6th Interdisciplinary Symposium on Public Procurement
Lisboa, 18-19 de setembro

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I would like to begin by expressing my greetings to the President of the Italian National Anticorruption Authority, **Mr. Giuseppe Busia**.

I extend my greetings to:

- The Vice-Admiral and Commander of the Military University Institute, **Mr. José António Mirones**;
- The President of IMPIC, **Mr. Fernando dos Santos Batista**;
- **Mr. Gustavo Piga**, Professor at the University of Rome Tor Vergata;
- The members of the **Organising Committee**, the **Scientific Committee**, the **Debaters,** and the **Speakers**;
- Distinguished guests;

- As well as all the other participants in this 6th edition of the Symposium on Public Procurement.

My first words are to express my deep satisfaction in being present at this conference. So, first and foremost, I would like to thank you for the invitation. It is a pleasure to be here.

Allow me to say that it is a great honour to deliver this speech on behalf of the President of the Supreme Administrative Court of Portugal, Mr. **Jorge Miguel Barroso de Aragão Seia.**

It is with particular satisfaction that I participate in this *Interdisciplinary Symposium on Public Procurement.* As a member of the Supreme Administrative Court, I serve in the Administrative Section, which holds legal jurisdiction over judicial proceedings related to public procurement law (besides public contracts)

For this reason, I am well aware of the profound impact these cases have on civil society, the economy, and businesses, but most importantly, on the fulfilment of the public interest.

Indeed, public procurement arises precisely from the need of the State to ensure the satisfaction of public needs by providing goods and services

which, quite often, it is unable to deliver using its own resources. Consequently, the State must seek out the competitive market to find suppliers capable of meeting these needs, though within pre-established parameters of time, manner, place and objectives.

Through public contracts, the State entrusts tasks to private entities to ensure the fulfillment of specific public interests.

In this context, the State does not act freely or arbitrarily, but rather within a tightly defined axiological and legal framework, which fundamentally aims to safeguard the public interest—both in general terms and as it unfolds into a range of more specific, identifiable public interests:

- First and foremost, the interest in addressing a specific collective need or public interest (which the State, in its various dimensions, is responsible for fulfilling for its citizens);
- The public interest of ensuring that this collective need is met within certain quality parameters, not only regarding the goods or services provided, but also ensuring that the act of providing or delivering by

the economic operators complies with the legal provisions in force in social, labour, environmental, gender equality, and anti-corruption matters, as derived from international law, European law, and national law;

—The public interest in ensuring the sustainability of public finances, which requires that the chosen tender not be excessively burdensome to public resources, but rather represent the most economically advantageous offer for the State;

—Lastly, but by no means less importantly, the overarching public interest in ensuring that the State—whose actions, through its institutions and services, are bound by fundamental legal principles such as legality, equality, impartiality, proportionality, and good faith—opens public contracts to competition on a European scale and guarantees transparency and non-discrimination among economic operators.

It is absolutely paramount—and undeniably central—that all competitors are granted equal opportunities in formulating their bids, which must be evaluated under identical rules and conditions.

Indeed, the significance of public procurement is asserted by Union law and is continuously evolving.

Very recently (on September 9th), the European Parliament adopted a Resolution on Public Procurement. In summary, it recommends the simplification of procedures to facilitate greater access for competitors, particularly small and medium-sized enterprises, thereby increasing competition. The resolution also emphasizes reducing the number of contracts awarded based solely on the lowest price criterion, favouring qualitative award criteria, alongside the introduction of more advanced digital systems and platforms.

The central role of public procurement in enabling the State, in its various facets, to fulfil its constitutional and legal mandates—*particularly as a provider of public services*—is so significant that its regulation by law is

exceedingly detailed, with a myriad of mandatory provisions, and an extensive catalogue of mutual special rights and obligations for both the public contracting authority and the private contractor. This framework incorporates the general principles derived from the Constitution, the Treaties of the European Union, and the Administrative Procedure Code.

Among these principles are those shaping the administrative activity, such as legality, the pursuit of the public interest, proportionality, impartiality, equality of treatment, non-discrimination, good faith, the protection of trust, transparency, and publicity.

Litigation in this area, driven in large part by the substantial economic values involved, is particularly noteworthy. Judicial proceedings concerning these matters arise in such significant numbers that the Portuguese legislature decided to establish **specialised administrative chambers** within the administrative judiciary to address them.

Indeed, the need to accelerate judicial proceedings, enhance the quality of judgments, and ensure consistency in jurisprudence in key areas of

administrative and tax law led the legislator, in 2019, to restructure some administrative and tax courts into specialised chambers. This resulted in the establishment within the Administrative and Tax Courts of Lisbon and Porto, *Public Procurement Chambers* with extended jurisdiction over a considerable number of other courts' jurisdictions.

Accordingly, the Administrative and Tax Court of Lisbon now handles public procurement cases from approximately 25 (**twenty-five**) municipalities, while the Porto court handles such matters from around 61 (**sixty-one**) municipalities.

Since 2020, this Public Procurement Chambers, with jurisdiction over public contracts, has been entrusted with the demanding task of judging all disputes concerning the validity of pre-contractual acts — *that is, all administrative acts carried out by the contracting authority during the phase preceding the conclusion of the public contract* — as well as disputes relating to the interpretation, validity, and performance of contracts for public works, public concessions, the procurement or leasing of movable goods, and the procurement of services.

Additionally, they rule on civil liability cases— *such as, pre-contractual, contractual, and extra-contractual*—arising from acts or omissions occurring in connection with the conclusion or execution of public contracts.

These matters are, as a rule, highly complex, both in terms of facts and legal reasoning, and often require more in-depth analysis and deliberation from judges than other types of administrative judicial cases.

On the other hand, the essential role of public procurement in enabling the State to fulfil its *service-providing responsibilities* has led to an undeniable increase in the number of cases entering the administrative courts.

To illustrate: in the first-instance, Public Procurement Chambers of the administrative courts in Porto and Lisbon alone, received approximately 700 (**seven hundred**) cases in 2024, and by the end of that year, over 1,100 (**one thousand one hundred**) cases were still pending judgment or further procedural steps.

The legislator's commitment to the specialisation of administrative and tax courts (particularly administrative ones) was subsequently extended to the appeal level.

In 2023, specialised subsections were established within the Administrative Central Courts, including two specifically for public procurement—one in the Northern Central Administrative Court – located in the city of Porto - and another in the Southern Central Administrative Court – this one in Lisbon.

Thus, at present, according to procedural law in the administrative courts, specialization in public procurement exists both at the first and second instance levels.

To provide a sense of scale: in 2024, the Administrative Central Courts received 397 (**three hundred ninety-seven**) appeals in public procurement matters, with approximately 523 (**five hundred twenty-three**) cases pending at the end of the same year.

However, it is undeniable that the most critical and sensitive cases are the urgent pre-contractual litigation matters—*disputes involving the annulment or mandatory issuance of administrative acts relating to the formation of public works contracts, public works concessions, public service concessions, and contracts for the acquisition or leasing of goods and services*.

These cases form the core of the specialised Public Procurement Chambers.

Such cases follow an expedited process, not only to optimize the protection of parties who feel wronged during the contract formation procedure but also to facilitate the swift stabilization of these administrative procedures. This is an approach that benefits, not only contracting authorities, but also economic operators and competitors.

After all, as is *self-evident*, the State turns to the competitive market, not out of mere preference, but with the legitimate aim of ensuring that the public benefits from goods and services that private economic operators can deliver—*often more efficiently than the State itself, given its limited resources.*

These contributions are essential to serving the public interest.

Therefore, the challenge of an administrative act issued during the procurement procedure may, as often occurs, have an impact on the quality of the related public service—or, in some cases, even delay its delivery.

There are also cases in which, despite the specific good or service underlying the pre-contractual procedure continuing to be enjoyed or provided to citizens during the judicial proceedings, the Court ultimately concludes that the act that awarded the proposal on which this provision was based is illegal and, therefore, another proposal should have been awarded instead. In other words, the final act of the procedure is found to be unlawful, whether due to procedural issues, substantive issues, or both.

In a situation such as the one just described, it is conceivable, in the extreme, that the State may be required not only to pay the awarded entity the full value of the public contract entered into and duly performed (that is, the price corresponding to the actual fulfilment of the underlying public

interest), but also to bear liability for compensation to be paid to the tenderer whose bid should, in fact, have been awarded but was not.

Pursuant to the legal framework established under Portuguese law — specifically, the Code of Procedure in Administrative Courts — in the absence of an agreement between the parties, it falls to the court to determine the amount of compensation due.

It is perfectly clear that the State's pursuit of the public interests constitutionally and legally entrusted to it is subject to the obligation to ensure competitive openness, as well as legality and impartiality in its decision-making processes. It is equally evident that any failure to comply with this framework of legal principles and statutory rules may entail significant consequences for the State itself.

In this context, I wish to highlight the importance of awarding authorities being adequately equipped in the field of public procurement. This necessarily entails an enhancement in the qualifications of the relevant administrative units and the professionals therein, with a view to avoiding

inefficiencies in meeting the needs of the community and preventing undue burdens on public finances.

In this domain, it should be noted that the Court of Auditors also plays a fundamental role in overseeing the legality of public expenditure.

These are, therefore, the types of issues — in both their nature and complexity — that frequently arise in pre-contractual litigation brought before the Portuguese Supreme Administrative Court, in most cases within the context of an appeal on points of law (appeal for review of the application of the law).

The prevalence of these urgent pre-contractual litigation proceedings is notably significant, even before the highest administrative court. In the past two years alone, the Administrative Litigation Section of the Portuguese Supreme Administrative Court has received 50 (**fifty**) urgent pre-contractual actions, representing one fifth of the total number of cases — both urgent and non-urgent — currently pending before that Section.

The significant number of such urgent pre-contractual proceedings—*and the diversity, complexity, and importance of the legal issues raised*—led, fortunately, to an initiative by three judges of the Supreme Administrative Court, who coordinated the publication of a series of ***Thematic Case Law Files***.

Essentially, this concerns a set of significant decisions — *whether due to the legal issues addressed therein or, in some cases, because they signal a shift in previously established jurisprudential trends of the Supreme Administrative Court in the field of public procurement.*

These files compile summaries of key judgments issued by the Portuguese Supreme Administrative Court on public procurement, divided into three thematic areas:

—procedural documents that frame the contract formation process;

—major topics regarding tenders and the award of public contracts;

—and, finally, more specific issues related to pre-contractual litigation before de court.

These ***Thematic Case Law Files*** are freely accessible on the official website of the Portuguese Supreme Administrative Court.

[I therefore recommend its reading to all those interested. It will certainly be valuable not only for judges, public prosecutors, lawyers, public entities, and academia, but also for all stakeholders, and citizens in general.]

In order to make it absolutely clear that the pursuit of public interests—*not merely a unidimensional public interest*—lies inherently and inescapably at the core of Public Procurement Law, I shall now present some of the most emblematic decisions recently handed down by the Portuguese Supreme Administrative Court on this matter:

I – Selection Criteria Set in the Contract Formation Documents

The necessity to comply with the selection criteria established in the contract formation documents is—*essentially for reasons linked to the public interest and the principles guiding administrative activity*—of such importance that if an economic operator intends to rely on the capacities of a third party to perform the contract, it must prove, or at least submit to the contracting

authority, a declaration whereby that third party undertakes to comply with those criteria.

In 2023, following a preliminary ruling question referred back by the Supreme Administrative Court of Portugal, the Court of Justice of the European Union held that Article 63 of Directive 2014/24/EU on public procurement was opposed to a national regulation whereby an economic operator intending to rely on the capacities of another entity to perform a public contract was only required to submit that entity's qualification documents and commitment declaration after the contract had been awarded.

In light of this ruling, the Supreme Administrative Court decided that a proposal in which an economic operator intended to rely on another entity's capacities for contract performance, but did not submit, together with the proposal, that entity's qualification documents and commitment declaration, must be excluded *ab initio*. In other words, it failed to prove that this "third party" would possess the necessary resources to meet the established selection criteria, thereby preventing the contracting authority

from verifying whether that entity complied with the relevant selection criteria and whether there were grounds for exclusion. The Court affirmed that such verifications, at the contract formation stage, do not conflict with the principle of proportionality *[Case No. 025/21.2BEPRT, 09-02-2023]*.

II – Guarantees of Quality of the Supplied Goods or Public Service Provided

The demonstration of guarantees regarding the quality of the goods supplied or the public service provided, in light of the documents constituting the contract formation procedure, is also relevant for the acceptance or rejection of proposals in such procedures.

Very recently, the Supreme Administrative Court came across a case in which it was necessary to determine whether a document submitted by a bidder in its proposal met the conditions set out in the contract

documents; specifically, whether it demonstrated the economic operator's capacity to supply replacement parts. It should be noted that the document submitted contained merely a declaration by which the bidder assumed responsibility for having the capacity to supply the requested replacement parts.

The Supreme Administrative Court held that, in this case, the contract documents required from bidders not merely the assumption of responsibility for supplying replacement parts (*as was the case with the bidder's proposal at issue*), but rather documentary proof or demonstration that they effectively possessed the capacity to provide such parts. For this reason, the proposal could not be admitted outright.

However, the Court understood that because the document in question referred to facts or qualities of the bidder prior to the submission of the proposal (*and not contractual obligations to be assumed in the future*), the proposal should not have been immediately excluded without first inviting the economic operator to remedy the identified irregularity. *[Case No. 01181/23.0BEPRT, 24-10-2024]*.

III – Compliance by Economic Operators with Current Legal Provisions on Social, Labour, Environmental Matters, Gender Equality, and the Prevention and Combat of Corruption

It is important to emphasize the essential nature of compliance by economic operators with the current legal provisions on social, labour, environmental matters, gender equality, and the prevention and combat of corruption, under penalty of potentially having their proposals excluded in the context of public contract formation procedures.

In several rulings, the Supreme Administrative Court has recalled that the Portuguese Public Contracts Code requires economic operators to comply with the obligations in force concerning labour matters (*this requirement has been particularly emphasized since the reform introduced in this legislation in 2017*). Moreover, the legal duty of oversight imposed on contracting authorities is not limited to the contract execution phase but extends to the pre-contractual phase as well.

It is mandatory, when analysing an abnormally low price or cost, to consider various circumstances and, when necessary or relevant, to request clarifications regarding compliance with obligations arising from environmental, social, and labour legislation, under penalty of possible exclusion of the proposal in question.

In other words, the legislator has explicitly established that contracting authorities must adopt an active role in ensuring respect for labour regulations, not only during contract execution but also at the moment of contract formation. *[Among others, see the rulings related to Case No. 0556/24.2BEPRT, of 23-01-2025 and Case No. 0339/21.1BECBR, of 22-09-2022].*

IV – Primacy of the General Principles of Public Procurement Law

Regarding the undeniable predominance of the general principles of Public Procurement Law in the fair resolution of disputes, I recall a decision of the Supreme Administrative Court from this year, 2025, in which it was affirmed that the principle of competition does not always

apply in the same way in Public Contracts Law. While on one hand it aims to encourage the participation of the greatest possible number of candidates and bidders, such broad participation must necessarily be accompanied by a system of guarantees that ensures equality of access rules and opportunities, so that effective and healthy competition among them may take place.

Consequently, the requirements set for the execution of a contract work, as established in the procurement documents, are instrumental in ensuring the control or supervision of the proper progress and execution of the construction works (*i.e., they serve the purpose of allowing the State to control the pace and sequence of execution and the means/equipment used in the project*).

The Supreme Court thus held that, in the case of public works contracts, the Work Plan document often contains the necessary elements for the contracting authority to adequately control the human resources and equipment allocated to the execution of the contract. Therefore, its absence prevents the contracting authority from fully exercising its powers of direction, supervision, and, if applicable, the imposition of sanctions

during the execution of the construction contract. *[Case No. 02401/23.7BEPRT, of 13-02-2025]*.

V – Finally, within this scope, I emphasize the primacy of the public interest and the requirement imposed on the courts to carefully weigh, in each specific case, the competing values in order to ensure the continued or efficient satisfaction of the public interest.

As you all surely know, in pre-contractual litigation there is an automatic suspensive effect arising from the challenge of award decisions, which corresponds, to some extent and by imposition of European Union law, to the recognition of a *standstill* period aimed to guarantee an effective contentious appeal.

However, there are situations in which, even though the automatic suspensive effect of the award decision (or of contract execution, if already initiated) is legally established, this paralyzing consequence of the normal development of public-law contractual relations must be lifted after balancing all the public and private interests at stake, if it is concluded that

the damages resulting from maintaining the suspensive effect outweigh those that could arise from its removal. This highlights the crucial importance of the intervention of administrative courts.

The Supreme Administrative Court has recently had the opportunity to rule on the legal regime for lifting of the automatic suspensive effect, clarifying — *with reference to European Union law, specifically Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007* — that the possibility of lifting the automatic suspension is limited to situations in which the harm to the public interest goes beyond the natural, ordinary, contemporaneous, or immediate consequences of the non-execution of the contract. A mere detrimental impact on the public interest is not, in itself, sufficient to justify such a measure.

It is along these lines that the concept of "*overriding public interest*" must be interpreted. Were it otherwise — *as I have previously said* — the public interest would, by its very nature, always prevail in the performance of the contract, consistently outweighing private interests, which are, as a rule, of a merely financial nature.

In this particular case, the judgment - *delivered in February of this year* - held that the automatic suspensive effect of an award decision concerning a framework agreement for the acquisition of combustion, electric, and fuel-powered buses should be lifted. This conclusion was based on the fact that such vehicles were considered essential and indispensable to the provision of public passenger transport services, with direct impact on the population, economic activity, urban planning, road safety, and the environment. It was further noted that the case concerned a continuous service intended to guarantee the uninterrupted and comprehensive provision of that public service across the entire national territory.

In support of its decision, the Portuguese Supreme Administrative Court carefully weighed the competing interests and ultimately recognized that the provision of public passenger transport constitutes one of the State's services that has a direct and material effect on the general public, economic operations, urban governance, road safety, and environmental protection.

Accordingly, the Court concluded that the circumstances of the case, in light of the applicable law, not only justified but indeed required the lifting of the automatic suspensive effect that would normally apply in such proceedings. *[Case No. 02513/24.0BELSB-S2, dated 30 January 2025]*

Ladies and Gentlemen, it's time to conclude.

It was my intention, not only to underline the importance of public procurement in the pursuit of the public interest and its major significance for individuals, businesses, and the economy, but also to provide a brief context of the core principles of Public Procurement Law and its practical manifestations — all of which have clear and decisive implications for the activity of the administrative courts and, in particular, for the development of case law by the Portuguese Supreme Administrative Court.

I conclude by thanking you all for the attention given and I sincerely hope that these, and other related topics, will serve as the basis for a broad and inspiring discussion over the course of the next two days.

Thank you very much.

Pedro Marchão Marques