

National Development, Bidding and Oversight by the Courts of Accounts



Crislayne Moraes

is a state Government Auditor at the Paraná State Court of Accounts. She holds a Bachelor's degree in Law from the Federal University of Paraná, a graduate degree in Civil Procedural Law from the Brazilian Institute of Procedural Law and an MBA in Public Administration and City Management.

ABSTRACT

The aim of this study is to analyze the relationship between national development, public bidding, and external control carried out by the Courts of Accounts. The study focuses on the breadth of the concept of development and on the timid pursuit for development through bidding by public entities. Thus, based on historical, documental and doctrinal research, it aimed to follow the evolution of the concept of sustainable development, establish the sustainability dimensions that apply to public bidding and propose extension of the scope of bidding audit by the Courts of Accounts.

Keywords: Sustainable development. Bidding. External Control.

1. INTRODUCTION

In Brazil's recent history, the pursuit for national development has guided government action since the new democracy was instituted; particularly since the 1988 Federal Constitution was enacted, establishing national development as one of the Republic's aims.

In times of state economic and financial crisis, such as the current Brazilian situation, this "national development" theme is once again the



focus of debates, with the intention of seeking solutions to the crisis.

In addition to this scenario, recent amendments to Law No. 8,666, also known as the Public Procurement Law (BRAZIL, 1993), and to the Micro and Small Enterprises (MPEs) Statute (Id., 2006) are also driving discussions on ways to consider public bidding as a national development tool, especially when considering that Public Administration is Brazil's largest "buyer." It is estimated that about 10 to 15% of Brazil's GDP comes from the public market (NARDES, 2015; SEBRAE, 2014).

With regard to public bidding, the greatest difficulty for those who work with the Law is the conceptual wide scope of the term "sustainable development." This creates difficulties in implementing and controlling concrete actions.

Thus, considering the current situation and this topic's importance, this study intends to analyze the evolution of the concept of "sustainable development," report on the inclusion of the term "development" in the context of bidding, and propose actions which could be implemented to objectify "development", as well as suggest external control actions.

2. SUSTAINABLE DEVELOPMENT

One of the main objectives of the Federal Republic of Brazil is to ensure national develop-

ment, according to Article 3, II, of the Federal Constitution (BRASIL, 1988).

Another one of the Republic's aims, according to the same article in the Constitution, item III (Ibid.), is economic development to promote reduction of regional inequalities. For a long time, national development was understood as such and would be provided by the implementation of public policies (CANOTILHO et al., 2013).

With the increase of environmental concerns and their apparent conflict with economic growth, the idea of "sustainable development" spread, in attempts to make the economy and environmental conservation compatible (BITTENCOURT, 2014).

The term "sustainable development" came from a document published in 1987 by the World Commission on Environment and Development, called *Our Common Future*, and was later ratified by the 1992 United Nations Conference (Ibid.)

Thus, the entire production process began to be debated and reconsidered, aiming towards a harmonious relationship with the environment, including in regards to "forms of production, consumption, housing, communication, food, transportation, in addition to interpersonal relationships" (Ibid., p. 5).

In consequence, these social development issues are included in the concept of sustainability, which is therefore analyzed through three aspects: economic, environmental and social. Today,

however, we hear talk of sustainable development multi- or pluri-dimensionality.

For example, Bittencourt (2016) points out six main sustainability dimensions: social (income distribution equity and homogeneity), spatial (better land distribution for settlement, urban environment and economic activities), cultural (balance between tradition and innovation), political (consolidation of democratic institutions), economic and environmental.

In 2012, the UN organized Rio+20, a conference to discuss sustainable development. The event's final document contained 17 commitments to sustainable development for Heads of State:

1. End poverty in all its forms everywhere;
2. End hunger, achieve food security and improved nutrition;
3. Ensure healthy lives and promote well-being for all;
4. Ensure inclusive and equitable quality education;
5. Achieve gender equality and empower women and girls;
6. Ensure availability and sustainable management of water;
7. Ensure access to affordable, reliable and sustainable energy;
8. Promote sustained, inclusive and sustainable economic growth;
9. Build resilient infrastructure, promote inclusive industrialization;
10. Reduce inequality within and among countries;
11. Make cities and human settlements inclusive, safe and resilient;
12. Ensure sustainable consumption and production patterns;
13. Take urgent action to combat climate change;
14. Conserve and promote sustainable use of oceans;
15. Protect, restore and promote sustainable use of forests;
16. Promote peaceful and inclusive societies for sustainable development;
17. Strengthen the means of implementation and revitalize the global partnership. (United Nations, 2012a)

Therefore, when dealing with the theme of sustainable development, many aspects or dimen-

sions of development should be ensured, among which we should highlight social (combating poverty and hunger; improvements in health and education), environmental (protecting water, energy, forest, etc. resources), spatial (improved urban centers, with adequate and inclusive infrastructure), economical (the quest for inclusive economic growth, reducing inequality), and political development (maintenance of democratic institutions and strengthening of global partnerships).

3. SUSTAINABLE DEVELOPMENT AND BIDS

As ensuring national development is one of the objectives of the Federal Republic of Brazil, as stated in Article 3, II, of the Federal Constitution (BRASIL, 1988), for a long time public policies were the means intended to implement this goal.

Meanwhile, bidding and administrative contracts had an instrumental focus. It was the way the Public Administration acquired the goods and services necessary to perform its functions. Therefore, bidding and contracts were most concerned with choosing the most advantageous offer, or getting the highest quality of products for the lowest price, guaranteeing competitiveness and equality between participants.

In time, the focus of bidding and administrative contracts acquired a bias for constitutionality in which the social function of contracts



was discussed, considering that “administrative contracts is used to use to promote economic and social development, eliminate individual and collective inequality, and promote the realization of constitutionally protected purposes” (JUSTEN FILHO, 2007, p. 28-29).

According to Law No. 8,666 (BRASIL, 1993), some examples of administrative contracts with the purpose of promoting development are insertion of direct contracting, by bidding waiver, and intervention in the economic domain (Art. 24, VI): to provide services with social organizations (Art. 24, XXIV); to hire Brazilian institutions dedicated to the social rehabilitation of prisoners (Art. 24, XIII); to hire associations for physically disabled persons (Art. 24, XX); to acquire products for research and development (Art. 24, XXI); to hire technology transfer, usage licensing or use of protected content (Art. 24, XXV); to hire recyclable or reusable waste collection and processing with associations or cooperatives (art. 24, XXVII); to hire services or acquire goods of high technological complexity or national defense value (art. 24, XXVIII); to hire organizations for technical assistance in the National Technical Assistance and Rural Extension Program in Family Farming and Land Reform (Art. 24, XXX); to hire businesses aiming to fulfill incentives for innovation and scientific and technological research (Art. 24, XXXI); to hire technology transfer for products used in the Unified Health System (*Sistema Único de Saúde – SUS*) (Art. 24, XXXII); to hire non-profit organizations to implement cisterns or other water access technology (Art. 24, XXXIII); and to acquire strategic health inputs produced and distributed by foundations (art. 24, XXXIV).

Certain changes in the Bidding Law (*loc. cit.*) with respect to supplier qualification documents also reflect the pursuit of other social values, rather than only of the best proposal and insurance of equality, exalting the importance of hiring suppliers who comply with social security and labor laws. Changes that can be cited include requiring regular status with INSS (art. 29, IV) and no impaired debts before the Labor Courts (Art. 29, V).

The purpose of these changes was to bring other constitutionally relevant values into effect, as bidding and administrative contracts were al-

ready being used as tools to implement many aspects of sustainable development.

However, an important step in the pursuit of economic development through bidding and administrative contracts came about with the advent of the MPE (micro and small businesses) Statute (*Id.*, 2006) in 2006. The statute gave to micro and small businesses rights to access the public market, especially the right of hiring preference in the event of a *ficto* tie (Art. 44), the right to late tax settlement (Art. 42), and the possibility of public entities to use bidding exclusive to micro and small businesses with quotas for them (Art. 48).

At the time, the constitutionality of these measures, the real objectives of public bidding, and the impact of Public Administration buying power on the economy, among other topics, were discussed at large. Yet, due to the constitutional provision for differential and favorable treatment to micro/small businesses, added to the fact that these types of establishments are, by quantity, the base of the economy and largest generator of formal jobs, this differential treatment was consolidated and recognized¹.

It can therefore be observed that bidding and administrative contracts as a way of implementing development policies were already being carried out, taking into consideration the social function of administrative contracts. But it was only in 2010, through Law No. 12,349 (BRAZIL, 2010a), that Article 3 of Law No. 8,666/1993 was changed to include sustainable national development as one of the aims of bidding, becoming the legal landmark of sustainability in public bidding.

Thus, the objectives of bidding and administrative contracts expressly became choosing the offer most advantageous to the Administration, ensuring equality between bidders and promoting sustainable national development.

Just as the concept of sustainable development evolved, as described in the first item of this article, the approach to sustainable development in bidding, as of implementation of Law No. 12,349/2010, had any economic focus at the beginning and has been gradually expanding.

For example, it is noteworthy that the original draft text (Bill No. 13/2010) in the rationale of the bill which culminated in Law No. 12,349/2010 used the term “national development.” It focused on creating preference margins for purchasing do-

mestic products, on strengthening national supply chains, and on encouraging innovation and research. As cited in the rationale: “6. The amendment to heading of Article 3 aims to add *national economic development* as a purpose of public bidding.” (Id., 2010b, emphasis added).

But during the course of examination of the bill, one of the amendments to the original text added the word “sustainable” to “national development” (Id., 2010a), which extended the hermeneutic scope of bidding objectives to include the various dimensions of sustainable development, not only the economic aspect.

In practice at the federal level, standards evolved to implement these legal sustainability objectives in their broadest sense, either by Federal Decrees, which established preference margins for domestic products (economic dimension), or by Decree No. 7,746/2010, which established criteria and guidelines to promote sustainable national development that focuses on the environmental dimension. Recently, with the change in the Micro and Small Enterprises Statute by 2014 Complementary Law No. 147/14, new dimensions of sustainable development were added to the legal system. These were local or regional development and technological development, given the MPE Statute Article 47 amendment:

Art. 47. In direct and indirect, autonomous and foundational, federal, state and municipal public Administration contracts, differential and simplified treatment should be granted to micro and small businesses, *aimed at promoting economic and social development at the local and regional level, expanding the efficiency of public policies and encouraging technological innovation.* (Ibid., emphasis added).

Thus, since the change made to the MPE Statute, it is mandatory that Public Administration use exclusive bidding for Micro and Small Business or to set aside quotas of up to 25% of the target for competition solely amongst MPEs (Art. 48, LC123/06), as well as give preference to local or regional MPEs, paying up to 10% of the best valid price (Art. 48, §3).

Some scholars understood that this local/regional preference resembles the preference between foreign and domestic products, authorizing the administration to pay up to 10% more than

the best offer to hire local or regional companies (MANASFI, 2014).

Others stood by the understanding that this legal provision would be a kind of “ficto tie,” with a local or regional company that presents a better proposal than a non-regional MPE having the right to hiring preference².

In spite of differences in application, the legal provision of Article 48, paragraph 3 and the heading of Article 47 brought a new perspective to bidding. With it, the Administration’s purchasing power could be used in the context of local development public policies, including opening a hermeneutic range to enable bidding restricted exclusively to companies in the same city or region.

To cite an example: suppose that the city of Mariana, MG, develops a public policy of economic, social and environmental development in order to manage its environmental liability from mining waste and to promote technological innovation and new local businesses, creating jobs. To this end, through public policy, it would be determined that all direct and indirect administration in the municipality would use bricks made of dam mud from regional mines, developed by the Federal University of Ouro Preto in their construction work. (Franco et al., 2014).



Buying bricks produced by companies from other states would not meet the demand of the Mariana, MG, administration, as they could only purchase from local companies that use local raw materials (dam mud), given the need to reduce environmental liabilities.

Thus, based on Article 47 of the Complementary Law No. 123/2006 and on a sound public policy, with defined goals and adequately detailed action execution controls, one possible interpretation could be that bids for providing bricks should be limited to local businesses or those in the dam region. This would take into consideration other constitutionally relevant values, such as environmental conservation, promotion of economic activity, job creation and technological innovation.

It should be noted that this change in the MPE Statute converges with the goals set in the Rio+20 document, especially regarding the eighth goal, “to promote sustained, inclusive and sustainable economic growth”. It is also aligned with the third subgoal, “to promote policies aimed towards development that supports productive activities, generates decent employment, entrepreneurship, creativity and innovation, and encourages the formalization and growth of micro, small and medium enterprises, including through access to financial services” (UNITED NATIONS, 2012b).

Therefore, considering the inclusion of sustainable national development as an aim of bidding and the obligation to grant preferential treatment to MPEs in public contracts for local/regional and technological development, the focus turns to the planning phase of public bidding and contracts. The aim is to verify if the choice of the object took into consideration environmental aspects or innovation; if the qualification requirements took into consideration social aspects (no child or slave labor, no debts with the INSS or Labor Court, etc.); if there was differential treatment for MPEs (economic and social aspects) and a participatory budget to authorize spending (political aspect); if there is a preference for hiring local companies in bids that are exclusive to MPEs (economic and spatial aspect); and if there are specific public policies geared toward other aspects of sustainable development.

Consequently, bidding assumes a fundamental role in developing the strategic planning



of governments and that is why its management and oversight should be reassessed.

4. OVERSIGHT BY COURTS OF ACCOUNTS

In addition to accounting, financial, budgetary, performance and assets oversight, from the perspectives of legality, legitimacy, economy, subsidy applications and revenue waivers (BRAZIL, 1988, Art. 70), the Courts of Accounts are in charge of overseeing expenses resulting from contracts and other instruments governed by the Public Bidding Law (Id. 1993, Art. 113).

Therefore, as sustainable national development is the new objective of public bidding, the courts are also responsible for overseeing the enforcement of this topic.

Oversight of compliance with the Bidding Law and related legislation by itself ensures verification of various dimensions of development. Some examples are if division of the object into items is appropriate, if economically and technically viable (which is the economic dimension, given the possibility of obtaining the highest number of contracts with different companies); com-

pliance with qualification requirements (social dimension, by verifying that there are no underage or slave workers and no INSS or Labor Court debts, etc.); compliance with bidding waiver requirements (social, economic or technological aspects, according to the rationale for waiver); the application of differential treatment to MPEs (economic and social aspects, by promoting new businesses and the possibility of new job creation) etc.

In general, the Brazilian Courts of Accounts already perform compliance audits on bidding and contracts of entities, particularly with regard to the legality of the act. Therefore, some aspects of sustainable development are checked, but not all.

The environmental dimension of sustainable development in bidding, for example, has been understood as a mere faculty of entities and as such has generally not been within the audit scope.

However, given that Article 3 of the Bidding Law determined that sustainable national development is one of the aims of bidding, all technical specifications of the bidding object should consider and justify adoption of environmentally sustainable criteria. Ferreira (2012) even argues that the Courts of Accounts should provisionally suspend bid announcements that do not contain environmental aspects for choosing the object until the entity corrects the criteria.

Although included in the legal framework by Complementary Law No. 147/2014, which amended the Statute of Micro and Small Enterprises, the economic dimension of local and regional sustainable development has not been subject to oversight by the Courts of Accounts.

This occurs because oversight of legality alone - to verify if there were exclusive bids or bids with quotas for MPEs - will not ensure local or regional economic development. On the contrary, to monitor compliance with the MPE Statute regarding the aspect of local or regional development, it should be verified that the entity conducted previous studies on the supplier market and on the advantage of hiring MPEs (v. Art. 49 LC No 123/2006) and that it elaborated structured public policies. Finally, if a study was conducted on the vocation of the municipality or regional for the economic activity intended to be developed, to support applying preference margins to local/regional products.



Moreover, the mere performance of exclusive bidding or those with quotas for MPEs raises great risks of deserted bids, due to the absence of MPEs to deliver the object. This will require the entity to repeat the bidding process, making operating costs very expensive for the Administration.

Therefore, in account audits, the choice of the procedure to be adopted should consider the operating costs of administrative decisions.

After all, if the purpose of bidding is also sustainable national development, no development will be attained if the Administration itself does not work to cut operating costs. Yet reducing administrative operating costs of bidding procedures is generally not within the scope of the oversight of the Courts of Accounts. Continuing on local or regional development, when the recent changes to the MPE Statute were disseminated in cities of Paraná by SEBRAE/PR, the following difficulties arose in implementing new legislation:

- Micro and small local and regional entrepreneurs claim they do not participate in public bidding because they do not have advance notice on what the Administration will buy, and mainly because they believe that purchasing processes are all targeted.

They therefore do not participate in bidding, which consequently compromises local and regional development;

- Public Administration fears exclusive bidding or bids with quotas because of the impact on product price, i.e. due to a perception that buying from micro and small businesses is always more expensive, and consequently there would be risk of repression by the Courts of Accounts.

It is noteworthy that the concerns of local and regional entrepreneurs would be easily solved by adopting public governance practices in acquisitions, including developing a strategic plan for the purchasing department, disclosing an annual purchase plan and using tools to increase purchasing process transparency.

Similarly, based on Administration concerns, a prior study of the supplier market, verification of advantages for the Administration in hiring MPEs, and defined local or regional economic development plans should also be part of strategic planning for the public procurement sector.

This analysis regarding strategy and planning in the procurement sector is consistent with the concept of public governance, which the Federal Court of Accounts has already audited.

A precedent from this Court can be cited. Judgment No. 2,328/2015-P, which appraised the consolidated report of audits that evaluated governance and management of Federal Public Administration procurement. This was an important precedent for the oversight of governance by state Courts of Accounts.

Audits on the achievement of development goals established by the Rio+ 20 UN document, which include the priority dimensions of sustainable development for participating countries, are also in this context.

In January 2016, Paula Hebling Dutra, a TCU federal government auditor, wrote an article entitled “SDGs Audit Results Framework” in the winter issue of the INTOSAI Journal (International Organization of Supreme Audit Institutions). In the article, she shows the results of audits carried out by international control agencies that can be included in the risk matrix of government action plans to achieve the goals proposed for sustainable development particularly to

avoid specific risk factors in government programs. Some are overlapping responsibilities among agencies/entities; lack of coordination between different levels of government; lack of public policies and strategies to achieve goals; inadequate assessment of social and environmental effects of government policies and programs; lack of economic, social and environmental analysis to support decisions; lack of long-term planning; inadequate program financial management; no internal laws requiring goal fulfillment; lack of control and monitoring programs to achieve goals; and lack of data and accurate information for decision making.

Thus, given the evolution of the concept of “sustainable national development” as the objective of bidding, the form of monitoring by the Courts of Accounts should also evolve, advancing from compliance audit to performance audit that measures the governance of public procurement. This audit should include control of operating costs and of government guidelines for public procurement, which should contain all sustainable development dimensions present in the Rio+20 document.

5. FINAL CONSIDERATIONS

National development is, and should be, one of the aims of the Federal Republic of Brazil. This was always sought through public policies, initially focusing solely on economic development. As the concept evolved, its focus began to include social, environmental and other aspects, such as those established by the 17 Rio20+ goals for sustainable development.

In this evolving context, bidding was first used as a means to carry out public policies, but with the social function of administrative contracts as a concern, bidding became a tool to achieve development.

Therefore, legislation related to public procurement experienced many changes to include facets of the search for development. Some examples are increased bid waiver possibilities to prioritize other constitutional values in the face of isonomy and the most advantageous proposal; additional qualification requirements to find companies that comply with labor and social security laws; and even differential and preferential tre-

atment established for MPEs to access the public market.

Yet the legal landmark for sustainability in the area of public bids only emerged in 2010, with the advent of Law No. 12,349/2010, which altered the Bidding Law to include sustainable national development as an aim of bidding.

At first, the pursuit of sustainable national development through bidding focused on the economical aspect of sustainability in view of preference margins to acquire domestic products were included.

Nevertheless, with the evolution of the concept of sustainable national development in the area of bidding, we notice an increase in issuance of norms, which regulate the environmental and social aspects of public bidding.

Recently, Supplementary Law No. 147/2014, which altered the MPE Statute to make exclusive bidding for MPEs or with quotas mandatory, brought two further dimensions to sustainable development in the area of public bidding: local or regional sustainable development and technological development (innovation).

Given that the Courts of Accounts are in charge of overseeing bidding and administrative contracts, it is the responsibility of these bodies to monitor achievement of the sustainable national development goal in public bidding, whether through compliance auditing, analyzing solely the legal aspects which contemplate sustainability dimensions, or through performance auditing, verifying the criteria for public governance and operational costs. It is also up to them to try to achieve the goals for sustainable development established in the Rio+20 document.

NOTES

- 1 The Federal Supreme Court has even already ruled regarding constitutionality of the Micro and Small Enterprises Statute. See one of the judgments: RE 627543/RS.
- 2 Understanding adopted by Federal Decree No. 8,538/2015 and Paraná State Decree No. 2,474/2015.

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