



Modernity and legality

Vital do Rêgo

Minister of the Federal Court of Accounts

Physician and attorney, Minister Antônio Vital do Rêgo Filho joined the TCU in early 2015. He came from the Federal Senate where, as a senator, he chaired committees that discussed important issues for the country, such as the Constitution and Justice (2012 to 2014) and Petrobras CPMI (Parliamentary Committee of Inquiry - 2014) Committees. He also participated in the external committee to monitor the program for transportation and revitalization of the São Francisco River. Before the Senate, he already had long legislative experience as a city councilor and state and federal deputy. Now at TCU, his task is to report processes of comprehensive government functions such as Social Security, Foreign Affairs and Sports. In this interview to the TCU Journal, he talks about the evolution in the Public Procurement Law, about the RDC (Differentiated Public Procurement Regime), and about audits coordinated by him of social security and the electric energy area.

1. You have a degree in Medicine and Law and began your parliamentary life (first as city councilor, then state deputy, federal deputy and senator) in 1988, the same year when our current Constitution was enacted. In the meantime, you witnessed the evolution of public services and strengthening of democracy. Taking into account your extensive political career, how do you perceive the evolution in the Federal Government in the area of bidding and contracts?

In the past, the government limited itself to assigning qualified public servants only to the bidding and contracts sectors, to carry out the tasks relating to bid committees and formalization of contracts.

It was believed that, if a procurement process had its object accomplished with timing and quality, it was thanks solely to the bidding and contracts department. If things did not go well, the blame rested solely on those employees.

Big mistake! Over time, and with a central role played by the Federal Court of Accounts (TCU) with its numerous judgments, the government realized that the procurement process actually is the result of a large mechanism with various players who have relevant roles for the success or failure of procurement.

Reinforcing this statement, I dare to say that, based on TCU's decisions themselves there are two main causes of failure in public procurement: failure or lack of planning and/or of oversight.

As a rule, procurement planning, including the preparation of the basic design or the reference document, as well as the estimated budget, should be performed by the sector that seeks a contract, since it has the technical knowl-

edge, i.e., technically knows the object to be hired.

Moreover, it is precisely in this sector demanding a contract that the government should find the employee to perform the role of contract supervisor. Surely, he/she must be one of those who know well the technical aspects related to the performance of the contractual object. Therefore, the sector that requires procurement takes on a very important role in the success or failure of a particular bidding process.

In general, the government is more aware that it is useless to have excellent floor officials or members of bid committees, with deep knowledge of procedures provided for in the law if there is no competent workforce to give a technical opinion on the contractual object. The workforce should also forward technical solutions that are appropriate to implement this object and clearly describe the market in which it is inserted.

There has been, indeed, clear advances in the administrative sector, but there still is a long path to follow, mainly because society demands from the Administration, with all legitimacy, increasing efficiency in handling the public matters.

This is the social and legal control of all those who generate public funds consisting of tax payment by society.

2. After the implementation of the Differentiated Public Procurement Regime, some critics claim that Law 8.666/93, which regulates Art. 37, item XXI of the Federal Constitution, entitled "Public Procurement Law", and needs to be amended. This claim is reinforced by the recent scandals in the country related to bidding

processes. Do you believe that the Public Procurement Law should be amended?

We must not forget that the Public Procurement Law, drafted in 1993, had as its main purpose to fight fraud and collusion, in order to avoid the scandals experienced at that time, such as "CPI do Orçamento" and "Anões do Orçamento" among others.

Hence, the more bureaucratic bias of the new law more focused on the procedural part of bidding.

Following the legislative evolution of the matter, came the Reverse Auction Law, bringing procedural innovations that made bidding processes much faster: phase inversion, bidding phase, single appellate phase, use of information technology resources, mainly with the adoption of electronic reverse auction.

The use of electronic reverse auction has become increasingly stimulated and encouraged, even by TCU itself.

However, there was a serious problem. The reverse auction law prohibits the use of this bidding modality for public works. Perhaps this was the major innovation provided by the Differentiated Public Procurement Regime (RDC), i.e., indirectly allow the use of reverse auction for procurement of works.

Why indirectly? In fact, the RDC Law (Law 12.462/2011) introduced in the legal world a new bidding modality, which some scholars call 'RDC' mode, associating this mode to procedures virtually identical to the reverse auction, but providing for the application of these procedures to public procurement for works as well.

That is why it is said that the RDC is, in essence, "a reverse auction for public works".

In addition, the RDC legislation incorporated much of the TCU's decisions. TCU's interpretations and directions supported by the principles in a broad way - not only those of strict legality - are implemented in the RDC.

In fact, I have only two observations regarding the legal regime of the RDC: **integrated hiring and confidential budget.**

The former due to the great difficulty of budgeting without prior preparation of a basic design by the contracting authority, causing the public procurement to be based on a blueprint.

The latter due to the lack of transparency, i.e., disclosure of the price that the government is willing to pay, which may lead to side deals in exchange for inside information.

More than a simple amendment to the Public Procurement Law, what we have now is a draft bill before the Congress (PLS 559/2013), which aims to consolidate Law 8.666/93, the Reverse Auction Law and the RDC, picking the best of each norm to prepare the so-called National Code of Public Procurement and Contracts.

Contrary to what some argue, the recent scandals that have surfaced mainly with "Operação Lava Jato" are not the mere result of gaps in our legislation. The problem is much broader and goes beyond the normative dimension.

3. How to modernize public procurement and, at the same time, always meet the principles governing the public administration (legality, impersonality, economy)?

The initiative to conciliate modernity and adherence to principles formally began in 1998 through the enactment of Constitutional

Amendment 19, with the inclusion, in the Constitution, of the principle of efficiency, which was included in the heading of Art. 37, next to the principles of legality, impersonality, transparency and morality.

One of the great merits of the reverse auction legislation was to innovate with administrative procedures that conciliate, particularly, legality and efficiency. It is important to highlight that this harmony between the principles of legality and efficiency is also present in the scope of the RDC.

The respect for the constitutional and legal principles, including the legality, impersonality, equality, efficiency and economy, does not represent any obstacle to modernity.

There is no conflict whatsoever between modernity and compliance with the principles, even because, from the perspective of strict legality, today we identify positive behavior that increasingly honors other principles, such as the anticipation of a negotiation phase under the trading floor shortly after the bidding phase.

This approach is based on the principles in all their completeness. The law enforcers abide by the principles, including in search for the best interpretation of the laws themselves.

It must be said that the principle of legality is not the most important principle nor the one that should prevail in real cases.

In many cases, as evidenced by TCU's decisions, the principle of legality loses strength to other principles, with the purpose of finding the best solution for the real case, which, like the principle of legality, are also supported by the legal system in force.

As examples, I can mention the principles of economy, reasonable-

ness, proportionality, administrative continuity, search for the most advantageous bid, efficiency, public interest, etc. The modernity we want for our public procurement is precisely in the harmonious coexistence of all these principles.

4. In the Congress, you proposed and discussed laws that eventually affected and improved the citizens' lives. How has this experience contributed to your performance here at the TCU?

The Congress is a great formulator of Brazilian law and there, as a Congressman and Senator, I had the opportunity to experience all the phases of a legislative construction in pursuit of improving the citizens' lives.

Now I can use what I learned in the matters under TCU's mandate, interpreting the laws and judging with the teleological sense of the law.

As an example, I can mention my participation as rapporteur in the reform of the public procurement law, currently pending before the Federal Senate, which will be very useful for my judgments, in addition to inducing other hundreds of possible initiatives.

5. On February 4, you will complete one year as minister of this Court of Accounts. How do you evaluate your first anniversary at TCU?

It was very positive, beyond my highest expectations. It is an honor to have been brought to this house, first by God's will and through the support from my peers at the Congress, who appointed me as Minister of the TCU.

For someone who has had all legislative mandates over 26 years in the Parliament, elected

by popular vote, as city councilor, state deputy, federal deputy and senator, it is very fruitful to be part of a house deeply related to the Legislative Branch, performing oversight at the service of society.

I want to thank my fellow ministers, public servants and our advisors for the extreme cordiality and friendship with which they welcomed me in the court, which greatly facilitated my adaptation to a new professional life.

6. Last November, under coordination of your office, the TCU performed a Public Debate on the social security sustainability. What were the main findings of the debate with the society?

First, it is important to highlight that this initiative by the TCU was admirable. It aimed to discuss publicly the problems of the country's social security in search for solutions that will only be possible with the participation of all the Brazilian society and, in particular, with the participation of the government authorities of the three branches.

In general, the conclusion was that social security sustainability, and consequently its impact on Brazilian tax schedule, is a chronic problem due to two aspects of high importance:

- the decrease in revenues due to economic problems related to the economic crisis, in addition to the changing demographic profile of the country, with an increasing elderly population that do not contribute to the social security and;
- the high level of misinformation of society about the current state of social secu-

rity, both in the General Regime (managed by the INSS – National Institute of Social Security) and the Specific Regimes (managed by the Federal Government, states, federal district and cities), preventing the subject from reaching the level of importance it deserves in society and, therefore, pushing governments to seek the necessary measures to fulfill their responsibilities with the social security system.

Because of the discussions in this public debate, I can highlight some measures considered to mitigate the impact of social security expenditure on public accounts:

1. the need to advance the implementation of supplementary retirement;
2. the end of retirement per time of contribution, used in only 13 countries in the world, including Brazil;
3. postponement of retirement;
4. 4) redefinition of access to the benefits;
5. the gradual reduction of the difference between genders and,
6. the convergence of rules of the general and specific regimes.

Finally, the essential service that the TCU has provided to the Congress and Brazilian society was highlighted. Since 2012, it has been providing information about the sustainability of the country's social security, in a number of judgments, such as AC 3414-2014-P, related to the systemic report of Brazil's Social Security; AC 2314/2015-P, which addresses the

risk of insolvency of the social security regimes; and AC 2710/2015-P, which addresses a comparative study between the general social security system in Brazil and in some countries of the European Union and the Organisation for Economic Co-operation and Development (OECD). It also addresses the coordinated audit that is currently ongoing to assess the solvency of the social security regimes of the states and cities.

7. You were also the rapporteur of the Systemic Electricity Report (Electric Energy Oversight). What has the TCU found in this work?

We found several structural problems, notably:

- Overvaluation of the physical guarantees of the power plants,
- Lack of measures to re-power and modernize the power plants;
- High level of electrical losses in the system;
- Exclusive construction of run-of-the-river hydroelectric plants.
- Systemic delays and dissonances in the completion of new ventures;
- Uncertainty related to the expiration of the old concessions.

8. Minister Vital do Rêgo, what do you expect from the TCU's performance in 2016?

It will be a year of consolidation of our progress, with audits increasingly responding to the desires of a society longing for better use of public resources.

I am certain that, in the last year, we strove to improve our decisions and modernize our work.

However, there is much to be done, and we have tools to advance further. We count on the technology and an efficient staff and, above all, general commitment to the future of Brazil.

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