

# The guaranties provided by the principle of *audi alteram partem* and of the right to a fair hearing within the ambit of the Accounting Court of the State of São Paulo (TCE-SP)



Em caso de dúvidas sobre os temas discutidos nessa publicação, favor contatar o escritório.

If you have any questions regarding the matters discussed in this publication, please contact the office.

**Antonio Araldo Ferraz Dal Pozzo**  
Sócio Fundador | Founding Partner  
araldo@dalpozzo.com.br

**Augusto Neves Dal Pozzo**  
Sócio Fundador | Founding Partner  
augusto@dalpozzo.com.br

**João Negrini Neto**  
Sócio | Partner  
joao@dalpozzo.com.br

**Percival José Bariani Junior**  
Sócio | Partner | CLO  
percival@dalpozzo.com.br

**Beatriz Neves Dal Pozzo**  
Sócia | Partner | CEO  
beatriz@dalpozzo.com.br

**Ana Cristina Fecuri**  
Advogada | Lawyer  
Autora | Author  
afecuri@dalpozzo.com.br

A presente publicação é produzida pelo corpo técnico do escritório Dal Pozzo Advogados e se destina a fins meramente informativos. Ela não constitui e tampouco deve ser utilizada como aconselhamento advocatício. O texto reflete a opinião pessoal de seus autores.

This text is published by Dal Pozzo Advogados for informational purposes only. It is not intended and it should not be interpreted, or construed, as legal advice. The text expresses the opinion of the authors.

© Dal Pozzo Advogados. All rights reserved 2018.

**DALPOZZO**  
ADVOGADOS

**SÃO PAULO**  
Rua Gomes de Carvalho, 1510 - 9º andar  
04547-005 - Vila Olímpia - São Paulo  
Office +55 11 3058-7800

**BRASÍLIA**  
SHS Quadra 06 - Conjunto A - Bloco E - Sala 1411  
70316-000 - Edifício Brasil 21 - Brasília DF  
Office +55 61 3033-1760

[dalpozzo.com.br](http://dalpozzo.com.br)

One of the most frequent doubts presented by companies contracted by the Government, in proceedings before the São Paulo Accounting Court, refers to the reflexes of the signing of a statement of awareness of notice, instituted by Resolution 08/2004, issued by said Accounting Court, and grounded on Article 90 of Federal Law no. 709/931<sup>1</sup>, within the sphere of its rights.

This is so because, upon execution of the statement of awareness and notice, such companies declare not only to be aware that the agreement between the parties will be subject to the supervision of said Court, but also assume the duty to follow up on the status of all the procedural acts until final judgment, including court orders and decisions rendered and published in the Official Register of the State, in order for them to, if so needed, present their defense, lodge appeals and whatever else may apply.

Countless contractors who were affected by decisions restricting their rights have submitted to the State Judiciary the analysis of the constitutionality of the Resolution published by the São Paulo Accounting Court, which, by a majority decision, accepted the thesis argued and assured the right to due process of law, based on Binding Precedent no. 3<sup>2</sup>, issued by the Brazilian Supreme Court, and on Article 5, items LIV and LV, of the Brazilian Constitution, thus determining the annulment of the aforementioned decisions and the resumption of proceedings<sup>3</sup>.

However, we observe that the position initially adopted by the State Judiciary, although still followed in some of the cases submitted to it, especially when there are penalties imposed on contractors, has been losing its strength in recent years. There is a clear and growing change of jurisdictional position on the subject, toward accepting the argument that the signing of the statement of awareness and notice is sufficient to replace the personal service of notice on the interested party as to the initiation of the administrative proceedings in the Accounting Court<sup>4</sup>.

<sup>1</sup> Art. 90. Notification of the acts and decisions of the Accounting Court is presumed to be completed upon publication thereof in the Official Journal, without prejudice to the exceptions under the law.

<sup>2</sup> "In proceedings before the Federal Auditing Court, the principle of *audi alteram partem* and of the right to a fair hearing are guaranteed when the decision may result in annulment or revocation of an administrative act that benefits the interested party, except for the assessment of the legality of the act of initial granting of retirement and pension."

<sup>3</sup> TJSP; Appeal / Mandatory Review 0017013-33.2012.8.26.0053; Adjudication Date: April/11/2018.

<sup>4</sup> TJSP; Interlocutory Appeal 2106559-54.2017.8.26.0000; Adjudication Date: November/29/2017.

# The guaranties provided by the principle of *audi alteram partem* and of the right to a fair hearing within the ambit of the Accounting Court of the State of São Paulo (TCE-SP)

---



Due to such court dissent, and even though the question posed is subject to heated legal debates, it is recommended that those who are under the jurisdiction of the Accounting Court of the State of São Paulo follow *pari passu* the proceedings under supervision, in order to provide the clarifications concerning their operation, regardless of any personal notification, and if so needed, in order to avoid any negative consequences arising from decisions rendered in proceedings the processing and contents of which they do not even have any knowledge.