

Integrated Contracting Regime: Binding or Discretionary?

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ABSTRACT

The choice of the integrated contracting regime is based on situations where the market offers more than one possible technical solution for the execution of a work or service, unknown to the Public Administration, giving the contractor the freedom to choose the most effective methodology, i.e., the one capable of actually producing the desired outcomes. When there is the possibility of using different methodologies in the execution of a work or service, they should refer to aspects of greater magnitude and quality, capable of engendering a real competition between proposals involving several methodologies, to ensure gains to the Public Administration. When transferring to private initiative the responsibility for the development of the projects and execution of the object, providing in the notice only a pre-project that makes it possible to characterize it, the Brazilian legal system introduces a contracting regime that conforms to the species associated with the result obligations. No longer limited to the basic project previously established in the notice's annex, it is possible for the contractor to use a specific solution of execution that, in the end, meets the conditions set forth in the notice.

Keywords: Integrated contracting. Advantageousness. Preferential regime. Assessment. Contract amendments. Risk matrix.

1. NORMATIVE CONTEXT

The integrated contracting regime has, in Brazilian Administrative Law – which obtained it from extensive international experience¹ –, a normative precedent in now revoked Decree 2,745/1998, which regulated the simplified tender procedure of Petróleo Brasileiro S.A. (PETROBRAS)², in the following terms:

1.9 Whenever economically advisable, PETROBRAS may adopt the integrated contracting regime, comprising basic design and/or detailing, execution of works and services, assembly, testing, pre-operation and all other operations deemed necessary and sufficient for the final delivery of the object, with the solidity and safety specified.

In the Brazilian legal system in force, the use of the integrated contracting regime in the bidding of engineering works and services is foreseen in Law 12,462/2011, which governs the Differentiated Public Procurement Regime (RDC). See below:

Art. 9. The integrated contracting regime may be adopted in the bidding of engineering works and services within the context of the RDC, provided it is technically and economically justified.

Paragraph 1. Integrated contracting comprises the design and development of the basic and executive projects, the execution of engineering works and services, assembly, testing, pre-operation and all other operations deemed necessary and sufficient for the final delivery of the object.

Paragraph 2. In case of integrated contracting:

I – the notice shall contain a pre engineering project containing the technical documents intended to enable the characterization of the work or service, including:

- a) the demonstration and rationale of the program of needs, the overall vision of the investments and the definitions of the service level desired;
- b) the conditions of solidity, safety, durability and the deadline, according to the provisions laid out in the *caput* and paragraph 1 of art. 6 of this Law;
- c) the architectural project's aesthetics; and
- d) the adequacy to public interest parameters, to economy in use, to the ease of implementation, to the environmental impacts involved and to accessibility;

II – the value of the contract will be estimated based on the values practiced by the market, on the amounts paid by the Public Administration for similar works and services, or on the evaluation of the work's total cost, using a synthetic budget or an expeditious or parametric methodology; and

III – the judgment criterion adopted will be that of technique and price.

Paragraph 3. In case the presentation of projects with differentiated execution methodologies is allowed in the pre project, the notice will establish objective criteria for evaluation and judgment of the proposals.



Paragraph 4. If the integrated contracting regime is adopted, it is forbidden to add amendments to the signed contracts, except in the following cases:

I – to recompose the economic-financial balance lost due to a fortuitous event or force majeure; and

II – due to the need to improve the technical adequacy of the design or specifications in relation to the contract's objectives, at the Public Administration's request, provided it is not a result of omissions or errors committed by the contractor, in accordance with the limits of the first paragraph

of art. 65 of Law 8,666, of June 21, 1993.

As laid out in the caput of art. 9 of Law 12,462/2011, the Public Administration may adopt the integrated contracting regime, as long as a rationale shows it is technically and economically adequate. The public administrator's discretion also stems from another RDC device, i.e., art. 8, paragraph 1, which establishes the preferential use of the integrated contracting regime alongside the overall price and integral contracting regimes.

2. TECHNICAL AND ECONOMIC PREFERENCE

Whatever the elected regime – the preferential ones or the others –, it is essential to justify clearly the technical and economic advantage of the solution adopted. As this is, so to speak, a discretionary choice of the manager in each case, both in relation to the Public Power's bidding and contracting procedures, there is possibility of controlling administrative discretion based on the motives expressed. The relevance of the motivation does not lie only on the association with the motives revealed. It is also important to demonstrate that, being a regime that the law declares preferential, the integrated contracting regime may only be replaced by another model if said model is shown to be superior in a specific case.

It should be noted that the TCU used Judgment 1,388/2016-Plenary to inform the Ministry of Transport, Ports and Civil Aviation (MTPA) that the option for the integrated contracting regime, as per subsection II of art. 9 of Law 12,462/2011 ("Art. 9. The integrated contracting regime may be adopted in the bidding of engineering works and services within the context of the RDC, provided it is justified technically and economically and that its object involves at least one of the following conditions: (...) II – possibility of execution with different methodologies ;"), must be based on objective studies that justify it technically and economically. In addition, one must consider the expectation of advantages in terms of competitiveness, time, price and quality, in comparison with other contracting regimes, especially the overall price contracting regime. Among other aspects and when possible, it should be compared to the international practice regarding its use when procuring the same type of work, generic rationales that are applicable to any enterprise being forbidden.

3. OBJECTIVE PARAMETERS

Based on a comparative analysis of contracts that have already been concluded or other



data available, the advantages and disadvantages (monetary or otherwise) of the use of the integrated contracting regime must be quantified, and a detailed rationale is required in case it is impossible to valuation of the parameters. Also according to the Federal Court of Accounts, in the tenders that adopt the integrated contracting regime covered by subsection II of art. 9 of Law 12,462/2011, it is mandatory to include in the notices objective criteria for evaluation and judgment of proposals with admissible differentiated executive methodologies. This complies with paragraph 3 of the same article (*"In case the presentation of projects with differentiated execution methodologies is allowed in the pre engineering project, the notice will establish objective criteria for evaluation and judgment of the proposals."*)

Thus, we can conclude that works and services characterized by techniques, methodologies, and conditions usually employed, identifiable and known by the Administration, are not in line with the integrated contracting regime of Law 12,462/2011. That is, using the integrated contracting regime is not admissible when the object of the tender already has a complete basic and/or executive project, since the solutions will be previously defined, bypassing the conditions set forth in art. 9 of the law for application by the institute.

According to the Federal Court of Accounts, under the terms of art. 9 of Law 12,462/2011, in order to choose the integrated contracting regime there must be technical and economic justification. From the economic perspective, the administration must demonstrate, in monetary terms, that the total expenses to be incurred with the implementation of the enterprise will be lower than those incurred with other contracting regimes. From the technical perspective, it must demonstrate that the object's characteristics allow real competition between contractors for the design of different methodologies/technologies that lead to solutions that the Public Power can use advantageously (Judgment 1,850/2015-Plenary, Rapporteur Minister Benjamin Zymler, Process No. 011,588/2014-4).

Law 13,303/2016, which foresees the legal status of public companies, mixed-capital corporations and their subsidiaries, also contains provisions on the use of the integrated contracting regime. See below:

Art. 42. In the bidding and contracting of works and services by public and mixed-capital companies, the following definitions shall be complied with:

[...]

6 – integrated contracting: comprises the design and development of the basic and executive projects, the execution of engineering works and services, assembly, testing, pre-operation and all other operations deemed as necessary and sufficient for the final delivery of the object, as laid out in paragraphs 1, 2 and 3 of this article;

[...]

Paragraph 4. In the case of bidding of engineering works and services, the public and mixed-capital companies covered by this law shall use semi-

integrated contracting, foreseen in item 5 of the caput, being responsible for the design or contracting of the basic project before the tender mentioned in this paragraph takes place. They can also use other modalities foreseen in the subsections of this article's caput, if this option is duly justified.

Paragraph 5. For the purposes of the final part of paragraph 4, the absence of a basic project shall not be accepted as justification for the adoption of the integrated contracting modality.

According to Law 13,303/2016, the absence of a basic project shall not be accepted as justification for the adoption of the integrated contracting regime. If the state-owned company is able to define, with a high degree of precision, the object of the contract and the conditions for its perfect execution, it must design or contract the basic project and choose another regime for the indirect execution of works and services. Therefore, it cannot adopt the integrated contracting regime because it does not have a basic project, when it is able to define the ideal solution.

4. INCLUDED IN A NEW GENERAL DRAFT BILL

Draft Bill 6,814, of 2017 (prior to Senate Draft Bill 559, of 2013), which seeks to repeal Law 8,666/1993, Law 10,520/2002 and arts. 1 to 47 of Law 12462/2011, also contains provisions on the integrated contracting regime. See below:

Art. 5. For the purposes of this Law, the following is considered:

[...]

30 – integrated contracting: contracting regime where the contractor is responsible for designing and developing the complete and executive projects, performing engineering works and services, providing goods or special services, assembling, testing, pre-operating and all other operations deemed as necessary and sufficient for the final delivery of the object, with remuneration based on the overall price, depending on the stage of the contract's execution;

[...]

Art. 41. In the indirect execution of engineering works and services, the following regimes are allowed:

1 – unit price regime;

2 – overall price regime;

3 – integral regime;

4 – contracting by task;

5 – integrated contracting;

6 – semi-integrated contracting;

7 – provision of associated service. (emphasis added)

Use of the integrated contracting is justified in the aforementioned laws and draft bill: there are situations in which the Public Administration needs to contract the execution of a work or service with a detailed design it does not have enough technical knowledge to carry out. However, the execution may be provided by business entities that are active in the field of the object of the tender. That is why this regime confers greater autonomy to the contractor so they can come up with technical and/or operational solutions, unknown to the Administration, that are essential to execute the object satisfactorily,

According to the Federal Court of Account's opinion in Judgement 1,388/2016-Plenary:

In these tenders, contractors have greater freedom to innovate and seek the constructive methodology they regard most adequate for the object's execution. This greater freedom may allow bidders to envisage alternatives with lower costs than the one that would have been established by the basic project. These lower costs, in a competitive environment, will lead to proposals that are more advantageous for the Administration, favoring the principle of economy. That is, the economic impacts caused by greater uncertainties about the work's budget during bidding can be counterbalanced by the possibility of the contractor seeking better solutions during execution of the contract.

The lack of definition of the execution method in the pre project developed by the Administration, granting bidders greater freedom to apply different methodologies during the contract's execution, frees the tender notice from technical requirements (professional and operational). This encourages the participation of a greater number of bidders and, therefore, makes it possible to obtain proposals that are more favorable for the contracting entity.

5. COMPETENCE TO PRODUCE BASIC AND EXECUTIVE PROJECTS

A common and distinctive feature of the integrated contracting regime, based on the aforementioned laws (Law 12,462/2011 and Law 13,303/2016) and draft bill, is the transfer of production of the basic project – referred to as *complete project*⁶ in Draft Bill 6,814, of 2017 – and executive project⁴ from the Public Administration to the winning bidder (contractor). Thus, in the internal phase of the bidding process, the Public Administration is only responsible for the creation of a pre project (which will be included in the bidding notice as an annex), based on previous technical studies, which will inform the elaboration of the basic (or complete) and executive projects by the winning bidder (contractor).

The pre-project⁵ comprises the specifications and techniques to be employed, the definition of the work fronts, the sequence of activities, the use and characteristics of the necessary equipment and the activities associated with the object's execution, to avoid possible external interference.

See below Minister Benjamin Zymler's opinion in Judgment 1,388/2016-Plenary:

That is, the pre-project should not be an imprecise or incomplete document, which does not adequately define the object. It should be a detailed engineering work that, by in-depth analysis of the best possible alternative chosen based on the technical and economic feasibility studies that precede it, allows the Administration to demonstrate how the public interest must be met. All this without preventing that innovations incorporated by the private initiative improve even more the advantageousness in fulfilling the needs of the program.

It is fundamental that the Public Administration bases the pre-project and the public notice on indicators of purposes and results that the successful bidder must produce. In this way, the contractor will have greater autonomy to define the methods of execution of the object and possible solutions for the achievement of results and purposes. Therefore, the integrated contracting regime is adopted in the pursuit of results, relativizing the means to achieve them.

The Administration's recognition that the market has innovative technical solutions and that, therefore, the task of designing the basic project can be superiorly performed by private initiative, does not exempt it from the responsibility of judging the basic project created by a third party, rejecting it if it disregards previously established technical and economic requirements, which should also be foreseen and defined in the proceedings, along with objective criteria for the judgement of the technical solutions presented (judgment criterion based on the combination of technique and price).

6. CONTRACT AMENDMENTS

The integrated contracting regime forbids the formalization of contract amendments. See below the provision related to this prohibition in Law 12,462/2011:

Art. 9. [...]

Paragraph 4. If the integrated contracting regime is adopted, it is forbidden to add amendments to the signed contracts, except in the following cases:

I – to recompose the economic-financial balance lost due to a fortuitous event or force majeure; and

II – due to the need to improve the technical adequacy of the design or specifications in relation to the contract's objectives, at the Public Administration's request, provided it is not a result of omissions or errors by the contractor, in accordance with the limits laid out in the first paragraph of art. 65 of Law 8,666, of June 21, 1993.

Also in Law 6,814, of 2017:

Art. 101. [...]

Paragraph 9. If the integrated contracting regime is adopted, it is forbidden to change contract values, except in the following cases:

I – to recompose the economic-financial balance lost due to a fortuitous event or force majeure; and

II – due to the need to improve the technical adequacy of the design or specifications in relation to the contract's objectives, at the Public Administration's request, provided it is not a result of omissions or errors by the contractor, in accordance with the limits laid out in the first paragraph.

The prohibition of the addition of amendments to the contract under the integrated contracting regime, except in the two exceptional cases listed ⁶, is the compensation for the greater autonomy conferred to the contractor in the definition of the technical and operational specifications related to the object and its execution, laid out in the basic and executive projects. In other words, the contractor will absorb any mistakes when producing the basic and executive projects and will not be able to pass on costs derived thereof to the Administration. This is because changes in the project are only allowed to recompose the equilibrium of the contract's economic-financial equation – a hypothesis, in principle, eliminated if there is an error by the bidder who created the project. Changes are also admitted in the interest of the Administration – a hypothesis that would be justified when the changes correct deficiencies or omissions by the Administration when creating the pre project or due to supervening events, and provided the amendment does not change the nature the object of the contract.

The two exceptional hypotheses, which authorize the Administration to change the contract relationship that was initially agreed upon, are subject to Art. 37, 21, of the Federal Constitution:

Art. 37 [...]

21 – except in the cases specified in the legislation, works, services, purchases and sales will be contracted through a public bidding process that ensures equality of conditions to all competitors, with clauses that establish payment obligations, maintaining the effective conditions of the proposal in the terms of the law, which will only allow the demands of technical and economic qualification deemed as indispensable for the obligations' fulfillment.

The administrative contract aims to meet the needs of the Administration and, reflectively, public interest. The contractor is entitled to obtain profit that is legitimate and inherent to its business activity, derived from the remuneration defined in the contract's financial clauses. The remuneration shall be ensured in the original terms that were agreed upon, and in the course of the contract's execution, preserving the initial burden/remuneration relationship that the Federal Constitution seeks to ensure when it establishes the maintenance of the proposal's effective conditions (art. 37, 21.) If, on the one hand, the Administration has the power-duty to unilaterally change the regulatory or service clauses of its contracts, on the other, the contractor has the right to maintain the economic-financial equation in specific situations that may compromise the contract's fulfillment, whether due to unilateral changes, unforeseeable circumstances or force majeure.

It should be noted that the hypothesis of addition of amendments under the integrated contracting regime, are *numerus clausus*, i.e., do not admit analogical or extensive interpretations, only occurring in the strict terms of the established regulation.

An evaluation performed by the Ministry of Transparency and Comptroller General of the Union (CGU)⁷ on the results achieved by the National Department of Transport Infrastructure (DNIT) with the use of the RDC, indicated the reduction of amendments under the integrated contracting regime compared to other indirect execution regimes adopted by the entity, but not their complete elimination. CGU found that the adoption of integrated contracting reduced the number of amendments in DNIT's works, mainly those related to changes in the value of the contract, but did not eliminate them: amendments were formalized in 40% of the completed works and in 31% of those in progress.

The percentage of amendments identified by CGU is considerable since, in the integrated contracting regime, any gains or charges arising from the solutions adopted by the contractor in the creation of the basic project must be earned or supported solely and exclusively by private initiative, regardless of the existence of a risk matrix disciplining the contacting process. On the other hand, any omissions or lack of definition in the pre project, as a rule, does not lead to the signing of contract amendment terms, because a pre project is not a basic project.

7. RISK MATRIX

According to art. 9, paragraph 5, of Law 12,462/2011, and Law 13,190/2015, if the pre project includes a risk allocation matrix between the Public Administration and the contractor, the estimated value of the contract may consider a risk rate compatible with the bid object and with the contingencies attributed to the contractor, in accordance with the methodology predefined by the contracting entity, which should, in principle, inhibit contract amendments aimed at the contract value's recomposition. The reason for this additional value (risk rate) in the bidder's proposal is to exclude, according to the scope of the risk transferred, amendments related to inaccuracies in the project considered during the bidding process.

In integrated contracting, according to TCU, it is essential to include the detailed risk matrix in the notice, allocating to each party the risks that are inherent to the enterprise (Judgment 2,980/2015-Plenary, Rapporteur Minister Ana Arraes, Process No. 034,015/2012-4).

In the integrated contracting regime, the greater restrictions to signing contract amendments is an additional risk for the bidders, so any risks projected by the Administration in the pre engineering project should be priced and considered in the respective proposals offered by them.

The risk matrix is the tool that defines the objective distribution of responsibilities associated with events derived from the contracting process, which is relevant for the characterization of the object and of the respective responsibilities of its future execution. It is also important so bidders can dimension their proposals. It falls within the scope of the pre engineering project, in compliance with the principles of legal certainty, isonomy, objective judgment, efficiency, and pursuit of the best proposal. It is usually represented by a graph containing two coordinated axes showing, with the indication of future events that may affect the contract's execution, the probability/risk of their occurrence and their impact on the enterprise. The risk matrix

identifies the main factors that may influence execution of the object, allowing the evaluation of strategies of allocation or mitigation of possible risks and of the probability of occurrence of events, indicating the respective financial impacts on the contract. The distribution of risks in the integrated contracting regime, according to the capacity of each bidder to price and manage them, contributes to the reduction of the enterprise's final cost.

8. CONCLUSION

One of the indirect execution regimes foreseen in the Brazilian legal system is that of integrated contracting. This regime distinguishes itself by transferring to the contractor the responsibility for the creation of the basic and executive projects, in addition to the execution of the work or service, assembly, testing, pre-operation, and all other operations deemed as necessary and sufficient for the final delivery of the object. The Public Administration is only responsible for the creation of a pre project, based on previous technical studies, which will help the successful bidder in the creation of the basic and executive projects.

The choice of the regime is based on situations where the market offers more than one possible technical solution for the execution of a work or service, unknown to the Public Administration, giving the contractor the freedom to choose the most effective methodology, i.e., the one capable of actually producing the desired outcomes. When the condition to be met is the possibility of using different methodologies in the execution of a work or service, they should refer to aspects of greater magnitude and quality, capable of engendering a real competition between proposals involving several methodologies and ensuring real gains.

From TCU's perspective, when transferring to private initiative the responsibility for the development of the project and execution of the object, providing in the notice only a pre project that makes it possible to characterize it, the Brazilian legal system introduces a contracting regime that conforms to the type associated with the obligations of results. No longer limited to the basic project previously established in the notice's annex, it is possible for the contractor to use a specific execution solution that, in the end, meets the conditions set forth in the notice. It is expected that not defining these limitations in the pre project will lead to an increase in competitiveness and, therefore, to more advantageous proposals for the Administration.

Thus, we perceive the advantages for the Administration of using the integrated contracting regime. The lack of delineation regarding the manner of execution in the pre project gives the contractor greater freedom to apply differentiated methodologies during the contract's execution. This frees the Administration from the requirements of technical (professional and operational) qualification laid out in the bidding notice and promotes the participation of a greater number of bidders, which, in turn, makes it possible to obtain proposals that are more advantageous. For the contractor, choosing the best solution to be used in the contract's execution influences the final cost of the work or service, particularly due to the possibility of efficiently allocating the risks involved and better managing and mitigating them.

However, an evaluation undertaken by the Ministry of Transparency and CGU on the results achieved by DNIT with the use of the RDC, with emphasis on the adoption of the integrated contracting regime, reveals the existence of a considerable number of contract amendments

(formalization of amendments in 40% of the completed works and in 31% of those in progress). This happened despite an express legal provision prohibiting them except in two exceptional cases (a) to recompose the economic and financial balance lost due to a fortuitous event or force majeure and (b) because of the need to improve the technical adequacy of the design or specifications in relation to the contract's objectives, at the request of the Public Administration, provided they are not the result of omissions or errors by the contractor, in accordance with the limits laid out in the first paragraph of art. 65, of Law No. 8,666/1993).

The considerable number of amendments registered by CGU in DNIT's contracts shows that the integrated contracting regime needs to be improved. Perhaps producing a pre project that is more detailed and has an excellent level of technical adequacy in view of the objectives of the contract, without reaching the basic project level, may contribute to the desired reduction in contract amendments. Perhaps qualified and efficient performance of the oversight designated to monitor the contract's execution will produce this reduction; perhaps demonstrating the performance/functionality of what was executed in each stage, and not just at the end of the execution, can also produce this effect.

Certainly, the combination of all these measures, along with the precise establishment of the fractions of the object in which the contractor will be free to adopt innovative methodological or technological solutions, in terms of modifying those previously outlined in the pre project, will enable the identity between the execution and the solution laid out in the pre project. The inclusion of the risk matrix in the pre project, allocating to each party the risks inherent to the work or service to be executed, will also tend to reduce the number of amendments under the integrated contracting regime. Not to mention its institution as preferential regime for the execution of works and services, which is also in Draft Bill 6,814, of 2017.

If this occurs, the answer to the intriguing question posed in the title of this article may be that which has always, in the doctrine established, the proportion between binding nature and discretion in public management. That is, strictly speaking, there is no totally binding or totally discretionary act. What exists are nuances of binding or discretionary, according to the regulation in force, with the purpose of offering elements that enable the public manager to distinguish the solution that best meets the results of public interest, according to the circumstances of each case. If these factual and normative circumstances prove that solution A is superior to solution B, administrative decision becomes bound to the former. In other words, the integrated contracting regime will be preferential and therefore mandatory whenever it is its superiority over the other regimes for the execution of a particular work or service is unequivocally demonstrated. Under these circumstances, not adopting it will violate the law and subject managers to answer for a choice that goes against the principle of efficiency, possibly making them guilty of administrative impropriety.

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NOTES

- 1 Judgment 1,388/2016-Plenary, of the Federal Court of Accounts (TCU), refers to the use of the integrated contracting regime in international legal systems. See below: "10. Although recent in our legal system, except for the provision in Petrobras' Contract Regulation (Decree 2,745/1998), this is a widely disseminated practice at the international level, being also applied in financing carried out by the World Bank, and which has shown good results . 11. Directive 18/04 of the European Parliament – pertaining to public procurement – establishes as follows: '*In view of the diversity of public works contracts, contracting authorities should be able to make provision for contracts for the design and execution of work to be awarded either separately or jointly. It is not the intention of this Directive to prescribe either joint or separate contract awards.*' 12. The Federal Acquisition Regulation (FAR) of the United States (item 36,302) also foresees the combination of design and construction in a single contract. 13. According to José Antônio Pessoa Neto and Marcelo Bruto da Costa Correia, in their work *Regime Diferenciado de Contratação (RDC): uma perspectiva gerencial* (Curitiba, Negócios Públicos do Brasil, 2015, p. 115), the model has been applied by the public sector in countries such as France, United Kingdom, Greece, Sweden, Mexico, United States, Australia, Thailand, Singapore, in works of various complexities such as buildings, hospitals, highways, railways and industrial facilities. According to the authors, in 2013, the model was adopted in the United States in about 30% of the universe – excluding military and residential works – of government construction contracting. 14. It should be noted, therefore, that this is not an innovation without basis or precedent, but rather a model already tested in other countries, and that can yield good results in Brazil. It is certainly not a universal solution for the public contracting of engineering works and services, but rather an option that may, in certain circumstances, better serve the public interest." (Rapporteur Minister Ana Arraes, Process No. 030,958/2014-8).
- 2 In the entity's current regulation (Decision of October 25, 2017, published in the Official Journal (DOU) of January 15, 2018), there is also a provision concerning the integrated contracting regime, based on Law 13,303/2016.
- 3 Art. 5. [...] 23 – complete project: a set of necessary and sufficient elements, with an adequate level of precision, to characterize the work(s) or service(s) established as the bidding's object, based on previous technical studies to ensure the technical feasibility and appropriate treatment of the enterprise's environmental impact, and to allow the evaluation of its costs and the definition of its methods and execution period, containing the following elements: a) development of the chosen solution, so as to provide an overall perspective on the enterprise and identify all its constituent elements with clarity; b) global and localized technical solutions, sufficiently detailed to minimize the need for reformulation or variants during the phases of creation of the executive project and execution and assembly of the works; c) identification of the types of services to be performed and of the materials and equipment to be incorporated in the work, as well as their specifications, to ensure the best results for the enterprise and executive security in the use of the object for the purposes for which it is intended, considering all identifiable risks and hazards, without detracting from the competitive nature of their execution; d) information that enables the study and deduction of the

- construction methods, provisional installations and organizational conditions of the enterprise, without frustrating the competitive nature of its execution; e) subsidies for the assembly of the work's management and bidding plan, comprising its programming, supply strategy, inspection standards and other necessary data in each case; f) detailed budget of the work's overall cost, based on the proper monetary valuation of services and supplies;
- 4 According to a precedent of the Federal Court of Accounts: "The administration shall require the contractors under the integrated contracting regime to submit a detailed budget containing descriptions, measure units, unit values and prices of all construction services, along with the respective compositions of the unit costs, as well as the detailing of social burdens and BDI rate, according to art. 2, sole paragraph, of Law No. 12,462/2011, applicable to all contract execution regimes of the RDC, and to Precedent 258 of the TCU" (Judgment 2,433/2016-Plenary, Rapporteur Minister Benjamin Zymler, Process No. 025,990/2015-2).
 - 5 Art. 74, paragraph 1, of Decree 7,581/11, which regulates Law 12,462/11, after repeating the requirements listed in art. 9º, paragraph 2, of this same law, regarding the technical documents that must be included in the preliminary design, added the following: (a) planning of the engineering work or service; (b) previous projects or studies that support the design adopted; (c) topographic and cadastral analyses; (d) surveying results; (e) descriptive memorial of the building's elements, construction components and materials, to establish minimum standards for contracting.
 - 6 According to a precedent of the TCU: "19. The prohibition of the addition of amendments to the contracts signed under the integrated contracting regime of the Differentiated Contracts Regimes is not absolute, and has the aim of ensuring that the risks assumed by private initiative are in fact attributed to it in the execution stage" (Judgment 1,541/2014-Plenary, Rapporteur Minister Benjamin Zymler, Process No. 004,877/2014-4).
 - 7 Synthesis of the report, extracted from the Ministry's website (<http://www.cgu.gov.br/noticias/2017/02/ministerio-da-transparencia-avalia-adocao-do-regime-diferenciado-de-contratacao-no-dnit>). The audit confirmed, in DNIT's RDC, the reduction in the term of the three execution regimes (overall price, unit price and integrated contracting), when compared to Law 8,666/1993. However, it indicated a high rate of unsuccessful bidding, with many notices being repeated, especially those under the integrated contracting regime, where noncompliance with the deadline established in the notices for presentation and approval of the project is frequent. The Ministry noted that the adoption of integrated contracting has reduced amendments in DNIT's works, mainly those related to the change in the contract's value. However, this regime does not eliminate the amendments, as they occurred in 40% of the completed works and in 31% of those in progress. The number of amendments tends to increase because larger, more complex works are still in progress, and because of the recent resource constraints. Data show a smaller number of participants and reduction in the discounts obtained in the works under the integrated contracting regime. The auditors found that, when integrated contracting is adopted, the final cost to be paid by the Administration is, on average, 7.5% higher than under the unit price regime and 6.9% higher than under the overall price regime. These percentages were obtained by weighting the average risk rates, discounts and amendments. The RDC allowed the use of new technologies and methodologies by the contractors, but allowed weaknesses in the preliminary design to lead to (sometimes disproportionate) gains, which were fully absorbed by the private partners, such as engineering gains. Recommendations and provisions. The Ministry of Transparency recommended the DNIT: to use, preferably, the RDC in electronic form, where greater competition and, consequently, greater discounts have been observed, in addition to greater transparency of procedures; not to use the percentage of 2% of the contractual value to estimate the value of the engineering risk insurance

policies, and to adopt the value calculated based on the price of the policies that were previously granted to the entity, which is, on average, one tenth of the value questioned by CGU; to include the risk matrix in the notices, in order to explain the exact responsibilities and burdens to be assumed by private initiative in all regimes. The first two recommendations have already been complied with by the entity examined. Regarding the third, DNIT reported using the risk matrix in all RDC Integrada's notices and committed itself to evaluating the possibility of extending the practice to the other two regimes. The Ministry of Transparency remains in the joint search for solutions and systematically monitors the adoption of measures by the managers.