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A critical review from Law & Economics of selection modalities and market advantages in public procurement

Una revisión crítica desde el Derecho y la Economía de las modalidades de selección y las ventajas del mercado en la contratación pública

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ABSTRACT
The premise of this article revolves around considering whether the procedures for choosing future public administration collaborators should be the result of plural and open process. That is, through the market. This is so that the greatest number of offers can be presented, and that it is precisely this openness that results in the indeterminacy of the number of participants that will make each one of them strive to present the best offer. Therefore, based on the incorporation of some precepts of Law & Economics, this article aims to defend a position that is understood as socially efficient.

Keywords: Public procurement, selection modalities, market advantages, economic efficiency

RESUMEN
La premisa de este artículo gira en torno considerar si los procedimientos de escogencia de los futuros colaboradores de la administración pública debe ser el resultado de un proceso plural y abierto. Es decir, a través del mercado. Esto con la finalidad de que puedan presentarse la mayor cantidad de ofertas, y que precisamente esa apertura que deriva en la indeterminación del número de participantes es lo que hará que cada uno de ellos se esfuerce en presentar la mejor oferta. Por lo tanto, partir de la incorporación de algunos preceptos del Derecho y de la Economía, en este artículo se apunta a defender una postura que se entiende como socialmente eficiente.

Palabras clave: contratación pública, modalidades de selección, ventajas del mercado, eficiencia económica

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1. Introduction

State contracting in Colombia, following the regulations in force, includes the performance of inclusive contractor selection procedures based on the postulates of transparency and free competition, and in particular, the rules on objective selection to obtain the most favorable offer for the interests of the contracting state entity, based on the assumption that the plurality of offers in its maximum expression will allow obtaining the best conditions of quality and price for the State, optimizing the investment of public resources[2]. Thus, it is a constant premise to consider that the procedures for choosing the future collaborators of the public administration must be the result of a plural, open process, in which the greatest number of offers can be presented, and that precisely this openness that derives in the indetermination of the number of participants is what will make each one of them strive to present the best offer[3].

Indeed, under the premises of the perfect market, it is assumed that there is as much supply as demand, which means that, in the natural interaction between them, prices reach equilibrium, that is, the value at which efficient exchange is achieved for all, emptying the market, without the State having to intervene, since competition is perfect, information is symmetrical, positive or negative effects are assumed by demand and supply within the price, there is always a transfer of ownership, and no agent has market power[4]. But the reality is different and far from perfect: in markets, there are situations in which there are one, two, or a reduced group of suppliers or demanders of works, goods, and services, which leads to positions of power in the market; there are externalities, information is incomplete and there are incentives to reserve it due to the same competition, and there are public goods that do not imply transfer of ownership because there is no rivalry or exclusion in their use from one agent to another. This is what is known as market failures, and they are the reason that justifies regulatory and supervisory measures for the healthy development of the economy[5] .

This is especially important in the context of government procurement because it is well known that worldwide, and Colombia is no exception, public procurement represents a great weight within the economy of all countries, and is the mechanism par excellence with which the return of the tax burden is evidenced through the acquisition of works, goods, and services necessary for the implementation of

[2] "The theoretical literature emphasizes the benefits of competitive auctions as sale or procurement mechanisms (see, e.g., Bulow and Klemperer, 1996). These benefits, as well as arguments for equal opportunity and corruption prevention, justify statutes, such as the Federal Acquisition Regulations (FAR), that strongly favor the use of auctions in the U.S. public sector" (Bajari et al., 2003, p. 1).

[3] "Adam Smith in 1776, in his book The Wealth of Nations, recognizes the importance of competition to achieve the efficient use of resources. Generally speaking, the more suppliers there are in a market -the greater the competition- the more efficient the production of goods and services will be. [Competition allows choice because supply is not restricted to a single supplier of the good or service" (Savas, 2008, p. 31).

[4] "Perfect market: A market that meets these conditions: homogeneous product; a large number of buyers and sellers; freedom of entry into the market; perfect information; no seller or buyer can influence the price; no collusion; consumers maximize their profits and sellers their profits, and the commodity is transferable. A market in which buyers and sellers have information about the totality of supply and demand and market conditions, and can act freely in it at prices formed according to supply and demand." The great encyclopedia of economics, at http://www.economia48.com/spa/d/mercado-perfecto/mercado-perfecto.htm.

[5] Pindyck and Rubinfield (2005, 614 ff): "We can give two different interpretations of the conditions necessary to achieve efficiency. The first emphasizes that competitive markets work. It also tells us that we must ensure that the necessary preconditions are met. It tells us that we should focus attention on how to resolve market failures [...] Competitive markets fail for four basic reasons: market power, incomplete information, externalities, and public goods." In this sense, "A monopoly exists when there is only one supplier of a good or service in the market for which there are no perfect substitutes. [...] An externality is defined as the benefit (or cost) derived from the production of a good (or service) that falls on a third party, i.e. on a person other than the consumer or producer of the good (or service). The problem with externalities is that their effect (positive or negative) is not included in the price of the good (or service) that generates it. [A good is public if it meets two requirements: non-excludability (you can enjoy it even if you do not pay for it) and non-rivalry (the consumption of the good by an individual who enjoys the same good)" (Querol Aragón, 2007, pp. 35 to 49).

public policies, and thus the fulfillment of the constitutional and legal purposes that justify the very existence of the State in our days[6].

Thus, for the State to buy well, it is essential, first of all, to understand how the public procurement market works in reality and not based on the theoretical model that is proposed as a corollary of the principle of transparency, to analyze the selection methods adopted in our legal system and explain the problems they present in the current market, to conclude with the proposal of measures that could lead to a truly transparent contracting based on efficient purchasing[7].

2. The market of and for public procurement

If the state contract is, according to the General Statute of Contracting of the Public Administration (Law 80 of 1993), a legal act that generates obligations provided both in private law or in special provisions, or derived from the exercise of the autonomy of the will, and Article 864 of the Code of Commerce establishes that the contract is an agreement of two or more parties to constitute, regulate or extinguish between them a patrimonial legal relationship, it is clear that public contracts are instruments that regulate relations of exchange of goods and services in the framework of a market, It is clear that public contracts are instruments that regulate relations of exchange of goods and services within the framework of a market, and that regulation is required because the incentives of each of the parties, given their interest in maximizing a certain benefit, leads to problems of opportunism and gaps in the face of unforeseen circumstances[8]. Consequently, it is necessary to understand that the general rule is that the State purchases works, goods, and services, i.e., it behaves as a consumer, and individuals —and exceptionally the State itself— are the ones who provide these products, assuming the role of suppliers on the supply side.

Thus, although in economic theory the best way for the State to make optimal purchases is to resort to the most open competition possible, and this has been understood in the field of administrative law —unfortunately— as the need to give strict protection to the rights to equality and freedom of enterprise, reality shows that producers do not behave as expected based on these premises, precisely because of their selfish behavior. Therefore, if a businessman is aware that, in order to obtain a business with the State, as a general rule he must submit himself to a competitive selection procedure, he validly assumes that the probabilities of being the winner, that is, the one chosen for having submitted the best proposal, are inversely proportional to the number of contestants, so that the greater the number of participants, the lower his chance of winning, since he assumes —*ceteris paribus*— that all participants are on equal terms

6 Currently, the public procurement market demands annually, on average, more than seven percent of the world's gross domestic product, which is equivalent to the entire GDP of Latin America and represents thirty percent of global trade. In Colombia, according to the most recent study prepared by the OECD in 2016, public procurement represents 12.5 % of the country's GDP and is equivalent to 35.7 % of public spending, which implies being below the world average (OECD, 2016). In Europe, public procurement accounts for approximately 19.7 % of the region's GDP (Pernas García, 2016, 719).

7 "Public procurement is a system of chain tenders for the acquisition of all necessary goods, services, and works by the state when it acts intending to satisfy the general interest; it is a key economic activity for states since it has a great impact on how taxpayers' money is spent; it plays a strategic role in avoiding mismanagement and waste of public resources. [...] State contracting is of great importance for the economic development of any country because the public sector can use its great purchasing power to promote economic and social objectives and policies, and Colombia is no exception" (Safar Díaz, 2009, 15).

8 "Both parity contracting (i.e., that carried out in a context of perfect negotiation between the parties) and mass contracting pursue the same end: to exchange goods and services. From an economic point of view, they pursue the same thing. Perhaps the only ones who are interested in the contract as a legal relationship are lawyers. For the parties, the contract is first and foremost a mechanism of exchange. It is therefore an economic relationship. [...] In contract law, the typical event is the exchange. But more than a typical event is needed. It is necessary to identify the objective or function that the law develops in each branch to have a full understanding of the object under analysis. It is, therefore, necessary to define what functions the contractual system develops" (Bullard González, 2003, p. 191).

and offer the same type of product, regardless of the differences in terms of production and costs, under a strict cost-benefit analysis that does not include the variable that the consumer is a state entity, nor its motives or purposes with the contracting of efficient and continuous provision of public services for the satisfaction of the general interest, if it concludes that paying to be awarded the contract -either to the director of the selection process, or to those who control it, or to its competitors so that they withdraw or do not offer the best- is compensated by the benefit of its execution, it will opt for such option in view of the expected utility.

It is a simple analysis: the producer is interested in selling what he produces and obtaining a profit for it (of any kind, not only monetary), and if he cannot convince the consuming state entity with direct information as to why his product is the best for what it needs and must strictly conform to what it requests, given that the state contract, essentially, is one of adhesion[9], then he will resort to the mechanism that offers him the best benefit to achieve the objective of selling his product. Assuming that this producer is risk-averse, it will take greater measures not to be discovered, and of course, the reward it expects to obtain for this decision must be good enough to make such a decision[10].

Let us now study the demand aspect. The consumer is the State, and specifically, a state entity, which in legal terms uses contracting for *"the fulfillment of state purposes, the continuous and efficient provision of public services and the effectiveness of the rights and interests of those who collaborate with them in the achievement of those purposes"*[11], so that everyone and no one is its owner, i.e., there are no direct interests that are affected by an inefficient or irregular purchase, and consequently, there are no incentives that motivate the directors of the contracting processes to think about the positive or negative consequences of a good or bad purchase[12].

In addition to the foregoing, and as a direct consequence thereof, state entities have a bad reputation, determined by the assumption that the general rule is that to be able to contract with the State, the official who directs the selection process must be paid for the right to be a contractor, regardless of the comparative advantages that are decisive in contracting between private parties[13], and because during the execution of the contracts, public officials make demands on services that were not included within the scope of the offers submitted by the contractors or their price, to which the latter agree to avoid problems and obstacles in the payment or complications in the receipt to satisfaction and subsequent liquidation of the contractual relationship[14]. In addition to the above, there is a third component: the nature of what is purchased. Most of the products purchased by the State are part of projects with specialty components

9 Expósito Vélez, 2003 and Suescún Melo, 1995.

10 If he is risk neutral, he will not worry so much about investing in measures to control the probability of being discovered, and will focus on managing the consequences of this; and if he is a risk lover, he will focus more on utility and will invest enough in managing neither probability nor consequence (Monchón and Sáez, 2011, p. 10).

11 This is enshrined in Article 3 of Law 80 of 1993, General Statute of Public Contracting; however, it is clear that not all state contracts are governed by this regulation, but the same purposes can be derived from the same concept of administrative function enshrined in Article 209 of the Constitution, and of course, from the very purposes of the State as expressed in Article 2 of the Political Charter.

12 "The incentive structure of the private for-profit firm, particularly related to production cost minimization and innovation, makes it more competitive in the production of numerous goods and services. Private ownership gives private sector firms incentives to innovate because they can capture the advantages associated with innovation. The public sector not only lacks the incentives that ownership gives, but also the regulation of its hiring procedures and the impossibility of layoffs hinders innovation" (Cabrillo et al., 2008, p. 9).

13 According to the National Survey of Anti-Bribery Practices in Colombian Companies conducted by Transparencia por Colombia and the Universidad Externado de Colombia, 2015 it was found that 58 % of businessmen consider that if bribes are not paid, business is lost, and 17.3% is the weighted average of the value of the contract that is paid secretly to win the award. https://infogr.am/_/Hu5lSkiDpQCtONEf4tjd

14 According to the survey on probity conducted by Confecámaras in 2006, 84.4 % of businessmen abstain from participating in contracting processes with the State, because they consider that the competition is not fair, that there is politicization in the contracting process, and unofficial payment. (Corporación Transparencia por Colombia, 2008, p. 12).

that require the acquisition of specific assets[15], which often places it in a position of monopsony or oligopsony, i.e., it is the only one to whom producers can turn because they are the only ones who want to or can buy[16], in addition to which, given that it is a practically indisputable premise that the State must adopt bidding procedures to achieve competition among the greatest possible number of agents to obtain the best offer, and that these procedures must establish factors that automatically determine, objectively, who the winner will be, based on their application, together with the existence of regulatory components that are justified from the administrative function as the materialization of the principles of equality, impartiality, and due process, but that in practice generate entry barriers to the public procurement market[17], the state entities do not have the entire market at their disposal, They only have those who are willing to submit to this complex process of contracting with the State, which in reality shows that the State depends on those who want to sell to it, and that, in reality, it is not so attractive to sell to the State, so if no suppliers are willing to sell to them, the State entities simply cannot acquire what they are looking for[18].

Thus, reality puts us in a context quite different from that of a perfectly competitive market, because, on the one hand, the State is a generally ignorant consumer -beyond what is rationally acceptable-, and as a consequence of the foregoing, suppliers are excessively opportunistic, and will opt to buy the position of the successful bidder and subsequent contractor, or will seek agreements with the other potential bidders, either to withdraw or refrain from participating or to submit proposals that do not meet the parameters to be the best, sacrificing the quality standard required by the State, precisely because the State itself does not even know it.

This is often mentioned in the economic analysis of contract law, in the sense that "Someone who is known to fail to perform his part of the bargain will struggle to find someone willing to trade with him in the future, which is a costly punishment for taking advantage of the vulnerability of the other party to a contract, a vulnerability caused by the sequential nature of performance" (Posner, 2007).

15 "With asset-specific services, the difficulty of service evaluation makes governments vulnerable to unscrupulous vendors, as suggested by principal-agent theory, who can exploit their informational advantages to reduce the quality and quantity of services." (Brown et al., 2008, 183). In a similar vein, Cabrillo et al., 2008 state that "[G]overnments generally enjoy a monopoly situation. Although it may often be the case that in a public contract there is only one supplier of a good or service, competition may have existed *ex*-ante in the market [...] When there is no monopsony and the government acts as one buyer of a good or service among many other buyers (other private sector organizations), there is constant pressure to maintain competitiveness in contracts, which ensures that contracting firms will try to be more efficient. [...] Once the parties have established contractual relationships, they often make specific capital investments. We call this asset-specific investment (or specific linkage)", as they are investments made expressly for contractual reasons. The alternative use (opportunity cost) of these investments is less productive than the specific use within the contract so the parties can be said to be locked into the contractual relationship. Once the parties start working together, they should fulfill the contract rather than terminate the relationship and start over with other contractors. [...] Contracting parties, of course, understand that investments in specific assets pose a risk of bilateral dependence and, therefore, design contractual clauses to mitigate this problem and promote contractual continuity. Such mechanisms include, among others, penalties for premature breach of contract, verification and publication of information, dispute resolution mechanisms to encourage contract continuation." Brown et al. 2008, pp.10 and 11, citing Williamson, O. "The economics of governance," *The American Economic Review* Vol. 95, No. 2, *Papers and Proceedings of the One Hundred Seventeenth Annual Meeting of the American Economic Association*, Philadelphia, PA, January 7-9, 2005 (May 2005), pp. 1-18, at http://www.jstor.org/stable/4132783.

16 There is monopsony when there is only one buyer in the market for a given good or service, and oligopsony when the group of buyers is reduced or limited, in both cases having the power to impose itself on the sellers. Cf. Case et al., 1997, p. 344; Zorrilla Arena, 2004, p. 138.

17 Specifically, we refer to the Sole Registry of Bidders established in article 9 of Law 1150 of 2007. In this regard, see Expósito Vélez, 2013, p. 113.

18 "One of the barriers to contracting services may be the shortage of sufficiently skilled service providers. This is one of the most pressing problems in developing countries, although it is also experienced in industrialized nations, particularly in small communities. [Sometimes the number of interested bidders is so low because it is well-known that governments are slow to pay. We consider a city in which, over the past century, a highly interwoven, slow, costly, and bureaucratic system of checks and balances has been built up to control that what you get is fair value for what you pay and that you protect against corruption by outsourcing supplies and equipment. But the consequence is that bids, supplies, and payment of invoices are greatly delayed." Savas, 2008, p. 153; original paper in *Privatization and Public - Private Partnerships,* New York, CQ Press, 2000, chapter 7.

3. The modalities of selection versus the reality of the market

The parameters for designing selection modalities and procedures cannot only be legal postulates but must also focus on the achievement of efficient contracting, which will be the most transparent contracting[19]. Thus, while European law justifies the implementation of selection processes that allow and guarantee free competition and equal treatment based on the importance of public procurement in the development of markets, in Latin America, and of course in Colombia, this same premise is justified on the bases of administrative law and with a constitutional basis in the fundamental right to equality and its secondary materialization in the freedom of enterprise[20]. In other words, while Europe approaches public procurement from a market perspective and with an economic approach[21], in Latin America we are still stuck in the legal vision of public procurement, assimilating it to any administrative procedure in which the fulfillment of the administrative function is materialized as if it were an expropriation or an administrative sanction.

In this sense, although in practice the public or open call for bids selection procedure allows for maximum competition, this is optimal when there is a large number of companies in the market that are interested in participating in the State contracting developed under this modality and the costs for the State entity —such as those related to the delivery of documentation and evaluation of the proposals submitted—, and above all, the costs for the bidders of preparing the bids, are lower than any benefit that may be derived from this greater competition, especially when the object of the contracting consists of highly complex projects in which the costs of bidding and evaluation may be quite high, since a modality that guarantees freedom of competition and equal opportunities to submit bids may entail a great waste of resources in the submission and evaluation of proposals by persons who do not have the capacity or requirements required in the contracting conditions, since the nature of the procedure does not allow the contracting entities to verify the qualifications of the participants prior to the receipt and evaluation of the bids[22].

In other words, if the State is not prepared to identify the best offer among all those presented to it, because it does not have sufficient knowledge of what it is contracting given its level of specificity, or does not have the appropriate personnel to do so —internally or contracted externally—, free competition ceases to be an advantage and becomes a problem, and the technical criteria of efficiency for the award disappear, leaving only the rule of law arguments of legality, equality and due process, which of course are important, but not the determining factors if the aim is to obtain the offer most favorable to the interests of the contracting entity and the purposes it pursues, the legal definition of the duty of objective selection[23].

This situation is aggravated when the criterion for opting for the open and competitive bidding procedure is the amount and not the nature of the contract, or in fact the real need to obtain that undetermined plurality of offers in the face of the diversity of options offered by the market that does want to contract with the State, so that the contractual objects that demand large amounts of budget are those that must be subject to the rules of the competition, regardless of its object, except that by some legislative criterion it may be subject to a restricted mechanism or direct contracting, as these are the most susceptible to corruption; However, reality shows in our environment that due to the reasons of market structure that

[19] Safar Díaz, 2009 and Safar Díaz, 2010, pp. 211-236.

[20] Constitutional Court, Judgments C-400 of 1999 and C-508 of 2002; and Council of State, Contentious-Administrative Chamber, Judgment of December 3, 2007, Exp. 31.447.

[21] EU Directive 2014/24 of February 6, 2014, European Economic Community.

[22] Arrowsmith, 1996, pp. 186, 193, and 194.

[23] Article 5 of Law 1150 of 2007: "The selection is objective in which the choice is made to the most favorable offer to the entity and to the purposes it seeks, without taking into consideration factors of affection or interest and, in general, any kind of subjective motivation".

we analyzed in due time, in addition to cultural and sociological factors, the most affected by corruption practices are the bidding processes, being the most serious of all that the contractual objects are not executed or are defectively executed, leading to waste of public resources and state inefficiency due to the absence of compliance with public objectives and policies[24].

It is for this reason that, from an economic point of view, it is often preferable for state entities to resort to a closed or restricted procedure, or to the application of a negotiated modality, where a preliminary relationship is initiated with a certain number of companies, whose qualities are already known, This can have a positive impact on the industrial structure of the economic sectors that contract with the State, favoring domestic suppliers and, ultimately, stimulating the disclosure of information to the State that is practically non-existent under open bidding rules, which leads to high costs that are not socially desirable[25].

4. On the modalities of selection under Colombian Law

Article 2 of Law 1150 of 2007, amended in turn by Articles 88 and 94 of Law 1474 of 2011 and 125 of Law 153 of 2015, reformed and amended Law 80 of 1993, the original rule of the State Contracting Statute, enshrining five selection modalities that are developed, each one, through one or several procedures, depending on the characteristics of each one of them and the legally established grounds to proceed. As a result, for the existing selection modalities of public bidding, abbreviated selection, merit-based competition, direct contracting, and minimum amount contracting, there are currently fourteen contractor selection procedures (bidding procedure, selection procedure for lesser amounts, reverse auction, purchases in commodities exchanges, price framework agreements, direct sale with sealed envelope, public auction, contracting of intermediaries, open merit competition, competition with prequalification, architectural competition, direct contracting, minimum amount and minimum amount for purchases in large stores) without prejudice that the Government may establish different procedures for abbreviated selection and merit competition.

This structure, by itself, already denotes the high level of inefficiency of public procurement in Colombia, since the diversity of procedures overly complicates public procurement, generating a greater likelihood of making mistakes by the officials in charge of advancing the procurement that results in disciplinary, fiscal and criminal investigations, which discourages them to be proactive in achieving the objective of efficient and effective procurement, resulting in poorly made contracts, unexecuted or defective objects and, again, breach of State duties; And it is also this complexity that encourages, on the one hand, to opt for the most simplified form of contracting, which is directly, and on the other hand, as far as possible, to justify some kind of an exception to the rules of the General Statute of Public Administration Contracting to be able to apply private law, even when opting for a competitive bidding process[26]. Thus, the difficulty of selection in state contracts is a propitious opportunity for corruption.

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[24] In the words of Shavell (2003, Ch. 14, p. 1)., an important aspect of contract formation is the effort that individuals expend on it in terms of time and resources that are invested in the search for contractual opportunities, so if there is too much effort in the search, it will be too much for social welfare, and if too little, the benefit of entering into the contract will be less than the surplus that the contract itself creates and is shared among the contracting parties, and that too is socially inadequate.

[25] Mardas, 1999, pp. 189-203.

[26] "Although most contracts are concluded by direct awarding, the value of public procurement is also concentrated in other types of contracts, in particular contracting with minimum budget and special regimes. However, based on available information, approximately USD 8.8 billion in 2012 and USD 12.5 billion in 2014 were through direct awarding, which shows the importance of this type, not only in the volume of contracts but in all public procurement" (OECD, 2016, p. 72).

As we have stated in other scenarios, the main problem with the selection modalities in Colombia is not understanding that they are at the service of the State as the owner of the project objectives of the contract and that automatically the plurality of offers is synonymous with transparency. Fortunately, with as of the regulatory norms created in 2013 and today replicated in Decree 1082 of 2015, along with the creation of the National Procurement Agency, the perspective is beginning to change, understanding the true nature of procurement processes as a tool for the execution of public policies, and of the contract itself as a mechanism for the exchange of goods and services; In other words, public procurement is not an employment exchange, nor the solution to the problems of employment, equality, and competition, but the tool for the State to buy what it needs in terms of works, goods and services to execute employment, equality and competition policies, among others.

In this order of ideas, we find that the selection modalities today abandon the traditional criterion that transparency will only be achieved with a call to undetermined persons to choose the offer among the plurality, which is how the paragraph of Article 30 of Law 80 of 1993 defines *public bidding*. Indeed, although it is maintained in Article 2.1 of Law 1150 of 2007 that this is the modality that constitutes the general rule, the truth is that in the market reality in which we find ourselves it is inefficient due to the excessive time it demands and that the benefit of it does not really compensate the costs of its execution in time, personnel and effort, and it is perhaps for this reason that four additional modalities are consecrated in which by criteria of amount, object and nature of the contracts are given different rules, allowing the restriction of the number of participants and the negotiation.

So, at present, and even though we are reluctant to completely abandon the purely legal criterion introduced by the jurisprudence of the administrative litigation, we are inclined to resort to mechanisms that seek to reveal information to the State that it does not have when deciding what it wants to buy and how much it is willing to pay for it, and at the same time transfer the opportunism to the supply itself and does not burden the consumer State. Hence, we are betting on the use of auctions as a dynamic mechanism for price bidding, the use of commodity exchanges in which there is greater flexibility in purchasing and opportunities to interact with suppliers, and the structuring of framework agreements as contracts that cover direct purchase orders under preset conditions.

All these techniques, which in our system are procedures for contracting under the abbreviated selection modality, have the purpose of making contracts with the State more affordable, since contrary to the first price auction, that is, the one in which there is only one opportunity to submit an economic offer, in these mechanisms, there are opportunities to make offers during the procedure, which generates in the offer an incentive to disclose more information so that the State knows the point of the offer of indifference, that is, the point at which it is at the limit of the opportunity cost[27]. The problem we still face with these procedures is the systematic interpretation of the primacy of equal opportunities for bidders over the legitimate interests of the entity, in the sense that the selection parameters established by the contracting administration are questioned to allow the entry of the largest number of participants, and this translates into problems of time and effort wasted in the purchase, as happens with the bidding process, which again generates a disincentive for economic agents to submit bids; In addition, in the case of the —inverse— auction, it has been established that the price is the only determining factor to choose the contractor, ignoring the differences that exist among the bidders and that may be an advantage for the state entity. Finally, these procedures are only expressly established for the contracting of goods and services of uniform technical characteristics and common use.

[27] $Pi - C = ri$, where Pi is the indifference bid of player i (any one of the participants in the selection procedure game), C is the execution cost and ri is the opportunity cost. Intuitively, then, the opportunity cost is equal to the indifference bid minus the execution cost.

Now, concerning the *abbreviated selection* procedure initially designed for the lowest amount in contracting, which is determined based on budget ranges established annually by each state entity, and later extended to other grounds within this modality, except for goods and services of uniform technical characteristics and of common use, we have that the regulations again raise a different aspect concerning the general rules of public bidding, which is the possibility of restricting the number of bidders, we have that the regulation again raises a different aspect concerning the general rules of public bidding, which is the possibility of restricting the number of bidders participation, by establishing that if the entity so provides in the bidding documents, in case of having received more than ten expressions of interest, it may carry out a lottery to restrict the number of bidders that may submit proposals to a maximum of ten of the interested parties[28].

The rule opens the door to a restricted procedure, which evidences the awareness that it is important to control the number of participants in terms of efficiency, to the extent that it encourages participation and improves the information conditions; but, unfortunately, the same rule subjects the limitation of the number of bidders to a random mechanism, since it wastes the opportunity to advance the procedure with agents whose specific qualities of the contractors and their technical and financial capacity to execute what the State wants with the best quality-price ratio that can be obtained from the market are known. Thus, holding a lottery to limit the number of participants in an abbreviated selection procedure may not only cause an unnecessary waste of administrative resources in the evaluation of proposals submitted by those who do not have the necessary qualities, but may also discourage truly qualified bidders to submit offers that disclose information on performance and price conditions that allow the Public Administration to know the reality of the market, or even to present themselves within the procedure, making evident a lemon market problem due to a random adverse selection.

However, this restriction of participants is also evident in the merit-based competition selection method, designed for the selection of consultants or projects, and in general the contracting of intellectual works whose amount exceeds the minimum threshold following the budget of each public entity. Indeed, although the methodology to be followed when a merit-based competition is held is very similar to the one contemplated by law for both public bidding and abbreviated selection, as regards the steps to be followed for contracting, the entity may opt for the possibility of previously opening a stage only to verify the conditions of the bidders, that is, that which allows verifying the profile of the participant and is not necessary for the comparison of offers (i.e. legal capacity, financial capacity, general experience, and organization)[29].

This component of the prior evaluation of the minimum conditions of the bidders is what legitimizes the restriction in the participation to exploit the advantages of the market since the purpose is to achieve the participation of those who meet the qualities that the entity requires, and that among them there is competition so that the State truly obtains the offer most favorable to its interests. The limitation of the number of participants becomes even more evident when the regulation establishes that the state entity is the one that must determine the number of prequalified bidders that will be allowed to submit bids in the subsequent process, a decision that must be duly justified with market reasons[30].

[28] Article 2.2.2.1.2.1.1.2.20 Decree 1082 of 2015.

[29] However, it should be noted that Article 5 of Law 1150 of 2007 (numeral 1) establishes that these requirements, which can only be enabling or compliance verification requirements for public bidding, abbreviated selection, and minimum amount modalities, may be weighted in the merit-based bidding process.

[30] Article 2.2.2.1.2.1.1.3.4 Decree 1082 of 2015.

Another important aspect of this selection modality, compared to reverse auctions, commodity exchanges, and price framework agreements, is that the price is not an evaluation factor so the choice derives from the quality conditions of the offer and the bidder, and the value is only taken into account to verify that it does not exceed the maximum that the entity is willing to pay for it, as established in its budget availability; and this is complemented by the fact that the parties —entity and bidder— may make agreements on the scope and value of the contract, which entails a negotiation component not foreseen under any other selection modality and which, if used correctly, would lead to the State obtaining advantages from the future contractor, since at this point, as the competition phase has been overcome and there is already a more plausible expectation of being the contractor, the bidder would have incentives to disclose information.

However, the unfortunate thing about this procedure, from the regulatory point of view, is that the prequalification lists can only be used for a single merit-based competition, so the requirements verification phase to limit the number of participants must be done for each contracting, which generates inefficiency and delays in the process, discouraging the use of prequalification and the advantages it offers. In this sense, the existing rules in previous regulatory norms of 2008 and 2012 established the figure of conformation of multipurpose lists for several merit competitions with similar or common objects and with a validity of six months31, since this is precisely the philosophy of requalification, to be able to invite those who meet the minimum requirements to submit comparable bids.

Let us now analyze the most controversial modality of all, *direct contracting*. Direct contracting, according to the regulations and its denomination, will be carried out for the selection of contractors in the events expressly indicated in the law in expressly established cases, and its procedure consists of the selection of a contractor without resorting to a public and massive request for bids and awarding according to market conditions, based on the negotiation between the contracting entity and a specific market agent.

Direct contracting, as a negotiated modality par excellence, is strongly criticized for being an exception to the general premise of the need for a plurality of bids so that the market can come up with the best one based on free competition, and because it has become a mechanism for acts of corruption32 . But what seems to be inaccurate is to assimilate that direct contracting and negotiation are practically synonymous with each other and that both are synonymous with illegal acts, because there is a blind conviction that objective selection does not allow interaction between the contracting entity and the bidders beyond the actual submission of an offer and being evaluated by it to decide by applying pre-established parameters that are not open to discussion.

Thus, it is worth noting that direct contracting is the most expeditious mechanism for the State to purchase what it needs to achieve its objectives, and precisely the fact that it is used to establish a relationship with a specific agent without having to exhaust a bidding mechanism implies the existence of a relationship

31 Article 65 Decree 2474 of 2008, and Article 3.3.3.4 Decree 734 of 2012.

32 "The Colombian government contracting regime calls for the use of tenders as the preferred method for the procurement of goods and services by its public procurement entities. However, Tables 3.1 and 3.2 demonstrate that the vast majority of public sector contracts in Colombia are awarded through direct awarding and that several other selection processes are more often used than public tenders. The OECD recognizes the importance for public procurement agencies to be permitted the flexibility to purchase via direct awards in the case of small-value contracts or purchases that are best sourced locally for resource, time, and cost reasons. However, the overall value of public tenders, at both national and sub-national levels is only about 20 % of the total contract value and less than 1% of all procurement contracts made in Colombia in 2014. [...] Most Colombian procurement processes do not involve public tenders; they utilize direct awards or involve only a few select participants. Procedures other than public tenders usually undermine transparency in public procurement and they tend to focus on easing the workload of procurement officials rather than on the functional performance of the goods and services to be procured, as suggested by the 2012 OECD *Recommendation of the Council on Fighting Bid Rigging in Public Procurement* (OECD, 2016, pp. 69 and 71).

of trust between the parties that can be very beneficial for both parties, but especially for the State, if the mechanism is used correctly. Indeed, based on the market problems we have described, and taking into account that it is essential for a manager to be able to meet his objectives, either to be kept in office —if he has been directly elected by the board— or to move up in his career —when he is popularly elected—, they will prefer to turn to those economic agents that they know for their technical and professional, and even personal qualities, rather than submitting the achievement of the established goal, which requires a well-made purchase and a good supplier, to the risk that the future contractor may be a stranger, who may be the successful bidder due to technicalities and not because his offer is the most favorable to the interests of the entity, or risk the situation that the contracting cannot be held because no one attends the call or none of those who participate meets the requirements.

Perhaps this is most of the time the reason why state entities opt for direct contracting and not to resort to bidding modalities, more than for corruption reasons; but the problem of direct contracting —and, of any selection modality— is that if the contractor's profile is not clear and what is required to be purchased from him, it becomes a magnificent opportunity for corruption, because the biggest problem is that it is contracted with inexperienced or unqualified agents for what is required, This results in the absence or deficient execution of the contracts and the increase in the cost of the projects, either because they have to be contracted again, which means the cost of a new process and prices, with the time and effort that this demands, and/or legal proceedings for non-compliance, which also demands costs of all kinds.

It is so important the issue of direct contracting, and the contradiction of believing that it goes against market rules, since the same doctrine points out that the logic of external contracting, that is, with individuals, should only occur when the same entity or no entity within the State itself can provide what the contracting entity requires for the achievement of its objectives[33]. Likewise, aspects that require a level of specificity that makes public bidding useless (sole bidder in the market, artistic works) or highly inefficient due to the reduced market of bidders (certain scientific and technological activities), or insecure (defense and intelligence sector reserve contracting), or that simply demand a level of trust in an agent for functional aspects of the entity (provision of professional services), justify the need to exhaust an expeditious and direct contracting, it is reiterated, with an agent that meets the requirements for the object to be contracted, since, ultimately, this contracting relies on a subjective component, of preference for a specific agent, although others can provide the same good or service, even at a lower price, in less time or with better conditions.

Finally, as for the modality of a *minimum amount,* which is applied for the contracts of lower price within the entities subject to this regime (up to ten percent of the value identified annually as the lowest amount), the same, despite being the most recently included in the State Contracting Statute, returns to the classic concept of the bidding process, inviting an undetermined person to receive a plurality of offers, returns to the classic concept of the bidding process, inviting an undetermined person to receive a plurality of offers, but the difference with that modality is that the selection criterion, as in the auction mechanism, is the lowest price, and that very reduced terms are established to carry out the procedure. Based on the market considerations that we have already analyzed and the incentives of the bidders, we find that this modality may present more problems than benefits for the contracting entities, since, on the one hand, the excessive

[33] "With asset-specific services, the difficulty of service evaluation makes governments vulnerable to unscrupulous sellers, as suggested by principal-agent theory, who can exploit their informational advantages to reduce the quality and quantity of services. Under these circumstances, managers would be wise to bypass the market altogether by dispensing services in-house. The advantage of producing services whose evaluation imposes difficulties is that managers can monitor and control and also incentivize their employees more easily than their vendors" (Brown et al., 2008, pp. 183-184).

reduction of the terms discourages serious bidders to submit themselves to the selection processes, and given that the determining factor is the lowest price and that these are purchases of low value, the push for lower prices will end up sacrificing quality, in addition to generating all the problems of collusion inherent to the bidding process; Ironically, however, the regulation returns to the restricted mechanism when the contracting within this value range is carried out with supermarkets or department stores, since in this case it is allowed, and in fact, it is ordered to invite at least two supermarkets, which again shows that the limitation of participants is possible and is considered suitable[34].

It is clear, then, that the perspective of contracting in terms of contractor selection mechanisms is gradually changing to seek to take advantage of the market, but we still have a long way to go on the subject. For now, it is worth noting that we are beginning to understand that procedures that restrict the number of participants have the advantage of allowing suppliers of goods and services to operate in a given activity with other non-tariff barriers such as technical controls, administrative barriers and the like[35], and that this will encourage the submission of better offers, both by increasing the probability of winning in the face of a reduced number of bidders previously evaluated in terms of their qualities and by the greater disclosure of information to the State, i.e., we are on the way to understanding contracting in the context of the market; but we still have to bet on important aspects such as negotiation, at least about the technical conditions of execution, and understand that it is a method that, rather than implying contradictions to transparency in contracting, allows economic efficiency by reducing transaction costs and purifying the market of bidders, in addition to allowing the parties to obtain relevant information for the realization of the object of the contract that they can incorporate in the same to avoid future conflicts as soon as the necessary remedies are provided for in advance by mutual agreement[36].

In this sense, it is important to highlight that the first document of the draft bill for a new general contracting statute that was socialized last year by the National Contracting Agency, restricted contracting with the prequalification, restricted competition with the invitation and subsequent negotiation and competitive dialogue modalities are incorporated, in which the aim is to encourage interested parties to disclose information for the technical structuring of the project to be contracted and to discuss the final price of the contract; Unfortunately, however, the proposed wording is deficient, since it presents a generic delimitation of the forms of contracting, without parameters for its development by way of regulation, which will perpetuate the current problem of legal uncertainty and the ultimate decision of its content by the administrative judge[37].

[34] Article 2.2.2.1.2.1.1.5.3 Decree 1082 of 2015.

[35] It is important to remember that the domestic market is generally protected by the adoption of tariff barriers, which are maintained for as long as it is decided to implement the measure, and which seek to restrict the entry of foreign industry into the domestic market, affecting the entire economy by transferring the higher value to the final consumer. In the case at hand, public procurement can operate as a non-tariff barrier, whose effect will depend on the adaptability of the companies, with the advantage that the relative price of the good, work, or service only varies for the public contractor, without affecting the other sectors of the economy.

[36] If it is assumed that restricted and negotiated contractor selection procedures introduce an idea of preferential contracting and that government contracting is repetitive and with high prices, what is created is a quasi-rent, which is part of the cost of acquiring goods, services, and works, composed of the cost of the visible characteristics of the product, The quasi rent is an analytical term in economics to define the earned income that is higher than the opportunity costs after the investment, which are the sunk or sunk costs. http://en.wikipedia.org/wiki/Quasi-rent

[37] Consult at https://tinyurl.com/5h2jhfxx

5. The (English) auction as a price evaluation mechanism

An optimal tool that would be very useful to extract advantages from the market for the State, because of the reluctance to direct negotiation, is the dynamic bidding among bidders, as it is a mechanism that generates competition resulting in the disclosure of information that leads to the best cost-benefit ratio for the contracting entity. This is known as an auction - in its English modality and is characterized as a dynamic game in which successive bids are submitted by the participants depending on individual valuations and common information, making decisions in each round, until someone offers the last price and is the winner - although it can also be used for other non-monetary aspects, but quantifiable.

It is a productive mechanism when there is a potential number of potential participants, because theory suggests that the greater the number of bidders, the greater the bidding towards its limit; it is positive when there are open public calls, since, given the uncertainty of the number and qualities of the participants, it reveals how interesting the project, as proposed, is for the market in monetary terms, thus revealing information; it is the mechanism that best aligns the incentives of the bidders (when there can be no negotiation), because it concentrates on evaluating objective aspects of the proposal, so that the discussion about them takes place among the competitors themselves and not with the requesting State, which allows the latter as an observer to identify the bidders' true assessment of what they want to contract and learn from the experience for future contracting; and finally, it is the most expeditious mechanism for evaluating these measurable or quantifiable aspects to the extent that the measurement thereof is made immediately in the dynamic bidding process based on the information disclosed by the bidders themselves in each of their successive bids[38].

Thus, the greater the number of bidders, the greater the incentive for the auction as a dynamic bid, since the discussion is generated from the competition, which simplifies the costs of searching for the best offer that is so high under the traditional rules of evaluation of a single proposal (first-price auction), since it shifts the burden of disclosure of information to suppliers and minimizes the risk of error of evaluation by the State as a consumer, especially when it is not an expert in the technical and economic component of what it is buying[39]. This facilitates the flow of exogenous information, thus increasing competition as bidders are encouraged to bid more aggressively, thereby improving the terms of the future contract, and consequently the quality-price ratio of the object to be contracted[40].

6. Conclusions

The incentive structure existing in the public procurement market is far from the perfect market and from the ideal in which traditional contractor selection processes are proposed, where the possibilities of rapprochement and exchange of information between the State and its bidders were forbidden due to the high risk of corruption, since reality shows that this perspective distances State entities from the markets and, on the contrary, generates even more incentives for the commission of these undesirable conducts

[38] Safar Díaz, 2016.

[39] Starting from an extreme case of association of valuations, which is the one that occurs in the common value model, in which the true value of the object subject to auction is uncertain and the knowledge that the participants have about it is limited, the bidders make faulty judgments regarding the true value of the object of the contract, in which case the award will be made to the most overestimated bid and not to the most appropriate one, that is, the one that reflects the true value of the contractual object. Thus, this phenomenon in which the winner tends to bid a price higher than the expected value of the auctioned item is known in the literature as the "winner's curse", and justifies that public entities set aside proposals that lower their price beyond what seems to be reasonable because they are considered abnormal. This is what is known in our environment as the discarding of artificially underpriced proposals (Soudry, 2004, p. 356).

[40] Subramanian, 2010.

due to excessive opportunism of economic agents and the State's exaggerated ignorance of its position as a consumer.

If the advantages of the market are to be truly exploited in order for the State to purchase efficiently, it is necessary to abandon the concept that excessive plurality is the best and that this guarantees transparency, and begin to resort to the intelligent selection of bidders and negotiation, since restricted competition implies control over the information available and the possibility of making a more assertive decision, and it generates greater incentives to competition from the supply side because the fewer the number of participants, the greater the probability of winning in a fair fight, so that there will be more cases in which it is not worthwhile to assume the cost of paying the director of the selection process or the competitors to be the successful bidder if there are more options to win cleanly; And, if in any case there is collusion or cartelization among those invited to participate, the problem is solved by competition law with optimal sanctions that punish the behavior at the optimal level that not only dissuade the actors from committing these behaviors again, but also dissuade the other agents in the market from doing so.

The selection procedures in Colombia are currently showing signs of incorporating much more economic components aimed at placing the State in a strategic position in which it truly obtains advantages from the market such as conditions of restriction in participation and possibilities of negotiation, as well as dynamic mechanisms of bidding on price, but without abandoning the classic concept of the bidding process, perhaps due to the strong tradition of assuming the contracting process as one more administrative procedure, in which the center and objective are the administered, so we have a long way to go and a wholly personal, individual experience to assimilate. Importing international models, especially European ones, is not efficient if we do not change our perspective on public procurement, because only by seeing the State as a powerful and aggressive consumer that is obliged to extract from the market the best for the purposes it pursues its contracting, we will understand that this mechanism is to acquire goods and services and has no other purpose than being the strategy for achieving public policy objectives.

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