

TRIBUNAL DE CONTAS, COURT OF AUDITORS OF PORTUGAL: THE AUDIT OF PUBLIC PROCUREMENT

The Constitution of the Portuguese Republic specifies that the *Tribunal de Contas* is the sovereign body that is responsible for the supreme external audit over the financial activity of the Portuguese state. The Court's organisation and activity are regulated in Law no. 98/97, of August 26 and its respective alterations.

The Court may conduct *a priori*, **concomitant** or *a posteriori* audit.

- 1. *A priori* audit:** Verifies the legality and the budgetary allocation for acts, contracts or other instruments that generate expenditure or represent direct or indirect financial liabilities for entities of the Central, Regional and Local Public Administration. Specification of the acts that must be submitted to *a priori* audit by the *Tribunal de Contas*, together with identification of the entities that must submit such acts, is provided in the law of the *Tribunal de Contas*, mainly focusing in contracts signed by public bodies whose value lies in excess of €17,160.

A priori audit is exercised via seal approval concession or refusal. Grounds for seal approval refusal include illegality of the acts that implies that such acts are null and void, expenses that are not matched by a specific budgetary allocation or direct breach of financial norms and illegality that alters or may alter the respective financial result. In the latter situation, the Court, subject to a well-grounded decision, may grant seal approval concession and issue recommendations to the respective entities in order to overcome or avoid such illegalities in the future.

Payments related to acts and contracts subject to *a priori* audit may not be made prior to seal approval concession.

- 2. **Concomitant audit:**** Is exercised by means of carrying out audits of the administrative procedures related to acts and contracts that do not need to be submitted to *a priori* audit or of the financial activity of public entities exercised prior to closure of the respective management period.

The audit reports include observations and recommendations and may originate proceedings for the enforcement of liabilities. Concomitant audit also permits, in the event of determining the illegality of a pending procedure or an act or contract that has not yet been executed, to order that the respective act or contract be submitted to *a priori* audit.

- 3. *A posteriori* audit:** Is exercised in order to evaluate the internal control and decision-making systems and appraise the financial fairness and regularity, legality or cost-effectiveness, efficiency and effectiveness of the financial management of the entities subject to the Court's control, including application of funds from the European Union.

A posteriori audit is pursued via verification of accounts or audits of entities of the State, autonomous regions, local councils, public institutes, social security institutions, associations involving public bodies, public-sector companies, companies whose shares are partly owned by the public sector, concessionaire companies, foundations and entities of any nature that have a public shareholding or benefit from public financing, in this case in order to inspect the application of such financing.

The audits may focus upon a wide array of different matters. Questions related to public procurement may be subject to a specific audit but are also addressed in most of the audits made of entities in order to evaluate the management activity of a specific year.

The audits are concluded through the approval of a report, including the respective observations and recommendations, which are submitted to the Public Prosecution Service whenever they indicate facts that generate liabilities as the basis for initiating any eventual legal proceedings.

The *Tribunal de Contas* has a **Jurisdictional Chamber**, responsible for judging proceedings for the enforcement of financial liabilities arising from facts demonstrated in audit reports, at the Public Prosecution Service's request.

In these proceedings, the Court may order the restitution of embezzled funds or incorrectly spent funds (e.g. payments for works that were not executed) and/or apply fines for breach of legal norms (e.g. failure to organise a public tender or failure to comply with rules in proceedings).

The table provided below identifies the main observations made in the field of public procurement, identified in *a priori*, concomitant and *a posteriori* audits conducted between 2000 and 2005. In the area of *a priori* audit these observations result from the analysis of around 4,000 contracts per year. In the area of concomitant and *a posteriori* audit they correspond to a summary of the observations made in a wide number of audit reports, in which other matters were also addressed.

Recommendations were made in relation to the referred observations aimed at avoiding their future occurrence, in terms of compliance with national or community legislation or the adoption of better practises in the preparation and management of contracts.

In its annual report¹, the *Tribunal de Contas* always provides a summary of the observations and recommendations produced during the year in the several decisions and audit reports.

¹ Available at: www.tcontas.pt

Main observations resulting from *a priori*, concomitant and *a posteriori* audits, in the area of public procurement, during the period 2000-2005

- Contracts authorised by an entity that is not empowered to approve the expenditure
- Failure to draw contracts up in writing, namely in the case of complementary works not included in the initial contract
- Contracts that are incorrectly classified as complementary works that actually represent new works
- Complementary works that exceed the legally established limits in this field
- Practise of the fractioning of expenditure
- Incorrect estimates of expenses in continuous supply contracts
- Use of procedures that do not involve public tenders or which are unsuitable for the awarding of contracts
- Launch of a public tender without first setting the base price
- Opening of public tenders for the design/construction of works whose technical complexity or degree of specialisation does not justify such a proceeding, with elevated and unnecessary costs
- Preparation of projects that do not rigorously observe the prevailing technical norms
- Lack of discrimination and rigour in drawing up projects for construction jobs and the respective budgets, originating difficulties of appraisal and control over the prices practised, over conformity of the work's execution in comparison with the project or over suitability of the amounts paid in relation to the works actually carried out
- Errors and omissions in projects, originating alterations during implementation, need for complementary works, extension of implementation deadlines and/or additional costs
- Insufficient definition of the pre-contractual elements provided to bidders in relation to design/construction tenders, thus obliging the introduction of alterations during the implementation of works with repercussions on the final cost of works
- Failure to guarantee the independence of the inspection function of works, without clear separation between project preparation, execution of the work and its inspection
- Requirement, in the tender specifications of public works construction jobs, to supply material resources intended to guarantee the subsequent inspection of the works
- Specification of commercial or industrial brands in the list of quantities included in the work project, thus posing restrictions on free competition
- Failure to include the price revision formula in the tender specifications or text of the contract.
- Lack of rigour in indication of the deadline granted for the presentation of bids
- Incoherence between the various tender documents
- Failure to set the evaluation criteria used to appraise the bidders' financial and economic capacity
- Inclusion, in the evaluation of the merit of the bids, of factors intended for appraisal of the financial-economic and technical capacity of the bidders
- Awarding criteria that have little connection to the public interest and the needs underlying the acquisition
- Alteration of the bid appraisal factors after the tender has been launched
- Undue admission of bidders in light of the law or the requirements previously set in the tender documents

➤ Admission to the tender procedure of bids that do not include all the documents required in the tender programme
➤ Admission to the tender procedure of bids that present conditions that diverge from those defined in the tender specifications, without such a possibility being expressly foreseen
➤ Alteration of the content of the bids at any time prior to the adjudication, in breach of the principle of the intangibility of bids
➤ Dilution of general expenses in unit prices (e.g. failure to establish an autonomous category for expenses related to construction yards)
➤ Awarding of a contract after a public tender in which the total price specified in the bids is considerably higher than the tender's base price
➤ Significant divergence between the contracted prices and those practised in the market
➤ Awarding of the contract job to a bidder that does not have the technical or economic and financial capacity to execute the job.
➤ Insufficient grounds stated in the minutes of the awarding decision and/or of other key steps in the tender procedure
➤ Insufficient provision of information on the budgetary allocation or insufficient funds in instruments of annual or multi-annual programming
➤ Failure to comply with expenditure eligibility rules in construction works financed by European funds
➤ Lack of monitoring and control of the physical and financial execution of public works
➤ Deficiencies in the registration of information
➤ Failure to carry out inspections in due time, thus originating the need to carry out corrections that could have been avoided
➤ Excessive delegation of relations with the contractor to the external inspector of the work
➤ Non-verification of the effective permanence on the job site of suitable material and human resources for the job's execution, as specified in the bid and the contract.
➤ Failure to comply with the implementation deadlines of the construction jobs
➤ Failure to apply the fines specified in the contract for delays in the implementation of the works
➤ Alterations to the object of the tender, with direct awarding of such alterations on the grounds of urgency
➤ Illegal payment of advance instalments
➤ Lack of evidence of technical reception of goods
➤ Lack of rigour in the execution of technical assistance contracts, especially in the field of maintenance of computer software applications
➤ Delays in administrative procedures that cause prejudice to urgency of certain works or acquisitions
➤ Insufficiencies in the documentation of proceedings