The USA Federal Procurement System and the Public Procurement in Portugal

Within the framework of Administrative Law II, the present article intends to analyze the differences between the Federal Procurement System in the United States of America (USA) and the Public Procurement System in Portugal. To contextualize the administrative reality of both countries, the article will begin with a brief introduction to the political and administrative system in each country. Nevertheless, the work will mainly focus on analyzing the regime of public procurement in both countries.

Portugal is a Unitary State with administrative autonomy assigned to the Local Authorities, and political and administrative decentralization assigned to the Autonomous Regions. Portugal is structured as a semi-presidential system, which means that the President has some significant powers, however, it is the Government, headed by the Prime Minister, that holds the administrative/executive power. Regarding the administrative system, Portugal adopts the Romano-Germanic model - the French type of administrative system. The few relevance of custom, the primary role of legislation as a source of law are some of its general characteristics. On the other hand, the USA is a Federal Republic, composed by a federal district and fifty federated states, endowed with constitutional decentralization. The USA is structured as a presidential system, which means that the President heads the Administration directly, exercising executive functions. The USA Administration system is influenced by the Anglo-Saxon model - the British type of administrative system. It is worth recalling some general characteristics of Anglo-Saxon law, such as custom as a source of law and the binding to the rule of precedent.

With these initial considerations being made, it is proper to begin a more detailed analysis, starting with the **Public Procurement System in Portugal.** The Public Contract is a form of administrative action that has become increasingly important, which is justified by the need for collaboration between the Administration and private individuals, in the pursuing of the public interest.

Regarding the historical evolution of this regime, as Professor Vasco Pereira da Silva points out, the issue of public procurement is strongly marked by an original "schizophrenia"[1] that has remained in the Portuguese law system until the implementation of European directives, the rules that result from the transposition of those directives, and the Reform of Administrative Litigation of 2002-2004. Initially, within the framework of the Administration as an authoritarian reality, there were no contracts. It is in France, in the 19th century, that emerges the figure of contracts within the administrative function. On one hand, there were administrative contracts of the public authorities, that were regulated by administrative law. And, on the other hand, the remaining contracts of

[1] SILVA, Vasco Pereira da - *O Contencioso Administrativo no Divã da Psicanálise*, 2ª edição, 2013, p.488

administrative activity, that were regulated by private law. As noted, the figure of administrative contracts was not unified in a single regime. And it is this distinction that was transposed into the Portuguese law.

The defense of a common regime for public contracts begins in Portugal with the thesis of Professor Maria João Estorninho[2], in which she defends that, when celebrating a contract of private law, the Administration continues to practice an administrative act, within the administrative functions. Therefore, all public contracts should be regulated by administrative law. This new position created a division in the Portuguese doctrine. In the defense of a single common regime, alongside with Professor Maria João Estorninho, were also Professor Marcelo Rebelo de Sousa and Professor Vasco Pereira da Silva. On the contrary, in the defense of the traditional position, Professor Freitas do Amaral, Professor Sérvulo Correira and Professor Vieira de Andrade. In fact, Article 200, n. º 1 of the Administrative Procedure Code (CPA), distinguishes two different types of contracts: civil contracts, when the Administration exercises private management activities; and administrative contracts, when the Administration exercises public management activities. Later, in the Administrative Litigation Reform of 2002-2004, it was decided to submit the interpretation, execution, and validity of contracts into the jurisdiction of administrative courts, regardless of whether they were contracts within the exercise of public or private management[3].

However, what really contributed to the unification of the public procurement regime in Portugal was the European Law, which established common rules for public procurement. It was the European directives, transposed into the Portuguese legal order, that instituted a unified regime of public contracts.

This regime is now regulated in the Public Contracts Code (CCP), approved by Decree-Law no. 18/2008, of the 29th of January, and defines all contractual types that the Administration is allowed to celebrate in the pursuit of its duties.

The CCP does not specify anything about the private or administrative nature of contracts, it only refers to a public contracting authority. Regarding this topic, it is important to make a distinction between administrative contracts and public contracts. According to Professor Freitas do Amaral, administrative contracts are all those that, in the light of administrative law, create, modify, or extinguish legal administrative relations. And public contracts are the ones signed by the Administration that, regulated by administrative or private law, are submitted to a special procedure and to the rules derived from European law[4]. Therefore, it can be said that all administrative contracts are public contracts, but not all public contracts are administrative contracts. Concerning this distinction, Professor Vasco Pereira da Silva has a critical position regarding the use of

---

[2] ESTORNINHO, Maria João - *Requiem pelo Contrato Administrativo*, 1990

[3] Estatuto dos Tribunais Administrativos e Fiscais, aproved by the Law no 13/2002, of the 19th of February.

[4] AMARAL, Diogo Freitas do - *Curso de Direito Administrativo*, volume II, 4ª edição, 2018, p.449

the term "administrative contracts" by the Portuguese legislator, since it refers to the schizophrenia of the French law.

According to Article 200, n. º 3 of CPA and Article 278 of the CCP, the celebration of public contracts does not require a specific qualification rule. In these contracts, one of the parties must be a public contractor. Article 3 of the CCP specifies the different entities that can be considered public contracting entities: the contracting authority mentioned in Article 2, n. º 1, the public legal entities that are part of the traditional Administration in an organic sense, including autonomous and independent administration; according to Article 3, n. º 2, all entities that celebrate a contract on the exercise of materially administrative functions, regardless their public or private nature; and, according to Article 7, any entities that exercise activity within the scope of some special sectors, such as water, energy, transport and postal services, when they are under the control or influence of a contracting authority.

Although the CCP establishes a very wide concept of public contracts in its Article 1, n. º 1, which includes administrative contracts, there is no application coincidence of regimes of CCP Part II and Part III[5]. On one hand, *stricto sensu* public contract, which are not of an administrative nature, are subjects of Part II. On the other hand, Part III is applied to administrative contracts that do not fall under the concept of public contracts, since they do not involve services subject to market competition – for example, they are subject to market competition, under the terms of Article 16, n. º 2: public works contract, concession of public works, concession of public services, lease, or supply of goods, served provision and company incorporation contracts.

Just like all administrative activity, public procurement is subject to legal principles, in this case, of European influence[6]. They are the principles of equality, publicity and impartiality, mutual recognition, proportionality, and effective judicial protection of interested parties. But it is important to mention that the principles of publicity and impartiality are the two mainly relevant to guarantee the market competition in the contracts that the Administration celebrates. In addition to these European principles, the national law defines that all public contracts that involve the exercise of public powers must be subject to all the general principles of administrative activity, provided for in Articles 3 and following of the CPA, with the necessary adaptations. Aside that, public procurement must also respect the rules of international law in social, labor, environmental and gender equality matters, according to Article 1-A, n. º 2 of CCP.

Regarding the contract formation procedures, the European Union establishes open procedure as the main rule. However, national law sets out, in Article 16, n. º 1, several procedures for contracts of acquisition of goods and services on the market: direct ward, prior consultation, open procedure, restrict procedure, negotiation, competitive dialog and partnership for innovation. The choice of these procedures is made according to the rules defined in the CCP and considering the value of the contract. It should be noted that the

[5] ANDRADE, José Vieira de – *Lições de Direito Administrativo*, 5ª edição, 2017, p.256-258

[6] These principles must be interpretated according to European law, under the terms established by the Court of Justice of the European Union.

open procedure regime is, however, the one that most seems to safeguard the autonomy and independence of public decisions, preventing corruption.

In any case, it is possible to identify general rules, common to most procedures, which must be followed by the contracting authorities[7]. The procedure begins with the initiative phase. It is at this stage that is made the decision to hire, the authorization of expenses and the decision to choose the procedure to be adopted. It is made a contract notice, to provide an opening notice, and the contract documents. There are two types of contract documents: the program procedure, which is the regulation that defines the pre-contractual procedure, the terms that the contract formation must obey until its conclusion, according to Article 41 of CCP; and the specification document, which institutes the negotiating basis and the contractual clauses to be included in the future contract, according to Article 42 of CCP. The second phase is the submission of proposals. According to Article 56, the proposal is the declaration by which the tender express to the contracting authority its willingness to contract and the way in which it is willing to do so. The next phase is the evaluation, where a jury performs an analysis of all proposals, according to the established rules and the public tender documents. Then, there is a preparation of the award, in which two reports are made: a preliminary one, that concentrates the decision on all procedural issues, in which the jury proposes the exclusion of proposals and classifies by order the remaining ones that are not excluded; and a final report, after the previous hearing of the interested parties. This is followed by the decision-making phase, the awarding of contract, which the competent body for the hiring decision accepts one of the proposals, according to Article 73 of CCP. This decision must be made considering a quality/price ration - the most economic advantageous proposal for the contracting authority must be chosen, according to Article 74. Finally, there is the stage of closing the contract, where the contractor confirms its commitment (Article 81 to 93), the draft of the contract is fixed (Article 98 to 102) and the contract is award, under the terms of Article 14, n. º 1, point a).

As it was mentioned before, Part I and II of CCP refers to the common public procurement regime, while Part II refers to administrative contracts. However, according to Professor Mário Aroso de Almeida[8], there is a common regime in Part III, applicable to all contracts: the invalidity regime, regulated in Article 283 to 285. This regime is divided into two plans. The first refers to the consequent invalidities, which establishes in Article 283 and 283-A, the invalidities that may result from illegalities committed within the scope of the pr-contractual procedure. The second one refers to the regime of own invalidity, in Articles 284 and 285, in the case of a specific defect of the contract itself – the nullity or annulment of an administrative act, for example, when the contract is concluded by and authority without competence.

Regarding the **Federal Procurement System in the USA**, as a Federation, the division of power is made at a federal, state, and local levels. The same happens with the

[7] ANDRADE, José Vieira de – *Lições de Direito Administrativo*, 5ª edição, 2017, p.263

[8] ALMEIDA, Mário Aroso de – *Teoria Geral do Direito Administrativo*, 2ª edição, 2015, p.414

Administrative Law. Its competence is concurrent, which means that there are both federal, state, and local administrative laws. However, this question will be analyzed at a federal level.

The historical evolution of Federal Procurement has been shaped by the country's armed conflicts. The relationship between Congress and procurement, especially in defense matters, is notorious. In fact, many of the procurement reforms were launched throughout the annual authorization legislation for the U.S. Department of Defense[9]. The first procurement laws required a formal procurement process: notification and tendering, influenced by the European Procurement System. Several centuries later, the USA started to have a predominant role in the international framework, with regard to multilateral negotiations, the so called "competitive negotiations".

From the beginning, the federal system has developed a method to evaluate the potential performance and qualifications of contractors. This method is now regulated in the Federal Acquisition Regulation (FAR), Part.9, where it says that only "men of substance and talents" were authorized to celebrate government contracts. Later, the Federal Government also began to delegate substantial discretion to professional employees as contracting parties. This people should also be qualified, in order to avoid risks and performance failures.

At the beginning of the 19th century, the system of structured requests and competitive awards was already well established. And also, the principle that the Government, when celebrating a contract, does not act as a sovereign, but as a contracting party submitted to the rule of law and its fundamental principles.

The most relevant norm in this matter is the Federal Acquisition Regulation (FAR), which regulates contracts of work, services and good. Still, at a federal level, the administration bodies and agencies are empowered to issue rules on their own contracts to supplement and implement the FAR. Currently, American legislation has quite a few rules regarding the procurement procedure, but with a considerable discretion regarding the criteria for judging proposals and defining requirements for hiring, such as, for example, the qualification of the contractor.

The Federal Procurement System in the USA is also submitted to several principles. The FAR, in Part.1.102, establishes some principles for the Government Procurement System, being them: satisfying buyers in terms of cost, quality and time, the promotion of competitiveness, the minimization of administrative costs, conducting business with integrity, fairness and transparency, and the fulfillment of public policy goals. Also, both opportunities and awards must be published on the "Governmentwide Point of Entry" (GPE)[10]

[9] YUKINS, Christropher R. - *The U.S. Federal Procurement System: An Introduction*, 2017, p.70

[10] YUKINS, Christropher R. - *The U.S. Federal Procurement System: An Introduction*, 2017), p.75

It is important to keep in mind that there are two basic types of contracts in the USA Federal system[11]: fixed-price and cost-based. Regarding the first one, all federal contracts for commercial items under FAR Part. 12 are required to be fixed price contracts. Regarding the second ones, they are typically used for riskier projects, because the government presumptively absorbs much of the cost and performance risks.

Regarding the different forms of contract award procedures, there are three main different forms at a federal level. The simplified acquisition procedure, used for small contracts. The sealed bidding procedure, regulated in Part. 14 of the FAR. This type of award procedure is used for more specific contracts and for contracts that have a more relevant values, but in which the selection of the proposal does not require a complex negotiation. In this type of procedure, the candidate submits his proposal, and the Administration makes the selection according to previously established rules and based on the lowest value and other factors, like quality. Finally, there are also negotiates competitive proposals procedures, that can be divided in two different modalities: Solo source acquisition, which occurs in a non-competitive environment, since there is only one source of supply; and competitive acquisitions, applied to cases where negotiation is necessary to mitigate the complexity of the selection procedure, making the administrative decision easier.

Therefore, it can be said that the choice of these modalities depends on what is established by law, the estimated value of hiring and the complexity of the selection process.

As it can be noticed, the are some differences and some similarities in each country. The main two differences I consider to be the most relevant are the lack of unity in public procurement regime in the USA and the wide discretion that is given to administrative bodies and agencies to create their own rules of procurement. Although the USA has a federal common procurement law, the FAR, at a state and local level it is possible to apply different norms. And even within the federal level, the agencies and administration bodies hold a wide discretion power to complement and implement the FAR. On the contrary, Portugal has now a unitary procurement system. The Public Contracts Code is applied, in the same way, to all public entities, at a national or local level.

Subsequently, both regimes present different procurements procedures modalities. In Portugal there are five different procedures: direct ward, prior consultation, open procedure, restrict procedure, negotiation, competitive dialog, and partnership for innovation. In the USA there are three main types of procurement procedures: simplified acquisition, sealed bidding, negotiates competitive proposals.

Aside that, there is also an evaluation policy of the contractors' qualifications in the USA System, expressly provided in FAR, that does not seem to take place in Portugal.

However, it can also be noticed some similarities in the choice of the procedure. In Portugal, the choice is made according to the rules defined in the CCP and considering

[11] YUKINS, Christropher R. - *The U.S. Federal Procurement System: An Introduction*, 2017), p.86

the value of the contract. And in the USA the choice also depends on the law and the estimated value of hiring, adding the complexity of the selection process.

Furthermore, although the administrative principles are more complexed in Portugal and the system is also submitted to international and European principles, the USA also has to submit its contracts to some principles defined by the law.

References:

ALMEIDA, Mário Aroso de – *Teoria Geral do Direito Administrativo*, 2ª edição, 2015

AMARAL, Diogo Freitas do - *Curso de Direito Administrativo*, volume II, 4ª edição, 2018

ANDRADE, José Vieira de – *Lições de Direito Administrativo*, 5ª edição, 2017

ESTORNINHO, Maria João - *Requiem pelo Contrato Administrativo*, 1990

SILVA, Vasco Pereira da - *O Contencioso Administrativo no Divã da Psicanálise*, 2ª edição, 2013

YUKINS, Christropher R. - *The U.S. Federal Procurement System: An Introduction*, 2017