SEEM. ADMINISTRATIVE DISHONESTY. PROHIBITION OF CONTRACTING WITH THE PUBLIC AUTHORITY. INITIAL TERM

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resume

Question: 1 Restrictive penalty of right concerning the prohibition of contracting with the Public Power or receiving tax or credit benefits or incentives, directly or indirectly, even though through a legal entity of which it is a majority partner, for a period of five years, applied with based on Federal Law 8,492 / 92 (Administrative Improbity Law), does the final decision of the respective court decision have its final term for its effectiveness?

Consulente is a company with a notorious and recognized expertise in providing specialized services of educational methodologies and teacher training and is focused exclusively on the public educational market. It happens that its founding partner, “A”, is also a founding partner and responsible for company “B”, which, in turn, was subject to the penalty of prohibition of contracting with the public power based on the legal regime that protects probity administrative under the terms of art. 12, item II, of Federal Law 8,492 / 92.

Company “B” was contracted, by means of a direct contracting procedure based on the unenforceable bidding process, in 2004, to provide specialized services for the provision of innovative educational methodologies, a time when, in fact, there were no competitors to offer even similar service, so that competition was not viable due to the uniqueness of the service.

Well then. Despite this (and the fact that all contracts entered into by the company with other public entities were deemed regular by the São Paulo State Court of Auditors), the State Prosecutor's Office postulated the annulment of the contracting procedure due to unenforceability and, consequence of the contract in question, in the file of case no. "X". Even the sentence has a passage that clearly indicates that the application of all the penalties provided for by law would not be applicable:

“For this reason, I fail to apply to the defendants all the sanctions provided for, inasmuch as the law · gives the prudent criterion of the judge the choice of the penalty compatible with the reprobability of the conduct. To the defendant [“Y”], I impose the penalties consistent in repairing the damage; in suspension of political rights, for five years and payment of a civil fine, fixed at 10% of the amount of the damage. To defendant [“B”], I

impose the penalties consistent in repairing the damage; payment of a civil fine, fixed at 50% of the damage amount; and prohibition to contract with the Government or to perceive tax or credit benefits or incentives, directly or indirectly, even though through a legal entity of which it is a majority shareholder, for a period of five years. To defendant ["A"], I impose the penalties consistent with the repair of the damage; suspending political rights for three years; payment of civil fine, fixed at 10% of the damage amount; and prohibition to contract with the Government or to perceive tax or credit benefits or incentives, directly or indirectly, even though through a legal entity of which it is a majority shareholder, for a period of five years. [...] "

The sentence in question was published on March 21, 2012 and, as can be seen from the transcribed excerpt, despite the fact that the penalty for prohibiting contracting with the government is included in the statement of reasons, the provision of the sentence did not apply this penalty to "B" and "A" - by the provision, only the penalty of suspension of political rights was applied.

Notwithstanding, despite this discussion, "C", whose market segment is the public sector, continued to participate in public tenders and enter into administrative contracts, with "A" remaining in its corporate structure and exercising its management and senior management until December 27, 2017, when the amendment to the Social Contract was registered, through which it was formally removed from the membership.

However, it happens that, between the publication of the sentence, in March 2012, and the withdrawal of the "A", in December 2017, contracts were signed by company "C" and, currently, one of these contracts, celebrated in the year of 2017 with the Municipality "D", is sub judice due to a measure brought by the Public Ministry of São Paulo, which postulates the declaration of its nullity due to the supposed effectiveness of that penalty applied, in 2012, to "B" and "A ".

However, supposing that it is credible to assume that the penalty of prohibition on hiring has, in fact, been applied to "A" and that, therefore, it would have the aptitude, in theory, to reach the CONSULENT's performance, "C", is a fact that neither the Administrative Improbity Law, in the abstract, nor the judicial sentence, in particular, defined the term a quo of the effectiveness of the restrictive penalty. There is, therefore, an undeniable state of objective doubt in this regard and it is to remedy it that this CONSULTATION is formulated.

This doubt has caused enormous losses to CONSULENTE since it has been removed from public tenders (in addition to being prosecuted for measures brought by the Public Prosecutor's Office) due to the mistaken idea that the referred decision has been producing its regular effects, being, in fact, its effectiveness should be restricted due to judgments that are pending before the Superior Court of Justice and the Supreme Federal Court. In other words, the decision, even before being final, has been used by the Administration and the Judiciary as if it had already produced its deleterious effects.

The Consultant attached judicial decisions favorable to its understanding.

I answer the question in the following terms.

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1. Litigants in judicial or administrative proceedings and defendants in general, as provided in art. 5, LV, of the Federal Constitution, "the contradictory and broad defense are ensured, with the means and resources inherent to it". Moreover, according to the preceding paragraph, "no one will be deprived of liberty or property without due process of law". Therefore, under penalty of nullity, any sanction must be preceded by the fulfillment of this requirement.

It should be noted that the Magna Law does not say that the defense of the aforementioned legal assets presupposes the initiation or the triggering of the due process, but otherwise, it presupposes the prior occurrence of such a process and this, to be said to occur, presumes, as indeed it results from the explicit and clear normative language, the existence of “means and resources inherent to it”. Hence, it is clear that, without this, that is, without completing this appeal phase, the due process is not carried out, since it presupposes it as an indispensable element. Without this, what the Constitution considered necessary for its occurrence is not accomplished.

Hence, it follows, by mere and unavoidable logical consequence, that no judicial or administrative sanction can be applied before the conclusion of a due process. That is to say, the sanctions presuppose the completion of a due process, without which there will be a contradiction to the principle of great importance explicitly embraced in an emphatic manner by the Constitution of the Country. Thus, for such an exception to occur, there must be a previous and indisputable reservation regarding to this. If it does not exist, it is obvious that no qualified interpreter will endorse such an understanding, because it would offend openly principled diction residing in the Magna Lei.

2. Therefore, according to your requirement, it is unavoidable, beyond any doubt or doubt, that the restrictive penalty of law regarding the prohibition of contracting with the Government or receiving tax or credit benefits or incentives, directly or indirectly, even though, through a legal entity of which it is a majority shareholder, for a period of five years, it is applied based on Federal Law 8,429 (Administrative Improbity Law) without the prior completion of a complete administrative or judicial procedure, with extensive defense by the media. and inherent resources.

Hence, there is no way to contend the assertion that it is radically inadmissible to apply this sanction without having preliminarily concluded the process with the conclusion of the broad defense. If it has not been carried out, that is, if it has not been integrated and concluded, it is absolutely clear that the legal space indispensable for the application of the sanction has not been opened.

3. Nor would it be necessary to inquire the reason for these devices, as it is immediately apparent that their objective is, on the one hand, to ensure the great precept that everyone is innocent until proven otherwise and, on the other, to prevent the adoption of a measure that may , afterwards, it would prove to be literally impossible to make amends, if at last it was judged that the party had not committed any irregularity. In fact, which often

happened in cases similar to that of the Consultation, which decisions by the State Court of Auditors mentioned by the Consultant, considered the waiver of bidding in absolutely equivalent cases to be correct. Indeed, it would be impossible beforehand to say that the sanctioned would or would not be victorious in a given event and that his gain or gains, in the case of several bids, would amount to as many reais,

4. Having said all this, and considering the inquiry of the Consultation, I reply, reaffirming the above:

“No judicial or administrative sanctions can be applied before the conclusion of a due process that would have to precede it. That is to say, the sanctions presuppose the completion of a due process, without which there will be a contradiction to the principle of great importance explicitly embraced in an even emphatic manner by the Constitution of the Country. about this. If it does not exist, it is obvious that no qualified interpreter will endorse such an understanding, because it would offend openly principled diction residing in the Magna Lei. ”

It is my opinion.

This opinion was transcribed by Renan Marcondes Facchinatto and Victor Augusto de Oliveira.

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