmental Law is called to account for the fact that the "Principle of Sustainable Development affirms nothing more than the harmonious and logical relationship of association between economic development and the protection of the environment in all its forms, an extremely current subject [...] "(LEGAL SCOPE, 2016).

As a new reality in the posture of the Public Administration, the imposition of Normative Instruction No. 1, of 2010, even though of a nature of a normative administrative act, stands out the change of standards in the procedures of acquisition of goods and services by the public service . In the Federal sphere, sustainable public procurement was imposed, which according to the Environmental Agenda in Public Administration says:

> Sustainable purchases consist of those in which actions are taken to make the use of material resources as efficient as possible. This involves integrating environmental aspects at all stages of the purchase process, from avoiding unnecessary purchases to identifying more sustainable products that meet the required usage specifications. Therefore, it is not a matter of prioritizing products just because of their environmental aspect, but rather seriously considering this aspect along with the traditional criteria of technical specifications and price. On April 19, 2010, the Ministry of Planning, Budget and Management launched the Federal Government's Sustainable Contracting Portal, aimed at disseminating information and sustainable hiring practices, bringing together standards, notices, contracts and sustainable purchases. Also, in 2010, federal agencies,

It is observed, then, that the aspects of environmental responsibility do not overlap with the other classic criteria and consecrated by the Brazilian state, regarding the bidding processes. It is a sum, an additional condition, with relevance just like the others that already exist.

CONCLUSION

Regarding the concept and characteristics of the public bidding procedure. The Federal Constitution of 1988 in its art. 37 addresses public administration, and must ensure that the principles of legality, impersonality, morality, publicity and

efficiency, and thus, are imposed on all federative spheres, encompassing direct and indirect administration.

The purpose of the bidding is to select the most advantageous proposal, which best serves the public interest, using the administrative procedure as an instrument, through the modalities provided for in Law No. 8,666 / 1993, which in its Article 32, guarantees the observance of isonomy and select the best proposal, obtaining equality before, during and after the bidding procedure.

Sustainable bidding was analyzed. It was created through the concern of international organizations to guarantee the protection of life and everything that surrounds it, as a form of fundamental human rights. In the context of the bidding procedure, the approach is to preserve the requirements of the bidding document, ecological and sustainable values, aiming at the preservation of the environment as a preventive measure. The environmental principles related to sustainable bidding are: prevention, polluter pays, balance and cost / benefit examination.

Sustainable regulation, in the face of the high complexity of certain processes, must understand reverse causality and depart from the fallacy of false causes. The adoption of a bidding procedure aimed at promoting environmental sustainability does not yet have a specific legal discipline in the Brazilian legal system, however, certain federal states have been dedicating themselves to the regulation of this matter, having as example Acre, Amazonas and Sao Paulo; which stand out in relation to the observance of environmental criteria in their administrative contracts.

The applicability of green bidding and its administrative practice was demonstrated. When all dimensions of sustainability are taken into account when contracting by the Public Administration, considering the social, spatial, cultural, political, economic and, above all, environmental criteria in the bids in all stages of its process. Transforming the purchasing power of the State into a strong inducer of sustainable development. Therefore, in terms of green bidding, it is undoubted that the practice (insertion of sustainability criteria) must be adopted with common sense by the responsible agent, with conduct based on the principles of reasonableness and proportionality.

The hypothesis was confirmed in the monograph, as sustainability is multidimensional, that is, it is legal-political, ethical, social, economic and

environmental. The delay of one dimension necessarily leads to the delay of the others. It is undeniable: interrelationship is factual.

The adoption of green tenders undoubtedly constitutes an interesting solution to a problem that afflicts the applicators of sustainable tenders: the failure to reach some sustainable products with the economy of scale necessary to have competitive prices.

Sustainability is incompatible with the naive belief in economic growth as an end in itself, nor is it in line with regressivism of any kind (present, strikingly, in the tax system). Therefore, it must be inextricably linked to lasting well-being, especially in the face of climate or financial stress and related vulnerabilities.

Indeed, it was concluded that sustainability must illuminate strategic decisions towards a low carbon economy, creating a new standard of responsibility, practicing equity with future generations and, at the same time, ensuring equity in the present, eradicating discrimination (including gender), promote food re-education, universalize conscious consumption, regularize safe land occupation and guarantee access to decent work.

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