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Administrative liability of the legal entity, in cases of direct contracting, based on the anti-corruption law

Administrative liability of legal entities in cases of direct contracting, based on anti-corruption law

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SUMMARY

This article analyzes the possibility of holding legal entities liable under the Anti-Corruption Law (Law No. 12,846/2013) when acts damaging public assets are committed in direct contracting procedures. Using a qualitative approach, the study utilizes a literature review and critical analysis of legal provisions. The aim is to elucidate the administrative nature of the law and demonstrate the existing controversy regarding its application.
of the Anti-Corruption Law in cases of exemption and non-requirement for bidding. It is concluded that Law No. 12,846/2013 can be applied, since its art. 5, paragraph IV, item "d", covers factual hypotheses not initially foreseen by the legislator, such as cases of fraud in direct contracting.

Keywords: Anti-Corruption Law. Direct hiring. Typicality.

ABSTRACT

This article analyzes the possibility of holding legal entities liable under the Anti-Corruption Law (Law No. 12,846/2013) when acts damaging public assets are committed in direct contracting procedures. Using a qualitative approach, the study uses a literature review and a critical analysis of legal provisions. The aim is to elucidate the administrative nature of the act and demonstrate the ongoing controversy surrounding the application of the Anti-Corruption Law in cases of waiver and non-requirement of bidding processes. The conclusion is that Law No. 12,846/2013 can be applied, since its Article 5, Section IV, item "d," encompasses factual hypotheses not initially anticipated by the legislator, such as cases of fraud in direct contracting.

Keywords: Anti-Corruption Law. Direct Contracting. Typicality.

1. INTRODUCTION

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The Anti-Corruption Law (Law No. 12,846/2013) provides for the possibility of accountability of legal entities that commit acts that harm public administration, especially with regard to bidding and public contracting procedures.

Based on the analysis of legal provisions, this study seeks to elucidate the typicality administrative review of harmful acts in the Anti-Corruption Law and then assess the (im)possibility of holding the legal entity liable for committing infractions in direct hiring procedures.

2 ANTI-CORRUPTION LAW AND ADMINISTATIVE TYPICALITY

2.1 ANTI-CORRUPTION LAW

With the aim of safeguarding probity in Public Administration, protecting primary and secondary public interests of the State, as well as in compliance with the principle of *morality* enshrined in art. 37, *caput,* of the Federal Constitution of 1988, the Law was published No. 12,846/2013, popularly known as the “Anti-Corruption Law”, which “provides for the the administrative and civil liability of legal entities for the practice of acts against the public administration, national or foreign”.

According to art. 1, *caput,* of the Anti-Corruption Law, it is noted that this law has the purpose to promote the “ objective administrative and civil liability of legal entities for practice of acts against the public administration, national or foreign”, so that it is enough to classification of the fact as an act harmful to the Public Administration – dispensing, by express legal provision, the assessment of the subjective element (guilt).

In short, any legal entity can respond based on the Law No. 12,846/2013: companies, whether personified or not, including those constituted in fact (art. 1, sole paragraph). It is emphasized that – once practiced, “in their interest or benefit, exclusive or not” (art. 2, *caput),* the harmful acts provided for in art. 5 of the aforementioned Law – people legal entities will be held objectively liable, regardless of the liability individual of its directors or administrators (art. 3, *caput* and § 1), which will be held responsible to the extent of their culpability (art. 3, § 2).

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Said liability, which may result in administrative penalties of fines (0.1% to 20% of gross revenue) and extraordinary publication of the conviction decision (art. 6th, items I and II), will occur through the so-called Administrative Process of Accountability (PAR), with observance of the adversarial system and broad defense, under the terms of regulations set out in articles 8 and 15 of Law No. 12,846/2013. Furthermore, the penalties may not be applied (in the case of publication of the conviction) and mitigated (reduction of the value of the fine by up to two thirds) in the case of the conclusion and fulfillment of the agreement of leniency (art. 16).

In addition to accountability in the administrative sphere, the Anti-Corruption Law also provides for judicial accountability (art. 18), promoted by the Public Prosecutor's Office and bodies of judicial representation of the units of the Federation (art. 19, *caput),* which subjects people legal offenders in the sanctions of forfeiture of assets and values, suspension or interdiction partial suspension of activities, prohibition of receiving incentives and subsidies for one to five years, and – even – compulsory dissolution (art. 19, items I to IV).

2.1 TYPICALITY OF ACTS HARMFUL TO PUBLIC ADMINISTRATION

Specifically in relation to acts that are harmful to public administration, national or foreign, the Anti-Corruption Law provides:

> Art. 5. **Acts that are harmful to the public administration, national or foreign,** for the purposes of this Law, all those practiced by the legal entities mentioned in sole paragraph of art. 1, which violate national public property or foreign, against principles of public administration or against commitments international obligations assumed by Brazil, defined as follows:
>
> I - promise, offer or give, directly or indirectly, undue advantage to an agent public, or the third person related to it;
>
> II - demonstrably finance, pay for, sponsor or in any way subsidize the practice of illegal acts provided for in this Law;
>
> III - demonstrably using an intermediary natural or legal person to conceal or conceal their real interests or the identity of the beneficiaries of the acts performed;
>
> IV - **with regard to bids and contracts:**

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> a) frustrate or defraud, by means of an arrangement, combination or any other expedient, the competitive nature of public bidding procedures;
>
> b) prevent, disrupt or defraud the performance of any bidding procedure act public;
>
> c) to remove or attempt to remove a bidder, through fraud or offering an advantage of any kind;
>
> d) **defraud a public tender or contract arising therefrom;**
>
> e) fraudulently or irregularly create a legal entity to participate in a bidding process public or enter into an administrative contract;
>
> f) obtain undue advantage or benefit, fraudulently, from modifications or extensions of contracts entered into with the public administration, without authorization in law, in the public bidding notice or in the respective instruments contractual; or
>
> g) manipulate or defraud the economic-financial balance of contracts entered into with public administration;
>
> V - hinder the investigation or inspection activities of bodies, entities or agents public, or intervene in their activities, including within the scope of regulatory agencies and of the supervisory bodies of the national financial system.

When providing for the administrative framework of the Anti-Corruption Law, Ribeiro (2017 p. 159-160) argues that the list of infractions in article 5 is exhaustive *(numerus clausus)* and that the classification "in one of the listed offenses must maintain a logical correlation with the goods and legal values covered in the *caput* of the aforementioned article, so that this will serve as a precept legitimizing the assessment of the illicit nature of the conduct".

In this sense, it is necessary to verify whether the conduct eventually practiced by the person legal act "against national or foreign public assets, against principles of public administration or against the international commitments assumed by Brazil" (art. 5th, *caput).*

According to doctrinal understanding, administrative infractions must observe the attribute of typicality, since it "represents a guarantee for the administered, as prevents the administration from carrying out acts that are imperative and enforceable,

unilaterally binding the individual, without any legal provision" (DI PIETRO, 2009, p. 194-195).

Therefore, it is important to highlight that the "theory of typicality is a phenomenon peculiar to Law, without a necessary connection with the idea of criminal types. Hence, naturally, the types enter the administrative field, performing certain functions" (OSÓRIO, 2005, p. 207-208), so that the aforementioned theory applies within the scope of the Anti-Corruption Law.

It is noted that, as a rule, the legal types provided for in Law No. 12,846/2013 are well delimited. However, the doctrine has pointed out the existence of controversy regarding the application of the type provided for in art. 5, paragraph IV, item "d", which provides for the harmful act of "defrauding public tender or contract arising therefrom".

This is an "administrative framework of a subsidiary nature" (RIBEIRO, 2017, p. 169), which allows the classification of various conducts and, therefore, "covers all conduct linked to the bidding process and the contract" (MOTA & ANYFANTIS, 2021 p. 103).

3 LIABILITY IN CASES OF DIRECT HIRING

Based on the theory of administrative typicality, an understanding emerged doctrinal in the sense that the Anti-Corruption Law should not be applied in cases of direct hiring (waiver and non-enforceability). This is because art. 5, item IV, of Law No. 12.846/2013 provides for hypotheses of acts harmful to the public administration, national or foreign, "with regard to bids and contracts".

However, it is well known that the term "bidding" covers the cases of exemption and unenforceability, since these also deal with the administrative procedure through the which the most advantageous proposal should be selected for the contracting of goods or services for public administration, observing the principles listed in the Federal Constitution and in rules governing bids and contracts.

In this sense, in line with the understanding defended by Marçal Justen Filho, the non-enforceability and waiver of bidding, as species of the direct contracting genre, are classified as *an anomalous bidding method,* since:

> [...] presupposes a prior formal procedure, designed to produce the best choice possible for the Administration. This procedure involves varying autonomy for the Administration, but which only deals with the concrete measures to be adopted. There is no margin of discretion regarding the observance of prior formalities, which must be sufficient to prove the presence of the hiring requirements directly and to legitimize the Administration's choices regarding the contracted individual and the adopted price. (JUSTEN FILHO, 2010, p. 296)

The distinguished scholar confirms, when discussing direct hiring and the "absence" of bidding:

> As stated several times, **it is incorrect to say that direct hiring excludes a "bidding procedure".** The cases of waiver and non-requirement of bidding actually involve a special and simplified procedure for selecting the most advantageous contract for the Public Administration. There is an ordered series of acts, aiming to select the best proposal and the most suitable contractor. "Absence of bidding" does not mean that there is no need to observe prior formalities (such as verification of the need and convenience of hiring, the availability of resources etc.). The fundamental principles of administrative activity must be observed, seeking to select the best possible contract, according to the bidding principles. (JUSTEN FILHO, 2010, p. 387).

Furthermore, the Comptroller General of the Union (CGU), in its *Accountability Manual of Private Entities*[2] (2022, p. 61), reinforces the understanding that the harmful acts of art. 5, paragraph IV, of the Anti-Corruption Law do not only encompass public contracts governed by the Law of Tenders, asserting that – wrongly – "a superficial reading of the device could lead one to believe that the contracts mentioned therein are only those arising from bidding procedure (or its waiver or non-enforceability)".

Thus, it is understood that the administrative type enshrined in item "d" of section IV of the art. 5 of Law No. 12,846/2013 fits perfectly with harmful acts committed by people legal in cases of exemption or non-requirement of bidding, when they violate the

2. BRAZIL. Office of the Comptroller General of the Union. **Manual on Accountability of Private Entities.** Brasília: May, 2022, Available at: https://www.gov.br/corregedorias/pt-br/assuntos/painel-de-responsabilizacao/responsabilizacao-entes-privados/manual_de_responsabilizao_de_entes_privados-2022.pdf >. Accessed on June 5, 2025.

national or foreign public assets, against principles of public administration or against the international commitments assumed by Brazil.

FINAL CONSIDERATIONS

In view of the doctrinal notes elucidated in this work, regarding the existing controversy over the possibility of applying the Anti-Corruption Law to cases of direct contracting, it is noted that art. 5, paragraph IV, item “d”, of Law No. 12,846/2013 allows the application of the aforementioned Law to cases in which fraudulent action occurred in the procedures exemption or non-requirement of bidding.

The administrative typicality is observed with the application of the aforementioned device, which has the power to accommodate other factual hypotheses, in addition to those expressly delimited by the legislator, with the intention of effectively protecting public assets and ensure probity in the Administration.

REFERENCES

BRAZIL. **Constitution of the Federative Republic of Brazil.** Brasília, DF: Federal Senate, 1988. https:// Available in: < www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm >. Accessed on: July 22, 2025.

_____. Office of the Comptroller General of the Union. **Manual on Accountability of Private Entities.** Brasília: May, 2022. Available at: < https://www.gov.br/corregedorias/pt-br/assuntos/painel-de-responsabilizacao/responsabilizacao-entes-privados/manual_de_responsabilizao_de_entes_privados-2022.pdf >. Accessed on June 5, 2025.

_____. **Law No. 12,846 of August 1, 2013.** Provides for the administrative and civil liability of legal entities for the practice of acts against the public administration, whether national or foreign, and contains other provisions. Available at: < https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2013/lei/l12846.htm >. Accessed on: July 23, 2025.

DI PIETRO, Maria Sylvia Zanella. **Administrative Law.** 18th ed. São Paulo: Atlas, 2009.

JUSTEN FILHO, Marçal. **Comments on the law of public tenders and administrative contracts.** 14th ed. São Paulo: Dialética, 2010.

MOTTA, Fabrício. ANYFANTIS, Spiridon Nicofotis. Comments on Art. 5. *In:* DI PIETRO, Maria Sylvia Zanella. MARRARA, Thiago. (Coord.). **Commented Anti-Corruption Law.** 3rd ed.
Belo Horizonte: Forum, 2021, p. 81-112.

OSÓRIO, Fábio Medina. **Sanctioning Administrative Law,** São Paulo: Courts Review, 2005.

RIBEIRO, Márcio de Aguiar. **Administrative liability of legal entities under the corporate anti-corruption law.** Belo Horizonte: Fórum, 2017.