

CONTRATAÇÃO PÚBLICA SUSTENTÁVEL: UM CASO DE ESTUDO DE POLÍTICA PÚBLICA NO TRIBUNAL DE JUSTIÇA DO ESTADO DE SÃO PAULO

SUSTAINABLE PUBLIC PROCUREMENT: CASE STUDY OF PUBLIC POLICY AT THE COURT OF JUSTICE OF THE STATE OF SAO PAULO

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Resumo: Passar de uma cultura consumista para uma sustentável e adotar políticas socioambientais, além de uma necessidade, representam hoje, um desafio global. Entre os desafios da sustentabilidade está a proposta de contratação pública sustentável (CPS), diante da qual o objetivo geral da pesquisa foi analisá-la junto às políticas públicas que a incentivam, com foco no caso concreto do Tribunal de Justiça do estado de São Paulo (TJSP). Especificamente, pretendeu-se investigar quais são as bases legais, institucionais e teóricas para que as entidades públicas implementem as CPS; detectar quais são as dificuldades de implementação na instituição de foco; propor formas de superação destas; e, ainda, verificar se e como as políticas públicas que incentivam as CPS encontram-se efetivas ou se mostram como formas de gestão mais eficazes e eficientes, adequadas e protetivas ao meio ambiente. Para tanto, utilizou-se metodologia qualitativa, inicialmente focada na pesquisa exploratória e na pesquisa teórico-bibliográfica, com coleta e revisão da literatura doutrinária e legislação correlata, bem como buscas (com análise) de documentos públicos disponíveis em sites do governo. Também foram realizadas entrevistas semiestruturadas com os servidores e gerentes diretamente envolvidos na área de compras e contratos, por meio da análise de conteúdo dos dados coletados. Mais do que apontar as dificuldades, o objetivo foi oferecer soluções, cuja principal contribuição foi a elaboração de uma Recomendação à Presidência do TJSP, a fim de reforçar a importância desta política pública e auxiliar na sua efetiva implementação dentro da instituição.

Palavras-chave: Contratação Pública Sustentável; Compras Públicas; Administração Pública; Sustentabilidade.

Abstract: Moving from a consumerist to a sustainable culture and adopting socio-environmental policies, in addition to be a necessity, today represent a global challenge. Among the sustainability challenges is the proposal for sustainable public procurement (SPP), before which the general objective of the research was to analyze it together with the public policies that encourage it, focusing on the specific case of the Court of Justice of the state of São Paulo (TJSP). Specifically, it was intended to investigate what are the legal, institutional and theoretical bases for public entities to implement SPP; detect which are the difficulties of implementation in the institution of focus; propose ways to overcome these; and, further, to verify if and how the public policies that encourage PHC are effective or show themselves as more effective and efficient forms of management, appropriate and protective to the environment. For that, qualitative methodology was used, initially focused on exploratory research and theoretical-bibliographic research, with collection and review of doctrinal literature and related legislation, as well as searches (with analysis) of public documents available on government websites. Semi-structured interviews were also carried out with the servers and managers directly involved in the procurement and contracts area, through content analysis of the collected data. More than pointing out the difficulties, the objective was to offer solutions, whose main contribution was the drafting of a Recommendation to the TJSP Presidency, in order to reinforce the importance of this public policy and assist in its effective implementation within the institution.

Keywords: Sustainable Public Procurement; Public Purchases; Public Administration; Sustainability.

Resumen: Pasar de una cultura de consumo a una cultura sostenible y adoptar políticas socioambientales, además de ser una necesidad, representa hoy un desafío global. Entre los desafíos de sostenibilidad se encuentra la propuesta de contratación pública sostenible (SPP), ante la cual el objetivo general de la investigación era analizarla junto con las políticas públicas que la fomentan, centrándose en el caso específico del Tribunal de Justicia del estado de São Paulo (TJSP). Específicamente, se pretendía investigar cuáles son las bases legales, institucionales y teóricas para que las entidades públicas implementen SPP; detectar cuáles son las dificultades de implementación en la institución de enfoque; proponer formas de superarlos; y, además, verificar si las políticas públicas que fomentan la APS son eficaces y cómo se muestran como formas de gestión más eficaces y eficientes, apropiadas y protectoras para el medio ambiente. Para ello, se utilizó una metodología cualitativa, inicialmente enfocada en la investigación exploratoria y la investigación teórico-bibliográfica, con recopilación y revisión de literatura doctrinal y legislación relacionada, así como búsquedas (con análisis) de documentos públicos disponibles en sitios web gubernamentales. También se realizaron entrevistas semiestructuradas con los servidores y gerentes directamente involucrados en el área de adquisiciones y contratos, a través del análisis de contenido de los datos recopilados. Más que señalar las dificultades, el objetivo era ofrecer soluciones, cuya contribución principal fue la redacción de una Recomendación a la Presidencia de TJSP, con el fin de reforzar la importancia de esta política pública y ayudar en su implementación efectiva dentro de la institución.

Palabras clave: Contratación Pública Sostenible; Compras Públicas; Administración Pública; Sostenibilidad.

1 Introduction

Moving from a consumerist culture to a sustainable one and adopting social and environmental policies nowadays represents, in addition to a need, a global challenge. In this sense, the Public Power has come to appear as a kind of "Manager" of the environmental patrimony and, since it has constitutional and fundamentally protected, a fundamental right that is of every society, it is necessary to use the measures necessary to achieve (SARLET E FENSTERSEIFER, 2014).

Ecological economists defend the elaboration of regulations and public policies that restrict the actions of economic agents that harm the preservation of the environment and that stimulate the companies that contribute to it (VIEIRA, 2012).

Among the sustainability challenges is the proposal for sustainable public procurement (SPP), which is why the general objective was to analyze it together with the public policies that encourage it, focusing on the concrete case of the Court of Justice of the State of Sao Paulo (TJSP) which is considered the largest court in the world in terms of volume of proceedings (TJSP, 2016).

The introductory theoretical bases that supported the subsequent analysis of the results were the legal frameworks, policies and strategies on environment and development in the global context, in Brazil and more specifically, in the state of São Paulo.

The emergence of the concept of "sustainable development" and its multiple interpretations was investigated (SILVA E BARKI, 2012; REDCLIFT, 2007; SACHS, 1981; SERRA, 2015; CANOTILHO, 2010; CARVALHO, 2017), the State's purchasing power (SILVA, 2008; OLIVEIRA E SANTOS, 2015; TAVARES et al, 2008; MPOG, 2018; OCDE, 2015; BIDERMAN et al, 2008; SQUEFF, 2014) and how sustainability is addressed in the "new Public Administration" (BRESSER PEREIRA, 1996; ABRUCIO, 1997), specifically in relation to public contracts.

Still in theory, it was necessary to know and analyze the main Brazilian legislation on the subject, the Bidding Law, and the instruments

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of sustainable public procurement in the state of São Paulo, with emphasis on the Electronic Purchase Exchange (BEC/SP), the Materials Catalog (CADMAT), the Socio-environmental seal, the CADMADEIRA and the Technical Studies of Outsourced Services (CADTERC).

From the hypothesis that there are challenges that impede the implementation of the SPP, the research has as problem to identify them and to propose ways of referral for their overcoming. The justification for the research is the incontestability that the socio-environmental management by the Public Administration, also in its internal scope, is necessary for the survival of the present and future generation in a dignified way, with support in the Brazilian Constitution (BRAZIL, 1988) and other infra-constitutional legislations. It must be considered that the government is a great buyer, consumer and polluter of natural resources, which, as is known, are not perpetual.

The specific objectives were: (i) to investigate the legal, institutional and theoretical bases for public entities to implement sustainable contracting; (ii) to identify the difficulties encountered in the implementation of SPP in the institution of research focus with the servers directly active in the area; (iii) from the identification of the challenges, propose ways of referral to overcome them; (iv) and to verify if and how the public policies that encourage them are effective or show themselves as more effective and efficient, adequate and protective forms of management to the environment, by inducing certain sustainable practices of the market.

Rather than pointing out the difficulties, it is hoped to offer possible solutions, whose greatest contribution certainly consisted of devolutive to the managers and servers that act in the area of bidding, with the possibility to leverage the practices of sustainability in its routines. In addition, a recommendation was made to the Presidency of the Court of Justice of the State of Sao Paulo, aiming to reinforce the importance of public policy and to assist in its effective implementation within the institution.

Finally, it is believed that inserting the issue as a strategic planning guideline and prioritizing the education and training of public, servant and

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outsourced agents for a change of culture in contracting and in the use of public goods and services is an urgent measure for the success of this public policy.

2 Methodology

The methodology used initially focused on exploratory research, within a theoretical bibliographic basis, where meetings and reviews of related doctrinal literature and legislation were conducted, as well as searches and analysis of official documents available at government sites.

For the first specific objective, the collection of data was based on governmental sites and their respective institutional documents, from the related bibliography (whose initial research with the main authors was demonstrated in the introduction and in the first three chapters in particular), the research of articles, dissertations and theses sought in the main Electronic Magazines and repositories of institutions of higher education, whose academic insertions permeate the scope of work and the legislation on the environmental theme, mainly related to Public Administration, worldwide and national, available in the United Nations, Planalto, Federal Government Ministries, especially Ministries of Environment and Planning, Budget and Management.

In order to detect the difficulties encountered in the implementation of sustainable public contracting at the institution and to support the conclusions of the study semistructured interviews were also conducted with servers more directly involved in the area, called key informants.

Both interview scripts were based on the works of Aben-Athar (2013) and Teixeira (2013), with adequacy to the research institution. The questions of the interview scripts fit into six thematic axes, which are: (i) knowledge/understanding; (ii) vision/interest/commitment; (iii) procedures; (iv) difficulties; (v) facilitators/improvements/conditions for SPP; (vi) reflexes/benefits; and, finally, (vii) training.

The research was analyzed and approved by the Research Ethics Committee of the Faculty of Human and Social Sciences of Paulista State University (UNESP) and complied with ethical principles. In the

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preparation phase for analysis, the interviews were transcribed. From this, the content analysis method was applied with a proof administration function, in which the provisional hypothesis was the guideline for confirmation or invalidation.

The analysis was as follows: (i) pre-analysis and familiarization with the raw data, through the second reading of the material (the first reading was carried out concomitantly with the transcriptions); (ii) the formation of categories of analysis (whose method will be better explained below); (iii) exploration of the material, with the insertion of the comments in the analysis categories constituted; (iv) and data processing, with the inference and interpretation of each category, as well as the separation of excerpts from important and illustrative speeches.

In view of the theoretical framework researched, the following aspects were verified: (i) knowledge and understanding of the subject; (ii) the view on the institution's interest in the implementation of public policy; (iii) the use or not of the instruments, as is the treatment of the sustainability criteria; (iv) what are the difficulties of including sustainability criteria and what are the difficulties for implementing the public policy in the institution; (v) what are the most important facilitators and conditions for sustainable public procurement; (vi) what aspects need to be better worked on and what needs to be changed to achieve sustainability at the national level; (vii) and if there are market reflections and benefits for society (if the interviewee's conception exists).

Based on Moraes (1999), the data of the interviews were submitted to a process of unitization or transformation of the content into units and after the categorization or classification of the units into categories was performed. Unitarization took place in units of record (also called units of analysis) that represent information sets with a complete meaning in themselves, but which come together with the so-called context units.

According to Bardin (1977) it was chosen to obey the rule of enumeration of units of record called a simple frequency measure, which assumes of an item of meaning or expression, and the more it is frequency. repeating, all appearances of the same weight.

Moraes (1999) explains that once the categories are defined, it is necessary to communicate the result of the work by means of a description that, in a qualitative approach such as the one presented, is made through a synthesis text that expresses the set of meanings present in the units of analysis, recommending, also, the exhaustive use of direct citations of the original data, which was carried out in the research.

It should be noted that the study was approved by the Research Ethics Committee, under the CAAE: 02880818.4.0000.5408.

3 Results and discussion

It was verified that what is known in the literature as the tripod of sustainability was not the most found answer, which evidences either a difficulty in conceptualizing a SPP or a lack of knowledge of which socio-environmental criteria are also related to the sustainability of a contracting.

In general, the most advantageous tender is interpreted blindly as the cheapest, which is a relevant concern, since the public resource cannot be used without paying attention to the payment of a fair price but considers that the advantage is not limited to this (TEIXEIRA, 2013). Surprisingly the answers on the most advantageous proposal having the lowest price as the preponderant criterion were the least found.

More than half of the informants perform a cost-benefit analysis, differentiating cost from price, so that the lowest price does not mean the lowest cost, and there are also considerations about quality.

The SPP is still not seen by most of the interviewees as a legal obligation, which is also a difficulty in implementing public policy in the TJSP. It is noticed in several statements that the realization of SPP is linked more to the will of the public manager and there is clarity in the legislation, which is still, in this view, generic, sparse and retrograde.

The public contracting of the institution most cited as sustainable were the requirement of certification of the origin of the wood, followed by the supply network, which changed the way of procurement of common

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TJSP materials, broke the storage culture that was made by each building and sometimes he asked for what was necessary and extrapolated the validity of the products, which generated a waste. The supply network chain seeks to centralize the purchases of all units of the State by a single system, available in the internal network of the TJSP, by means of a system of registration of prices for acquisition of inputs.

More than half of the informants stressed the importance of implementing the digital judicial electronic process as a sustainability strategy. In addition, the exchange of technology park and destination of what would be junk was also mentioned as a case of success. Included in the contracting of the purchase of the computers were the reverse logistics of the previous equipment.

Specifically, for the contracting of Engineering services, the perception is that sustainable construction and construction have a higher cost of execution, mainly because it would require specialized technical professionals who dedicate themselves exclusively to design and then to execute in a sustainable way.

Examples of waste disposal and recycling and the energy efficiency of goods, products and contracts have also been mentioned. But about 30% of the respondents did not mention any examples of actions or contracts with sustainable criteria, which is quite expressive and may reflect, before so many others mentioned by others, a lack of reflection on the subject or a lack of knowledge about what would fit as SPP.

It is perceived that environmental and economic criteria (say, the lowest price) are more palpable for most of the interviewees. The social criteria, when mentioned, are linked to the strict compliance with the law, putting it that it is not possible to go beyond what the law expressly determines.

It should be noted that the majority of interviewees see the demand for social criteria in contracting services more easily, because in these cases the social seems to be more associated with the contracted object (people). However, the perception that the social responsibility of the

public sector also relates to the people who produce the goods acquired by the state was not found in any interview.

As a sensitive point of the interviews, when asking about the difficulties of inclusion of sustainability criteria and for the implementation of public policy in the institution, the answers were diverse, so grouped into 9 subcategories of difficulties: instrumental, referring to the instruments; financial institutions; cool; techniques; cultural activities; institutions; regulatory bodies; related to market aspects; and finally, related to training.

Among the greatest difficulties in the implementation of SPP, in the first place, there is the lack of technical capacity on environmental and social issues. Second, price was the main criterion, quoted by more than half of them.

The difficulties related to the instruments reveal that certifications and seals can restrict competition, which is a concern of the informants and, despite the theoretical research, Araújo and Teixeira (2018) have pointed out that the work of classification and revision of certifications and official stamps is continuous, respondents diverged in stating that there is a need for these instruments to provide more up-to-date information.

The difficulty of justifying the acquisition of a more expensive product also prevails when the economic aspect, that is, the economy, such as the reduction of water and energy costs, is not evidenced by the Preliminary Technical Studies and there is "only" a gain diffuse economy for the entire society, without direct repercussions on the institution's internal budget.

The subcategory related to the technical difficulties is the most pointed by the informants, for about 80% of them, because technical knowledge about the sustainability criteria is lacking, especially by the people that specify the products and services.

Besides knowledge, a cultural change would facilitate SPP. At various moments, it is perceived in the informants' speech that there is a need to change the mentality of the TJSP and the population in general,

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as a consumer and, on the environmental side, also polluting, since it is not yet internalized for Brazilians sustainability as a principle and lifestyle.

The performance of regulatory agencies has been linked to the fear of hurting standards and such fear impedes innovation and new ways of hiring, for example through applications.

To base the specifications with a Life Cycle Cost analysis, in which the difference between the immediate price at the time of contracting and the final cost of a product, which includes, in addition to the price, the expenses that will be incurred during the use, maintenance and final disposition, to be able to rely totally on the socioenvironmental certifications/seals and to have access to resources and tools that assist the SPP are among the important conditions.

Measuring results and impacts of public contracting is a challenge highlighted by most as a need for improvement. The metrics are still very much related to the quantification (actually, decrease) of the consumption and the expenditure of public financial resources.

Another necessary improvement is the existence of sustainable development strategies. This perception is aligned with the whole world and Brazilian context of changing patterns of consumption and production.

It reveals the definitive entry of the issue into the multilateral agenda of the states, and also the awareness of public agents, also as citizens, within a public institution in a developing country such as Brazil feel the reflexes of such a change and the necessity of that happening in their routines.

Although the design of incentive structures that promote cooperative arrangements in implementation networks represents one of the central tasks for state reform (SILVA E MELO, 2000), it was found that a little more than 20% considered that the formation of exchange networks of experience is an aspect that needs to be better worked in Brazil.

Both from the theoretical framework and from the interviews it was found that there is no formal network for exchanging experiences among

public bodies, in order to align their internal SPP policies and to help each other.

Consideration of partnership opportunities with other public agencies is a way of overcoming limited institutional capacities, and successful cases, such as the TJSP demonstrated from the implementation of the supply chain, could for example be replicated to other institutions.

The benefits to the market (and therefore also to the entire consumer society) are related to the reduction of prices of sustainable products and services, due to the increase in the demand generated by public contracting.

As the bibliographic research has shown, key informants also believe that SPP encourages new products and suppliers to adopt cleaner and faster technologies as a stimulus to business competitiveness and to represent a (good) business opportunity.

Finally, the benefits to society are not as palpable to most informants as they are diffuse, related to collective well-being. The evidence of social benefits, again, connects more with the economic issue, in view of the better use of public money.

4 Conclusions

SPP is considered to be technically efficient, since it is related to the reduction of consumption, both natural resources and the institution's material resources, linked to the introduction of new technologies and a new way of doing it, socially responsible and is politically viable because it complies with the legislation and improves the image of the institution before its own servants and society.

It was verified that, according to the theoretical framework and the experiences of the interviewees, the public policies that encourage them are more effective and efficient, appropriate and protective forms of management of the environment by inducing certain sustainable practices of the market, but, at present, there is an underutilization of the purchasing power of the State.

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A long-term vision, which goes beyond management exchanges, whether by the Presidency of the Republic of Brazil or by a Court such as the TJSP, especially with regard to sustainability issues, is still a confusing space for decision-making.

The public policy model that is proposed to foster within the researched institution aligns with the bottom up model in which the employees who work directly in the area will have greater participation in the possible solutions and indicate to the top management how to act.

There is also a need to regulate what a sustainable product or service is, how it does not infringe the principle of broad competitiveness and justify its advantage. The study showed that the benefits to the market (and therefore to the entire consumer society) are related to the reduction of prices of sustainable products and services, due to the increase in the demand generated by public contracting.

Empowerment is both a difficulty (lack of) and a facilitator. In short, the discourse aligns itself in the sense that efficient training would be general, more practical (without focusing only on theory and legal grounds) and related to technical issues. Informants always clarify that training is essential for SPP.

It was also observed that there is no precise classification to determine whether or not a public procurement is sustainable and, therefore, this occurs when any sustainable criterion is inserted in the bidding document, without taking into account the social and environmental contribution of these purchases, such as the analysis of the cycle products.

In view of the need pointed out by the interviewees to have widely spread within the institution a specific policy for the SPP to consider sustainability criteria in the specification of products and services, in an institutionalized way, it was proposed to the Presidency of the Court to do so through a Recommendation that is based on and indicative of possible strategic actions.

It is a propositional action because of the research.

This research product recommends, in summary: (i) training of all civil servants, especially those whose management and execution activities are related to the contracting of goods and services; (ii) adhesion as a partner institution to the A3P Program, Environmental Agenda in Public Administration; (iii) creation of a specific work group to carry out the SPP; (iv) elaboration of a specific Action Plan by this SPP Nucleus, detailing the actions or initiatives that will be carried out to achieve the goals, with the respective schedules, deadlines, responsible persons, indicators and resources; (v) review of the Sustainable Logistics Plan and the inclusion of SPP as a thematic axis; (vi) revision of the Procurement and Contracting Manual; (vii) inclusion of SPP implementation as a goal of the next TJSP Strategic Plan and Map, referring to the five-year period 2020 - 2025; (viii) creation of its own network of dialogues with other institutions, especially the Judiciary and of a similar size to that of the TJSP, also in view of the Social Environmental Network of the National Council of Justice.

The study of what is conceived as New Public Administration, with an increase in Accountability, transparency, effectiveness and efficiency without losing sight of equity, confirmed that through public governance it is possible to change production and contracting standards in order to promote sustainability within institutions and the market.

It is hoped that public policy cease to be a practice of exception to become a rule, not only from the prevailing view that it is valid to contract sustainably and have a cleaner production only if the public agencies spend less, ceasing to be considered the lowest price as a condition for the SPP.

Certainly, there is a lot to evolve, the challenges are many, but the analysis and evaluation of public policy can offer solutions for the public administrator and for society in general. It is a desire of the research that instigates, not only in the academic scope, the realization of new studies related to the subject, so that more and more the public institutions can potentiate their social, economic and environmental actions in favor of the sustainable development.

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