The mischaracterization of contract object: TCU cases

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ABSTRACT

This study aimed to present a list of arguments in Judgments of the Federal Court of Accounts – Brazil (TCU) about what this Court understands as mischaracterization of the contract object. It was motivated by the contact I had with contractual changes as an Analyst of the National Transportation Infrastructure Department (DNIT / BA), and by publication of Judgment nº 2819/2011 - of the Federal Court of Accounts – Brazil (TCU) - Plenary. Based on the judgments of the TCU, especially Judgment nº 2819/2011, which determines that the DNIT must obey the limits set and provided for in art. 65 of law nº 8.666 / 1993, some cases were highlighted as well as the observations made by the Court in contrast with the reasons presented by the corresponding audited bodies. In those cases presented, in addition to recurring disobedience to legal limits, we found forms used as reasoning as well as how important it is to understand what mischaracterization of the contract object means, in order to discourage actions that cause losses to the exchequer in this particular case, more related to investments in infrastructure.

Keywords: Mischaracterization; Contract object; TCU.

1. INTRODUCTION

As a Transportation Infrastructure Analyst of the National Transportation Infrastructure Department –

DNIT, my interest in dealing with the mischaracterization of contract objects arises from having contact with cases related to road maintenance services. Some of the cases present requests for alterations, whether exclusion or inclusion of services. My interest also arises as from the publication of Judgment No. 2819/2011 - TCU - Plenary, which enforced upon DNIT compliance with the limits provided for in art. 65 of Law nº 8.666/1993.

The purpose of this study is to present a list of arguments found in TCU's Judgements about what this Court understands by mischaracterization of the contract object. More specifically, it will describe situations of contractual amendments audited by TCU and will examine possible cases of mischaracterization of the object.

The research, which was descriptive and documentary, was held in the first half of 2015, when the main analyses performed were those of Judgments published by TCU, under the guidance of Judgment nº 2819/2011, which, in its wording, refers to several other Judgments dealing with the same subject.

Initially, we will introduce Judgment nº 2819/2011, its subject and conclusion. Then, we will present situations in which the mischaracterization of the contract object is evidenced, grouped in the following topics: real cases, quaint cases and hypothetical case. These cases did not include renovation of buildings or equipment[1].

We understand that this study is important because it enables suggestions for future researches correlated to the topic addressed. It is also important because it seeks to present a list of arguments based on TCU's Judgements about what this Court understands by mischaracterization of the contract object, it favors the implementation of improvements in the provision of public services, in our case more specifically focused on infrastructure.

2. JUDGEMENT Nº 2819/2011 – TCU – PLENARY.

Judgment nº 2819/2011 analyzes an appeal filed by DNIT, considering subitem 9.2 of Judgment nº 749/2010, partially amended by Judgment nº 591/2001 - TCU - Plenary.

Item 9.2 stands out as a result of the analysis, since it enabled a new view by DNIT of the changes introduced in some of its contracts.

> [...] ordering the National Transport Infrastructure Department, in future contracts executed from the date of publication of this Judgment in the Official Daily Gazette, for the purpose of compliance with the limits of contractual amendments provided for in art. 65 of Law 8.666/1993, to consider, the decreases or exclusions of amounts separately. That is., the set of decreases and the set of increases must always be calculated based on the original amount of the contract by applying to each of these sets, individually and without any offsetting

between them, the amendment limits set forth in the legal provision (BRASIL, 2011b, p. 17).

A careless interpretation of this order may contribute to a mere compliance with the percentage limits imposed by law, without due attention to the understanding that led to the resolution of this Court: the mischaracterization of the object in contracts executed by the Government. Therefore, it is important to read fully the referred document, which presents real situations, their peculiarities, as well as the argumentative development that, by referring to other Judgments and current legislation; it is possible to understand the objective of the final decision. This decision is, naturally, always open to new discussions and appeals to the extent permitted by current legislation.

Without wishing to cover the entire topic addressed in the referred Judgment, as well as the details present in the argumentative dynamics, we will present some cases which may favor a broader view, although the result of a closer look, of the topic addressed in this study.

3. REAL CASES

This section will present two real cases giving rise to a TCU audit that verified the modification of the contract object through amendments.

3.1 AN INCREASE ABOVE 100%

Concerning the construction works of the Regional Center of Nuclear Science - CRCN in Pernambuco, analyzed in Judgment nº 1733/2009 - TCU - Plenary, this case will be discussed with the aid of Table 1, below.

We can observe that, considering only the first 5 amendments to the contract, the total amount excluded is equivalent to 73.4% of the original value, while the total amount included represents 90.4%. Column Financial Impact Expected, added to the table, indicates the percentages for each amendment, assuming that each amendment had no relation with the previous ones. However, it is important to note that:

- The total financial impact expected (17%) refers to the balance of increase and decrease;
- The total decrease exceeds the 25% limit;
- The total increase exceeds the 25% limit;
- Some amendments (1st, 3rd and 4th) have equal amounts for decreases and increases, which represents a total impact, per adequacy, of 0%. However, in addition to the fact that, in this particular case, the sum of increases and decreases is not separately taken into account, this situation in which the total decrease matches the total increase, although possible, is a great challenge regarding its generalization of implementation, considering the dynamics and nature of engineering services. It is observed that, in addition to being an ingenious process, literally speaking, it requires a certain amount of luck. Additionally, TCU itself has indicated situations in which some unit prices have the highest percentage of overpricing to the detriment of necessary items, excluded without inclusion of replacement items, simulating a change without financial impact, as evidenced in Judgment nº 177/2005 - TCU - Plenary and commented in the material produced for the Public Works Audit courses of this Court.

In this case, the audit reported that, after the 6th amendment, the total increase represented 27.35% of the contract value, totalizing 77.94% of exclusions against 117.80% of inclusions, resulting in an increase of 39.85% of the initial contract value. This demonstrates the mischaracterization of the object.

Regarding the audited party's argument that the amendments, up to the 5th amendment, did not exceed the 25% limit, considering that they computed 17%, the Court states that

Table 1:
Exclusions and inclusions through the first 5 amendments

ORIGINAL CONTRACT VALUE: R$ 16,186,749.95			
AMENDMENT	**AMOUNT EXCLUDED (R$)**	**AMOUNT INCLUDED (R$)**	**FINANCIAL IMPACT EXPECTED (%)**
1º	2.405.595,37	2.405.595,37	0
2º	1.222.946,71	2.872.599,10	10,20
3º	6.228.532,96	6.228.532,96	0
4º	1.977.454,68	1.977.454,68	0
5º	55.788,85	1.155.788,85	6,80
Total (R$)	11.890.318,57	14.639.970,96	2.749.652,39
Total (%)	**73,4**	**90,4**	**17,0**

Source: Adapted, by the author, from Brasil (2009)

> If we considered only the balance of the increases minus decreases to calculate the 25% limit set forth in art. 65, paragraphs 1 and 2 of Law nº 8.666/1993, it would be possible to remove 100% of the items of a contract and add other items amounting to 125%, and, although the bidding project would have been completely modified, it would still be in compliance with the limit imposed by law. Of course, this understanding cannot thrive (BRASIL, 2009, p. 18).

3.2 THE OBJECT IN LAYERS

We observe in Judgment nº 749/2010 - TCU - Plenary, which addresses the services of adjustment, duplication, improvement and restoration on Highway BR-153/MG, that the analysis of the mischaracterization of the contract object is done by stratification of the object, as if slicing, cutting into layers.

The first layer, called first level (nature of the intervention), contains the performance of the services of adjustment, duplication, improvement and restoration on Highway BR-153/MG. The second layer (service group) contains the services of earthmoving, drainage, construction of special works of art, paving, environmental protection, signaling and complementary works. In these two layers, according to the Court's analysis, the object remained the same.

However, on the third layer (specific services), it was understood that the bidding object was modified. To illustrate: in the paving group, the paving had its structure changed; in the earthmoving, the item on disposal and transport of soft soil was excluded; in the special works of art, the technique for construction of viaducts and bridges was changed; in signaling, the services of vertical signaling were excluded.

This understanding is also reinforced by references to other Judgments, such as Judgment 2.065/2007 - TCU - Plenary, in which we stress:

- Uneconomical changes of average transport distances in earthmoving services;
- Replacement of the base improved with sand and cement 4% with a soil-cement base 6%;
- Replacement of sub-base stabilized with soil and sand with a sub-base granulometrically stabilized;
- Removal of lime in the regularization of the subgrade;
- Change in the consumption of bituminous materials;
- Replacement of MFC-01 curbs with MFC-03 curbs;
- Exclusion of special works of art covered by the bidding and inclusion of other works not covered by the bidding.

Thus, the analysis presented in the document evidenced

> [...] errors and omissions in the basic project, going against art. 6, IX and art. 7, I, of Law nº 8.666/1993 [...] And the change of the object in noncompliance with art. 3 of Law nº 8,666/1993 and art. 37, heading and item XXI of the Federal Constitution, for failure to meet the binding principles of the public bid invitation and of equality (BRASIL, 2010, p. 6).

4. QUAINT CASES

In these cases, we sought to focus on the examples considered to be more didactic, although, sometimes, also quaint, present in the reasoning given by the audited bodies and also in the subsequent arguments of the TCU.

4.1 CHANGES IN TYPES OF ROADS

To better illustrate a situation that would be in conflict with the claim of DNIT's leaders, who defended the thesis that the contract changes should be evaluated only through the final financial impact on the contract price, we chose the following comparative, wherein

> [...] after hiring, for instance, the construction of a 'road with asphalt pavement', the Administration is not authorized to change the contract object to '**road with concrete pavement**', regardless of possible equivalence in the prices (BRASIL, 2011b, p. 5, bolded emphasis added).

If the argumentation was plausible, in a situation in which a **paved road** was changed into an **unpaved road**, the argument that the object was kept would fall on the fact that it remained a road.

Therefore, even if, in a case like the one shown by TCU in the aforesaid Judgment, there is no significant change in the total price of the work, the change in

quantities of services and materials originally brought to the bidding will be much higher than the limits allowed by law.

4.2 CHANGES IN CARS

In Judgment nº 1428/2003 - TCU, in opposition to the defense of the Special Department of Environment, Water and Mineral Resources of the State of Paraiba - SEMARH, the following example is presented for better understanding of the Court's indication:

> [...] I question whether it would be reasonable to authorize a certain bidder to purchase **ten popular cars** at a total price of R$ 230,000.00 and then to sign an amendment to replace these cars with **six luxury cars**, totaling R$ 280,000.00, on the grounds that both are cars and, thus, the object was not changed and the amendment has not exceeded the limit set forth in aforesaid art. 65 (BRASIL, 2011b, p. 6, bolded emphasis added).

Although this case seems enlightening in itself, according to the TCU, one cannot even treat this as a bidding process, since the object of the bid was one and another one was procured, even though both have the same generic name. This would also go against the principle of equality among bidders and would fail to ensure the best price to the Administration, as required by art. 3 of Law nº 8.666/1993.

4.3 CHANGES IN DAMS

Judgment nº 1428/2003 presents part of the SEMARH's defense, which claims that "if an earth dam, for example, has its building method changed to a roller-compacted concrete (RCC) dam, no one can state that there was a change of object" (BRASIL, 2003, p. 6, bolded emphasis added).

In its defense on the methodology chosen (BRASIL, 1999), SEMARH pointed out:

- The need to increase the quantities of works and services due to the situation found during the excavations of the foundation;
- The replacement of the massive earth, originally provided for in the basic design and the contract, with roller-compacted concrete - RCC, would bring economic and social benefits to the community impacted by the work;
- The RCC technology was hardly used in the building of dams in Brazil at the time of preparation of the basic design.

According to the Court's reasoning, it will obviously remain a dam, but can never be considered the same object of the bid. The Court itself, in Judgment nº 100/2011, points out that:

With regard to new technical solutions, it is expected that many of the technical choices be decided in the project phase, not during the works. Improvements in the road conditions should have been established in the work project, although the law allows the qualitative improvement of the project during the implementation, in the event of proven benefit to the public interest (p. 8, bolded emphasis added).

5. HYPOTHETICAL CASES

In this part, we allowed ourselves to draw up hypothetical situations that can actually occur, in order to provide further analyses and discussions on possible changes in the contract object.

5.1 SUCCESSIVE AMENDMENTS

In this part, we allowed ourselves to draw up hypothetical situations that can actually occur, in order to provide further analyses and discussions on possible changes in the contract object.

Based on Judgment nº 2819/2011 - TCU, regarding compliance with the legal limits for service groups excluded and included, imagine a situation of successive amendments to a hypothetical contract between a company of road works, the Object Factory Ltda., also hypothetical, and a government body. Find below, in Table 2, the information presented by the body.

What the table shows:

- In every amendment the amounts excluded and included are the same. Thus, there is no financial impact;
- Individually in each amendment, the amounts excluded and included are within the legal limits, i.e., up to 25% of the original contract value;
- Despite many amendments, the contract has not suffered any financial impact.

However, the table evidences that:

Table 2:
Exclusions and inclusions through the first 4 amendments

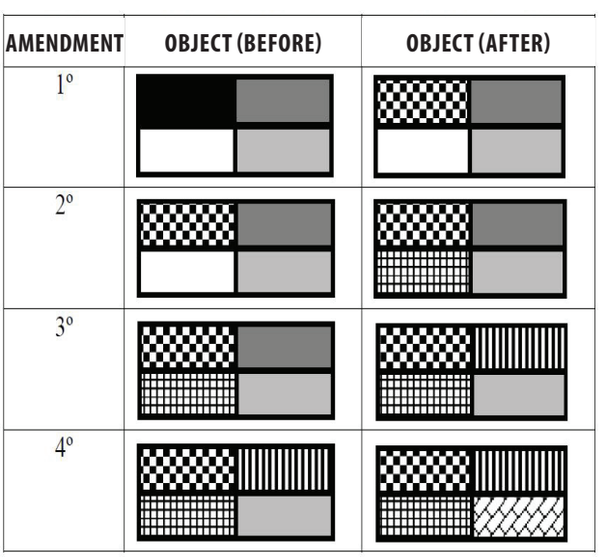
ORIGINAL CONTRACT VALUE: R$ 1,000,000.00						
AMENDMENT	**AMOUNT EXCLUDED**		**AMOUNT INCLUDED**		**FINANCIAL IMPACT**	
1º	(R$)	(%)	(R$)	(%)	0%	
	249.999,99	24,99	249.999,99	24,99		
2º	(R$)	(%)	(R$)	(%)	0%	
	249.999,99	24,99	249.999,99	24,99		
3º	(R$)	(%)	(R$)	(%)	0%	
	249.999,99	24,99	249.999,99	24,99		
4º	(R$)	(%)	(R$)	(%)	0%	
	249.999,99	24,99	249.999,99	24,99		
Total	(R$)	(%)	(R$)	(%)	(R$)	(%)
	999.999,96	99,99	999.999,96	99,99	0,00	0

Source: Original preparation

- In the 1st amendment, both exclusions as inclusions meet the legal limits of 25%;
- In the 1st amendment, since the amounts excluded and included are the same, the financial impact on the contract is zero;
- Whereas, in the 1st amendment, the changes made almost reached the acceptable limit, from the 2nd amendment on, there was no more conditions to exclude or include services;
- After the 4th amendment, it is evidenced that all the services originally contracted were excluded, giving way to new services, thus completely mischaracterizing the contract object.

In a graph, we would have the following distribution:

Chart 1: Changes to the contract object



Source: Original preparation

Where,

- Each smaller rectangle represents a group of services that characterizes the object hired (large rectangle) and is differentiated by its shade;
- Each one of them, in financial terms, also represents 24.99% of the original contract value.

This way, one can observe that, despite the assumption that, in each amendment, the limits of increase and decrease meet the law (25%), and the financial impact is zero, at the end of the 4 amendments, the object is not composed of the four original service groups (the rectangles of different shades) anymore, but rather of four other service groups represented in the scheme by the set of four hatched rectangles, thus fully mischaracterizing the object originally hired. Therefore, it is important to highlight that:

> If only the net change were considered, ultimately, it would be possible to exclude all the works, purchases and services originally hired and include new works, purchases and services that imply 125% of the value originally hired, updated. The purpose of the law, however, is not to define clear violations of the principle of mandatory bidding (BRASIL, 2011a, p. 5).

Although the use of an impact percentage of 24.99% may seem unusual or even not feasible, we stress that this is not only an educational effort to make the subject understood. To reach conclusions, we suggest consulting:

- Official Daily Gazette, of November 7th, 2013, section 3, p. 205 – Extract of the Amendment nº 4/2013 (DNIT);

- Synthetic Audit Survey Report / 2004 the House of Representatives - Bridge over Acre River (DNIT);
- Judgement nº 1502/2004 – TCU – Plenary (DNIT/ Deracre).

5.2 FREEDOM TO AMEND

Consider another hypothetical situation, according to Table 3 below.

What the table shows:

- In the 1st amendment, the amounts excluded and included are within the limits required by Law nº 8.666/1993, and the financial impact on the contract is 10%;
- In the 2nd amendment, no amount was excluded and the amount included is within the limits required by Law nº 8.666/1993, and the financial impact on the contract is 10%;
- The total amount excluded is 10%, while the total amount included is 30%, and the total financial impact is 20%.

However, the conclusion is that:

- In the 1st amendment, the amounts are legally acceptable and properly informed;
- In the 2nd amendment, individually, the amounts are also acceptable. Nevertheless, when considering the total inclusions (1st and 2nd amendments), it is found that its amount exceeds the 25% limit.

Despite having exceeded the legal limit, which evidences the mischaracterization of the object, the body was legally safe, considering Judgment nº 215/1999 TCU, according to which

> [...] the Administration is allowed to exceed said limits in the event of agreed qualitative and extraordinary amendments [...] **when the consequences of the other alternative - the termination, followed by new bidding and hiring - are too serious to the primary public interest** (Minutes 18 - Plenary VII, b, bolded emphasis added).

In other words, considering the critical situation concerning the work in question, which contributed to the aforementioned inclusions, we notice the full compliance with the treaty through the aforesaid Judgment. However, regarding the details of the critical situation commented, it is expected that, hypothetically, also, the reader can draw up the alleged event, as a way to exercise multiple analyzes on the possibility of exceeding the limits imposed by law, in this case, Law nº 8666/1993. Of course, far from the goal of only being able to exceed the limits, but rather visualizing decision making that always seeks the best for the public service.

6. CONCLUSION

Considering the motivation for this study, which was my professional contact with cases which presented changes, as well as the publication of Judgment nº 2819/2011 - TCU - Plenary, it was observed that the goal has been achieved. This can be seen in the list of arguments was presented in TCU's Judgements about the understanding of this Court on the mischaracterization of the contract objects. This is done based on the description of audited situations and examination of other cases in which the bidding object may change. Of course, without the intention to exhaust the subject addressed herein, we believe that this short study collaborated to broaden the understanding of the imperative duty to fulfill the legal directives governing the procedures in the public sphere, contributing to the improvement in the provision of services, specifically on infrastructure works.

Table 3:
Exclusions and inclusions through 2 amendments

ORIGINAL CONTRACT VALUE: R$ 1,000,000.00

AMENDMENT	AMOUNT EXCLUDED		AMOUNT INCLUDED		FINANCIAL IMPACT	
1º	(R$)	(%)	(R$)	(%)	10%	
	100.000,00	10,0	200.000,00	20,0		
2º	(R$)	(%)	(R$)	(%)	10%	
	0,00	0,00	100.000,00	10,0		
Total	(R$)	(%)	(R$)	(%)	(R$)	(%)
	100.000,00	10,0	300.000,00	30,0	200.000,00	20

Source: Original preparation

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NOTE

1 During the preparation of this study, the Senate Bill nº 25/2012 was approved at the Committee on Constitution, Justice and Citizenship – CCJ, amending paragraph 1 of art. 65 of Law nº 8.666/2003, to limit inclusions and exclusions in all the works, services or purchases, without exception, to 25% of the updated initial value of the contract.