Technical Attestation of Federal Tenders

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SUMMARY

The certificate of technical-professional capacity is not confused with the certificate of technical-operational capacity, since this refers to the structural attribute of the organization and its purpose is to measure the management capacity of the company, both in technical expertise - from services previously
performed satisfactorily - as well as the ability to manage their employees and / or service providers; it is intrinsic to the person of the technical professional and does not conform to the technical-operational acquis of the legal entity, in view of dealing with strictly technical issues, such as: experiences in related services previously performed. It is important to note that there is no legal support for the non-authorization of the company by the administration in bidding bids, under the prism that it does not have registration in professional council, since such requirement is mandatory only with regard to the certificate of technical capacity -professional. Also, the requirement, regarding the certificate of technical and professional capacity, of discharge of registration in the technical council of the profession is irregular, since this requirement does not find legal support, according to TCU's reiterated jurisprudence. As regards the permanent framework for the certificate of technical and professional capacity, it is to be noted that the case law of the federal court of law is already peaceful in the understanding that it is not necessarily - at the time of delivery of its proposal, that the company has to be able to perform with this contract governed by civil law or a declaration that the professional will integrate the framework of the bidder as technical manager, if the company is contracted. In another turn, important change brought, in its bulge, Normative Instruction No. 5/2017, which revoked Normative Instruction No. 2/2008, since this has been elaborated in more detail on the criteria for acceptance of the certificates of technical capacity in the stage of the bidding procedures.

Keywords: Bidding, Qualification, Attestation of Technical Capacity.

1. INTRODUCTION

The direct constitutional basis for the requirements of technical qualification, is understood as this: attestation of technical-operational capacity and attestation of technical-professional capacity, is contained in art. 37, inc. XXI, of the Federative Constitution of Brazil, 1988.

Starting from this principle, we will try to approach, in a very didactic but not exhaustive way, the infraconstitutional postulate that legislates about the general rules of licitations and administrative contracts, that regulate art. 37, inc. XXI, of the Political Charter of the Republic of 1988.

Specifically we will be addressing art. 30, inc. II, and inc. I of paragraph 1 of Law No. 8.666 / 93, due to the fact that among the most diverse entities that promote tenders within the Federal Government, there are somewhat nebulous doubts regarding the differences between the above-mentioned certificates, before the presidential veto referring to inc. II of § 1 of the infraconstitutional law in question, thus causing a certain stir in the juridical and doctrinal world.

Normative Instruction No. 5, dated May 26, 2017, which revoked Normative Instruction No. 2, of April 30, 2008, both edited by the Ministry of Planning, Development and Management - a comparative map,
which the current norm has altered, as well as the one that it brought of innovation to settle the dubious understandings - targets of several demands arbitrated by the Court of Auditors of the union.

Requirements for registration in professional council of attestation of technical-operational capacity, permanent professional staff, discharge of registration in the professional council, judgment of application of diligence in the institutes of certificates, will also be objects of approach of this scientific article.

2. PROOF OF TECHNICAL CAPACITY

The eminent doctrine Marçal Justen Filho in his work Course of Administrative Law states, in a peremptory way, that:

The technical qualification is the documentary evidence of the technical suitability for carrying out the object of the tendered contract, demonstrating previous experience in the execution of a similar contract and the availability of the necessary personnel and equipment. (JUSTEN FILHO, 2015)

Thus, we understand that such measures are intended to safeguard the public administration so that the service contracted hereafter is executed in a reliable manner to the one advocated by the convening instrument, in accordance with the principle of continuity of public service.

When it comes to technical qualification, it is a neuralgic point of the bidding, since the federal constitution in its article 37, section XXI, does not prohibit the requirements of technical qualification, however it represses unnecessary or inadequate requirements, let us see:

Art. 37, XXI - except for the cases specified in the legislation, works, services, purchases and disposals will be contracted through a public bidding process that ensures equal conditions to all competitors, with clauses that establish payment obligations, maintaining the effective conditions of the proposal , under the terms of the law, which will only allow the technical and economic qualification requirements indispensable for ensuring compliance with the obligations. (BRAZIL, 1988). (we grimace)

It remains clear that the text referred to in the political letter is therefore a rule of limited effectiveness, since it depends on supervening law to regulate it. In this wake, therefore, the infra-constitutional protection under the aegis of art. 30, item II, paragraph 1 and item I, of Law 8,666 / 93, which governs bids and administrative contracts:

Art. 30. The documentation relating to the technical qualification shall be limited to:

(...)
II - proof of suitability for performance of relevant and compatible activity in terms of characteristics, quantities and deadlines for the purpose of the bidding, and indication of the appropriate facilities and equipment and technical personnel available to carry out the object of the bid, as well as the qualification of each of the members of the technical team who will be responsible for the work;

(...)

Paragraph 1. The proof of aptitude referred to in item II of the caput of this article, in the case of permanent bids for works and services, shall be made by certificates provided by legal or public entities, duly registered in the competent professional bodies, limited to requirements to:

I - technical and professional qualification: proof of the bidder's possession of a certificate of technical responsibility for the execution of a work or service in his permanent staff, on the date scheduled for submission of the proposal, a professional of a higher level or another duly recognized by the competent authority. These characteristics are limited to those portions of greater relevance and significant value of the object of the bidding, subject to the requirements of minimum quantities or maximum deadlines; (BRAZIL. Law No. 8.666 / 93).

This is notoriously noteworthy that the regulation of the General Law of biddings has brought more security with regard to the contracting of works and services within the scope of the federal public administration, since, if constant in the bidding rules, bidding companies must present a proven technical qualification by means of certificates issued by legal entities governed by public or private law, thus proving that the company competing with the competition has the ability to perform the services and / or works that are the object of the bidding.

Although Law 8,666 / 93 covers important matters to prove suitability for relevant activity and compatible with the object of the bid, such as: characteristics, quantities and deadlines; she, the Law, tackled these issues in a laconic manner and did not establish specific criteria, that is, objective criteria for acceptance of the certificates.

With the purpose of stipulating criteria which would be used in the characteristic requirements, quantities and deadlines - included in the inc. II, art. 30, of the Supradite Law, the Secretary of Logistics and Information Technology of the Ministry of Planning, Budget and Management - SLTI / MPOG, issued Normative Instruction No. 2 of April 30, 2008, amended by Normative Instruction No. 6 of 23 of December 2013, in which the text of art. 19, below:

Paragraph 5 In the hiring of continuous services, the Public Administration may require from the bidder: (Included by Normative Instruction nº 6, of December 23, 2013)
I - proof that it has performed compatible outsourcing services in quantity with the object tendered for a period of not less than 3 (three) years; and (Included by Normative Instruction No. 6, of December 23, 2013)

(...) 

Paragraph 6 For the proof of the minimum experience of 3 (three) years provided for in item I of paragraph 5, the sum of attestations shall be accepted. (Included by Normative Instruction nº 6, of December 23, 2013)

§7 In the hiring of continuous services with more than 40 (forty) posts, the bidder must prove that he has executed a contract (s) with a minimum of 50% (fifty percent) of the number of jobs to be contracted. (Included by Normative Instruction No. 6, dated December 23, 2013 and rectified according to the wording published on page 86 of Section 1 of DOU nº 68, of April 9, 2014)

Paragraph 8. When the number of jobs to be contracted is equal to or less than forty (40), the bidder must prove that he has executed contract (s) with a minimum of 20 (twenty) posts. (Included by Normative Instruction No. 6, dated December 23, 2013 and rectified according to the wording published on page 86 of Section 1 of DOU nº 68, of April 9, 2014)

§9 Only attestations issued after the conclusion of the contract will be accepted or if at least one year has elapsed from the beginning of its execution, unless it is executed to be executed in a shorter term. (Included by Normative Instruction nº 6, of December 23, 2013)

§10. The bidder must provide all the necessary information to prove the legitimacy of the requested certificates, including, among other documents, a copy of the contract that supported the contracting, the contractor's current address and the place where the services were provided. (Included by Normative Instruction nº 6, of December 23, 2013)

§11. Justifiably, depending on the specificity of the object to be tendered, the technical and economic-financial qualification requirements in this article may be adapted, suppressed or added to others considered important for contracting, subject to the provisions of arts. 27 to 31 of Law No. 8,666 of 1993. (Included by Normative Instruction nº 6, of December 23, 2013)

§12 In order to prove the provisions of paragraphs 7 and 8, the sum of attestations proving that the bidder manages or managed outsourcing services compatible with the object tendered for a period of not less than three (3) years (Included by Instruction Normative nº 3, of June 24, 2014) (IN 02, 2008)
The edition of IN 2/2008, highlighted above, addressed a number of doubts, both from bidders and mainly from public agents that operate bids within the federal government. However, a number of other doubts also emerged, which culminated in several judgments handed down by Court of Auditors - TCU, which we will address later.

2.1 Attestation of Technical-Operational Capacity in the view of doctrine and jurisprudence

With the presidential veto to inc. II of paragraph 1 of art. 30, of Law 8,666 / 93, which dealt with the certificate of technical-operational training, a great stir settled in the doctrinal and juridical environment, which debated a lot about the legality of said certificate before its veto.

In view of the imbroglio, some legal precedents brought to the court the need for proof, by bidder, of a certificate of technical-operational capacity, we are judged by the Superior Court of Justice (STJ), which admitted the requirement in bidding for both the technical- as a certificate of technical-operational capacity:

ADMINISTRATIVE LAW. REQUIREMENT OF TECHNICAL QUALIFICATION IN BIDDING.

It is a lawful clause in a bidding notice requiring that the bidder, in addition to having in his technical collection, a professional who has conducted an engineering service similar to that in the bidding, has already acted in a similar service. This understanding is in line with the specialized doctrine that distinguishes professional technical quality from operational technical quality and the case law of the STJ, whose Second Panel has established the understanding that it does not prejudice the equality between bidders, nor the ample competitiveness among them, the conditioning on the previous experience of the competitors in the scope of the object tendered, under the pretext of demonstrating technical qualification, in terms of art. 30, inc. II, of Law no. 8,666 / 93 (REsp 1,257,886-PE, judged on 11/3/2011). In addition, other devices of the same art. 30 allow this inference. Thus, Paragraph 3 of art. 30 of Law 8.666 / 1993 states that there is a possibility that proof of technical qualification may be provided through similar services, with the same or higher technical and operational complexity.

Furthermore, § 10 of art. Article 30 of the same law stresses the indication of the technical professionals responsible for the engineering services as a management guarantee. RMS 39,883-MT, Rel. Min. Humberto Martins, judged on 12/17/2013.

The doctrine also communes with the same understanding of the upper court:

What is evident, along the legislative course of the technical qualification in qualification, is the solid trend that culminates in the provisions of Law 8.666 / 93, in order to require the bidder to prove their suitability for the achievement of the object through previous performance certificates, "Relevant and
compatible" with that object. How would this pertinence and compatibility be measured? Logically - according to the letter of the law - the extent to which the characteristics of the previous activity were similar to those of the object and the quantities were approximate, as well as the deadlines for compliance and enforcement. In initial consideration, there appears to be no legal obstacle to documentary presentation of these specifications. Jurisprudence had always understood this before the abovementioned veto. The solid reality of the presidential veto, however, persists with the so-called "operational capacity" of the bidder, which vetoes the requirement to prove specific operational suitability in the name of the bidder. (MOTA, 2005)

It is a fact that this dissidence is now overcome, given that, despite the maintenance of the presidential veto, the unified understanding between doctrine and jurisprudence is settled, even with the consent of the court of accounts of the union:

As pointed out by the instruction, this Court has evolved its jurisprudence to admit that it is possible - and even essential for ensuring compliance with the obligation - to delimit the characteristics that must be present in the previous experience of the bidder regarding technical-operational and technical-professional capacity 1.214 / 2013 and 3.070 / 2013 of the Plenary). (JUDGMENT TCU 534/2016)

2.2 Differences between technical and operational capacity and technical and professional capacity

The Court of Auditors of the union - TCU, made a very important distinction between the two technical capacities, objectively pointing out their differences and purposes:

The technical qualification covers both the business experience and the experience of the professionals who will perform the service. The first would be the technical-operational capacity, encompassing the company's own attributes, developed from the performance of business activity with the combination of different economic factors and a plurality of people. The second is called the technical-professional capacity, referring to the existence of professionals with technical assets compatible with the work or engineering service to be tendered. (JUDGMENT TCU 1,332,2006)

It is noted that there is a substantial difference between the two types of technical capacity, in the technical-operational capacity, it refers to the structural attribute of the company, ie it is easy to understand that the aforementioned certificate is intended to measure the management capacity of the company company, as much in the technical expertise, coming from services previously executed in a qualitative way (not counting anything that will discourage its conduct), as well as in the capacity to manage its employees and / or service providers.

In this wake, and with the purpose of preventing the bidders of the federal public administration from
exacerbating the technical qualifications of the companies, restricting the competitiveness of the event (which, in primary cognition, fulfills the basic principle of bidding, is that the Federal Court of Accounts has adopted in its judgments mechanisms to mitigate the recurring constraints to competitiveness in certain convening instruments:

As a consequence, Dnit should be required to refrain from requiring, in the technical authorization, documents other than those in art. Law no. 8.666 / 93, avoiding failures such as that found in Competition No. 431 / 2005-0, which unduly demanded the Term of Commitment and the Model Approval Ordinance issued by Inmetro (JUDGMENT TCU 1529, 2006)

In this context, another is not the understanding of the Superior Court of Justice - STJ:

ADMINISTRATIVE - PUBLIC BIDDING - SERVICES OF READING OF HYDROMETERS AND DELIVERY OF ACCOUNTS - NOTICE - REQUIREMENT FOR PREVIOUS EXPERIENCE PROOF - TECHNICAL TRAINING - ARTICLE 30, PARAGRAPHS 1, I, AND § 5 OF LAW No. 8.666 / 93 - SPECIAL APPEAL NOT KNOWN . It is true that the Administration can not under any circumstances make demands that frustrate the competitive nature of the event, but rather guarantee a wide participation in the bidding contest, allowing the greatest possible number of competitors, provided they have the technical and economic qualification to guarantee compliance of obligations. [...] (STJ - RESP 361736 / SP, - Franciulli Netto - Second Class - DJ 31.03.2003 page 196)

In another twist, as the competitive nature of bidding is ensured, the control bodies likewise create mechanisms to safeguard the public administration of companies without structures that enter the public service in the eagerness to venture to gain experiences, which almost always results in contractual termination for total or partial non-performance of the services, causing, in many cases, damage to the administration, since the services - when executed, are of a quality much inferior to the minimum that appears in the convening instrument.

Aiming at the usual events of discontinuity of service in the scope of the federal public administration by imperfect and negligent companies, the Audit Court of the union, after several judgments, issued in 2011 the Summary 263, which allows the requirement of proof of minimum quantitative in works or services.

In order to prove the technical-operational capacity of the bidders, and at the same time that it is limited to the portions of greater relevance and significant value of the object to be contracted, it is legal to require verification of the execution of minimum quantitatives in works or services with similar characteristics, and this requirement must be proportionate to the size and complexity of the object to be executed. (TCU, SÚMULA 263/2011)
Notwithstanding the settled understanding of the TCU regarding the legality of the requirement of the minimum quantitative, a gap was still open: what would be minimum quantitative?

Faced with the subjectivism that generated many representations in the court, the TCU objectively delimited what would be minimal quantitative, let us see:

The requirement to prove the execution of minimum quantitatives in works or services with similar characteristics, in order to attest the technical-operational capacity, should keep proportion with the size and complexity of the object and should fall simultaneously on the most important and significant value. **As a rule, the minimum required quantities must not exceed 50% of the budget forecast, except under special conditions and duly justified in the bidding process.** (JUDGMENT TCU 244/15 - PLENARY) (emphasis added)

Such an understanding now seems to have been superseded by the notorious court of accounts:

It is irregular the requirement of a technical capacity certificate with a minimum quantity of more than 50% of the quantity of goods and services to be contracted, except in cases where the specificity of the object recommends and there is no compromise to the competitiveness of the event, a circumstance that must be duly justified in the bidding process. (JUDICIAL TCU 3.663 / 2016)

With regard to services of a continuing nature, such as: cleaning, support and surveillance, the Federal Court of Audit understands that, since these services are of low complexity, the core of attesting to the technical-operational capacity is not linked in the experience of the company that is a specialist in the execution of the object of the bidding in which it is listed as a bidder, but is only in its capacity for manpower management, regardless of whether the similarity of the activity follow-up that it develops is in line with the object of the bid.

For a better explanation, we quote an excerpt from Judgment 1214/2013 - TCU:

110. (...) Therefore, the content of the certificates of technical capacity must be sufficient to guarantee to the Administration that the contractor will be able to execute the intended object. Such fitness may refer to several aspects.

111. At this point, the main discussion to be faced seems to lie - what kind of aptitude should be required for the execution of contracts for services of a continuous nature, in which the assignment of labor is characterized.

112. Companies that provide outsourced services, as a rule, are not specialists in the service properly, but in the administration of the workforce. It is a market reality to which the Administration must adapt and adapt its contracts. It is increasingly rare to enter into agreements with companies that specialize only in cleaning, or driving, or in reception. The contractors provide several types of service, sometimes in the same contract, so that they
acquire skills in the management of the employees who provide the services, not the technique of executing them.

While it is very likely that management's own demands have shaped this behavior of companies, discussing the theme or adherence of the model to the ideal conception of outsourcing of services does not prove useful.

What matters is to realize that the ability of contractors in the management of labor in these cases is really much more relevant to the Administration than the technical aptitude for the execution of the services, since these usually present little complexity. That is, in these contracts, given the nature of the services, it is in the interest of the Administration to ensure that the contractor is capable of recruiting and retaining qualified personnel and honoring the labor, social security and fiscal commitments. It is a very different situation from a contract involving technical complexity, such as a work, or a contract for the supply of goods, where capacity can be measured by reference to the size of the object - which serves very well the parameter of 50% usually adopted. (JUDGMENT 1.214 / 2013 - TCU). (we grimace)

In view of the aforementioned ruling, there is a concrete case that clearly portrays the current understanding that prevails among the ministers of the maximum court of accounts, which occurred in the Electronic Bidding 10/2015, whose object is the hiring of a company specialized in the provision of outsourced services in the categories of Executive Secretary, Bilingual Executive Secretary and Secretariat Technician, to assist the administrative units of the Ministry of Sports.

Although the purpose of the aforementioned electronic auction was the hiring of a company specializing in the provision of outsourced services to bilingual executive secretaries, we have settled the understanding by the TCU in the context of this court of accounts, culminating in Judgment 553/2016:

(...) it is verified that at least one of the certificates presented by the representative - the certificate issued by the Urban Cleaning Service of the Government of the Federal District, accompanied by a copy of the signed contract and its additives - would, in principle, of technical qualification, in order to demonstrate the ability of the bidder to manage labor in the required minimum quantity. (JUDGMENT TCU 553/2016)

Let us see that there is no similarity between the activities pertaining to the objects "bilingual executive secretaries and Urban Cleaning Service", however the supreme court of accounts understands that the preponderant in the analysis of habilitation is the capacity of management of labor of the company, understanding which has been adopted as a practice by most of the federal public administration bodies.

2.3 Attestation of technical-operational capacity in services of a continuing nature

Because it is something more common in the contractions of the federal public administration, special attention deserves the services of a continuing nature.
On September 25, 2017 - published by the Ministry of Planning, Development and Management - Normative Instruction No. 5, of May 26, 2017, came into force after 120 days of *vacatio legis*, that is, a period of vacancy of the law until entry into force; therefore, this normative instruction totally revoked Normative Instruction 2, dated April 30, 2008, also issued by said Ministry.

Let us see in the table below the main differences between the two Norms:

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<thead>
<tr>
<th>Normative Instruction nº 5/2017</th>
<th>Normative Instruction nº 2/2008</th>
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<tr>
<td>1 10.3. The provisions on technical qualification shall provide that:</td>
<td>Art. 19 (...)</td>
</tr>
<tr>
<td>2 a) the attestations or declarations of technical capacity presented by the bidder must demonstrate suitability for performance of relevant and compatible activity in characteristics, quantities and deadlines for the purpose of which the bidding process handles; and</td>
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