PUBLICAÇÃO 95

ISSN: 0101-9562
ISSN ELETRÔNICO: 2177-7055

SEQÜÊNCIA

Estudos jurídicos e políticos

Publicação do
Programa de Pós-Graduação em Direito da UFSC

VOLUME 44 ▪ ANO 2023

UFSC PPGD

SciELO

CAPES QUALIS A1

SEQUÊNCIA – ESTUDOS JURÍDICOS E POLÍTICOS é uma publicação temática e de periodicidade quadrimestral, editada pelo Programa de Pós-Graduação Stricto Sensu em Direito da Universidade Federal de Santa Catarina – UFSC.

SEQUÊNCIA – ESTUDOS JURÍDICOS E POLÍTICOS is a thematic publication, printed every four months, edited by the Program in law of the Federal University of Santa Catarina – UFSC.

Versão eletrônica: http://www.periodicos.ufsc.br/index.php/sequencia

A publicação é indexada nas seguintes bases de dados e diretórios/
The Publication is indexed in the following databases and directories:

Base OJS	OJS
Base PKP	PKP
CCN (Catálogo Coletivo Nacional)	Portal de Periódicos UFSC
Dialnet	Portal do SEER
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ICAP (Indexação Compartilhada de Artigos de Periódicos)	Sumarios.org
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Ficha catalográfica

Seqüência: Estudos jurídicos e políticos. Universidade Federal de Santa Catarina. Programa de Pós-Graduação em Direito. n.1 (janeiro 1980)-.

Florianópolis: Fundação José Boiteux. 1980-.

Publicação contínua

Resumo em português e inglês

Versão impressa ISSN 0101-9562

Versão on-line ISSN 2177-7055

1. Ciência jurídica. 2. Teoria política. 3. Filosoia do direito. 4. Periódicos. I. Universidade Federal de Santa Catarina. Programa de Pós-graduação em Direito

CDU 34(05)

Catalogação na fonte por: João Oscar do Espírito Santo CRB 14/849

PUBLICAÇÃO 95

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Estudos
jurídicos
e políticos

Ano XLIII
Volume 44

e97857
https://doi.org/10.5007/2177-7055.2023.e97857

ARTIGO ORIGINAL

The origin of competitive dialogue and its adoption in the Brazilian legal order

A origem do diálogo competitivo e sua adoção no ordenamento jurídico brasileiro

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Abstract: This article aims to analyze the origin of Competitive Dialogue and the way it was adopted in the Brazilian legal system through Law 14,133/2021. The study covers the origin of the new bidding modality inserted in Brazilian legislation, which has its embryo in Europe, through the Green Book, which is a Communication adopted by the European Commission on November 27, 1996, being a documentary landmark in dealing with a greater rapprochement between the Public Power and the private sector when carrying out public contracts. With the advent of Directive 2004/18/EC of the European Parliament and of the Council, which dates from 31 (thirty-one) March 2004, competitive dialogue expressly emerged. This Directive was revoked and succeeded by Directive 2014/24/EU of the European Parliament and of the Council on 26 (twenty-six) February 2014, which maintained the "competitive dialogue" in its provisions and improved its discipline. Examples of countries that have internalized competitive dialogue in their legal systems, the legislative process for internalizing the institute in the Brazilian legal system and its legislation in Brazilian law and comparative law are also discussed. For the construction and development of the theme, the positions of respected scholars and theorists were addressed, as well as the letter of the law itself, which enable an accurate analysis of the aforementioned topic, and, therefore, the methodology of the study is the research of legislation and doctrine regarding of the theme.

Keywords: Competitive dialogue. Law 14,133/2021. Origin. Green Book. European Union Directives.

Resumo: O presente artigo tem como objetivo a análise da origem do Diálogo Competitivo e a forma como foi adotado no ordenamento jurídico brasileiro através da Lei n.º 14.133/2021. O estudo abrange a origem da nova modalidade licitatória inserida na legislação brasileira, a qual tem seu embrião na Europa, através do Livro Verde, que é uma Comunicação adotada pela Comissão Europeia em 27 de novembro de 1996, sendo marco documental no trato de uma maior aproximação entre o Poder Público e a iniciativa privada quando da realização das contratações públicas. Com o advento da Diretiva 2004/18/CE do Parlamento Europeu e do Conselho, a qual data de 31 (trinta e um) de março de 2004, surgiu expressamente o diálogo concorrencial. Esta Diretiva foi revogada e sucedida pela Diretiva 2014/24/EU do Parlamento Europeu e do Conselho em 26 (vinte e seis) de fevereiro de 2014, sendo que a mesma manteve em suas disposições o "diálogo concorrencial" e aperfeiçoou a sua disciplina. Ainda são abordados exemplos de países que internalizaram o diálogo competitivo em seus ordenamentos jurídicos, o processo legislativo para internalização do instituto no ordenamento jurídico brasileiro e a sua legislação no direito brasileiro e no direito comparado. Para a construção e desenvolvimento do tema foram abordados posicionamentos de respeitados doutrinadores e teóricos, assim como a própria letra da lei, os quais possibilitaram uma análise apurada acerca do referido tema. A metodologia do estudo, portanto, é a pesquisa da legislação e da doutrina acerca do tema.

Palavras-chave: Diálogo competitivo. Lei 14.133/2021. Origem. Livro Verde. Diretivas da União Europeia.

1 INTRODUCTION

The New Bidding Law, Law No. 14,133/2021, in the search for updating, modernizing and improving the legal provisions until then in force in the Brazilian legal system, included the Competitive Dialogue as a new bidding modality.

This new modality was regulated in article 32 of the New Law, inspired by the Directives of the European Union, seeking, as well as in comparative law, greater efficiency in public procurement through the approximation between the public and private sectors.

For Thiago Marrara (2017), the nomenclature adopted in the Brazilian legislation, transforming the "competitive dialogue", which

is the name in the official Portuguese version (of Portugal), into a competitive dialogue, was due to a direct and unnecessary translation of the name given by the English language (competitive *dialogue*). Notwithstanding this, the fact is that the Brazilian legislation has called the so-called European competitive dialogue as competitive dialogue in Brazil.

Pursuant to item XLII of article 6 of Law No. 14,133/2021, competitive dialogue is the bidding modality for contracting works, services and purchases through which the Public Administration conducts dialogues with previously selected bidders, through objective criteria, in order to develop one or more alternatives capable of meeting their needs, Bidders must submit a final proposal after the end of the dialogues.

It can be said that the competitive dialogue presupposes a prior dialogical relationship between the entities that must bid and the agents of the private initiative, considering that the administration is aware of its need, but is not aware of the appropriate solution to meet this need, therefore, due to this fact, it engages in dialogues with previously selected agents of the private initiative, In order to be presented with one or more solutions, which will be evaluated and, finally, the one that best meets your need or needs will be contracted.

Regarding the competitive dialogue and its insertion in the Brazilian legal system, under the focus of political and economic circumstances, as well as in the face of the progress in the construction of ideas to overcome the vertical and authoritarian focus of the Public Administration towards the bidders, Marçal Justen Filho (2023, p. 469) teaches that it is crucial to emphasize that collaborative approaches in the context of the relationship between the public and private sectors reflect a political and economic orientation. The adoption of competitive dialogue is an expression of this perspective. The spread of the democratic exercise of power has led to the rejection of the idea of a strictly hierarchical relationship, in which the state has the role of controlling society. Nowadays, the participation of citizens in

the formulation of the will of the State and in the development of administrative functions is accepted.

This article addresses the origin of competitive dialogue, going through the analysis of the Green Paper and the European Union Directives, as well as examples of countries that have internalized the institute in their legal systems, also tracing the path of the legislative process that culminated with the advent of the New Bidding Law, Law No. 14,133/2021 and, consequently, with the inclusion of competitive dialogue as a bidding modality in the Brazilian legal system.

Finally, a comparison of the Brazilian legislation with the legislation of other countries is carried out, about how the competitive dialogue was conceived in each of them.

2 COMPETITIVE DIALOGUE AND ITS ORIGINS

The origin of competitive dialogue or competitive dialogue is given in embryo in the Green Paper launched by the European Commission with the title "Public Procurement in the European Union: Paths for Reflection for the Future", and was later expressly treated as "competitive dialogue" in Directive 2004/18/EC of the European Parliament and of the Council, which dates from 31 (thirty-one) March 2004.

This Directive was succeeded by Directive 2014/24/EU of the European Parliament and of the Council of 26 (twenty-six) February 2014, which expressly maintained the institute of competitive dialogue, followed by its internalization by several countries in their legislation.

2.1 Green Papers

The Green Papers launched by the European Commission are discussion documents aimed at stimulating debate and launching a consultation process at European level on a given subject or subject,

so that, in the future, measures can be taken so that the objectives set out can be achieved.

The Green Paper (Comissão Europeia, 1996) which will be dealt with in this study is a Communication adopted by the European Commission on 27 November 1996.

It is a government report with proposals that may be adopted by the countries that make up the European Union, being a first step for future modifications of laws and internal legal norms of the countries.

Specifically, the Green Paper discussed here is entitled "Public Procurement in the European Union: Reflection Paths for the Future", being a documentary milestone in dealing with a greater approximation between the Public Power and the private sector when carrying out public procurement. It brings reflections for the future in the field of public procurement, highlighting the importance of the exchange of information between the Public Administration and the private sector, being, therefore, the embryo of the competitive dialogue, called in Europe "competitive dialogue".

In fact, the Green Paper under analysis here contains in item "1" of its initial summary the proposition that the European Union's policy on public procurement has as its objective The main objectives are the creation of the conditions of competition necessary for public contracts to be awarded without discrimination, the rational use of public funds through the choice of the best tender submitted, Access: for suppliers to a single market offering important possibilities and the strengthening of the competitiveness of European companies.

In the same vein, about the need to face two problems regarding public procurement in the European context at the time, namely, the partial and incomplete transposition by the Member States of the directives on public procurement and the relatively tenuous economic impact of this policy, which demonstrated that the results obtained in terms of price convergence, growth of cross-border trade flows and increase in the number of suppliers participating in the In order to improve the situation in these two respects, the

Commission has drawn up the Green Paper, which is dealt with here with the aim of framing a broad debate on public procurement in the European Union.

The Green Paper is an initial reflection by the Commission on a number of key issues and invited all interested parties (Council, European Parliament, Economic and Social Committee, Committee of the Regions, professional organisations, contracting authorities, suppliers and consumers) to submit their views in writing by 31 March 1997. Once this written consultation stage has been completed, the Commission would consider whether it was appropriate to organise a hearing with interested parties. On the basis of the contributions submitted, the Commission would draw up a communication on public procurement.

It can be seen that the efforts of the European Union, arising from the discussions that gave rise to the Green Paper discussed here, influenced the models of public procurement in Europe in the following decades. Nicholas Matheus Nascimento Marins (2022, p. 21) states that the conclusions adopted by the Commission of the European Communities, meeting in 1996, ended up marking the European guidelines for public procurement in the decades that followed.

It should be noted that the Green Paper, at no time, expressly referred to competitive dialogue or competitive dialogue, but the guidelines brought in it are in line with the essence of what would become the institute, which is the dialogue between the public power and the private initiative, in order to seek the best solution.

For Augusto Schreiner Haab (2021), in the Green Paper dealt with here (COM 583 Final), back in 1996, the need for flexibility and the admission of greater dialogue between the Public Administration and private agents was exposed, and this understanding is extracted from the analysis of the topic in which the phase that precedes the launch of the tender and the complexity of the projects in the trans-European networks was discussed. The Commission recognizes that the innovation of solutions for certain complex cases that arise could

dispense with a greater technical dialogue prior to the publication of the bidding process with the specification of the object.

In some passages of the Green Paper, it is easy to see the European Commission's concern with the exchange of information between the public authorities and the private sector. In one of these excerpts, it is concluded that all those involved would benefit from the diffusion of electronics in the public procurement sector, since, in relation to the current system, which is governed by paper support, the processes will be more transparent, more open to dialogue with suppliers and much more effective. In another excerpt, the Commission acknowledges that, due to the complexity of most projects, which may sometimes require entirely new solutions, it may be necessary to carry out, before the call for tenders is published, a technical dialogue between the contracting authorities and the private partners concerned, warning that if the contracting authorities, by putting in place specific safeguards – both procedural and substantive – avoid requesting or accepting information which would have the effect of restricting competition, the principle of equal treatment would not be infringed.

In view of the above, it is undeniable that the embryonic ideas of the future institute (competitive dialogue or competitive dialogue) emerged with the advent of the European Commission's Green Paper, which influenced the European Union Directives.

2.2 European Union Directives

As a consequence of the reflections brought in the Green Paper previously analysed, Directive 2004/18/EC of the European Parliament and of the Council (Directiva, 2004) was issued, which dates from 31 (thirty-one) March 2004.

Rafael Sérgio Lima de Oliveira (2021, p. 8) asserts, referring to the Green Paper, that Directive 2004/18/EC of the European Parliament and of the Council is the result of a long process of revision of the European Directives that dealt with public procurement, and

the Green Paper in relation to the previous item marks the beginning of this process.

Directive 2004/18/EC of the European Parliament and of the Council inaugurates the competitive dialogue, which is referred to in the Portuguese of Portugal as "competitive dialogue" in that Directive.

Article 1, item "11", subparagraph "c" of this Directive states that the competitive dialogue is the procedure in which any economic operator may request to participate and in which the contracting authority conducts a dialogue with the candidates admitted to that procedure, with a view to developing one or more solutions capable of responding to their needs and on the basis of which, or in which the selected candidates will be invited to submit a proposal.

The discipline of competitive dialogue is laid down in Article 29 of the Directive. According to Rafael Carvalho Rezende Oliveira (2023, p. 200), the procedure involves dialogue between the contracting entity and private sector entities, which are previously selected after the announcement of the bidding process. This procedure is used in complex contracts, with the objective of identifying and defining the solutions that best meet the needs of the contracting entity, and the isonomic treatment between the candidates must be observed. Once the dialogue is over, the private entities, already initially selected to participate in the bidding process, must present their final proposals in detail, demonstrating compliance with all the requirements necessary for the realization of the intended object, and it is up to the contracting entity to finally define the winning proposal.

Directive 2004/18/EC of the European Parliament and of the Council was repealed by Directive 2014/24/EU of the European Parliament and of the Council of 26 (twenty-six) February 2014 (Diretiva, 2014), on public procurement.

This new Directive maintained the "competitive dialogue" in its provisions and improved its discipline. In that case, competitive dialogue was not only maintained but encouraged, as can be seen from recital 42 thereof.

Whereas it is very important that contracting authorities should have greater flexibility in choosing a procurement procedure which provides for negotiation; The increased use of such procedures is also expected to intensify cross-border trade, as the evaluation has shown that contracts awarded through a negotiated procedure, with prior publication of a notice, have a particularly high success rate of cross-border tenders. Member States should be able to provide for the use of the competitive procedure with negotiation or competitive dialogue in situations where an open or restricted procedure without negotiation is not likely to generate satisfactory results from a public procurement perspective.

It should be recalled that the use of competitive dialogue has increased significantly in terms of contract values in recent years. It has proved useful in cases where contracting authorities are unable to define ways to meet their needs or assess what the market can offer in terms of technical, financial or legal solutions. This may be the case, in particular, in the case of innovative projects, the implementation of large-scale integrated transport infrastructure projects, large IT networks or projects requiring complex and structured financing. Where relevant, contracting authorities should be encouraged to appoint a project leader to ensure good cooperation between economic operators and the contracting authority during the procurement procedure.

A major difference between the two directives is that in the first, article 29 brought the use of competitive dialogue, indicating that this should take place "in the case of particularly complex contracts", while in the successor directive, article 30 does not bring the same expression/necessity.

Augusto Schreiner Haab (2021) highlights the maintenance of the competitive dialogue in the successor Directive, as well as, considering the success of the application of the institute in specific cases in which the Public Administration encountered difficulties, the incentive to use the institute, given that the structure and premises of the competitive dialogue were maintained in the new Directive.

It also highlights the fact that, under Article 26(4) of the successor Directive, the adoption of competitive dialogue is mandatory internalization in the domestic legislation of the Member States in certain cases. Specifically, with regard to the difference pointed out in the previous paragraph, relating to the expression "particularly complex", contained in the repealed directive and not present in the new directive, the author asserts that this change takes place, despite the original idea that the application of the institute is in complex contracts, at the option of the European legislator in which the hypotheses of use of the competitive dialogue with the possibilities of using the special process of competition with negotiation, the latter provided for in European legislation, and, therefore, the absence of the expression.

In fact, as seen, another major difference between the directives is that the successor, in item "4" of its article 26, makes it mandatory for the member states of the European Union to adopt the competitive dialogue in their respective domestic legislation in specific cases.

According to that provision, Member States are to provide for the possibility for contracting authorities to use a competitive procedure with negotiation or a competitive dialogue in the following situations: (a) in respect of works, supplies or services which meet one or more of the following criteria: (i) the needs of the contracting authority cannot be met without the adaptation of readily available solutions; (ii) the products or services include innovative design or solutions; (iii) the contract may not be awarded without prior negotiations because of specific circumstances relating to the nature, complexity or legal and financial set-up or because of the risks associated therewith; (iv) the technical specifications cannot be defined with sufficient precision by the contracting authority by reference to a standard, European technical type-approval, common technical specifications or technical reference within the meaning of points 2 to 5 of Annex VII; (b) in respect of works, supplies or services, if, in

response to an open or restricted procedure, only irregular or unacceptable tenders have been submitted.

In such situations, contracting authorities shall not be required to publish a contract notice if they include in the procedure all tenderers, and only tenderers, who meet the criteria referred to in Articles 57 to 64 and who, in the previous open or restricted procedure, submitted tenders which correspond to the formal requirements of the procurement procedure. In particular, tenders which do not comply with the provisions of the tender documentation, which are received too late, which show evidence of collusion or corruption, or which are considered by the contracting authority to be abnormally low, shall be regarded as irregular. In particular, tenders submitted by tenderers who do not possess the required qualifications and tenders whose price exceeds the budget of the contracting authority, as determined and documented before the call for tenders is launched.

These European Directives gave rise to the so-called "competitive dialogue", which in Brazil was received in the New Bidding Law.

2.3 Countries that have internalized the institute in their legal systems

After the enactment of the Directives discussed above, several European countries have internalized in their legal systems rules providing for competitive dialogue as one of the forms to be observed for the purposes of public procurement. Notwithstanding this, at least since the 1990s, the exchange of information and the dialogical procedural form between public power and private initiative have already permeated some bidding models.

For Guilherme F. Dias Reisdorfer (2022, p. 26), the adoption of bidding models based on the exchange of information and spaces for negotiation among interested parties has been disseminated in the international experience at least since the 1990s. The starting point in the United Kingdom is the use of the competitive dialogue procedure

to structure privatization processes that resulted in public-private partnerships. Subsequently, the comprehensive use of more flexible and open contracting models has become the subject of discussion in the European Community. The initial idea of competitive dialogue originated as a means of increasing efficiency and competitiveness within the European common market, and its use was initially guided by the rules of Directive 2004/18/EC, which was succeeded by Directive 2014/24/EU.

Since then, several countries, as mentioned, have incorporated the institute into their internal legislation, sometimes under the name "competitive dialogue" and sometimes under the name "competitive dialogue". Countries such as Portugal, France, Spain and the United Kingdom have internalized the central figure of this study in their respective legal systems. This is what Ronny Charles L. Torres explains (2023) and Guilherme F. Dias Reisdorfer (2022, p. 26/27). Outside the European scope, the USA (United States of America) also incorporated into *the Federal Acquisitions Regulation* (FAR), a general authorization for the use of this bidding modality, before receiving the proposals.

Regarding the FAR, Guilherme F. Dias Reisdorfer (2022, p. 27) teaches that it was incorporated in the same general authorization for the use of dialogue prior to the receipt of proposals, and, unlike other legislations, no exhaustive model was established for this dialogical interaction. In Chapter 15 of the FAR, there is a general recommendation that prior to public procurement processes, the exchange of information with private agents should be carried out and in forms not necessarily equivalent to those inherent to the competitive dialogue, but with analogous functions, and the dialogic exchange may take place on the type of contract most appropriate to the needs of the contracting entity, contractual discipline, as well as in relation to planning aspects related to contract execution and the formation of the contracting process itself. Various techniques are foreseen for obtaining information and negotiating between contracting entities and private agents, in order to structure and prepare contracts.

2.4 Legislative Process for the internalization of Competitive Dialogue in the Brazilian legal system

In 2013, the legislative process of drafting Law No. 14,133/2021 began, with the publication of the Act of the President of the Federal Senate No. 19, of May 28, 2013 (Brazil, 2013a).

Nicholas Matheus Nascimento Marins (2022, p. 43) explains that the aforementioned legislative process was initiated with the justification of the significant transformations in the Brazilian public sphere after the advent of Law No. 8,666/1993, and the Special Commission was constituted to update and modernize the legislation that affects public bidding and contracting. The Commission was established on June 13, 2013, the date on which its first meeting took place, and the work plan was established, which, in its first phase, included debates with civil society entities, economic sectors, specialists, control bodies, government, representatives of the state and municipal public administration, as well as specialists in comparative law. In the second phase, the work plan included the study, collation and consolidation of the impressions arising from the suggestions and considerations collected in the first phase, as well as the preparation of a draft bill. The third and final phase of the work plan was focused on the preparation of the final version of the bill.

It can be seen that, for the modernization, improvement and updating of Law No. 8,666/1993, the Special Temporary Commission for the Modernization of the Law of Bidding and Contracts (Law No. 8,666/1993) – CTLICON – sought in its work plan the participation of the comprehensive range of institutions, bodies and specialists, so that everyone could be heard and could contribute with suggestions and criticisms for the improvement of Law No. 8,666/96 that would lead, after decades, to the approval of Law No. 14,133/2021.

In fact, considering the passing of the years and the urgent need to modernize and improve the bidding legislation, the Special Temporary Commission for the Modernization of the Bidding and Contracts Law

(Law No. 8,666/1993) – CTLICON – held public hearings, which were attended by representatives of various bodies and entities.

Regarding the aforementioned public hearings that were held, Nicholas Matheus Nascimento Marins (2022, p. 43/44) explains that they had the participation of several bodies and entities, such as: National Union of the Heavy Construction Industry, National Confederation of Industry, National Confederation of Transport, National Confederation of Commerce, Federal Council of Engineering and Agronomy, Union of Architecture and Engineering – SINAENCO, Brazilian Navy, Brazilian Army, Brazilian Air Force, Ministry of Defense, Office of the Comptroller General, Office of the Attorney General, Federal Court of Accounts, Ministry of Planning, Budget and Management, Brazilian Agricultural Research Corporation, Federal Data Processing Service, Brazilian Chamber of the Construction Industry – CBIC, Association of Brazilian Information Technology Companies, Brazilian Association of Distributors of Special and Exceptional Products, Brazilian Association of Pharmaceutical Wholesale, National Federation of Environmental Service and Cleaning Companies, Brazilian Association of Public Cleaning and Special Waste Companies, Brazilian Association of Solid Waste and Public Cleaning, Council of Architecture and Urbanism of Brazil, Institute of Architects of Brazil, Inter-American Development Bank, World Bank, PricewaterhouseCopopers, National Confederation of Municipalities, Municipal Secretariat of Finance of Salvador and Administrative Council for Economic Defense and Brazilian Association of Information and Communication Technology Companies.

Unlike the healthy and eclectic participation of agencies and entities in the public hearings, the presence of specialists was scarce, and Jorge Ulisses Jacoby Fernandes was the only expert who attended, although other renowned theorists were invited.

The Commission met last on December 12, 2013, when it approved its Final Report (Brazil, 2013c), which, on December 24, 2013, was transformed into the Senate Bill under number 559/2013.

During the course of the Bill in the National Congress, substitutes were presented to it, as well as several modifications to its provisions in both Houses of Congress. On December 13, 2016, the substitute was approved in a supplementary round with amendments in the Initiating House (Federal Senate) of Senate Bill No. 559/2013, and it was then forwarded to the Chamber of Deputies (Revising House) on February 3, 2017, when it was received as Bill No. 6814/2017.

In the Chamber of Deputies, after the legislative procedures, with a new substitute, the final wording of the bill was approved, which was forwarded to the Initiating House, where it was received as Bill No. 4523 of 2020, being submitted to the Presidency of the Republic, which sanctioned the Law with vetoes, which were partially maintained by the National Congress later, Law No. 14,133 was published on April 1, 2021.

Regarding the competitive dialogue, it is important to highlight that, until the last meeting of the Temporary Special Committee for the Modernization of the Bidding and Contracts Law (Law No. 8,666/1993) – CTLICON – which took place on December 12, 2013, there was no mention of the competitive dialogue as a proposal for the modernization and improvement of Law No. 8,666/1993.

Although there was no express mention of competitive dialogue at this point in the legislative process, Nicholas Matheus Nascimento Marins (2022, p. 44, 46/47) rightly pondered that in the discussions held until then within the scope of the procedures carried out by the Special Committee, demands were already brought for the flexibility of the bidding procedures for the resolution of complex cases, which would characterize the dialogue as conceived later.

In fact, regarding the effective concern that guided the work of the Special Temporary Commission for the Modernization of the Bidding and Contracts Law (Law No. 8,666/1993) – CTLICON –, with regard to the difficulty of defining complex objects, the representative of the Association of Information and Communication Technology

and Digital Technologies Companies (Brasscom) expressed himself in the sense that it was necessary to confer power to the public agent in order to solve the problem of the specification of the object to be contracted by the Public Administration, also due to the great speed of technological changes (Brazil, 2013b).

It is clear that the concern with the definition of complex objects by public managers, expressed above in a CTLCON meeting, is in line with what was already provided for in item "1" of article 29 of Directive 2004/18/EC of the European Parliament and of the Council, which provides that, in the case of particularly complex contracts, Member States may provide that contracting authorities, To the extent that they consider that the use of an open or restricted procedure does not allow the award of the contract, they shall have recourse to the competitive dialogue in accordance with this Article. The award of the public contract shall be made solely on the basis of the criterion of the most economically advantageous tender.

This concern eventually led to the inclusion of the institute of competitive dialogue in the legislative process under consideration, which effectively occurred.

In a substitute presented by Senator Fernando Bezerra, on August 2 (two), 2016, in the context of the Senate Bill under number 559/2013, for the first time, during the legislative process that culminated in the New Bidding Law, the institute of competitive dialogue expressly appears.

The Opinion presented by the aforementioned Senator brings in its core, in relation to the competitive dialogue, emphasis on the inclusion of the modality, treating its inclusion as a point of evolution in relation to the rules in force in the country regarding public bids and contracts (Senado Federal, 2016). The legal provisions presented in the substitute proposal underwent changes in their wording, and the bill was approved in the Federal Senate, resulting in the final version of PLS No. 559/2013, whose changes did not affect its essence, according to Nicholas Matheus Nascimento Marins (2022, p. 54).

It is important to note that the substitute presented by Senator Fernando Bezerra is inspired almost entirely by the provisions of Directive 2014/24/EU of the European Parliament and of the Council, but it is not identical, presenting some technical and textual distinctions, in addition to certain innovations. One of the innovations is the provision of item X of paragraph 1 of article 27 of the substitute, which provides that the competitive dialogue will be conducted by a commission to be composed of at least three civil servants or effective public employees, and the hiring of professionals to provide technical advice to the commission is allowed and that such professionals, when hired, must sign a confidentiality agreement and compromeeterem not to carry out activities that conflict with the obligations assumed by them in view of the link with the respective bidding process, and the European model does not determine the creation of boards and/or commissions, as well as does not provide for the hiring of professionals for technical advice (Marins, 2022, p. 53).

The final version of Bill project No. 559/2013 was forwarded to the Chamber of Deputies, receiving a new numbering, that is, Bill No. 6,814/2017 (Brazil, 2013c).

During the processing of Bill No. 6,814/2017, which ended up being treated with a new numbering (Bill No. 1,292, of 1995), unlike what had occurred in the Federal Senate previously, the competitive dialogue was the subject of discussions, in which arguments in favor were presented, as well as skeptical positions and positions against the institute.

As in the Federal Senate, public hearings were held, with popular participation until a final wording was reached, in addition to the analysis of numerous bills that dealt with bidding, as provided for in the Report of the Special Committee destined to issue an Opinion on Bill No. 1,292, of 1995, whose rapporteur is Federal Deputy João Arruda[1].

[1] That analysis: In March of this year, this Special Commission was set up in charge of the relevant mission of modernizing the legislation on bidding and contracts of

In fact, Bill No. 6,814/2017 constituted the preponderant basis for the work of the Special Committee constituted in the Chamber of Deputies, which would result in the Final Report of Bill No. 1,292, of 1995.

In view of this, a comparative analysis will be made of what was forwarded to the Chamber of Deputies, through the Final Report of Senate Bill No. 559/2013 and the Opinion of the Special Committee on Bill No. 1,292/1995, of December 11, 2018.

The new 2018 Opinion ended up limiting the use of the competitive dialogue to the contracting of large-scale works, services and purchases. As for the object and requirements for the adoption of the competitive dialogue currently provided for in the subparagraphs of items I and II of article 32 of the New Bidding Law, Law No. 14,133/2021, by the proposal of the Federal Senate, the

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the Public Administration. The work plan presented was considered bold: in two months we should dialogue with the various sectors involved, mature our convictions, examine the proposals in progress and conclude this honorable task. Over the course of two intense months, we held ten public hearings, with an average of two hearings per week, listened to more than 61 authorities on the subject, promoted seminars in all regions of the country, participated in countless meetings and, in this way, collected precious contributions from the public sector (areas of management and control), the private sector (industry, commerce and services), civil society, including national and international transparency organizations, and leading experts in the field. At the same time, we analyzed more than 230 attached bills and their respective amendments, always guided by the objective of harmonizing as many positions as possible and preparing a text that would meet the demands of the multiple sectors involved. Among the attached propositions, Bill No. 6,814, of 2017, of the Temporary Commission for the Modernization of the Bidding Law of the FEDERAL SENATE stood out by intending to establish a new legal framework for bids and contracts for Brazil. As will be shown below, Bill No. 6,814, of 2017, is the main reference of our Substitute, which, whenever possible, also incorporated other contributions from the Federal Senate and, mainly, from Parliamentarians of this House, arising from the attached Propositions and respective amendments (...). BRAZIL. Bill n.º 1.1292-C, de 1995. Altera a Lei n.º 8.666, de 21 de junho de 1993, que regulamenta o art. 37, inciso XXI, da Constituição Federal, institui normas para licitações e contratos da Administração Pública e dá outras providências. Diário Oficial da União, Brasília, DF, v. 73, n.º 205, Seção 12, 11 dez. 2018. In: https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=1697133. Access: 26 jun. 2023.

aforementioned subparagraphs, within each respective item, were to be filled in alternatively, and these are now of cumulative observation in the opinion of the Chamber of Deputies. A minimum value was also stipulated for contracts through competitive dialogue, which should have an estimated value of more than R$ 100,000,000.00 (one hundred million reais).

Regarding the publicity of the instrument calling for the competitive dialogue, the Chamber of Deputies added the need to publish the notice on the official website, as well as the observance of the minimum period of 25 (twenty-five) working days for any interested parties to express their intention to participate in the competitive dialogue procedure.

It was also added in the Opinion of the Chamber of Deputies that any interested parties who met the requirements pre-established in the convening instrument could participate in the dialogue phase itself. Still regarding the maintenance of the dialogue until the public administration finds the solution that meets its needs, the rule was added that such a decision to maintain must be justified.

In another innovation of the Chamber of Deputies in relation to the proposal of the Federal Senate, it was determined that the meetings with the pre-selected bidders will be recorded in minutes and recorded using audio and video technological resources. In addition, it was determined that the Administration shall, upon declaring that the dialogue has been concluded, attach to the records of the bidding process the records and recordings of the dialogue phase and begin the competitive phase with the disclosure of a public notice containing the specification of the solution that meets its needs and the objective criteria to be used for the selection of the most advantageous proposal and open a deadline. not less than sixty (60) working days for all pre-selected bidders to submit their proposals, which must contain the necessary elements for the realization of the project. The aforementioned deadline of 60 (sixty) working days in the proposal of the Federal Senate was 20 (twenty) working days.

Finally, the provision regarding the manifestation of the control bodies that would follow and monitor the dialogues included a maximum period of 40 (forty) working days for the aforementioned bodies to express their opinion on the legality, legitimacy and economy of the bidding, before the execution of the respective contract.

On September 17, 2019, Bill No. 1,292-F, of 1995, was voted and approved, with the removal of the provisions related to the institute of competitive dialogue, the requirement of a minimum value for contracting through the designated modality, under the justification of expanding its application, since it is considered a great advance in contracting involving technological innovation. Item II of the current article 32 of Law No. 14,133/2021 was also formatted, and its paragraphs are now an illustrative list.

Taken to the presidential sanction, within the scope of the provisions that referred to competitive dialogue, there were two vetoes by the Presidency of the Republic, which were later maintained.

The first was item III of article 32 of Law No. 14,133/2021, which linked the modality of competitive dialogue to the open and closed modes of dispute provided for in the new legislation, under the justification that such a measure is contrary to the public interest, and it is not appropriate to bind the institute to the mode of dispute in the due appreciation of variations between proposals and much less to the solution of any deficiencies with modes of dispute.

The other veto took place in item XII of paragraph 1 of Law No. 14,133/2021, removing the possibility for an external control body to monitor and monitor the competitive dialogues, which, within a maximum period of 40 (forty) business days, should give an opinion on the legality, legitimacy and economy of the bidding, before the conclusion of the contract, under the justification that the measure of attributing to the Courts of Auditors the control of legality over internal acts of the public administration of the three branches of the Republic, would extrapolate the competences attributed to these Courts in the constitutional text, as well as violate

the principle of separation of powers brought in article 2 of the Federal Constitution.

Thus, the provisions contained in Law No. 14,133/2021, which concern item XLII of article 6, item V of article 28 and article 32, remained in force in the Brazilian legal system, dealing with competitive dialogue from the perspective of administrative law about the designated institute.[2]

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[2] Article 6 For the purposes of this Law, the following shall be considered: (...) XLII - competitive dialogue: bidding modality for contracting works, services and purchases in which the Public Administration conducts dialogues with bidders previously selected according to objective criteria, in order to develop one or more alternatives capable of meeting their needs, and the bidders must present a final proposal after the end of the dialogues;

Art. 28. The bidding modalities are: (...) V - competitive dialogue.

Art. 32. The competitive dialogue modality is restricted to contracts in which the Administration: I - aims to contract an object that involves the following conditions: a) technological or technical innovation; b) impossibility of the organ or entity to have its needs met without the adaptation of solutions available in the market; and (c) the impossibility of the technical specifications being defined with sufficient precision by the Administration; II - verify the need to define and identify the means and alternatives that can satisfy their needs, with emphasis on the following aspects: a) the most appropriate technical solution; (b) the technical requirements capable of implementing the solution already defined; (c) the legal or financial structure of the contract; III - (VETOED). § 1 In the competitive dialogue modality, the following provisions shall be observed: I - the Administration shall present, on the occasion of the publication of the public notice on the official website, its needs and the requirements already defined and shall establish a minimum period of twenty-five (25) business days for expression of interest in participating in the bidding; II - the criteria used for the pre-selection of bidders shall be provided for in a public notice, and all interested parties who meet the established objective requirements shall be admitted; III - the disclosure of information in a discriminatory manner that may imply an advantage for any bidder will be prohibited; IV - the Administration may not disclose to other bidders the proposed solutions or confidential information communicated by a bidder without its consent; V - the dialogue phase may be maintained until the Administration, in a reasoned decision, identifies the solution or solutions that meet its needs; VI - the meetings with the pre-selected bidders will be recorded in minutes and recorded using audio and video technological resources; VII - the public notice may provide for the realization of successive phases, in which case each phase may restrict the solutions or proposals to be discussed; VIII - the Administration shall, when declaring that the dialogue has been concluded, attach to the records of the bidding process the records

2.5 Competitive Dialogue and its legislation in Brazilian and comparative law

As seen in the previous item, Brazil adopted in its domestic legislation a competitive dialogue model inspired by Directive 2014/24/EU of the European Parliament and of the Council of February 26, 2014, but with some changes and innovations introduced by the national legislator, which, primarily, took away the constant flexibility of the European model to the detriment of the discretion of the Brazilian public manager.

Joel de Menezes Niebuhr (2022, p. 630) asserts that the Brazilian bidding modality was inspired by foreign models, highlighting as a reference the European model, called competitive dialogue and which is provided for in article 30 of the European Directive 2014/24.

In fact, as already discussed in this research work, in the United States of America, through the *Federal Acquisition Regulation* (FAR), there is a general authorization for the use of prior dialogue with the private sector in order to receive proposals. This general recommendation of a procedure prior to public procurement, demonstrates the size of the flexibilization of dialogue in the North American country.

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and recordings of the dialogue phase, start the competitive phase with the disclosure of a public notice containing the specification of the solution that meets its needs and the objective criteria to be used for the selection of the most advantageous proposal and open a deadline; not less than sixty (60) business days, for all pre-selected bidders pursuant to item II of this paragraph to submit their proposals, which must contain the necessary elements for the realization of the project; IX - the Administration may request clarifications or adjustments to the proposals submitted, provided that they do not discriminate or distort competition between the proposals; X - the Management will define the winning proposal according to criteria disclosed at the beginning of the competitive phase, ensuring the most advantageous contract as a result; XI - the competitive dialogue will be conducted by a hiring committee composed of at least three (3) permanent civil servants or public employees belonging to the permanent staff of the Administration, with the hiring of professionals for technical advice to the commission being admitted; XII - (VETOED). § 2º Professionals hired for the purposes of item XI of the § Article 1 of this article shall sign a confidentiality agreement and shall refrain from activities that may constitute a conflict of interest.

The FAR does not establish a single model, as is done in Brazil, for the interaction between the contracting entity and the private public.

In England, according to Luiza Valgas de Paula's lesson (2022, p. 90), the competitive dialogue is more flexible regarding its use in public procurement, in view of its normative description, authorizing that all aspects of contracting can be the subject of debate, including the discussion of the final proposals and negotiation on the winning proposal, in order to confirm financial commitments or other terms of the bidding.

The same author deals with the similarities and differences regarding the competitive dialogue in the countries of England, Portugal and Brazil, she clarifies that the internal regulations and the frequency of use of the institute in the three countries are different. As a result of this comparison between the three countries, Luiza Valgas de Paula (2022, p. 144) elaborates a comparative table in Appendix B of her research.

It is evident that the legislations have differences, but the biggest difference between the countries analyzed is regarding the application or not of this legislation in practice by the three countries, that is, regarding the effective use of the competitive dialogue by these countries.

The comparative table to which the author refers, briefly, brings the following considerations about the similarities and differences between the three countries, regarding the institute of competitive dialogue, when synthetically compared the following elements: legal definition of competitive dialogue, legal hypotheses of its use, frequency/quantity of use of the institute and doctrinal criticisms about competitive dialogue.

In fact, Luiza Valgas de Paula (2022, p. 193/196), in her studies, realized that England is the country that is more prepared to use the Competitive Dialogue than the other countries in the research. The diversity of studies carried out in this country and the repeated use of this instrument favored this, and the phases of the procedure were well

studied in England, resulting in recommendations on what should be done and what should be avoided. Also, in the Inglaterra, The legal environment is safer and public agents are better prepared to operate the competitive dialogue, reducing possible problems, such as costliness, slowness and complexity. In Portugal, on the other hand, the internalization of the rules of the Competitive Dialogue with changes that made them less flexible and more complex, ended up hindering the use of the institute. The way in which the competitive dialogue has been regulated in Portugal does not arouse interest in its use by private agents and by the contracting entities themselves. The criticism of the regulation given in Portugal outweighs the positive aspects of the institute in that country.

Finally, in Brazil, according to the author, the regulation of the Competitive Dialogue proved to be more harmonious with its origin in the European directives, unlike the Portuguese regulation. However, there were significant deviations from European law in the bill, which were corrected when Law No. 14,133/2021 was published, and such changes were important to maintain a minimum correspondence between the national law and its original rule. In Brazil, there is still little knowledge about this modality, and it is necessary to invest in the qualification and training of public agents, without forgetting the importance of making the administrative environment increasingly safer and more attractive for this type of procedure in which there is interaction between the public and private sectors (PAULA, 2022, p. 193/196).

Looking at Spain, another country that adopts the European public procurement directives, referenced above, we find that this competitive dialogue is called consultas preliminares de mercado or in English "Preliminary market consultations" which have a dual purpose: "On one hand, allows the contracting bodies to correctly prepare the future tender since, as we will see, the use of this tool will make it easier for them to know if the needs posed by the administration exist and the degree of their development, as well as the estimated

value of the future contract. On the other hand, through this instrument, economic operators are announced the contracting plans and the requirements that will be required in the contracting procedure once it has started. In this way they will be able to better prepare to respond to the demands and needs of the contracting body and will reduce the problem of asymmetric information between economic operators." (De Guerrero Manzo, 2018. p. 1050)

Competitive dialogue enables us to anticipate aspects typically seen in contracts only during implementation and execution, when the results of these studies allow us to demonstrate whether they were prepared appropriately, whether they align with initial expectations, if they allow us to cover the citizen needs that motivated carrying out the contracting procedure. While some cases meet the set standards and achieve objectives, in others, deliveries fall short, exceed expectations, or even worse, they end up being different from those scheduled.

All of the above means that the State has to provide a different methodology for conducting previous studies, and that is when the need to have a competitive dialogue arises, which is also linked to transparency mechanisms within public procurement.

Regarding the way in which the Brazilian legislation adopted the competitive dialogue, distancing itself from the European model, Marçal Justen Filho (2023, p. 472) asserts that the changes implemented in the national Parliament generated uncertainty "as to the legitimacy of restrictive practices for the participation of possible interested parties", causing doubts as to the success of the new bidding modality.

Thus, in view of the exemplifying comparison brought, it is clear that for the effective practical implementation of the competitive dialogue in Brazil, public agents must qualify and train themselves so that they are able to use the new modality brought in the New Bidding Law. Without this, it will be difficult for it to be used and run into future public contracts to be successful. Another point that is a matter of concern, although it can be seen that the Brazilian legislation is more appropriate to the institute than the Portuguese legislation

itself, is the rigidity that was implemented by the Brazilian legislator to carry out the dialogue procedure competitive to the detriment of the flexibility observed, for example, in England and the United States of America.

3 CONCLUSION

In the light of all that has been addressed in this article, the origin of the competitive dialogue, which originates in Europe and is called the competitive dialogue, which was initially given through the Green Paper, which is a Communication adopted by the European Commission on November 27, 1996, which provided guidelines for future reflections on public procurement in the European Union. This is a documentary milestone in the treatment of a greater approximation between the Government and the private sector when carrying out public procurement, although it did not expressly refer to competitive dialogue or competitive dialogue.

Subsequently, with the advent of Directive 2004/18/EC of the European Parliament and of the Council, which dates from 31 (thirty-one) March 2004, the competitive dialogue expressly emerged. This Directive was repealed and succeeded by Directive 2014/24/EU of the European Parliament and of the Council on 26 (twenty-six) February 2014, which maintained in its provisions the "competitive dialogue" and improved its discipline.

Examples of countries that have internalized the institute in their legal systems were brought in the research, as well as the path of the legislative process that culminated in the advent of the New Bidding Law, Law No. 14,133/2021, and consequently with the inclusion of competitive dialogue as a bidding modality in the Brazilian legal system.

In addition, the Brazilian legislation was compared with the legislation of other countries, about how the competitive dialogue

was conceived in each of them, and it was found that the Brazilian legislation stiffened the possible operationalization of the institute, removing a greater flexibility that is noticed mainly in the United Kingdom and the United States of America.

In fact, it can be seen that there was a certain distance between the more flexible way in which the operationalization of the competitive dialogue was conceived in its origin in Europe and notably in the domestic legislation of the United Kingdom and the United States of America when compared with the less flexible and more rigid format adopted in the Brazilian legislation under the terms of article 32 of Law No. 14,133/2021.

This more rigid format adopted in our legal system through Law No. 14,133/2021 is primarily to the detriment of the discretion of the Brazilian public manager, establishing the legal hypotheses for the appropriateness of the competitive dialogue in a detailed and exhaustive manner, unlike, for example, the American FAR, which does not establish a single model for the interaction between the contracting entity and the private public.

It shouldn't be considered a questionable action for the Public Administration to approach suppliers, to jointly build the technical characteristics that best work for the great objective of carrying out intelligent and responsible planned public procurement. Engaging in dialogue with prospective contractors is beneficial for public institutions; it demonstrates good signs of institutional maturity and, above all, transparency.

The observation brought by Marçal Justen Filho (2023, p. 472) and presented in this study, that the way in which the competitive dialogue in Brazil was received legislatively will hardly make the new modality be used successfully, has its reason for being, since with the plastering of the procedure its use will probably be disregarded.

Notwithstanding this, it is only through the effective operationalization of the new modality that a more in-depth analysis of the competitive dialogue in the country can be carried out.

For now, as proposed in this brief essay, it was seen that the Brazilian model, although it has similarities with the original European model, also has significant differences, which, only with the effective use or not of the procedure, will reflect its effects, including so that the academy, in the future, builds an adequate response regarding the correctness of the adoption of the new bidding modality in the form stamped in Law No. 14,133/2021.

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Received: 11/04/2023
Accepted: 12/30/2023