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From bureaucracy to discretionary direct contracting and the challenges of the new bidding law.

From Bureaucracy to Discretion: Direct Contracting and the Challenges of the New Bidding Law

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Summary

Law No. 14,133/2021 was established with the purpose of modernizing and regulating the bidding process and administrative contracts within the scope of the Public Administration, gradually replacing the old Law No. 8,666/1993, which, for decades, regulated public procurement in Brazil. The new legislation introduced important innovations, especially regarding the hypotheses and procedures for direct contracting, expanding the cases of exemption and inapplicability of bidding.

In this context, this article aims to analyze the main changes promoted by Law No. 14.133/2021 in comparison with previous legislation, emphasizing the impacts of expanding the possibilities for direct contracting and the risks that such flexibility may represent for legality, transparency, and administrative efficiency. A qualitative approach is adopted for the study, based on bibliographic research, normative analysis, and a review of jurisprudence. It concludes that, although the new guidelines contribute to the speed and rationalization of public procurement, they also impose significant challenges regarding preventive and repressive control, requiring improvements in oversight mechanisms and an ethical stance from public agents to preserve the public interest.

Keywords: direct contracting, exemption from bidding, ineligibility, Law No. 14.133/2021, Law No. 8.666/1993.

Abstract

Law No. 14.133/2021 was enacted with the purpose of modernizing and regulating the bidding process and administrative contracts within the Public Administration, gradually replacing the former Law No. 8.666/1993, which for decades governed public procurement in Brazil. The new legislation introduced significant innovations, particularly regarding the cases and procedures for direct contracting, expanding the circumstances in which bidding may be waived or deemed unnecessary.

In this context, the present article aims to analyze the main changes brought about by Law No. 14.133/2021 in comparison with the previous legislation, highlighting the impacts of the expanded possibilities for direct contracting and the risks that such flexibility may pose to legality, transparency and administrative efficiency. The study adopts a qualitative approach, based on bibliographic research, normative analysis and a survey of jurisprudence. It is concluded that, although the new guidelines contribute to the acceleration and rationalization of public procurement, they also impose significant challenges regarding preventive and repressive control, requiring the improvement of oversight mechanisms and an ethical stance by public agents to preserve the public interest.

Keywords: direct contracting. waiver of bidding. Unnecessity of bidding. Law no. 14,133/2021. Law no. 8,666/1993.

Introduction

Direct contracting, a legal concept widely debated within the field of Law.

Brazilian administrative matters occupy a prominent position in the public procurement system, being traditionally governed by Law No. 8,666/1993, and more recently by Law No. 14,133/2021.

This last one was designed with the purpose of modernizing, systematizing, and providing greater efficiency.



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Legal certainty and transparency in bidding and contracting procedures in the public sector.

The new legislation not only updated the concepts, but significantly expanded the cases of Direct contracting, through exemption and inapplicability of bidding, signaling a change of paradigm in the relationship between Public Administration and the supplier market.

Law No. 14.133/2021, also known as the New Law on Bidding and Contracts Administrative bodies progressively revoke provisions of Law No. 8.666/1993, proposing a model which seeks to balance administrative flexibility and legal control, given the complexity of contemporary public demands (OLIVEIRA, 2022). One of the most relevant changes — and which warrants critical analysis — lies in the expansion of cases of direct hiring, which, in light of constitutional principle of mandatory bidding (article 37, item XXI, of the Federal Constitution), This raises important questions about the limits, risks, and potential of this flexibility. regulations.

Article 37, XXI, of the Federal Constitution establishes that, to finalize contracts, the rule is... to carry out the bidding process, which will only be excepted in cases specified by law. rule. Article 22, XXVII, of the Federal Constitution requires a general law to regulate bidding processes, which is therefore the core issue. from the origin of Law No. 14.133/2021, which was preceded by Law No. 8.666/1993. As Di Pietro points out (2022, p. 345), "direct contracting, due to its exceptional nature, requires the Public Administration A clear, technical, and reasoned justification is required; failure to provide such justification undermines the principles. "Constitutional principles of publicity and morality."

The 1988 Federal Constitution establishes bidding as the rule for public procurement. Public Administration, allowing exceptions only in cases expressly provided for by law. A The expansion of the grounds for exemption and inapplicability, as provided for by Law No. 14.133/2021, entails relevant practical and legal implications, especially regarding fraud prevention, Administrative efficiency and the guarantee of the public interest. Contemporary doctrine points out that... The use of direct contracting should be interpreted restrictively, respecting legal parameters. and the principles of morality, publicity and impartiality (DI PIETRO, 2022).

The new law came into effect in 2021 with the aim of improving hiring mechanisms. In addition Furthermore, it aimed to update the concepts of bidding and adapt them to the current context, the previous law being (Law Law No. 8,666/1993) is considered, in many respects, outdated, with precepts that could diminish The efficiency of hiring. One of the main objectives of the new legislation was to align the aligning public procurement with international best practices, promoting greater competitiveness, digitization of processes and simplification of administrative procedures (JUSTEN FILHO, 2021).

The interpretation given by the higher courts, especially the Court of Auditors The Federal Court of Accounts (TCU) reinforces the need for rigor and caution in the use of these exceptional hypotheses.



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In several rulings, the TCU (Brazilian Federal Court of Accounts) has reiterated that direct contracting, although permitted within certain limits...

Legal requirements do not exempt public managers from observing constitutional principles and due diligence.

Administrative motivation (BRAZIL, 2021). Judicial and administrative control over these

Therefore, contracting constitutes an important benchmark for the legitimate use of this instrument.

The main objective of this study is to critically analyze the implications of
Expansion of cases where bidding is waived or not required under Law No. 14.133/2021.
comparing its forecasts with the previously existing regime, established by Law No. 8.666/1993.
As specific objectives, the aim is to: (i) identify the main regulatory changes between the two
legal frameworks regarding direct contracting; (ii) assess potential operational benefits
(iii) analyze the risks associated with expanding the
hypotheses of direct contracting, especially regarding the targeting of contracts and fragility.
of the control mechanisms; and (iv) propose measures that can mitigate these risks, ensuring the
Transparency and efficiency in the management of public resources.

Methodologically, the work adopts a qualitative approach, of an exploratory nature and
descriptive, based on comparative legislative, doctrinal and jurisprudential analysis, using
Consult recent decisions from higher courts, especially the Supreme Federal Court.
(STF) and the Federal Court of Accounts (TCU). As Marconi and Lakatos (2021) teach, this
The methodology allows not only mapping relevant legal changes, but also reflecting on them.
the practical and theoretical challenges that emerge with the flexibilization of hiring procedures
public.

The relevance of the topic is justified by the direct impact that public procurement has.
Regarding administrative efficiency and the management of public resources. According to data from the Ministry of
In the economy, government procurement accounts for approximately 15% of the Gross Domestic Product annually.
Brazil's Gross Domestic Product (GDP), highlighting the economic and social magnitude of decisions related to
contracting processes (BRAZIL, 2022). Furthermore, the transition between legal regimes – with
the temporary coexistence between Law No. 8.666/1993 and Law No. 14.133/2021 until April 2023 – makes
An understanding of the changes and their potential effects is even more necessary.

This analysis aims to contribute to the legal and academic debate on...
Advances and limitations imposed by the New Bidding Law, providing technical support to assist
both legal professionals and public managers in the responsible and efficient exercise of
Direct contracting, reinforcing the need for a balance between streamlining the procedure and reducing bureaucracy.
and the zeal for public property.

The article is organized into five sections, in addition to this introduction and the concluding remarks.
The first section presents the doctrinal and normative aspects of public procurement in Brazil.
situating the process of debureaucratization and the constitutional principles that guide the duty of



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bidding. The second section performs a comparative analysis between Law No. 14.133/2021 and the old Law No. 8.666/1993, highlighting the main innovations introduced in the direct contracting system. A

The third section addresses the increased flexibility afforded by the new legislation, evaluating its benefits. operational issues and the risks arising from greater administrative discretion. In the fourth section,

The challenges of control and transparency in direct contracting are examined, based on... jurisprudence of the higher courts and the mechanisms provided for by the new law. The fifth section, by

In turn, it critically analyzes the risk of contract manipulation, relating it to the principles. constitutional principles and practices of administrative integrity. This structure seeks to offer a vision

a systematic and progressive approach to the topic, leading to an understanding of the impacts of expanding the hypotheses for direct contracting for legality, efficiency and morality in the Administration

Public.

1. DOCTRINAL AND NORMATIVE ASPECTS OF PUBLIC PROCUREMENT IN BRAZIL

1.1 Administrative reform and debureaucratization

The evolution of the legal framework for public procurement in Brazil reflects a process. Continuous transformation of the Public Administration itself, which has sought to overcome the model

A shift from Weberian bureaucracy towards a managerial paradigm focused on results and efficiency. As Bresser-Pereira (2020, p. 28) points out, "the Brazilian administrative reform has as

The central objective is to replace bureaucratic public administration with managerial administration, prioritizing the "Control by results as opposed to control by procedures."

This movement toward reducing bureaucracy, formally initiated with the Constitutional Amendment Law No. 19/1998, which included the principle of efficiency in the heading of Article 37 of the Federal Constitution, finds Law No. 14.133/2021 is one of its most recent normative expressions. The new legislation seeks

Simplify procedures, reduce transactional costs, and expedite contracting. public services, without, however, compromising the fundamental principles of Public Administration. (CARVALHO FILHO, 2023).

As Moreira Neto (2021, p. 173) observes, "debureaucratization does not mean abandoning the control, but its qualitative transformation, replacing excessive formalism with mechanisms of

"Smarter audits focused on preventing irregularities and ensuring results." This Perspective is fundamental to understanding the spirit of the new Bidding Law, which expands the... It allows for direct contracting, but also reinforces governance and transparency instruments.

1.2 Constitutional principles applicable to bidding processes

Public procurement in Brazil is subject to a set of constitutional principles. which define the scope of administrative action and ensure the integrity of procedures. Article 37, caput, of



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The Federal Constitution establishes the principles of legality, impartiality, morality, and transparency. and efficiency as guiding principles for all administrative activity. In addition to these, item XXI of The same article establishes the mandatory nature of bidding as the rule for public procurement. except in cases specified by law.

Meirelles (2021, p. 312) highlights that "the principle of bidding means that these contracts They are, as a rule, subject to the procedure of selecting the most advantageous proposals for the "Public administration." This understanding is corroborated by the jurisprudence of the Supreme Court. Federal, which recognizes bidding as an instrument for realizing the principles of equality and administrative morality (BRAZIL, STF, ADI 3.070/RN, 2007).

Law No. 14.133/2021, in its article 5, expressly expands the list of principles applicable to bidding processes, including, in addition to those constitutionally mandated, the principles of public interest, of administrative probity, planning, transparency, efficiency, segregation of functions, motivation, adherence to the terms of the call for proposals, objective judgment, legal certainty, reasonableness, competitiveness, proportionality, speed, economy and sustainable national development.

As Niebuhr (2022, p. 89) observes, "the expansion of the catalog of principles in the new law This reflects the increasing complexity of public procurement and the need to establish parameters. clearer for administrative action, especially in exceptional situations such as "Direct hiring." This robust, principled orientation serves as a counterweight to flexibility. Regarding the grounds for exemption and inapplicability, requiring the public manager to provide justification. consistent enough to waive the obligation to bid.

2. Comparison between Law No. 14.133/2021 and Law No. 8.666/1993

2.1 Comparative analysis of direct contracting hypotheses

The enactment of Law No. 14.133/2021 represents a regulatory milestone in the systematization of public procurement in Brazil. Its advent not only gradually revoked the historic Law No. 8.666/1993, but it also promoted a reorganization of bidding and contracting institutes, with The intention is to make the process more efficient, secure, and adaptable to the demands of the Administration. Contemporary public (DI PIETRO, 2022).

Under the aegis of Law No. 8.666/1993, the regime for public procurement was frequently pointed out by legal scholars and case law as excessively bureaucratic, rigidly procedural and, consequently, often unable to respond quickly to demands. public, especially in exceptional situations (JUSTEN FILHO, 2021). The new legislation, in this In this sense, it not only modernized concepts and expanded governance instruments, but also promoted a significant expansion of cases where bidding is waived or not required, whose



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The goal is to provide greater flexibility and adherence to administrative reality.

Regarding the waiver of bidding, Law No. 14.133/2021 introduced innovation by systematizing... in a clearer way the exhaustive hypotheses foreseen in its article 75, reorganizing the list. previously established in article 24 of Law No. 8.666/1993. It is noted that, in addition to the reorganization Structurally, the new law also updated values and adjusted parameters to accommodate situations previously... unforeseen, such as contracts resulting from technological innovation and scientific research (art. 75, item XXXI).

Regarding the exemption from bidding, article 74 of Law No. 14.133/2021 conferred more objective treatment and more compatible with the understandings already consolidated by doctrine and by case law, especially in clarifying that non-enforceability applies in cases of unfeasibility. of competition, eliminating recurring interpretative controversies in the text of article 25 of Law No. 8.666/1993. As an example of this, the Federal Court of Accounts (TCU) had already established, even Under the old law, the inapplicability of the requirement presupposes a rigorous analysis of the uniqueness of the case. The object and the contractor's recognized expertise are requirements that are maintained and reinforced in the new diploma (BRAZIL, TCU, Ruling No. 2,486/2018 – Plenary).

2.2 Limit values and criteria for exemption from bidding

One of the most significant changes introduced by Law No. 14.133/2021 refers to threshold values for exemption from bidding due to value, as provided for in items I and II of article 75. While Law No. 8,666/1993 established limits of R\$ 33,000.00 for works and services of engineering and R\$ 17,600.00 for other services and purchases (values updated by Decree No. 9.412/2018), the new legislation increased these thresholds to R\$ 100,000.00 and R\$ 50,000.00, respectively.

This substantial increase in limit values, according to Fortini and Motta (2021, p. 218), "reflects the legislator's recognition that the costs of the bidding process may, in certain circumstances... In certain situations, overcoming the benefits of formal competition, especially in lower-level hiring. "large size". However, the authors warn that such flexibility must be accompanied by mechanisms. efficient control and transparency mechanisms to prevent the improper splitting of expenses and the Contract targeting.

The TCU (Brazilian Federal Court of Accounts), in its recent jurisprudence, has highlighted the need for caution in the application of these principles. of the new limits. In Ruling No. 2,154/2023 – Plenary, the Court emphasized that "the expansion of The fact that bidding processes are waived does not eliminate the need for a robust price survey. adequate technical justification and adherence to the principles of economy and efficiency" (BRAZIL, TCU, 2023).

In addition to updating the values, Law No. 14.133/2021 also innovated by providing



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expressly, in §1 of article 75, that the values referred to in items I and II will be doubled to purchases, works and services contracted by public consortia, mixed-economy companies, and private companies. public entities and autonomous bodies or foundations qualified as executive agencies. This provision, which does not exist. Law No. 8.666/1993 recognizes the specific characteristics of these entities and seeks to grant them greater [benefits/protection/etc.]. managerial autonomy.

2.3 Parameters for inapplicability and new specialized technical services

The exemption from bidding, based on the impossibility of competition, received More detailed and comprehensive treatment is provided for in Law No. 14.133/2021. Article 74 of the new law maintained the The basic structure of Article 25 of Law No. 8.666/1993 was maintained, but the list of services was significantly expanded. specialized technicians who can be hired directly, provided they are characterized by The uniqueness of the object and the contractor's well-known expertise.

Among the most relevant innovations, the express inclusion of services such as (I) stands out. technical studies, planning, basic projects and executive projects; (II) opinions, expert reports and (III) assessments in general; (IV) technical advice and consulting and financial and tax audits; inspection, supervision and management of works and services; (V) sponsorship or defense of causes judicial and administrative; (VI) training and professional development of personnel; (VII) restoration of works of art and historically valuable goods; (VIII) quality and technological controls, analyses, tests and field and laboratory tests; and (IX) graphic design, interface design, navigation design, Interaction design, user experience research, digital product design and services. related terms.

As Zockun (2022, p. 156) observes, "the expansion of the range of technical services specialized professionals eligible for direct hiring reflect the growing complexity of the Administration. Contemporary public and the need for access to specialized knowledge that is not "They easily submit to objective criteria of judgment." However, the author warns that this Flexibility should be interpreted with caution, avoiding the trivialization of the inapplicability of bidding requirements.

The jurisprudence of the Superior Court of Justice (STJ) has reinforced that the characterization The inapplicability of bidding requires concrete proof of the uniqueness of the object and of the notorious fact. The contractor's specialization. In the judgment of Special Appeal No. 1,657,359/SC, the Superior Court of Justice (STJ) stated that "direct contracting without bidding requires unequivocal proof of impossibility of competition, the mere allegation that the service has a competitive nature is not sufficient. intellectual or that the contractor enjoys a professional reputation" (BRAZIL, STJ, 2017).

3. INCREASING FLEXIBILITY IN DIRECT HIRING

3.1 Operational benefits of flexibility

Law No. 14,133/2021 introduced significant changes to the legal framework for contracting.



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public initiatives, promoting not only procedural restructuring, but above all an expansion

The flexibility granted to the Public Administration in the direct contracting process. This advancement

The legislation reflects an effort to modernize regulations aimed at overcoming the rigidities of the model.

traditional instituted by Law No. 8.666/1993, responding to contemporary demands by

Efficiency, innovation, and agility in public administration.

One of the main operational benefits of this flexibility is the reduction in time.

necessary for the completion of the hiring processes. According to a study conducted by the Institute of Applied Economic Research (IPEA), the average time to complete a procedure.

The bidding process in the competitive modality, under the validity of Law No. 8.666/1993, was approximately 180 days, while exemption or inapplicability processes were completed, on average, in 45 days.

(FIUZA; MEDEIROS, 2020).

This procedural efficiency, when properly applied, can represent significant gains.

for Public Administration, especially in situations that demand quick responses, such as

Health emergencies, natural disasters, or the implementation of urgent public policies. How?

As Oliveira (2022, p. 312) points out, "the flexibility of direct contracting allows the State

respond more quickly to social demands, preventing bureaucracy from becoming an obstacle to...

"Realization of fundamental rights."

Another relevant benefit is the possibility of contracting innovative solutions and

technological, expressly provided for in item XXXI of article 75 of Law No. 14.133/2021, which authorizes

the exemption from bidding for "items that are demonstrably innovative and compatible with the

purposes of the body or entity, including for testing and instruction." This provision, which is absent in the Law

Law No. 8,666/1993 aligns with the Legal Framework for Startups (Complementary Law No. 182/2021) and encourages...

A closer relationship between the public sector and the innovation ecosystem.

As Sundfeld (2021, p. 87) observes, "the possibility of testing innovative solutions without the

The burden of a complex bidding process can accelerate the modernization of the public sector and...

"The adoption of technologies that improve the delivery of services to citizens." This perspective is

corroborated by international studies that point to public procurement as important

instrument for promoting innovation (OECD, 2022).

Flexibility is also evident in the simplification of hiring procedures.

of small value. Law No. 14.133/2021, in addition to raising the limits for exemption based on value,

Article 75, §3, established a simplified procedure for these contracts, requiring only

The publication of the direct hiring notice on the agency's official website for a minimum period of 3 days.

Useful, specifying the intended object and a simplified terms of reference.

3.2 Risks associated with expanding the hypotheses



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While the flexibility of direct hiring brings operational benefits, on the other hand

On the other hand, it also presents significant risks that cannot be ignored. The first and most

It is evident that there is a potential increase in corrupt practices, favored by the reduction of mechanisms for...
prior control and expansion of administrative discretion.

As Gabardo (2021, p. 143) warns, "the history of public procurement in Brazil is marked by corruption scandals that frequently involve the misuse of exemptions and "Inapplicability of bidding requirements." The author highlights that the expansion of the possibilities for direct contracting, If not accompanied by efficient control and transparency mechanisms, it can create an environment conducive to corruption and illicit favoritism.

This concern is supported by empirical data. According to a report by According to the Comptroller General of the Union (CGU), between 2017 and 2021, approximately 30% of the irregularities... identified in audits of public procurement involved exemption processes or exemption from bidding requirements, highlighting problems such as overpricing and bid rigging. contracts and lack of adequate technical justification (BRAZIL, CGU, 2022).

Another significant risk is the possibility of artificially fragmenting expenses for The framework for exemption limits based on value. Although Law No. 14.133/2021 maintains the prohibition against splitting expenses to evade the obligation to hold a bidding process (article 75, §7), the increase Significant changes in limit values may encourage this practice, especially in agencies with controls. fragile internals.

As Fernandes (2023, p. 218) points out, "the splitting of expenses is one of the The most frequent irregularities in public procurement, and the expansion of limits for exemption. This problem could worsen if efficient planning mechanisms are not implemented. and purchase control." The TCU (Brazilian Federal Court of Accounts) has repeatedly condemned this practice, as evidenced in... Ruling No. 1,084/2022 – Plenary, which emphasizes the need for annual procurement planning. to avoid improper splitting (BRAZIL, TCU, 2022).

Subjectivity in characterizing the notorious specialization and uniqueness of the object, The requirements for waiving bidding requirements also represent a significant risk. The expansion from the list of specialized technical services eligible for direct contracting, as provided for in Article 74, III, of Law No. 14.133/2021 may hinder control over these contracts, especially when the The criteria used to justify the choice of contractor are not sufficiently objective and transparent.

4. Challenges of Control in Direct Hiring

4.1 Monitoring and transparency mechanisms

The expansion of the possibilities for direct contracting brought about by Law No. 14.133/2021 represents



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This represents progress in terms of flexibility, but on the other hand, it also poses risks related to...

The fragility of the mechanisms for controlling and monitoring public spending. The scenario of

Regulatory flexibility, if not accompanied by efficient and rigorous control systems, can...

to create space for the practice of imprecise, uneconomical, or, ultimately, harmful administrative acts.

to the public treasury, especially when it comes to waivers and exemptions from bidding processes.

Historically, legal doctrine has warned that the absence of efficient controls in contracting...

Public policies compromise not only cost-effectiveness but also the legitimacy of decisions.

administrative. In this sense, Bandeira de Mello (2022, p. 345) warns that "direct contracting,

Due to its exceptional nature, it requires a clear, technical justification from the Public Administration and

motivated, the non-fulfillment of which weakens the constitutional principles of publicity and

morality".

Law No. 14,133/2021 sought to compensate for the expansion of the possibilities for direct contracting.

with mechanisms that reinforce the requirement for planning and transparency, such as

mandatory preliminary technical study and price research in cases of exemption (art. 72).

However, such measures are not sufficient, by themselves, to ensure the integrity of the process.

requiring ongoing oversight by internal and external control bodies.

One of the main advances of the new legislation in terms of transparency is the requirement for

disclosure on the official website of all actions taken during the contracting process.

direct, including the contract extract and the respective administrative process (art. 72, paragraph

(unique). This prediction significantly expands the possibilities for social and institutional control.

regarding these contracts, allowing citizens, civil society organizations and bodies to

Control systems monitor administrative decisions in real time.

As Ferraz (2021, p. 178) points out, "active transparency in direct contracting is a

An important mechanism for preventing illegal acts, as it exposes administrative decisions to scrutiny.

"public, inhibiting practices that would not withstand the light of day." This perspective is corroborated by studies.

Empirical evidence demonstrating a negative correlation between transparency and corruption in procurement.

public (TRANSPARENCY INTERNATIONAL, 2023).

Another relevant mechanism introduced by Law No. 14.133/2021 is the requirement that...

Direct hiring must be preceded by the publication of a notice on an official website, for a period of time.

minimum of 3 (three) working days, specifying the intended object and terms of reference.

simplified (art. 75, §3º). This measure, which had no parallel in Law No. 8.666/1993, seeks

To increase competitiveness even in cases where bidding is waived, allowing other potential competitors to participate.

Suppliers submit proposals and contribute to obtaining more advantageous prices for the

Administration.



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4.2 Case law of the higher courts

In the context of jurisprudence, the Federal Court of Accounts has repeatedly stated...

Concern about the misuse of direct contracting. In a landmark decision, the Ruling

Resolution No. 3.030/2022 – Plenary, highlighted that "the flexibility of direct contracting, if unaccompanied

Lack of effective controls tends to weaken the pillars of economy, equality, and efficiency.

especially in contexts where the Administration acts with excessive discretion and

"Insufficient motivation" (BRAZIL, TCU, 2022).

The TCU (Brazilian Federal Court of Accounts) has reinforced the importance of strategic planning in public procurement.

as can be seen in Ruling No. 325/2023 – Plenary, which establishes that "even in contracts

Directly, it is essential that the public manager demonstrates the implementation of adequate planning, with

a well-founded estimate of prices and a robust justification for the choice of contractor" (BRAZIL,

TCU, 2023).

The Superior Court of Justice, in turn, has consolidated its understanding to the effect that

that direct contracting requires unequivocal proof of legal requirements, and is not sufficient

The mere generic allegation of an emergency situation or of notorious specialization. In the judgment of

In Special Appeal No. 1,123,203/MG, the Superior Court of Justice (STJ) stated that "direct contracting requires proof..."

clear legal requirements and service needs, rendering null and void any contract that, even in

In an emergency situation, do not adequately justify the criteria used for choosing the

contracted" (BRAZIL, STJ, 2011).

This case law reinforces the need for public managers, even

Given the expansion of the possibilities for direct contracting foreseen in Law No. 14.133/2021, maintain

Technical rigor and transparency in their decisions, properly documenting the entire process.

decisive and demonstrating, unequivocally, compliance with legal requirements and principles.

constitutional principles governing Public Administration.

5. RISK OF CONTRACT DIRECTION

5.1 Critical analysis and jurisprudential parameters

One of the main challenges faced by the Brazilian Public Administration in the field of

Bidding and contracting processes carry the risk of improper contract allocation. This practice violates...

directly contradicting the constitutional principles that govern the Administration, such as impartiality,

Morality and efficiency (Brazilian Federal Constitution, 1988, art. 37), in addition to compromising transparency and competitiveness.

which should guide public procurement.

Law No. 8,666/1993, for almost three decades, consolidated a legal regime aimed at

Formality and document control, seeking through strict rules to eliminate practices that

would lead to direction. However, the very rigidity of the rule often served as

a device used by public officials, supported by a bureaucratic interpretation of the law, to find...



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loopholes to artificially restrict competition — whether through the drafting of Terms of Reference with overly specific criteria, whether through the prior selection of the supplier and adaptation following the technical justification.

As Justen Filho (2023, p. 712) warns, "the fairness of a bidding procedure does not reside not only in its formal fulfillment, but in the effective respect for competitiveness and transparency, the which prevents the process from being manipulated to serve private interests." This perspective is corroborated by Medauar (2022, p. 245), who highlights that "the targeting of contracts constitutes one of the most pernicious forms of administrative corruption, as it corrupts the very essence of "The competitive process compromises the search for the most advantageous proposal."

Case law has focused on this issue, reiterating the prohibition against directing... public contracts. In Ruling No. 1,214/2021 – Plenary, the Federal Court of Accounts warned that "The violation of equality in the bidding process, through the manipulation of the tender specifications, It undermines the essence of the competitive process and represents a serious affront to the principles. "Constitutional principles of Public Administration" (BRAZIL, TCU, 2021).

Furthermore, the Administrative Impropriety Law itself (Law No. 8,429/1992) provides for sanctions. severe penalties for actions that frustrate the competitive nature of the bidding process or distort its purpose. classifying them as improper acts that violate the principles of Public Administration (art. 11) This forecast was maintained even after the changes introduced by Law No. 14.230/2021. highlighting the seriousness attributed to these behaviors by the legal system.

The expansion of the possibilities for direct contracting promoted by Law No. 14.133/2021, although justified by the need to make the service more flexible in serving the public interest, it increases The system's potential vulnerability increases exponentially if it is not accompanied by... Effective oversight and an institutional culture of integrity. As highlighted by Bandeira de Mello (2022, p. 488), "no law is capable of completely eliminating the risk of capture of the decision-making process by corruption, especially in an environment where social control and institutional mechanisms are fragile".

The risk of bias occurs when the direct hiring process is not based on... objective technical criteria, allowing certain companies or professionals to be favored without a solid justification for waiving the bidding process. One of The main factors contributing to the improper targeting of contracts are subjectivity in definition of the renowned specialization and uniqueness of the service provided.

Law No. 14.133/2021 does not establish sufficiently stringent criteria to determine when a service can be considered so technical and specialized that it makes competition unfeasible. This allows public managers to use generic justifications to hire directly. specific suppliers, without demonstrating, in a concrete way, the absence of competition in



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market. This practice weakens transparency and prevents other service providers from entering the market.

Qualified individuals participate in the process, reducing competitiveness and the search for the best proposal.

for public administration.

Cases of improper targeting have already been identified in audits by the Court of

The Brazilian Federal Court of Accounts (TCU) has warned about the risks of excessive use of the exemption procedure without a proper evaluation.

due technical justification. Ruling No. 2154/2023 - Plenary of the TCU, for example, highlighted the

the need for the public administration to demonstrate, in a detailed and well-founded manner, the

The impossibility of competition in each specific case, under penalty of nullity of the signed contract.

FINAL CONSIDERATIONS

The expansion of the grounds for waiving and dispensing with bidding procedures by Law No. 14.133/2021

It brought significant operational benefits to the Public Administration, such as greater speed.

procedural, possibility of contracting innovative solutions and simplification of procedures

for small-value contracts. These innovations represent an important step forward in

Modernizing Brazilian public procurement, aligning it with international best practices.

and to contemporary demands for efficiency and reduced bureaucracy.

However, the analysis undertaken in this study shows that this flexibility also

This increased the risks of improper contract allocation and lack of efficient control.

vulnerability to corrupt practices. Raising the threshold values for exemption, expanding the

list of specialized technical services eligible for direct contracting and the subjectivity in

Characterization of notorious specialization are aspects that demand heightened attention from the relevant bodies.

control mechanisms and those of the public managers themselves.

The balance between administrative flexibility and efficient control emerges as the main...

Challenge in implementing the new legal framework for public procurement. Law No. 14.133/2021

It sought to compensate for the expansion of direct contracting possibilities with transparency mechanisms.

and governance, such as the publication on an official website of all actions taken during the

direct contracting process, the requirement for a preliminary technical study, and the obligation to

Robust price research. However, the effectiveness of these measures will depend on the capacity of

public agents, the strengthening of internal and external control bodies, and the consolidation of

an institutional culture of integrity.

The jurisprudence of the higher courts, especially the Federal Court of Accounts and

The Superior Court of Justice has reiterated that the expansion of the possibilities for direct contracting...

This does not mean a relaxation of the legal and constitutional requirements to waive the duty to hold a bidding process.

On the contrary, public managers are required to provide even more robust and transparent justifications.

demonstrating unequivocally the impossibility of competition or the precise alignment with

exemption scenarios provided for by law.

To mitigate the risks identified in this study, the adoption of measures such as the following is recommended:

(I) implementation of computerized control and transparency systems that allow the
(I) real-time monitoring of direct hiring; (II) continuous training of employees
those responsible for public procurement, with an emphasis on the ethical and legal aspects of the new
legislation; (III) strengthening internal control units, providing them with autonomy and resources
suitable for effectively monitoring direct contracting; (IV) preparation of manuals and
technical guidelines that establish objective parameters for characterizing the notorious
specialization and uniqueness of the object; and (V) encouragement of social participation in the control of
public procurement, through accessible channels for reporting complaints and access to information.

It can therefore be concluded that Law No. 14.133/2021 represents a significant advance in
Modernization of the legal framework for Brazilian public procurement is crucial, but its success will depend on...
The ability of public bodies to implement efficient control and transparency mechanisms.
that allow for reconciling the necessary administrative flexibility with the protection of the public interest.
and the constitutional principles that govern Public Administration. The balance between
Debureaucratization and control emerge as the great challenge to be faced by public managers.
by oversight bodies and civil society in building a public procurement system
more efficient, transparent and ethical, in order to respect the main stakeholder in the activities
executed by the Public Administration, which is the Brazilian people.

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