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Apresentação das demonstrações financeiras por microempresas e empresas de pequeno porte nas licitações regidas pela LEI 123/2006

Submission of financial statements by micro companies and small businesses in biddings under the rule of Law 123/2006

Presentación de estados financieros por micro y pequeñas empresas en licitaciones reguladas por la Ley 123/2006

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Resumo

O presente artigo tem como objetivo investigar se as Micro e Pequenas Empresas (MPE), enquadradas como ME/EPP são obrigadas a apresentar balanço patrimonial registrado em Órgão competente nas licitações de acordo com a lei 123/2006. Para isso, utilizamos um recorte no texto da Lei nº 10.406/02, Código Civil Brasileiro, ou pela LC nº 123/06, aplicável à ME e EPP, combinado ainda com Resoluções do CGSN e, também, do Conselho Federal de

Contabilidade como a resolução ITG 1000, através da metodologia bibliográfica e descritiva. Verificou-se que a obrigatoriedade da escrituração contábil anual por parte das Microempresas e Empresas de Pequeno Porte é fundamental para a participar de certames licitatórios, além de ser fundamental no fornecimento de dados para o controle e tomada de decisões.

Palavras-chave: Relatórios contábeis; Licitações; Microempresa; Pequenas empresas; Lei 123/2006.

Abstract

The current article aims to investigate if micro and small businesses, classified as micro companies/ small businesses, are obliged to present balance sheet registered in corresponding body in biddings according to law 123/2006. To that end, we use a clipping in the law nº 10.406/02 text, Brazilian Civil Code, or by Complementary Law nº 123/06, applicable to the micro company and to the small business, yet aggregated to Management Board of Simples Nacional resolutions and also of the Accounting Federal Board as General Technical Interpretation resolution 1000, through bibliographic and descriptive methodology. It was verified that the obligatoriness of the annual accounting bookkeeping by the Micro Companies and Small businesses is crucial to take part in bidding events, besides being essential to data provision to controlling and deciding making.

Keywords: Accounting reports; Biddings; Micro company; Small businesses; Law 123 /2006.

Resumen

El propósito de este artículo es investigar si las micro y pequeñas empresas (MPE), clasificadas como ME / EPP, deben presentar un balance registrado en un organismo competente en el proceso de licitación de conformidad con la ley 123/2006. Para esto, usamos un recorte en el texto de la Ley No. 10.406 / 02, Código Civil de Brasil, o por LC No. 123/06, aplicable a ME y EPP, combinado con Resoluciones CGSN y también del Consejo Federal de Contabilidad como el Resolución ITG 1000, a través de metodología bibliográfica y descriptiva. Se descubrió que la contabilidad anual obligatoria de Micro y pequeñas empresas es esencial para participar en concursos de licitación, además de ser fundamental para proporcionar datos para el control y la toma de decisiones.

Palabras clave: Informes contables; Ofertas; microempresa; Pequeña empresa; Ley 123/2006.

1. Introduction

The current study aims to investigate and discuss on the obligation or the exemption of the balance sheet elaboration by companies classified on Simples Nacional after enactment of Complementary Law nº 123 /2006, that brought several benefits in order for small businesses to apply in equal treatment with big companies in bidding processes. That Law was a great advance to small businesses, which intends to guarantee deals with public administration and, at the same time, foment local economy with job and income generation.

Intending to succeed in bidding processes small businesses focus on reducing the amount of proposals intending to win the competition with the smallest price, but the bidding process is formed by up to three phases and to win bid it is not enough the best bid, there is the phase of the company qualification in which some documents are required and one of them is the balance sheet.

And it's exactly in this first phase that the Micro Companies and Small Businesses have so much difficulty, mainly when the bidding notice asks for the balance sheet, intending to verify the economic and financial situation of the company.

Because these small businesses follow the Simples Nacional taxing, there are several approaches and controversies about the obligatoriness of these companies to have a complete, simplified accounting bookkeeping or not to be required to produce the balance sheet. And it has become problematic as some bidding process notices are demanding the submission of the balance sheet to technical qualification and small businesses when they do not have this financial statement, they have been using the law 123/2006 and other legislation to impugn the notice.

Before this context and the doubts generated about the subject, the current research seeks to answer the following question: with the advent of Complementary Law 123/2006, Has it brought any benefits to Micro Companies and Small Businesses about the submission of the balance sheet in the phase of bidding process qualification? It was used a bibliographical e descriptive research that aims to portray the most it can the subject studied, presenting its characteristics to later analyse defined variables.

Initially a brief context of Complementary Law 123/2006 will be explained, as well as the classification of small businesses and the main benefits generated regarding bidding processes. Second, it will be discussed the enforceability or dismissal in submitting the balance sheet by small businesses. At the end, an analysis of the main investigative points will be built in order to resolve the issue.

2. Methodology and Contextualization of the Main Laws that Rules the Bidding Process in Brazil

Research aims to bring new knowledge to society, as stated by Pereira et al. (2018). The present study is qualitative. Brazilian Federal Constitution of 1988, in its 22nd article, inc. XXVII, says that it is the task of the Union to legislate over general rules of bidding and hiring, in all categories, to direct public administrations, autarchies, foundations of the Union, State, Federal District and cities and in article 37, it demands bidding to Works, services, purchases and disposals, as well as to granting and permission of public services, assuring equal condition to all competitors.

In 1993 it was instituted Federal Law nº 8.666 which rules article 37, XXI, of Federal Constitution, and it instituted rules to biddings of Union, State, Federal District and cities Public Administration.

According to Silva (2009, p.672) “bidding is an administrative procedure destined to provoke proposals and to choose proponents of work, service, purchase execution contracts or disposals of the State.” Later, in order to become the bidding processes quicker, Federal Law nº10.520/2002 was published, which instituted the bidding category named “trading floor” to acquisition of goods and common services. The trading floor is categorized in: presential or electronic.

On presential trading floor outfitters will have to participate in public session to the receipt of proposals, and the interested party or its representative shall identify itself, and if necessary, prove the existence of the necessary powers to formulate proposals and to practice all the other acts inherent to the event. During the session, the three best proposals with the most advantageous prices to public administration will be able to make new bids – verbal and successive. But in electronic trading all procedures will be carried out trough the internet following the procedures defined in law and in the notice.

In 2006, Complementary law nº 123 /2006 was created, also known as National Statute of Micro Company and Small Businesses, in which it was instituted differentiated treatment regulating precepts instituted in the Federal Constitution.

The Federal Constitution of 1988, more precisely in its article 179, already mentioned differentiated treatment regarding to Micro Companies and Small Businesses:

The Union, the States, the Federal District and the cities will dispense the Micro Companies and Small Businesses, so defined in law, differentiated legal treatment, aiming to encourage them by simplifying their administrative, Tributary, social security and credit liabilities or by eliminating or reducing them through the law (Brasil, 1988).

The main objective of that law is to provide ways to economically develop small businesses and consequently increase the index of Jobs, income, business records and the fostering of local economy (SEBRAE,2018). Companies that fit in the general law, based on the criteria of the Complementary Law 123/2006, follow classification according to annual basis of gross revenue to know:

- Individual microentrepreneur: annual gross revenue up to R\$81.000,00
- Micro Company: annual gross revenue equal to or less than R\$ 360.000,00
- Small Business: annual gross revenue superior than R\$ 360.000,00 and equal or superior than R\$ 4.800.000,00 (Sebrae,2018).

In that way, companies that surpass limits above mentioned of annual gross revenue will be mismatched, which means, excluded from Simples Nacional and the following year this companies will be able to choose for Simples Nacional since its revenues conforms to limit zones of these companies.

Another important milestone happened in 2014 when it was approved the Complementary Law nº 147 that updated Complementary Law 123/2006 new milestones in favor of Small Businesses in legal instruments that regiment governmental purchases.

Among established milestones I highlight the resoluteness that purchases will have to be done exclusively from Small Businesses to amounts up to R\$ 80.000,00 (eighty Thousand reais) and all subcontracting of goods of divisible nature must have quotas of 25% exclusive to Small Businesses and also that all works may compulsorily require from hired companies the subcontracting of Small Businesses in minimum and maximum percentages what changes radically the paradigma of public hiring in our country. This law authorizes payment of an amount above the best proposal up to 10% in order to guarantee that the purchase be from local and regional companies.

Family farmer and individual rural producer start to have the same benefits of Micro Companies and Small businesses, of individual microentrepreneur and cooperatives. Deadline to late tax regulation was enlarged from 2 to 5 working days, extendable for equal time and

debits certificate was included in the process, an advance in law interpretation.

2.1 Obligatoriness of Balance Sheet Submission in Biddings

Financial qualification is always required in the phase of bidding process as the moment that the company shows its financial reports, more precisely, the balance sheet, where it's possible to check the company solvency and liquidity index, an important measure to identify if the company will be able to bear the contract that may come to be signed with public administration.

But many doubts have arisen, such as if the small businesses are required to submit these reports and if there is any benefit provided by law where this submission is exempted.

As we analyse the Law 8.666 of 1993 more precisely in its article 27, it states that all companies must meet the requirements prescribed in notice such as submitting in an envelope all the documents concerning the qualification phase, it must have documents of legal qualification, technical qualification, economical and financial qualification, tax and labor regularity and what is prescribed on item 37 of article 7th of 1988 Federal Constitution.

According to Law 8,666/1993, in its article 31 it's necessary the proof of some documents when it comes to economic and financial qualification, to know:

- Send the balance sheet and accounting statements of the last social assignment it must be presented as set forth in the law, which demonstrates a good financial situation of the company. It's forbidden its replacement for balance sheet or unclosed balance sheets, it can be updated by official indexes quando it's been closed for more than 3 (three) years during the submission of the proposal;
- Send negative certificate of bankruptcy or composition dispatched by the head office dealer of the legal entity, or of asset execution, dispatched in the residence of the natural person;
- Appear the guarantee, in the same modalities and criteria provided on "caput" and 1st § of article 56 of this law, limited to 1% (one per cent) of the estimated amount of the contract object;
- 1st § the demand of indexes will be limited to the demonstration of the financial capability of the bidder with views to commitments that he/she will have to take on in case the contract be awarded, it's prohibited minimum amount requirement of previous billing, profitability or future profitability indexes;
- 2nd § The Administration, on purchases to future delivery and on work and service

execution, will be able to establish, in the calling instrument of bidding, the demand of minimum capital or of minimum net equity, or guarantees provided on 1st § of article 56 of this law, as given objective of proof of economical and financial qualification of bidders and to guarantee effect to contract payment to be subsequently held;

- 3rd § the minimum capital or the asset value that is referred in the previous paragraph cannot exceed 10% (ten per cent) of the estimated amount of the contract, and proof must be done at the date of the proposal submission, under the law, and it's allowed updating to this date through official indexes;

- 4th § It may be demanded, the list of commitments accepted by the bidder that means reducing the operative capability or absorption of financial availability, calculated according to updated balance sheet and its capability of rotation;

- 5th § the proof of the good financial situation of the company will be done objectively, through the calculus of accounting indexes provided on the notice and properly justified in the administrative process of bidding that began the bidding event, and it's prohibited the demand of indexes and amounts not usually adopted by the right evaluation of financial situation enough to fulfillment of obligations resulting from bidding.

Thus we verify that law 8.666/1993 demands that all companies that come to take part in bidding processes prove their good financial health to public administration, with submission of the balance sheet in order to analyse net Worth and share capital.

We inform that, the only biddings that according to the law can exempt the balance sheet are the ones whose modality is the Invitation or whose object be material to prompt delivery, according to article 32 of law 8.666/93:

- The documents covered by the articles 28 to 31 of this law may be dispensed, entirely or partially, in cases of invitation, contest, supply of goods to prompt delivery and auction.

According to decree nº 5,538/2015 states, in qualification phase in bidding to supply of prompt delivery goods or material rental the small businesses won't be demanded to present the balance sheet of the last social assignment. But if these companies need to sign contract with public entity the submission of the balance sheet becomes compulsory. These are the only provided situations that do not demand economical and financial proof of the companies.

2.2. Small Businesses and the Elaboration of Balance Sheet

The Micro Companies and Small Businesses were ruled by law 9.317 /1996, which did not demand the elaboration of balance sheet with the promulgation of Complementary Law 123/2006 the law 9.317/1996 was abolished. Thus, Micro Companies and Small Businesses opting for Simples Nacional must keep a complete system of accounting bookkeeping, it can, optionally, adopt a simplified model to be ruled by the steering committee, as we can conclude from General Law, in its article 27, which mentions that small businesses can optionally adopt simplified accounting to control its operation according to regulations of the steering committee of Simple Nacional.

As we analyse the obligatoriness of companies in doing the accounting bookkeeping and resorting to orientation of law 10.406/2002 – Brazilian Civil Code, we have that entrepreneurs and societies are forced to keep a mechanical or manual system of accounting bookkeeping, based on accounting books in accordance with the documents and that produces the balance sheet annually. In fact, we verify that besides producing balance sheet the companies are obliged to maintain bookkeeping of its accounting books. In Complementary Law 126/2006 in article 26, states that Micro Companies and Small Businesses will have to maintain the bookkeeping of the book of accounts with its banking and financing operations.

According to Brazilian accounting rules regarding to nº 3.2 and 3.3, they inform that Micro companies and Small Businesses that choose simplified bookkeeping will be required to elaborate Balance Sheet and Demonstration Result, and it's optional any other demonstrations provided in the corporate law code.

The companies that chose the simplified bookkeeping will adopt a plan of simplified accounts according to Brazilian accounting rules 19.13 which identify important aspects that must appear in simplified accounts plan:

- Be simplified, having the essential elements according to its goal;
- Consider the specificity, size, the company's nature, among others;
- Have flexibility to generate and control management information;
- Meet the requirements of the General Law;
- Allow conciliation with other books;
- Segregate expenses, costs, revenues, aiming to assure the accounting consistencies.

About the accessory obligations of Micro Companies and Small Businesses, the Management Board of Simples Nacional, when regulating chapter IV of the General Law, Section VII, issued the resolution of the Management Board of Simples Nacional nº 10/17, that ruled the obligation of the bookkeeping of accounting and tax books through the following provisions

- I. Cash Book, in which all financial and banking transaction must be carried;
- II. Inventory Record book, in which financial transaction must appear registered at the end of each calendar year, when it's a taxpayer of ICMS (a tax over circulation of goods);
- III. Check-in Book, model 1 or 1-A, destined to tax documents bookkeeping related to goods or assets receipt and to acquisitions of transportation and communication services made for any purpose by the emporium, when it is an ICMS taxpayer;
- IV. Services provided Record book, destined to register of tax documents related to provided services liable to ISS (Tax over service);
- V. Record book of taken services, destined to register of tax documents related to taken services liable to ISS;
- VI. Record book of control seal entry and exit, exigible by IPI (tax of industrialized products) legislation;

1st § Books itemised in this article may be exempted, totally or in part, by taxing entity of the taxpayer emporium tax district, with respect to the boundaries of its respective competence.

2nd § Besides the books provided on caput, it will be used:

- I. Record Book of Tax Documents Print, by the graphic place to register prints that it manufactures to third parties or to its own use;
- II. Specific books by taxpayers who sell fuels;
- III. Vehicles Record Book, by all people who habitually interfere in vehicles intermediation process, including as simple depositaries or exhibitors.

3rd § The submission of the accounting bookkeeping, in special Journal Entries and Ledger exempt the submission of the cash book.

We notice that the accounting books of mandatory issuance by Micro Companies and Small Businesses according to the general law are: Journal, ledger, Inventory register, Goods inflow Register, Provided Service Register, Taken services Register and others in specific cases.

As we analyse the approaches so far presented, be it under the rule of law n° 10.406/02, Brazilian Civil Code, or by Complementary Law n° 123/06, applicable to Micro Companies and Small Businesses combined with resolutions of CGSN and, also, Federal Council of Accounting, leave no doubts concerning the obligatoriness of accounting bookkeeping, even if processed on the simplified modality, as provided by the regulation. However, in 2011 resolution 1.115 /2007 of the Federal Council of Accounting (FCA) that approved and ruled simplified bookkeeping to Micro Companies and Small Businesses and it was revoked by resolution 1.330/2011 of FCA. In this context in 2012, the FCA approves resolution 1.418, approving ITG 1000 (General Technical Interpretation) – accounting model to Micro Companies and Small Businesses, that states in item 26 the following:

- The entity must collaborate with Balance Sheet, Result Demonstration and explanatory notes at the end of each social year. When it becomes necessary, the entity must elaborate them in intermediate periods.

Before this context there is no prevision in the mentioned laws in which Micro Companies and Small Businesses be suspended from the elaboration of Balance sheet.

4. Final Considerations

Intending to present an analysis about the obligatoriness of balance sheets by companies named as Micro Companies and Small Businesses, and after checking several laws, decreets and other regulations that rule the issue, it was verified the obligatoriness of elaboration of balance sheets by these companies, therefore, that still have the benefit of doing their accounting in a simplified way to tax purposes, if they want to take part in bidding events, they must elaborate annually their respective balance sheet , under penalty of disqualification.

Laws, decreets and other normatives that could base the non obligatoriness or the simplified accounting bookkeeping by these companies have already been revoked.

This way every bidding process according to notice must demand of all partipant companies the reports that prove finantial and economical situation. Having some peculiarities as in the case of Invitation modality, which exempt the submission of the balance sheet, supply of prompt delivery goods or material rental, it won't be required of small businesses the submission of balance sheet of the last social year, and also the micro entrepreneur won't be required to be present at the balance sheet.

To Public Administration it is of vital importance to check the finantial situation of the

bidding participant, it's a way to guarantee and check if these companies have financial capability of fulfill their obligations in service provision or in hiring labor before administration.

On the other hand, Balance Sheet is a very important tool to all companies including Microcompanies and Small Businesses, balance sheet is source of information to decision making, so, it's an important control instrument and it's essential to companies good financial health.

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