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O Presidente

Accountability and Transparency in Public Procurement: the experience of the Portuguese Court of Auditors

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Abstract

Accountability and transparency are important values of the democratic State. Since public managers are public servants, committed with the realization of the public interest within the framework of democratic values and the rule of law, their decisions must be scrutinized. Public procurement is one of the most relevant fields of public financial management. For that reason, it deserves a special attention by SAIs. It must be assured that public procurement conducts to the realization of public interest. So, accountability and transparency are cornerstone issues in what concerns public procurement and in what concerns the assurance of the rule of law and of other democratic values. Our intent, in the present paper, is to show how the Portuguese Court of Auditors (*Tribunal de Contas*) contributes to assure accountability and transparency in public procurement.

Summary

1. Introduction 2. The importance of accountability and transparency in the field of public procurement; 3. The importance of a main approach to public procurement; 4. The experience of the Portuguese Court of Auditors (*Tribunal de Contas*); 4.1. General aspects 4.2. The *a priori* audit, 4.3. The concomitant and *a posteriori* audit; 5. Concluding Remarks



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1. Introduction

Accountability and transparency are important values of the democratic State. This was emphasized in the conclusions of the VIII EUROSAI Congress, which was held in Lisbon, in May-June this year.

Citizens legitimately expect that the Public Administration pursues, in an effective manner, the public interest and that public managers put their expertise and their work in the service of the community.

Public servants must manage rigorously public financial resources. They must also justify, explain and inform citizens of the decisions they make in the performance of their duties, by a logic of openness, transparency and accountability.

Accountability and transparency allow for the exercise of social control over the acts of the Public Administration.

One of the areas of public management in which the values of accountability and transparency prove to be critical is public procurement. It is imperative to ensure that the procurement's decisions and procedures be made in the general interest, and also that key elements of the procurement, including the reasons on which the choice of private partners are based, are understood by citizens.

In this respect, the SAIs play a very important role in the protection of the public interest and of the rights and interests of all citizens. For this reason, the Portuguese Court of Auditors (*Tribunal de Contas*) has paid a special attention to the area of public procurement.

2. The importance of accountability and transparency in the field of public procurement

Over the last years, accountability has been recognized as a complex concept. The multiplication of forms of action by the Public Administration, as well as by governance players, has contributed to break through management models that rely on hierarchy and bureaucracy. By overcoming Weber's and Taylor's models of management, we have therefore gone forward to a more complex concept of accountability, namely involving



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aspects of legal and ethical nature, and including the technical dimensions of good management such as economy, efficiency and effectiveness¹.

This notion of accountability was recognized by EUROSAI in its VIII Congress. This forum highlighted the importance of accountability and transparency not only as values of the democratic State, but also as cornerstones of good governance.

The reference that is usually made to transparency linked to accountability is understandable.

Both values are aimed at allowing the citizens to be aware of the critical aspects of public management, so that they can participate, in a conscious manner, in public matters, be it at the level of discussion, decision, implementation, or control. If we start from the contractualist theories, we easily understand the meaning of accountability and transparency. The people hold the constituent power, and those who exercise public authority, do it on behalf of and in the service of the people. Thus, the management of *res publica* should, as much as possible, be transparent, and the critical political and management options be known and understood by all. Those who exercise public authority should inform of, justify and explain the basic options that are made. Rather than a privilege, holding public office is about an opportunity to serve the community.

Transparency and accountability also work as mechanisms of assurance of other critical values and principles, such as legality, equality, impartiality and pursuit of the public interest.

In public procurement, all values and principles take on particular importance. By celebrating public procurement contracts, the State and the different public entities take on commitments with public financial impact. That's why it is vital to ensure that the critical elements of the procedure of procurement and the contract itself abide by the principles of legality, equality, proportionality, impartiality, sound competition and pursuit of public interest.

¹ On the evolution of the notion of accountability in the last few years, see, among others, A. J. Fowles, "Changing Notions of Accountability: a social policy view", *Accounting, Auditing & Accountability Journal*, 6 (3), 1993, pp. 97 and following; Mark Bovens, "New Forms of Accountability and EU-Governance", *Comparative European Politics*, 5, 2007, pp. 104 and following.



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In order to ensure these principles, it is of paramount importance that the whole procedure leading to procurement be transparent, as well as the justification of the critical options in this field, such as the decision to procure and the selection of the co-contracting party.

In a democratic State, public procurement is incompatible with secrecy.

This issue means a great deal to the constitutional states, in a national perspective, but careful attention should also be paid to it at cross-border level. This is what happens at European Union level.

Public procurement has a significant economic impact, either actual or potential, and its normative discipline within the European Union is inseparable from the guarantee of the fundamental principles of the European economic constitution (in a material sense) – free movement of goods, people and capitals and freedom to provide services and freedom of establishment – and from the principles of non-discrimination and promotion of a sound competition. This is the purpose of the European public procurement standards, which determine, to a great extent, the national public procurement rules.

3. The importance of a principial approach to public procurement law

The public procurement law is founded upon fundamental values and principles of Constitutional and Administrative Law and of European Union Law.

Therefore, a principial approach to public procurement law seems important, and, often decisive. In fact, the observance of rules regarding public procurement law, namely those related to the selection of the pre-contractual procedure, is not an end in itself. It is instrumental for the previously mentioned values and principles.

In addition, public procurement rules include various exceptions, namely taking into account the object of the contracts. Nevertheless, the fact that certain issues are on the fringe of the application of the public procurement directives or of the national legislation on public procurement, does not mean – nor can it mean – that they are on the fringe of Law. Regardless of its objective scope, public procurement cannot be developed in other field other than Law. When specific rules of public procurement Law



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do not apply, namely because the application of EU directives are expressly excluded, the fundamental principles of Law (Constitutional Law and Administrative Law or European Union Law) do.

It is in this context that the Court of Justice of the European Union (CJEU) has expressed its views, and, very much along the same line, has been the jurisprudence of Portuguese Court of Auditors (*Tribunal de Contas*).

In terms of pre-contractual procedures, and according to the jurisprudence of the CJUE, where the Directive rules do not apply, the awarding entity is not automatically legitimized to decide to make a direct award. It should adopt the procedure that ensures at a greater extent the principles of impartiality, non-discrimination, transparency and openness to competition, among others. Any solution involving lesser protection of these principles should be justified and duly grounded by the awarding entity.

In accordance with the jurisprudence of the CJEU, the exemptions from the rules, which aim at ensuring the rights recognized by the Treatises on public procurement, must be object of strict interpretation.² In addition, it is up to those who intend to invoke an exemption set out in the Directives to give proof that the exceptional circumstances that justify that exemption effectively occur³. In addition, any procedure adopted under the derogatory norm should observe the principle of proportionality. That's why in the event of adoption of certain pre-contractual procedures (such as direct award), it is up to the awarding entity to show that the objective of the pursuit of a certain legitimate purpose cannot be guaranteed under the scope of a procedure that ensures the openness to competition⁴.

As can be understood, values like transparency and accountability are critical in the European public procurement law, in order to guarantee European fundamental

² See, among others, Judgment of 17 November 1993, Commission/Spain, C-71/92, no. 36 and Judgment of 2 October 2008, Commission/Italy, C-157/06, no. 23.

³ See Judgment of 3 May 1994, Commission/Spain, C-328/92, nos. 15 and 16, Judgment of 8 April 2008, Commission/Italy, C-337/05, nos. 57 and 58, and Judgment of 2 October 2008, Commission/Italy, C-157/06, no. 23.

⁴ See Judgment of 8 April 2008, Commission/Italy, C-337/05, no. 53, and Judgment of 2 October 2008, Commission/Italy, C-157/06, no. 31.



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values and principles. And so it is in the Portuguese internal law, on behalf of the constitutional values and principles of the republic.

4. The experience of the Portuguese Court of Auditors (*Tribunal de Contas*)

4.1. General aspects

According to the Constitution of the Republic, the Portuguese Court of Auditors (*Tribunal de Contas*) is a SAI endowed with jurisdictional nature, which is included in the list of sovereignty bodies.

Its nature reflects in the powers conferred on it by the Constitution and by the law, which manifests itself even in the audit mechanisms of the public procurement activity.

One of the most important mechanisms of control of that activity is the *a priori* audit⁵, without prejudice to the relevance that powers of audit and enforcement of financial accountabilities play.

4.2. The *a priori* control

The *a priori* control is achieved by granting or refusing seal (prior approval) or by granting seal with recommendations. In fact, it is a “decision that has a binding character as it is mandatory upon those to whom it is addressed and as it is an essential requirement to enforce financial consequences of the legal instruments subject to it”⁶.

Currently, the Portuguese Court of Auditors (*Tribunal de Contas*) carries out a *priori* audit of all acts and contracts that generate expenses or represent any charges and commitments for public entities, or for entities which, regardless of their nature, have been established to perform functions that were originally performed by the Public Administration and that benefit from budget transfers from the entity that established them, whenever there is a reasonable expectation of subtraction of the aforesaid acts and

⁵ On the *a priori* control, see José F. F. Tavares, *O Tribunal de contas. Do visto, em especial – Conceito, natureza e enquadramento na actividade de administração*, Coimbra, Almedina, 1998.

⁶ See Guilherme d’Oliveira Martins, “O Tribunal de Contas e a actividade contratual pública”, *Revista de Contratos Públicos*, no. 1, January-April 2011, pp. 12-13.



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contracts to the *a priori* audit of the Portuguese Court of Auditors (*Tribunal de Contas*)⁷.

It is important to stress that, today, the *a priori* audit is not confined to a formal verification of acts and contracts that are subject to it.

The Portuguese Court of Auditors (*Tribunal de Contas*) verifies, within the *a priori* audit, if the mechanisms that generate expenses or represent financial commitments, either directly or indirectly, comply with the law and have budget cover. When verifying the legal compliance of the aforesaid mechanisms, the Portuguese Court of Auditors (*Tribunal de Contas*) takes into account the legal and constitutional rules and principles, which give the framework to public procurement activity. Thus, for the Portuguese Court of Auditors (*Tribunal de Contas*), it is of particular relevance a set of elements that are closely linked to the requirements of **transparency** and **accountability** in the field of the public procurement activity, namely:

- *The reasons underlying the decision to procure and to select the procedure;*
- *The procedure to which the selected method is bound;*
- *The criterion to award and its support;*
- *The clauses that should make up the contract and their compliance with the decision to procure*⁸.

Some of the most important judgments of the Portuguese Court of Auditors (*Tribunal de Contas*), within the scope of the *a priori* audit, are supported on the previously mentioned fundamental principles of constitutional Law, of administrative Law and of the European Union Law, making a main approach to the public procurement issue within the scope of the audit that it performs, which is besides consistent with the jurisprudence of the CJEU.

⁷ Article. 5, no. 1, paragraph c), da *Lei de Organização e Processo do Tribunal de Contas*.

⁸ See Guilherme d'Oliveira Martins, *op. cit.*, p. 13.



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In 2010, 2139 new cases were brought to the Portuguese Court of Auditors (*Tribunal de Contas*), for purposes of *a priori* audit. From the concluded cases, 1853 were granted seal and 53 were refused seal⁹.

From the analysis of the cases, 2655 were returned for provision of further data or clarification of doubts. This has allowed, in many cases, for solving the illegalities and irregularities found, which have subsequently led to the granting of prior approval and also, in some cases, to the reduction of charges assumed by the respective entities¹⁰.

4.3. The concomitant and *a posteriori* control

The concomitant and *a posteriori* audit are also of paramount importance when it comes to audit the public procurement activity by the Portuguese Court of Auditors (*Tribunal de Contas*).

Within the concomitant control, the Portuguese Court of Auditors (*Tribunal de Contas*) follows up the implementation of the acts and contracts that were object of *a priori* audit, such as those that have not been subject to it under the legal exemption or dismissal.

Within the *a posteriori* control, the Portuguese Court of Auditors (*Tribunal de Contas*) may carry out audits of any nature, including those that focus on economy, efficiency and effectiveness in the implementation of the contracts.

Following the concomitant and *a posteriori* audits carried out, the Portuguese Court of Auditors (*Tribunal de Contas*) sends its recommendations to the audited entities with a view to improving management. The recommendations of the Portuguese SAI “... take on a decisive importance as pedagogical mechanisms that encourage good practices of administration”¹¹. In fact, there is a high degree of acceptance of the recommendations of the Portuguese Court of Auditors (*Tribunal de Contas*) by those to which they are addressed, which has contributed to the improvement of public management.

⁹ See Tribunal de Contas, *Annual Report 2010*, Lisbon, May 2011, p. 14.

¹⁰ *Idem*, p. 16.

¹¹ See Guilherme d’Oliveira Martins, *op. cit.*, p. 15.



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It is also important to mention that, from the conduction of the audits, signs of the practice of financial infringements may arise, which may lead to the enforcement of financial liabilities by the Portuguese Court of Auditors (*Tribunal de Contas*).

5. Concluding Remarks

A democratic State is founded upon the trust between its citizens and the public power. It is this trust that legitimizes the exercise of that power. In addition to the legitimacy originating from the government and from the parliament through vote, there is a requirement, arising from the central values of the democratic and republican State, of permanent legitimacy of those who exercise public power.

The safeguarding of the relation of trust established when electors cast their vote, and the legitimacy that derives from it, calls for the transparency of the exercise of public power and the permanent explanation and justification of government measures.

The SAIs, as entities specially designed, by its nature, for the promotion of good management, have the mandate to ensure transparency and accountability, in order to serve the democratic and republican State and, therefore, the owner of sovereignty – the people.

One of the most relevant fields of contemporary public management is that of public procurement. That's why this field deserves special attention by the SAIs.

This attention is given by the Portuguese SAI, which, through *a priori* audit, as well as through concomitant and *a posteriori* audit, has sought to ensure transparency and accountability in the field of public procurement, and, therefore, accompanied the principles of pursuit of the public interest, impartiality, equality and sound competition.

The action of the Portuguese Court of Auditors (*Tribunal de Contas*) has contributed to ensure the fundamental principles of the national legal and constitutional system, and, likewise, to ensure the respect for the cornerstones of the legal system of the European Union.

In the future, we expect to continue to deserve the trust of the people in the Portuguese Court of Auditors (*Tribunal de Contas*).



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