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ELECTRONIC PRICING AND FAVORED AND DIFFERENTIATED TREATMENT TO MICRO ENTERPRISES AND SMALL COMPANIES IN THE FEDERAL UNIVERSITY OF AMAPÁ.

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ABSTRACT

The present work aims to identify the applicability of the favored and differentiated treatment to micro and small companies in the electronic auctions held by the Federal University of Amapá, based on the forecasts contained in Complementary Law no. 123/2006 and its respective regulatory decrees. The theoretical framework used outlines the historical aspect of the bidding, explains the emergence of the Auction as a bidding modality and, finally, addresses the provisions of Complementary Law no. 123/2006 and its repercussions on the bidding process. Descriptive, bibliographic research was used as methodology, based on the case study at UNIFAP. Three categories were used for the analysis of the Electronic Auction Announcements published in the 2018-2019 period, through which the compliance with the provisions of the general law of micro and small businesses was evidenced. Thus, the results obtained were positive, it was noticed above all the compliance with §1 of art. 43 of Complementary Law 123/2006, almost the entirety of the notices mentioned the 2nd paragraph of art.44 and no reference to the possibility of subcontracting MEs and EPPs in the notices for contracting common services.

Key words: Electronic auction. micro enterprise. small business.

1. Public tenders: Preliminary considerations

In the management of public services, the Public Administration, through its state, municipal and business entities, performs works, services, makes purchases and disposes of goods. The performance of these activities depends on the execution of a contract, however, unlike what happens with the private initiative, the public agent is not free to contract with whomever he sees fit.

Thus, the contract, as a rule, must be preceded by a selective procedure, which is the bidding process. Through this procedure, the Public Administration will select the most appropriate and advantageous proposal for the Public Interest, in addition to providing equality

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to individuals interested in contracting with the Administration, as well as ensuring that public resources are well applied.

The Bidding, according to Meirelles (1999, p. 22) is the necessary antecedent of the administrative contract, thus, the contract is the logical consequence of the bidding. The bidding is the administrative preparatory procedure of the contract, it is the condition for its formalization. The best bid is selected through the bidding process, while the parties are bound by the contract to achieve their purpose.

Due to its importance, the Public Bidding Institute was erected to the degree of constitutional principle, being enshrined in art. 37, item XXI of the Federal Constitution of 1988. In this sense, the constitutionalist Silva (2004, p. 653) teaches that the principle of bidding means that these contracts are subject, in general, to the procedure of selecting the most advantageous proposals for the Public administration. Constituting an instrumental principle of realizing the principles of administrative morality and the equal treatment of eventual contractors with the Public Power.

1.1. History and Evolution of Public Tenders in Brazil

Public tenders were introduced in Brazilian public law approximately 145 years ago, when the Liberal State was in vogue in the world, regarding this historical context, explains Ribeiro (2005, p. 01):

> In the middle of the 19th century - the time of the Liberal State, the Bureaucratic Public Administration was created, aiming to protect the State from corruption, employments and nepotism. It is characterized by the centralization of decisions, by the functional hierarchy, by professionalism, by formalism (legality) and by step-by-step control of administrative processes, always a priori control, aiming, above all, to replace Patriarchal Public Administration.

At that time, Decree 2,926, of May 14, 1862, which instituted Public Tendering, called at the time of competition, was issued in Brazil. This decree regulated the procurement of services under the responsibility of the then Ministry of Agriculture, Commerce and Public Works.

After the emergence of several other laws that subtly dealt with the matter, the bidding procedure came to be consolidated, at the federal level, by Decree 4,536, of January 28, 1922, which organized the Federal Accounting Code. According to Motta (2005, p. 03-04), the

Federal Accounting Code is the most important text regulating the matter, contributing in an invaluable way to the Bids, and also points out that some of its provisions are still current.

In this sense, Pessoa (2003, p. 301) clarifies:

> The discipline of the matter at the federal level emerged as the Federal Public Accounting Code (Law No. 4,536, from January 28, 2002, arts. 4 to 52), which adopted the competition principle. The general regulation issued for the execution of the Code (Decree nº 15.783 / 22) provided extensively on the competition process and the subsequent administrative contracts (arts.736 a 804).

Bureaucratic administration[4], mentioned above, over time, showed signs of inefficiency, given that the various procedures that had the purpose of preventing corruptible acts, were also jamming the administrative machine. This fact is noticeable in public tenders of this period, which were full of addictions, legal loopholes and poor qualification of public entities.

In this context, changes in the bureaucratic administration were necessary, which until some time was feasible. In the midst of this context, management administration was chosen, which, according to Ribeiro (2005, p. 01) would be: "[...] that [management administration] linked to better management of public spending and with it the bidding is moving towards an effective improvement ".

Insists that the bureaucracy has great value as an indispensable and necessary administrative instrument, constituting the most perfected type of social system, in which it is possible to achieve the desired objectives with greater efficiency.

However, its cases of inefficiency are always related to its distortion, to its dysfunctions, caused by the characteristics of the people and the environments in which it is used, causing the excess of bureaucratization, excess of formalism and depersonalization, which often characterizes organizations. Bresser-Pereira and Motta (2004, p. 43-44) claim that it is this excess of bureaucratization that results in the popular conception of bureaucracy as an inefficient system, dominated by "paperwork" and inefficiently performing employees.

Since the old Federal Accounting Code of 1922, the bidding procedure had evolved with the objective of bringing greater efficiency to public contracts. In this sense, on February 25, 1967, Decree-Law 200 came into force, which established the federal administrative reform, and systematized, in arts.125 to144, bidding procedures. This decree was later extended to the

[4]It should be clarified that Bureaucracy, according to Prestes Motta (2000, p. 7), is a social structure in which the direction of collective activities is in charge of an impersonal hierarchically organized apparatus, which must act according to impersonal criteria and rational methods associated with a of organization. It has thus been used to designate a rational and efficient administration; to designate its opposite; to designate hierarchical government and also to designate organization.

Administrations of States and Municipalities, with the enactment of Law 5,456, of June 20, 1968.

Regarding this Brazilian political period, the considerations of Bresser-Pereira (1998 apud ZUGMAN, 2006, p. 27) are valuable:

> Considered the first attempt at managerial reform of the Brazilian public administration, in 1967, under the command of Amaral Peixoto, Decree-Law 200 was promulgated, which promoted the transfer of goods and services production activities to municipalities, foundations, public companies and mixed capital companies. Under the principles of administrative rationality, planning and budgeting, decentralization and results control, this decree-law sought to overcome bureaucratic rigidity, emphasizing decentralization, considered more efficient than the rigidity of direct administration.

Regarding the administrative reform implemented during the military dictatorship and its reflexes in the bidding institute, Pessoa (2003, p. 302, emphasis added), says that the so-called "administrative reform", promoted by the military government after 1964, manifested great concern about the chaotic situation hitherto in effect, marked by the dispersion and fragmentation of existing norms, as well as the constant deviations pointed out, contrary to isonomy and administrative morality. Here are the words of the author:

> Such administrative reform, regulated by Decree-Law nº 200/67, also tried to discipline the preliminary procedures to be adopted in the field of administrative contracts. Title XII of this diploma was dedicated to the rules related to tenders for purchases, works, services and disposals. Such discipline was intended to regulate bids "in direct administration and in municipalities".

Despite efforts, the bidding legislation until 1986, the year in which Law no. 2,300, was lacunous and confused. About this period, Rigolin and Bottino clarify (2006, p. 16): "So desolate was the gap of firm rules before its edition that, in the next moment, the business world of Administration seems to have suddenly changed, as if from chaos suddenly broke out.

In 1985, in the midst of a process of redemocratization, the New Republic and the government of José Sarney signaled a new attempt at change, given the poor results obtained by the Administrative Reform of Decree-Law 200 of 1967. This new attempt at change according to Marcelino (1988, apud ZUGMAN, 2006, P. 29) was based on the structural dimension, aiming to strengthen direct administration and modernize indirect administration.

In this political context, Decree-Law no. 2,300, of November 21, 1986. Thus, as Motta (2005, p. 05) recalls, in 1986 the then President of the Republic, invoking arts. 8, item XVII, letter c, and 55 of the 1969 Federal Constitution, and claiming urgency, issued Decree-Law 2,300, of 11/21/86, which dealt with bids and contracts from the Federal Administration,

considered the Legal Statute of Tenders and Administrative Contracts, with subsequent modifications: Decree-laws 2,348 / 87 and 2,360 / 87.

Pessoa (2003, p. 302), regarding the promulgation of Decree-Law 2,300 of 1986, asserts that the aforementioned Decree, in order to give greater systematicity to the previous legislation, minudenced and detailed the matter, both with regard to previous formalities as with regard to the contradictions themselves, including, in its art. 85, that the other federal entities could also discipline the matter, as long as they respected the general principles and rules established by federal legislation.

From the promulgation of the Federal Constitution of 1988 to bidding received constitutional principle status[5], of mandatory observance by the right and indirect Public Administration of all the powers of the Union, Federal District and Municipalities.

After the enactment of the 1988 Constitution, on June 21, 1993, Federal Law no. 8,666, current Federal Bids and Contracts Statute, which regulated art. 37, XXI of the Federal Constitution. This statute, which had been modified in several of its provisions by Laws no. 8.883 / 94, 9.648 / 98 and 9.854 / 99, disciplining the matter in a very detailed way, which expresses its intention to reduce the field of administrative discretion. Motta (2005, p. 6) draws attention to the Sanction of Federal Law 8.666 / 93, adding that for the first time a text with democratic legitimacy appears, since all the bidding laws edited until then originated from the Executive Branch, which the figure of Decrees (Accounting Code, Decree-Law 200/67, Decree 2.300 / 86),

Due to the enormous "impact" that Decree-Law 2.300 / 86 caused in national tenders (permeating strongly in the national legal conscience, in the practice of Administrations, and in the minds of the bidders themselves), the federal legislator preferred, when drafting the Law 8.666 / 93, to repeat that widely consolidated model, however, without ceasing to significantly increase it, from 90 to 126 articles, more than a third, therefore, further bureaucratizing the procedure, in addition to instituting an authentic Bidding Penal Code (arts .89 a 91)[6].

It urges to mention the problem that arose with the enactment of Law 8.666 / 93, which expressly prescribed in its art. 1, which would establish general rules on bidding and administrative contracts, meaning that all 126 articles would constitute general rules.

This provision innovated in relation to the previous legislation (Decree-Law 2.300 / 93), which out of its 90 articles constituted very general rules for bidding and contracts, in

[5] It should be remembered that EC No. 15, inserted the competition institute in the 1946 Constitution.
[6] Rigolin and Botino (2006, p. 41) point out that the effectiveness of so many criminal provisions inserted in administrative rules has been below the minimum of reason, due to the lack of inspection and control.

addition, this decree said it was necessarily applicable only to the Union, except in its very low general standards, which are: the 3rd and the 85th, single paragraph (bids), and 45 and48 to51 (contracts). Art. 85, caput, of Decree-Law 2,300 / 86, meant the principle of doctrinal discussions regarding the edition of general rules on bidding under Brazilian law, by allowing the application of the general rules established in that Decree-Law to States and Municipalities, the Federal District and Territories. What really materialized, especially after the promulgation of the 1988 Federal Constitution, which fully accepted that orientation of the 1986 bidding law, providing, for the first time in national constitutional law, on bids and administrative contracts, prescribing, in art. 22, XXXVII, that the Union is exclusively responsible for legislating general bidding and contracting rules, in all modalities, for the public administration.

Thus, if the Union was responsible for dictating general rules, and if they were already contained in federal law, then what happened was the full reception, under the new constitutional order, of the command contained in art. 85, caput, of Decree-Law 2,300 / 86. However, as previously stated, difficulty arose with the Union's edition of Law 8.666 / 93, declaring itself to be entirely constituted of general rules, which, in a way, does not contradict art. 22 of CF / 88, however, reduces the autonomy of States and Municipalities regarding the possibility of regulating specific matters of regional and local interest. The problem, then, is related to the legal legitimacy of the regulation made by Law 8.666 / 93.

This problem is addressed by Rigolin and Bottino (2006, p. 46, emphasis added), as follows:

> What is questioned about L. 8.666, above all and above all, is its legitimacy as a packager of relevant rules on a wide range of topics in no way affected or consistent with bids and contracts, which advance [...] over field of internal administration of the various state entities covered, the States and Municipalities, with their decentralized entities, thus facing the constitutional division of legislative powers, contained in art. 22 of the great text.

Over the years, such procedures have proved to be slow, outdated and even harmful, both to the interests of the Public Administration and to the interested individuals. to hire. In thatcontext, by Provisional Measure no. 2,026 / 2000, the Federal Government instituted, within the scope of the Union, a new type of bidding process, which it called the Auction. This legal innovation brought agility to the bidding procedures, in addition to increasing the savings in the acquisition of common goods and services, and giving transparency and equality to the bids.

Later in the year 2002, thesaid Provisional Measure was converted into Federal Law no. 10,520. This law preserved and improved the possibility, already existing in Provisional

Measure 2.026 / 2000, of carrying out the Auction mode by electronic means, with the resources made available on the Internet.

On May 31, 2005, the Federal Government issued Decree no. 5,450, making it mandatory to use the Auction, preferably in its electronic form, within the scope of the Union.

And more recently, on September 20, 2019, the Federal Government issued Decree no. 10,024, making the Electronic Auction mandatory within the scope of the direct, autarchic, foundational and special funds federal public administration bodies, except for public companies and mixed capital companies, which have their own regulations (Law No. 13,303 / 2016.) .

2. ELECTRONIC PRICING IN THE FEDERAL GOVERNMENT

The Federal Executive Branch, since provisional measure nº. 2,026 / 00, in its third edition, regulated, based on art. 84, IV, of the Constitution, the auction procedure for the acquisition of common goods and services at the federal level, by means of decree no. 3,555, of August 8, 2000, which was later amended by Decree no. 3,693, of December 20, 2000 and complemented by Decree no. 3,784, of May 6, 2001, which replaced the list of assets in Annex II.

It should also be noted that on December 21, 2000, under the aegis of the seventh edition of Provisional Measure 2.026 / 2000, Decree no. 3,697, which regulated art. 2nd, sole paragraph, of Provisional Measure nº. 2,026 / 00, referring to the auction held using information technology resources, which the doctrine agreed to call it the electronic auction, was also intended for the acquisition of common goods and services within the scope of the Union, as stated in the aforementioned provision cited below:

> 2nd Art. Auction is the bidding method for the acquisition of common goods and services, promoted exclusively within the scope of the Union, whatever the estimated value of the contract, in which the dispute for supply is made through proposals and bids in public session.
>
> Single paragraph. The trading session may be carried out using information technology resources, under the terms of specific regulations.

This regulation, as stated above, was made by Decree no. 3,697, which, in its art. 2nd recommends that the electronic auction will be held in public session, through an electronic system that promotes communication over the internet.

Regarding the innovative possibility brought about by means of electronic trading sessions, using the internet, Palavéri (2005, p. 127) says that the electronic trading session is a novelty in Brazilian legislation, and that until then the tenders carried out by the Public Power they were always processed through face-to-face mechanisms, so, until the provisional measure was published in 2000, there was no national disciplinary rule for electronic bidding, since what was at best was the availability of notices from public agencies over the internet, on their websites.

Decree no. 3,697 / 00, which regulated the Electronic Auction, brought several improprieties in its text, generating doubts and difficulties regarding its applicability, in addition to the fact that it presents several references to the text of Decree 3,555 / 00, making the activities of the law enforcer more difficult. With the advent of Law no. 10.520 / 02, this decree has become out of date, considering that the new Federal Law enshrined several innovations in relation to the provisions of the Provisional Measure that originally gave rise to the edition of the said decree. Furthermore, with the increase in its use, the trading procedure, both face-to-face and electronic, has evolved considerably since the last time it was instituted, which demonstrates the need for revision of the regulatory text, in order to adapt it to reality and make it even more efficient.

Thus, on May 31, 2005, the Federal Government issued Decree no. 5,450, published in the Federal Official Gazette on June 1, 2005, finally updating the Electronic Auction procedure. The edition of the new decree by the federal government aimed, as Fonseca (2007, p. 69) asserts, to optimize the applicability of public tenders, increase transparency and speed up government acquisitions, which would benefit even more from the reduction of costs in the acquisition of common goods and services acquired by federal public agencies.

As for the regulation of Provisional Measure through Executive decree, Szklarowsk (2002, p.10) believes it is perfectly lawful, since the provisional measure is law, however it is, under a resolutive condition. Consisting of an absurdity if the Charter foresaw, as it in fact foresees, the edition of these acts, with immediate validity, and it was not possible to regulate it, what would be a total contradiction, a true paradox, since its execution could become unfeasible .

Provisional measures, before Constitutional Amendment no. 32/2001, were edited successively. So that as the previous provisional measure sighed, without the National Congress considering the matter creating a new Law, the executive branch edited another provisional measure, which always validated the acts of the previous provisional measure. This was the

case until the last edition, no. 2182-18. It should be noted that, although Decree-Laws, no. 3,555 / 00 and No. 3,697 / 00, having been edited during a reissue, remained intact to regulate acts at the federal level, provided that the new provisional measure contained the same regulated matter, with minimal variation. As such, they are in full force until the enactment of Law 10,520 of 17 July2002, the which regulated the Auction in its face-to-face form, also providing for the existence of its electronic form, through regulation.

It should be noted that Decree no. 3,555 / 00, according to the majority understanding of the doctrine, remains in force in everything that does not contradict the provisions of the Federal Auction Law, assuming that it has not disappeared with the conversion of provisional measure no. 2,182-18, of 2001, in the current Federal Law, therefore accepting its reception.

This understanding is shared by Bittencourt (2006, p. 30), when stating that:

> [...] in response to the reception theory inscribed in art. 2 of the Civil Code Introduction Law, [...] we understand not only that the provisions of Decree nº. 3.555 / 00 not incompatible with the new trading law are received under the new legal order, remaining in force and applicable [...]

Pursuant to the most recent Decree 1024 of 20 September 2019, all tenders for the acquisition of goods and the contracting of common services must be carried out using the Auction, including common engineering services, and provides for the use of the dispensation electronic, within the scope of the federal public administration in electronic form.

The new rule makes the adoption of electronic auctions mandatory by the agencies of the direct, autarchic, foundational and special funds federal public administration. By the previous decree, as already mentioned, the use was preferential, but not mandatory.

The wording of the new decree does not apply to public companies or mixed-capital companies, which have their own bidding regime, dictated by the Law of State-Owned Companies (Law No. 13,303 / 2016).

3. THE DIFFERENTIATED, FAVORED AND SIMPLIFIED TREATMENT GRANTED TO MEs AND EPPs.

As observed in the legislative practice, the correctness of the legislation applied to Micro and Small Enterprises for access to public markets is correct, there is an increasing movement of fomentation through regulation to insert this business category in the public purchases made by the federal entities.

Currently, MEs and EPPs enjoy differentiated, favored and simplified treatment to ensure the expansion of opportunities for access to markets previously dominated by large companies, there are countless reasons that justify and justify the legislative action in order to provide equality and equity in public procurement for goods, services and contracting works.

One reason is that Brazil is recognized worldwide for the entrepreneurship of its people, according to studies, 39% of the economically active population own their own business[7], which in many cases move quickly from informality to work based on management and legal performance rules, starting to have constitutional guarantees and allowing them to access more demanding markets, such as public procurement, which are directly linked to state bureaucracy and the general regulation of bids and contracts established by law no. 8.666 / 93, as outlined previously.

The genesis for differentiated treatment, favored and simplified in the national order is contained in constitutional norms, of programmatic character, inserted in arts. 146, 170 and 179 of the Constitution of the Republic (CR).

> 146. The complementary law is responsible for:
> (...)
> III. establish general rules on tax legislation, especially on:
> (...)
> d) definition of differentiated and favored treatment for micro and small businesses, including special or simplified regimes in the case of the tax provided for in art. 155, II, of the contributions provided for in art. 195, I and §§ 12 and 13, and the contribution referred to in art. 239.
> Art. 170. The economic order, founded on the valorization of human work and free initiative, aims to ensure a dignified existence for all, according to the dictates of social justice, observing the following principles: Art.
> (...)
> IX. favored treatment for small companies incorporated under Brazilian law and having their headquarters and administration in the country.
> 179. The Union, the states, the Federal District and the municipalities shall grant micro and small businesses, as defined by law, differentiated legal treatment, aiming to encourage them by simplifying their administrative, tax and social security obligations and credit claims, or by eliminating or reducing them by law

The constitutional program was implemented with the enactment of Complementary Law 123/06 (LC123 / 06), which, among other things, regulated the matter in the following terms:

> Art. 1 This Complementary Law establishes general rules regarding the differentiated and favored treatment to be given to micro and small businesses within the scope of the Powers of the Union, the States, the Federal District and the Municipalities, especially with regard to:

[7]In Brazil, 39% of the economically active population owns their own business. The data is part of a study by the consulting firm McKinsey, carried out in partnership with the event Brazil at Silicon Valley.

> I. the calculation and collection of taxes and contributions from the Union, the States, the Federal District and the Municipalities, through a single collection system, including ancillary obligations;
> II. compliance with labor and social security obligations, including ancillary obligations;
> III. access to credit and the market, including the preference for the acquisition of goods and services by public authorities, technology, associations and inclusion rules.
> IV. to the single national taxpayer register referred to in item IV of the sole paragraph of art. 146, in fine, of the Federal Constitution.

This complementary law, which the doctrine came to call it the General Law of Micro Enterprises (MEs) and Small Enterprises (EPPs) became a landmark in tax legislation, putting a permanent chapter in the way of conceiving the participation of the state and its public policies aimed at sustainable national development, especially in terms of economic development, through public tenders, in view of the gigantic potential of the state in the acquisition of goods and the contracting of services, as well as in the execution of public works throughout Brazil .

In addition to the provisions of art. 1, Complementary Law no. 123/2006 also established the framework limits so that companies could live up to the benefits it brings.

Pursuant to items I and II of article 3 of the General Law, a micro enterprise is considered to be that which generates in each calendar year, gross revenue equal to or less than R $ 360,000.00 (three hundred and sixty thousand reais) and a small business, that which generates, in each calendar year, gross revenue greater than R $ 360,000.00 (three hundred and sixty thousand reais) and equal to or less than R $ 4,800,000.00 (four million eight hundred thousand reais), as follows:

> Art. 3. For the purposes of this Complementary Law, micro or small companies are considered to be the entrepreneurial company, the simple company, the individual limited liability company and the entrepreneur referred to in art. 966 of Law No. 10,406, of January 10, 2002 (Civil Code), duly registered with the Registry of Mercantile Companies or with the Civil Registry of Legal Entities, as the case may be, provided that:
>
> I - in the case of the micro-enterprise, increase, in each calendar year, gross revenue equal to or less than R $ 360,000.00 (three hundred and sixty thousand reais); and
>
> II - in the case of a small business, earn, in each calendar year, gross revenue greater than R $ 360,000.00 (three hundred and sixty thousand reais) and equal to or less than R $ 4,800,000.00 (four million and eight hundred thousand reais).

It appears from the normative provisions above that the deferred, favored and simplified treatment to be given to MEs / EPPs is composed of tax and extra-tax benefits to companies that fall within the limits provided for in items I and II of art. 3rd of the General Law.

Tax benefits were enshrined in the form of the regime, popularly known as, Simples Nacional. Briefly, it can be conceptualized as a simplified, differentiated and, as a result, favored collection, collection and inspection of taxes, provided to MEs / EPPs. Its composition is detailed in the provisions of art. 13 of LC 123/06.

It is fair to note, according to what has already been said in previous lines, that tax benefits are not the only prerogatives that are entitled to MEs / EPPs. In addition to these, they can also enjoy extra-tax benefits, among which stand out those related to public contracts, provided for in the following articles of LC 123/06:

> Art. 43. Micro and small businesses, when participating in bidding processes, must present all the required documentation for the purpose of proving tax and labor regularity, even if this presents some restriction.
> Paragraph 1. If there is any restriction in the proof of tax and labor regularity, a period of five working days will be ensured, whose initial term will correspond to the moment when the bidder is declared the winner of the contest, extendable for an equal period, at the discretion of the public administration, for regularization of documentation, for payment or installment of the debt and for issuing any negative or positive certificates with effect of negative certificate.
> Art. 44. In the bidding process, as a tiebreaker criterion, contracting preference for micro and small businesses will be ensured.
> §1 °. A tie is understood to mean situations in which the proposals submitted by micro and small businesses are equal to or up to 10% (ten percent) higher than the highest ranked proposal.
> §2 °. In the trading session, the percentage range established in §1 of this article will be up to 5% (five percent) higher than the best price.
> Art. 48. In order to comply with the provisions of art. 47 of this Complementary Law, the public administration:
> I. must carry out a bidding process aimed exclusively at the participation of micro and small businesses in the contracting items whose value is up to R $ 80,000.00 (eighty thousand reais);
> II. may, in relation to the bidding processes aimed at the acquisition of works and services, require bidders to subcontract a micro or small business;
> III. must establish, in events for the acquisition of goods of a divisible nature, a quota of up to 25% (twenty-five percent) of the object for the contracting of micro and small companies (without emphasis in the original).

Notwithstanding the tax benefits already outlined in the explanation above, they constitute mechanisms in which the legislator gave due and favored and differentiated treatment to micro and small businesses referred to in art. 146, inc. III of the Magna Carta, Chapter - V (ON ACCESS TO MARKETS), in turn, innovated in terms of the normative and pragmatic incidence of guidelines to be followed by management and its agents in the internal phase and in the conduct of public tenders.

The executive branch also issued Decree no. 8,538, of October 6, 2015, which regulatedprovisions of arts 42 to 45 and arts. 47 to 49 of Complementary Law No. 123, of December 14, 2006, filling the gaps for operationalization that might exist for the realization of the favored, differentiated and simplified treatment for microenterprises, small businesses,

family farmers, rural individual producers, individual microentrepreneurs and cooperative societies in public procurement of goods, services and works within the federal public administration.

In order to better understand the moment when such guidelines must be observed by the administration, it is necessary to briefly present the stages of a public bidding process, already enshrined in the best existing doctrine.

Although each one of the modalities of the general law (Competition, Price Taking, Invitation, Auction and Tender), the Auction (In-person or Electronic) and the Differential Contracting Regime (RDC), may have their specificities regarding the driving system since the opening of the process to approval, the doctrine teaches that there are basically two phases, namely, the internal and the external.

The internal phase has as main reference the provision in art. 38 of the General Bidding Law, which describes that the bidding procedure will begin with the opening of an administrative proceeding, duly assessed, filed and numbered, containing the respective authorization, a brief indication of its object and the own resource for the expense, and which will be attached the other documents described in its items.

As the objective of this article is aimed at analyzing the applicability of favored and differentiated treatment to micro and small businesses in the Electronic Auction conducted by the Federal University of Amapá, it will stick to the relevant legislation.

In these terms, the recent Decree no. 10.024 / 2019 establishes a well-defined theoretical framework on the bidding steps mentioned above, as follows:

> Art. 6 The trading session, in electronic form, will observe the following successive stages:
> I - hiring planning;
> II - publication of the notice of notice;
> III - presentation of proposals and qualification documents;
> IV - opening of the public session and bidding, or competitive phase;
> V - judgment;
> VI - habilitation;
> VII - appeal;
> VIII - award; and
> IX - homologation.

In item I of art. 6, there is the planning of the contracting, which corresponds to the internal phase, in which all aspects pertinent to the future contracting sought by the administration must be addressed, such as the definition of the object of the bidding process, preparation of the minutes of the call for bid and annexes, term reference and in this the precise and sufficient definition of the object, the methods and execution deadlines, the spreadsheet

estimate of the expenditure, forecast of budgetary resources, authorization of the opening of the bidding, designation of the auctioneer and support team and legal opinion.

From item II to IX, correspond to the external phase of the bidding process, when the call for bid is made public to all interested parties, until the proper approval of the bidding procedure by the competent authority.

Returning to the analysis of the guidelines present in the General Law of MEs and EPPs, it is clear that those contained in art. 43, 44 and 48 must be addressed in the planning phase of the Electronic Auction (internal phase), specifically in the preparation of the draft public notices and respective Terms of Reference, which in turn must have the consent of the competent authority before being made public (external phase).

4. METHODOLOGY

In this research, the method that provided the logical basis for data processing was the deductive method; in the rational process of object analysis, an approach that used the general to the particular was used.

Regarding the research design, we opted for the Case Study modality, usually used in research in the field of applied social sciences. According to Cooper and Schindler (2011), the use of case studies in management aims to "make it possible to obtain multiple perspectives of an organization, situation, event or process at a point in time or for a period of time".

In this context, the case study made it possible to analyze the applicability of the legislation pertinent to the favored and differentiated treatment of Micro and Small Companies in the Electronic Auction notices of the Federal University of Amapá.

From the reading of the devices in question, the following three categories of analysis were defined:

a) special period for proof of tax and labor regularity: here understood as the possibility of regularization of tax and labor documents, when they present any restriction;

b) preemptive right (or fictional tie):guarantees the preference for hiring ME / EPP when characterized by a fictional tie (read on those occasions when the proposal of a micro or small business exceeds by 10% (ten percent) the value of the lowest value offered by a Big company). In the Auction, this percentage is 5% (five percent);

c) carrying out differentiated and exclusive bids, namely: exclusive bidding for the participation of MEs / EPPs; mandatory subcontracting to MEs / EPPs; quota reservation for the participation of MEs / EPPs;

These three categories presented above supported the analysis of the defined data source and allowed a basis for specific and comprehensive conclusions, the impressions and considerations about the results are characteristics of the case study.

The selection of the case was based on sampling by criterion, that is, it was decided to study the electronic auction notices of UNIFAP due to the technical expertise and experience of the author, who has worked for 10 years as a auctioneer at the Federal University of Amapá .

The data source used was the legislation related to the subject and the electronic bidding documents published on the federal government's purchase site, at www.comprasgovernamental.gov.br, UASG query parameter: 154215, years 2018 and 2019.

5. PRESENTATION OF RESULTS

The data analyzed in this research were obtained by consulting the federal government's purchasing website (www.comprasgovernamental.gov.br), a search was carried out by reading the devices and annexes of the Electronic Auction Notice published by the Federal University Foundation do Amapá, as a search parameter in the system, the general services unit (UASG) nº. 154215, year 2018 and 2019.

For the year 2018, as a result of the search, no. 03/2018, 04/2018, 05/2018, 08/2018, 09/2018, 10/2018, 11/2018, 12/2018, 13/2018, 14/2018, 15/2018, 16/2018, 17 / 2018, 18/2018, 19/2018, 20/2018, 21/2018, 22/2018, 23 / 2018.24 / 2018.25 / 2018.26 / 2018 and 27/2018. For the year 2019, the published notices were those of nº. 01/01, 03/2019, 04/04, 06/2019, 07/07, 08/08, 09/2019, 13/2019, 15/2019, 18/2019 and 19/2019.

In the Electronic Auction notices published in the 2018-2019 period, the results of the analysis of the applicability of the favored and differentiated treatment to Micro and Small Enterprises, in the defined methodological categories, were as follows:

a) special period for proof of tax and labor regularity:

This obligation is due to the reading of paragraph 1 of art. 43 of Complementary Law 123/2006, as amended by Complementary Law No. 155, of 2016, and has a practical consequence in the session of the Electronic Auction, that is, allowing micro and small

businesses, in the qualification phase , if there is any restriction in the supporting documentation of tax and labor law, present, within five days, the initial term of which will correspond to the moment when the bidder is declared the winner of the event, which can be extended for an equal period, at the discretion of the public administration, for regularization documentation, for payment or installment of the debt and for issuing any negative or positive certificates with effect of negative certificate.

From the analysis of the notices of the 2018-2019 period, all contemplated articles that reproduced ipsis litteris the provisions of §1 of art. 43 of Complementary Law 123/2006, thus achieving the desired legality status at the fairs of that modality regarding one of the objectives expressed in the general regulation of micro and small companies.

b) preemptive right (or fictional tie): Provision in paragraph 2 of art.44 of the general law of MEs and EPPs, ensures that, in case a company other than ME or EPP is the winner of the bidding phase, all bidders classified as ME or EPP, and who have their bids within of a level of 5% higher than that bid, they may, in succession, be called to offer a new bid, lower than the bid of the company other than ME or EPP first placed.

With the exception of the trading sessions or items of the exclusive trading sessions for ME or EPP, which as a logical consequence there would be no need to give preference, in this category the vast majority of notices referred to the provisions of §2º of art.44, as a requirement to be observed by the auctioneer.

However, the trading sessions 15/2018, 21/2018, 25/2018 and 26/2018 made no mention of the fictional tie, nor is there any technical justification for not being observed, which is why anyone could request, through an impugnation request. , the rectification of the public notice, or even, in a preliminary injunction via a writ of mandamus after the event, revoke the bidding, as this is a right, guaranteed by law.

c) differentiated and exclusive bids: As for this category of analysis, most of the notices complied with the program of the legal provision, stating, in the calling instruments, the exclusivity for items or lots with estimated values of up to 80 thousand, and quota reserve of up to 25% (art. 8, Decree No. 8538/2015) for the participation of MEs / EPPs; However, the possibility of subcontracting to MEs / EPPs in the trading sessions for contracting services has not been identified, thus, the scope of the favored treatment has been impaired, at least for micro and small companies whose registration of main economic activity and underlying either in the provision of any of the services bid and whose contractors are companies of a size different from MEs or EPPs.

6. CONCLUSION

The results found in the present study showed that in the special term category for proof of tax and labor regularity, set out in §1 of art. 43 of Complementary Law 123/2006, as amended by Complementary Law No. 155, of 2016, were strictly included in the public bidding documents. In the category of preemptive right (or fictitious tie) device present in §2º of art.44 of the general law of MEs and EPPs, the majority of the notices contemplated the provision through sections and articles, however, the absence of a provision of the tie draw in the trading sessions 15/2018, 21/2018, 25/2018 and 26/2018, without technical justification or any legal reference for the non-application, it is illegal, subject to impugnation and a posteriori judicialization. Finally, in the category of differentiated and exclusive bids, the notices made the appropriate framework for the hypotheses for exclusive bids, both for items / groups of estimated value up to 80 thousand. Regarding the quota reserve of up to 25% of items of a divisible nature for MEs and EPPs, none of the Electronic Auction notices made express mention, although it is a faculty of general law, the absence of this rule in the fairs impaired the scope provided for in the standard, not encompassing microenterprises or small businesses providing services relevant to the common service contracts entered into between the Federal University of Amapá and companies other than MEs and EPPs, at the rate of 25% of the items of a divisible nature that were tendered.

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