

The Adversary System and the Right to a Fair Hearing in the State-Owned Enterprises Law (Law 13303/2016)

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ABSTRACT

This study is about the adversary system and the right to a fair hearing in the scope of the administrative sanctions referred to in Brazilian Law 13303/2016. The State-Owned Enterprises Law (LE) inaugurated a new hiring regime for state-owned enterprises (SOEs), which began to adopt, preponderantly, the Private Law regime, unlike what occurred under Law 8666/1993, in which the Public Law regime prevailed. This established a condition of equality in the contractual relationship between the Administration and the supplier, eliminating prerogatives of the Public Administration that were valid under Law 8666/1993. After introducing the initial concepts relevant to better understand the subject, we discuss the adversary system and the right to a fair hearing, emphasizing that state-owned enterprises were not fully exempt from observing the Public Law regime, even with the advent of the LE, since characteristics typical of Administrative Law remain in the law. In this step, we conclude that the adversary system and the right to a fair hearing must be observed when punitive claims are involved, meaning that the LE has failed to provide for the possibility of appeal, which is an indissociable part of the constitutional right to a full defense. Thus, the internal regulations of state-owned enterprises must use the legislation related to the subject, such as Law 9784/1999, as a complement, including in the case of a state or municipal company, as already decided by the Brazilian Superior Court of Justice (STJ).

Keywords: Public Law. Private Law. Adversary System. Right to a fair hearing. State-Owned Enterprises Law. Administrative sanctions.

1 INTRODUCTION

Brazilian Law 13303/2016, known as the State-Owned Enterprises Law (LE), came to comply with the provisions of the first paragraph of article 173 of the Federal Constitution (FC), establishing the legal status of public companies and mixed-capital companies. Among other aspects, the LE provides for bidding and contracting, including administrative sanctions against suppliers.

Before Law 13303/2016, public companies and mixed-capital companies were subject to the provisions of Law 8666/1993, which also provided for bidding, contracting, and administrative sanctions against offending suppliers.

Regarding administrative sanctions, Law 8666/1993 provides for a proceeding that encompasses the adversary system and the right to a fair hearing. On the other hand, Law 13303/2016 has a quite limited text concerning this aspect, leaving it up to the respective internal regulations of the public companies and mixed-capital companies to establish a specific rule, respecting, however, the principles that must be observed by the Public Administration, according to item II of Art. 173 of the FC, namely:

Art. 173. With the exception of the cases provided for in this Constitution, direct exploitation of economic activity by the State shall only be permitted when necessary for the imperatives of national security or a relevant collective interest, as defined by law.

§1st. The law shall establish the legal regime of public companies, mixed-capital companies and their subsidiaries that engage in the economic activities of production or marketing of goods or services, providing for:

[...]

III. competitive bidding and contracting of works, services, purchases, and transfers, observing the principles of Public Administration; (emphasis added)

In this step, the present work intends to investigate whether the LE provided a proceeding sufficiently capable of preserving the adversary system and the right to a fair hearing regarding the application of administrative penalties in the face of irregularities practiced by suppliers contracted in the scope of the mentioned law.

2 INITIAL CONCEPTS

For the development of the proposed theme, it is necessary to explain some initial concepts, as follows.

2.1 PUBLIC LAW

As Alexandrino (2010, p. 42)¹ teaches, Public Law disciplines the relations between society and the State and the relations of the state entities among each other. In the scope of Public Law, the collective interests (public interest) prevail over individual interests (private). In the words of the author mentioned above:

Thus, when the State acts in defense of the public interest, it enjoys certain prerogatives that place it in a legal position of superiority before the private,

¹ ALEXANDRINO, Marcelo. *Direito Administrativo descomplicado* / Marcelo Alexandrino, Vicente Paulo. 18. ed. rev. e atual. Rio de Janeiro: Forense; São Paulo: Método, 2010.

evidently in compliance with the law and respecting the individual assurances consecrated by the legal framework.

Therefore, within the scope of Private Law, the State will be in a differentiated position in relation to the individual, enjoying certain prerogatives justified by the fact that the interests under which the State performs, the public interest, has primacy over the private interests (principle of the supremacy of the public interest).

2.2 PRIVATE LAW

In turn, the objective of Private Law is to regulate the legal relations among private individuals. Civil Law (Civil Code) is an example of a part of Private Law.

In the relations covered by Private Law, there is equality of prerogatives and treatment among the parties, even if the State is one of such parties. On the other hand, in any situation in which one observes the possibility of reflexes on collective interests, the Public Law standards must be applied. Hence, even if the predominant relation is Private Law, whenever collective interests are involved Public Law standards will be employed subsidiarily.

2.3 ADMINISTRATIVE LAW

In the words of Maria Sylvia Zanella Di Pietro (2009, p. 49)², Administrative Law may be understood as:

The branch of Public Law whose objects are the agencies, agents, and administrative legal persons who comprise the Public Administration, the non-contentious legal activity it exerts, and the assets that it uses to achieve its ends, of public nature.

Administrative Law is considered a branch of Public Law. However, it is not restricted to the legal relations governed by Public Law because, even in the cases in which the Administration takes part in a legal relation within the scope of Private Law, it must obey the principles observable by the entire Public Administration related to the branch of Administrative Law. Some of these are probity, publicity, and public interest, among others.

3 CONTRACTING REGIME IN LAW 13303/2016

The LE inaugurates a new contracting regime, different from the one adopted in Law 8666/1993, which adopts Public Law precepts and, on a supplementary basis, Private Law provisions, while Law 13303/2016 adopts the Private Law precepts as a rule, as shown below:

Art. 54. The administrative contracts referred to in this law are governed by its clauses and by the Public Law precepts, applying to them, on a supplementary basis, the principles of the general theory of contracts and the Private Law provisions. (Law 8666/1993)

² DI PIETRO, Maria Sylvia Zanella. *Direito Administrativo*. 22. ed. São Paulo: Atlas, 2009.

Art. 68. The contracts referred to in this law are governed by its clauses, by the provisions of this law, and the Private Law precepts. (Law 13303/2016)

Thus, the new legislation provides bilaterality in contractual relations, which typically occurs in private relations, to the detriment of the systematics verified within the scope of Law 8666/1993, in which the Administration enjoyed prerogatives that put it in a position of advantage over the contractor.

As an example, there is no longer the possibility of unilateral contract modifications such as additions and suppressions, to which the contractor used to be obliged, in case this was the will of the Administration, if the percentages stipulated in Law 8666/1993 are respected.

It is also no longer possible to terminate the contract unilaterally – one of the forms of contract termination provided for in the 1993 legislation, as shown next:

Art. 58. The legal regime of the administrative contracts instituted by this law confers to the Administration, in relation to these contracts, the prerogative of:

I - modifying them, unilaterally, to better suit the public interest purposes, provided the rights of the contractor are respected;

II - terminate them, unilaterally, in the cases specified in item I of article 79 of this law;

Thus, the forms of contract termination and sanctioning hypotheses must be stated expressly in the contract. Moreover, any contractual modifications must have the consensus of both parties.

In spite of the prevalence of the Public Law norms, there is still an incidence of Public Law in the contractual relations among state-owned enterprises, mixed-capital companies, and the contractees. This is because the LE itself has Administrative Law norms (branch of Public Law), such as bidding procedures and administrative sanctions. In such cases, evidently, the Public Law rules regarding such matters must apply, extracted from Law 13303/2016 itself and from the internal regulations to which its 40th article alludes, as shown below:

Art. 40. State-owned enterprises and mixed-capital companies should publish and keep updated an internal regulation of biddings and contracts, compatible with the provisions of this law, notably concerning:

[...]

VIII - the application of penalties;

[...]

One must observe that the LE refers to the internal regulation of state-owned enterprises the rules of biddings, contracts, and sanctions, which must align with the provisions of the LE.

Although not expressed in the law, it is important to emphasize that the internal regulations

are not exempt from also aligning with the Public Law norms in the matters in which the LE is not sufficient to regulate the hypotheses that involve it, using the sparse legislation and the principles tangible to the Public Administration.

4 SANCTIONS TO SUPPLIERS

The possibility of application of penalties due to irregularities in the execution of the contract constitutes a binding administrative act. The Administration does not have discretion in the face of the materiality of an objectively measurable administrative wrong. That is, in the occurrence of a situation contemplated in the contract as punishable, the Administration shall initiate the administrative proceeding to investigate the occurrence and, if applicable, apply the appropriate administrative penalty.

From the viewpoint of administrative sanctions, the LE reveals some alterations compared to the previous legal regulations (Law 8666/1993). The LE removed from the list of sanctions the *blacklist* declaration, maintaining the sanctions of warning, fine, temporary suspension of bidding, and impediment of entering into a contract with the sanctioning entity, as per its 83rd article. Moreover, the deadline for the presentation of prior defense was extended to ten working days, compared to five working days provided for in Law 8666/1993.

However, Law 13303/2016 failed to provide for the possibility of filing an appeal. Since the LE is silent on the possibility of presenting an administrative appeal, it is understood that the respective internal regulations of the state-owned enterprises must provide for it, given that the right to the adversary system and to a fair hearing, which encompasses the possibility of an appeal, is a constitutional precept, as we will analyze in the following topic.

5 THE ADVERSARY SYSTEM AND THE RIGHT TO A FAIR HEARING - POSSIBILITY OF APPEAL

The adversary system is understood as the possibility of the person under the jurisdiction of the Administration contradict what is being attributed to them, with the Administration making them aware of what they are being accused of, as well as the opportunity to manifest themselves.

The right to a fair hearing aims to assure all forms of manifestation by the interested party, enabling them to gather evidence, make requirements, and present appeals against the decisions of the Administration. It is, therefore, a consequence of the adversary system.

The adversary system and the right to a fair hearing are provided for in the constitution, appearing on the list of fundamental rights and assurances, according to the article 5, item LV, of the FC. This provision assures to litigant persons in a judicial or administrative process, and to accused persons in general, the adversary system and the right to a fair hearing, with the means and resources inherent to it. In this step, the possibility of an appeal stems from an express constitutional provision, as an integrating part of the adversary system and the right to a fair hearing. In the lessons of Sérgio Ferraz and Adilson Dallari (2001, p. 21-22)³, the practical

3 FERRAZ, Sérgio; DALLARI, Adilson Abreu. *Processo Administrativo*. São Paulo: Malheiros Editores, 2001. p. 21-22.

realization of the democratic principle involves the possibility of the person under the jurisdiction of the Administration participating in the administrative decisions. To this end, it is essential that the citizen be able to make requests to the Administration, including presenting appeals.

According to the thinking of Gilmar Ferreira Mendes (2009, p. 602)⁴, the Brazilian Federal Supreme Court (STF) established an understanding that the adversary system and the right to a fair hearing are assured in administrative processes.

José dos Santos Carvalho Filho (2009, p. 905)⁵, when mentioning item LV, of the article 5 of the FC, states that the right to a fair hearing will not be complete if it is not assured to the interested person the right to file appeals. Appeals are how the interested person can convey to the superiors of the decision maker the knowledge of possible arbitrariness.

In the face of the above, we see that Law 13303/2016 failed in not providing for the possibility of an appeal, with the internal regulations of state-owned enterprises having to fill this gap, observing the subsidiary legislation, so to avoid the judicialization of the controversy and consequent annulment of the administrative acts.

6 THE APPLICABILITY OF LAW 9784/1999 TO STATE-OWNED ENTERPRISES

Let us consider the inapplicability of Law 8666/1993 to state-owned enterprises after the advent of Law 13303/2016. With the exception of criminal clauses, as provided in article 41 of the PCL, and of the tie-break criteria in biddings provided in article 55, item II, also of the PCL, we have that Law 9784/1999 seems to be the most suitable to fill the gaps left by the new legislation concerning the adversary system and the right to a fair hearing, which are constitutional prerogatives to be safeguarded.

Law 9784/1999 regulates the administrative process in the scope of the federal Public Administration, direct and indirect, according to the express diction contained in its 1st article: "*This law establishes basic norms about the administrative process in the scope of the direct and indirect federal Administration (...)*".

In the meantime, according to precedents in STJ⁶, in the case of absence of specific legislation in the scope of the member states, Law 9784/1999 may also be employed if a local law is absent.

Therefore, even with the advent of Law 13303/2016, the administrative process that sanctions suppliers did not have its regulation fully elucidated. It is up to the internal regulations of state-

4 MENDES, Gilmar Ferreira. Curso de Direito Constitucional. 4. ed. São Paulo: Saraiva, 2009. p. 602.

5 CARVALHO FILHO, José dos Santos. Manual de Direito Administrativo. 21. ed. ver. ampl. e atual. Rio de Janeiro: Lumen Juris, 2009. p. 905.

6 STJ. AGRAVO DE INSTRUMENTO: Ag. 1.384.939 - SP (2011/0009128-9). Relator: Ministro Mauro Campbell Marques. DJ 25/03/2011. Jusbrasil, 2011. Disponível em: <<https://stj.jusbrasil.com.br/jurisprudencia/18498626/ag-1384939>>. Acesso em: 15 jun. 2018.

owned enterprises to observe the legislation that governs the matter, the state laws in the case of states and municipalities, and in the absence thereof, Law 9784/1999, which, without a question, must also be observed by federal state-owned enterprises as per express legal provision.

7 CONCLUSION

The LE modified the contracting regime that was in force up to its advent, namely the Public Law, regime, which was governed under Law 8666/1993, and the Private Law regime prevailed.

As a result, the Administration and the supplier are now in a condition of equality in the contractual relationship. The Administration no longer enjoys prerogatives granted to it by Law 8666/1993 such as the imposition of contract expansion or reduction of up to 25%, or even the possibility of unilateral termination.

Even when under the regime of Private Law, the Administration was not dismissed from observing the Public Law regime, given that Law 13303/2016 itself brings, in its core, institutes of the Administrative Law such as biddings and administrative sanctions to suppliers. Regarding such aspects, the Administration shall guide itself by the Public Law norms and, naturally, by the basic principles that govern the Public Administration.

Regarding the sanctions to suppliers, Law 13303/2016 failed in not providing for the possibility of filing appeals, thus hurting the principles of the adversary system and the right to a fair hearing. Hence, the internal regulations of state-owned enterprises must resort to legislations correlated to the subject so that their regulations provide for the rites and minimum deadlines for filing appeals.

In the case of federal state-owned enterprises, Law 9784/1999, which regulates the administrative process of the federal direct and indirect Administration, shall be observed. In turn, in the scope of states and municipalities, the respective legislation pertinent to the theme shall be the parameter for the internal regulations of state and municipal state-owned enterprises. In the absence of specific legislation, states and municipalities may employ law 9784/1999, as already decided by the STJ.

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