The normative framework of the Public-Private Partnerships in Brazil

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1. BROAD AND STRICT CONCEPTS OF PPP

On the 30th of December, 2004, the law of public-private partnerships - PPP (Federal Law no. 11.079) was created. State laws had already been issued, such as of the States of Minas Gerais (no. 14.868, of the 16th of December, 2003) and São Paulo (no. 11.688, of the 19th of May, 2004) and several others.

In view of the current Brazilian legislation, the expression can be used legally in two parallel ways.

In a broader sense, public-private partnerships are the multiple business bonds of a continued nature established between the Public Administration and private partners to enable the development, under the responsibility of the latter, of activities with some degree of general interest. In this sense, the partnerships are different from contracts that, albeit also involving the State and private partners, either do not generate a continuous relationship or do not create legally relevant common interests (ex.: simple sale, for the lowest price, of governmental good without use for the Administration). In the contracts that, in contrast, create such interests and whose execution is carried out over time, the challenge emerges to discipline the relationship between the contract parties and to define how the contributions and responsibilities for the achievement of the objectives will be shared, as well as the risks deriving from the enterprise.

This wide range of partnerships includes well known contracts, such as the *public service concession* ruled by Law no. 8.987, of 1995 (Law of Concessions – LC) – that assigns to a private partner the profitable management of a public enterprise, under state regulation – and the more recent *management contracts* with social organizations (SOs) and *terms of partnership* with public interest civil society organizations (PICSO). There are several other different mechanisms, whether contractual or not, that enable the *private use of public good,* free of charge or not, in activities of some social relevance (setting up a new industry or community school, use of public university logo by professors' entity for sale of consultancy services, etc.). There is the case of private partners who, out of altruism or image benefit, graciously take on public responsibilities. And there is the case of entrepreneurs that exchange tax benefits for investment commitments. The variations are almost infinite.

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The legal basis of these multiple partnerships is not found in PPP law, but in the legislation that organized them gradually, especially from the 1990's. Possibly the best known is the Law of Concession. It is undeniably a partnership law, in a broad sense, not only for disciplining a classic arrangement that it makes logical sense to call a partnership, but also – and especially – for having been conceived under the impact of ideas and solutions that have been internationally associated with the expression PPP. But this is not all. The abundance of sectoral legislation, in areas as vital as telecommunications, energy, oil and gas, ports, railroads, etc., that emerged after the Law of Ports (no. 8.630, of 1993) initiated the trend, is also completely absorbed of these ideas and solutions. These examples of partnerships are the ones that involve economic public services. But, if we think about the social services, there are the laws on the SOs (Federal Law no. 9.637, of 1998) and on the PICSOs (Federal Law no. 9.790, of 1999). For partnerships aimed at establishing urban planning enterprises, there is the Statute of the City (Federal Law no. 10.257, of 2001), regulating urban operations in consortia and other mechanisms.

All this legislation has a common general goal – to enable the non-exclusive state management of the public interests – and adopts normative guidelines that repeat themselves and are in some way contrary to the previous legislative trends.

The new PPP laws are aimed at complementing the legislation to make possible specific contracts that, albeit interesting for the Administration, still could not be done, whether due to normative insufficiencies or because of legal prohibition. PPP Law (that is, Federal Law nº 11.079) had, then, the limited scope of instituting precisely the rules that were missing. And what was missing?

In the first place, norms disciplining the provision of a payment guarantee of tariff supplement by the awarding authority to the concessionaires of public services or works. It is true that, under the regime of the Law of Concession, it was already viable for the concessionaire to have other revenue sources in addition to the tariffs charged from the users, including additional amounts paid by the Administration. But, although these contracts were already legally possible, their practical viability depended on the creation of an appropriate system of guarantees, that protected the concessionaire against default by the awarding authority.

So, to create this system, PPP Law gave a name, *sponsored concessions,* to the public service concessions (including public works concessions) that involve the payment of tariff supplement by the Administration. The sponsored concessions are not something new, since they already existed legally. The novelty is the name, created only to facilitate communication. Thus, due to PPP Law, the already known service concessions of the Law of Concession were divided into two groups: the *sponsored* ones, with tariff supplementation, and the *common* ones, without tariff supplementation. In fact, beyond the name, there are new rules applicable to the sponsored concession modality, especially to enable the guarantees, as will be shown below.

Secondly, it was necessary to create legal conditions for the celebration of other contracts where, similarly to the traditional concessions, the private partners undertook the responsibility of investing and establishing state infrastructure and maintaining it afterwards, making it fulfill its purpose and being remunerated in the long term. It was necessary, in short, to allow the application of the economic-contractual rationale of the traditional concession to other objects, other than exploitation of economic public services (such as water supply and sewer services, electric energy distribution, fixed telephony, etc.).

After all, why not use it in administrative services in general, that is, the penitentiary, policial, educational, sanitary, judiciary, infrastructure services, etc. or even those resulting from division into stages or parts of the economic public services per se (establishment and management of a sewer treatment plant for a state-owned basic sanitation company or of an automated system of collection for a state-owned collective transport company, for example)? For such purposes, PPP Law created the *administrative concession* that copies the economic-contractual rationale from the traditional concession (obligation of initial investment, stability of the contract and long-term validity to allow capital recovery, result-based remuneration, flexibility in the choice of means to achieve the purposes established in the contract, etc.), and drew from the sponsored concession the rules aimed at enabling the guarantees.

In this way, it is evident that PPP Law is not a general law of partnerships, but rather a law on two modalities: the sponsored concession and the administrative concession. Therefore, specifically for disciplining this law, the PPPs are these two contracts, and nothing more. This is how the public-private partnership in a strict sense emerged.

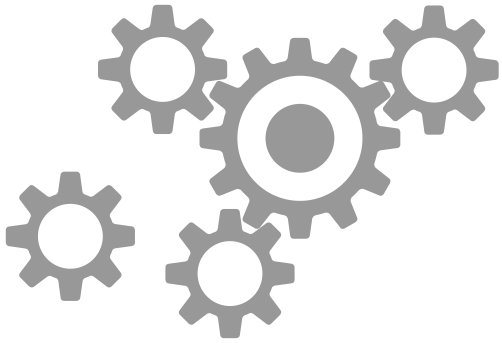
The two parallel ways in which the expression public-private partnership can be legally employed in Brazil are thus clarified. In a broad sense, PPPs are the multiple business bonds of a continued nature established between the Public Administration and private partners to enable the development, under the responsibility of the latter, of activities with some degree of general interest (common, sponsored and administrative concessions; sectoral concessions and deals; management contracts with social organizations; terms of partnerships with PICSOs etc.). Their legal regime is disciplined in many specific laws. In a strict sense, PPPs are the business bonds that adopt the form of sponsored concession and administrative concession, as defined by Federal Law nº 11.079, of 2004. Only these contracts are subject to the regime created by this law.

2. GENERAL ASPECTS OF THE PPP LAW

The central characteristic of the administrative and sponsored concessions that motivated the new legal discipline is to generate solid and long-term state financial commitments. Since the concessionaire will make investments right from the beginning of the execution and will be remunerated later, two goals emerge: to prevent the present administrator from irresponsibly committing future public resources, and to offer guarantees that persuade the private partner to invest.

The sponsored concession was already viable before, since tariff supplements could be paid as a complementary revenue (LC, article 11). Fiscal responsibility in the undertaking of these financial commitments was already provided for (Federal Constitution, article 167; Law no. 4,320/64; and Law of Fiscal Responsibility, complementary Law no. 101/2000). What the PPP Law did was to reaffirm these requirements (article 10) and create specific limits for expenditures with PPP contracts (articles 22 and 28). The clear objective is to strengthen fiscal responsibility (PPP Law, article 4, IV).

However, the administrative concession did not exist. The procurement of services by the Administration was only viable by means of the administrative contract of services provided for in the Law of Public Procurement, under the following regime: the Administration defines previously and comprehensively the way the service is to be provided (LP, article 7, paragraph 2, I and II); there must be monthly payment, corresponding to the cost of the rendering executed in the period (LP, article 7, paragraph 2, III and article 40, XIV, a; the price portions are calculated according to executed task, not the final result achieved (LP, article 7, paragraph 2, II and article 40, XIII); the contracted party cannot finance the operation (LP, article 7, paragraph 3); in the continuous services, the maximum original period of contract is one year, extendable until the limit of five years (LP, article 57, *caput* and item II).



The administrative concession is a new contractual formula for the Administration to obtain services (PPP Law, article 2, paragraph 1). Although the Administration defines the object and means of delivery of the service, it does not need to do it at length, it may allow freedom in the detailing and means to be employed (both PPP Law, article 3, *caput* and LP, article 25, combined); see also the reasons for vetoing article 11, II, of the PPP Law). The contracted party will make investments, a minimum of R$20 millions (article 2, paragraph 4, I). The remuneration will depend on the achievement of results (article 6, only paragraph and article 7), not deriving automatically from the execution of the service rendering (articles 4, VI and 5, III). The service will be delivered for at least 5 years (article 2, paragraph 4, II and article 5, I) and for a maximum period of 35 years (article 5, I).

Therefore, the creation of this new contractual formula – the administrative concession – made possible an arrangement for obtaining services for the State that was impossible before: one in which the private partner invests financially in the creation of the public infrastructure needed for the existence of the service and helps to conceive it.

Finally, the PPP Law overcame a weakness of the previous legislation: the lack of a well-organized system of guarantees of the long-term financial commitments of the State with the contracted party. The PPP Law not only affirmed the legality of these guarantees (article 8), but also conceived a new legal entity for this purpose: the Guarantor Fund of Public-Private Partnerships – FGP (article 16).

However, it should be taken into account that any new instrument can be misused by the Brazilian state apparatus, which has serious problems of control, in spite of all the undeniable advances of the last years. Specifically in relation to the partnerships in a strict sense, some risks should be pointed out.

The first one is the irresponsible commitment of future public resources, either by entering unpayable commitments, or by the choice of non-priority projects. the PPP Law took this into consideration, when it established rigid requirements of fiscal responsibility (article 4, IV and articles 10, 22 and 28), imposed previous public debate of the projects (article 10, VI) and created a centralized management agency to define the priorities and to evaluate the economic-financial possibilities for the federal contracts, as well as to oversee their execution (articles 14 and 15).

The second risk is that, due to haste or technical incapacity, the Administration might take on commitments with long-term contracts that are badly planned and structured. Deals of this type are very complex, for the number of variables involved (determination of the object, identification of the risks and their attribution to the parties, selection of evaluation criteria, etc.) and for the disarrangements that can occur over time. The option between a PPP contract and a common administrative contract requires comparison of the responsibilities and advantages of each one, based on sound elements. In its guidelines, the PPP Law pointed out the need to weigh all this (article 4). This norm has to be taken seriously; otherwise, there will be wasting of resources, conflicts between the parties and poor services.

The third risk is populist abuse in the state sponsorship of the concessions. The economic public services (telecommunications, energy, sanitation, collective transport, toll-paid highways, etc.) generate individualized economic value for its users. Therefore, it makes sense for them to pay the respective cost, by means of the tariff. The public service concessions are viable precisely for this: for the existence of users with interest and economic capacity to enjoy the services. But obviously organized groups will always fight to increase their economic advantages, whence the permanent criticism against the public service tariffs. Populist governments are very sensitive to these pressures and, if they can, they will always tend to contain tariff readjustments and to create exemptions for segments of users, transferring the respective responsibilities to those who do not vote in elections: the public coffers. The sponsored concession, in spite of its undeniable value and importance, is also a potential instrument for this misuse. Intent on this, the PPP Law, in addition to the guidelines in article 4 – that are added to those in the Law of Fiscal Responsibility – instituted a mechanism to try to contain the distortions: it demanded specific legislative authorization for each sponsored concession where more than 70% of the remuneration of the concessionaire is paid by the Administration.

The fourth risk of a program of partnerships is of misuse of the administrative concession. This new contractual modality was invented to allow the service provider to finance the creation of the public infrastructure, making investments gradually amortizable by the Administration. This is why its length may extend to 35 years (articles 2, paragraph 4, I and 5, I). However, it is to be expected that the interest of certain administrators and companies generates a fight for the loosening of the concepts, by means of interpretation, in order to use the administrative concession in the very same situations in which the administrative contract of services of the Law of Public Procurement was used. If the maneuver is successful, it will result in absurd contracts for surveillance or cleaning of public buildings, economic consultancy, maintenance of equipment, etc., for 10, 20 or 30 years, without any investment to justify this long duration.

It is predictable that two strategies be used by the interested parties to promote this misuse. One is to interpret article 2, paragraph 4, I of the PPP Law – that prohibits PPP contracts of a "value lower than" R$20 million – as if it were referring to the sum of the price portions to be paid to contracted party throughout the validity of the contract, and not the investment to be made by it. This interpretation does not make any sense, and even goes against the reason for the existence of the institute, well expressed in article 5, I: the attainment of private investments in the creation of public infrastructure. Furthermore, it would be ridiculous for the law to be simply aimed at increasing the cost of the administrative contracts, by providing for a "minimum value" of R$20 million. It is obvious, therefore, that what article 2, paragraph 4, I prohibits is the PPP contract that does not provide for the undertaking, by the private partner, of investment of at least R$20 million.

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Another strategy of the interested parties in the misuse of the administrative concession is the use of the argument that article 2, paragraph 4, I of the PPP Law would not be a general norm (Federal Constitution, article 22, XXI), but rather a specific norm, only applicable to the Union, not to the States and Municipalities, which would be free to establish the minimum value of investment in PPP contracts. The argument is clearly mistaken. The general norm includes both the definition of the existing contractual modalities in the Brazilian Law (e.g.: administrative contract of services and administrative concession contract), as well as, obviously, of the criteria for their application (object, duration, value, etc.). The minimum investment of R$20 millions, indicated in article 2, paragraph 4, I of the PPP Law, is a criterion that identifies the suitability of the administrative concession, therefore it is a general norm. The rhetorical argument that small or poor States and Municipalities would be discriminated, since their contracts do not reach the value limit, is only empty rhetoric. However, if these entities do not have the economic power for such enterprises, they simply do not need administrative concessions. Their businesses, which have to be small because of scarce financial resources, can well be carried out by means of common administrative contracts.

3. COMMON, SPONSORED AND ADMINISTRATIVE CONCESSIONS

The public service concessions referred to in article 175 of the Federal Constitution are a type of concession characterized by their object: the attribution, to the concessionaire, of the responsibility for the execution of public services (including establishment and maintenance of public works, such as highways and bridges). Regarding the remuneration regime, there are three possible types: the common, the sponsored and the administrative concession.

According to article 2, paragraph 3 of the PPP Law, common concession is the one where the awarding authority does not pay consideration in money to the concessionaire. The remuneration of the latter can include the collection of tariffs as well as other alternative revenues (LC, article 11), provided they do not involve payments of a pecuniary nature by the awarding authority. Therefore, the common concession is still applicable if the remuneration includes (or is limited to) non-pecuniary consideration made by the Administration, in the modalities foreseen in article 6, III and IV of the PPP Law.

The common concessions are not included among the PPP contracts. By the way, the only function of the concept of common concession is to clarify that it is ruled exclusively by the Law of Concessions and related legislation, and the provisions in the PPP Law are not applicable to it. This means, for instance, that in the common concession it will not necessarily be required that the concessionaire constitute a specific purpose society (as provided in article 9 of the PPP Law), and the more flexible rule of article 20 of the LC applies. Furthermore, in the bidding for common concession, it is not possible to use the reverse auction created by the PPP Law, in its articles 10 to 13.

The sponsored concession is, together with the common concession, a type of public service concession. Therefore, it is under the regime of the general legislation for this type of contract (the Law of Concession and other related laws, such as Federal Law no. 9.074, of 1995), with the complement of the norms of the PPP Law (article 3, paragraph 1).

What characterizes the sponsored concession is its remuneration regime, that must include both a tariff charged from the users and pecuniary consideration from the awarding authority (PPP Law, article 2, paragraph). If, in a utility concession, the concessionaire does not charge tariff from the users, and is remunerated by subvention from the awarding authority (with or without other non-tariff revenues), this will not be a sponsored concession, but rather an administrative concession.

And what it is the "pecuniary consideration of the public partner", essential for characterizing the concession as sponsored (article 2, paragraph 1)? It is, to use the language of article 6, the one done by "banking order" (numeral I) or by "cession of non-taxable credits" (numeral II). Article 6 alludes to other non-pecuniary forms for the Administration to remunerate concessionaires: granting rights over government goods and other rights against itself (e.g. the right of alternative use of real estate or to build above the coefficient of use of the place, referred to in articles 28 and 29 of the Statute of City). These revenues, in principle, are included in the alternative revenue concept referred to in article 11 of the Law of Concession. The mere fact that a concessionaire receives them does not turn its contract into a sponsored concession, since this only happens when the Administration provides a "pecuniary consideration"; otherwise the concession will be "common".

On the other hand, in the presence of tariffs charged from the users and the pecuniary consideration of the awarding authority, it will be considered a sponsored concession, even if the concessionaire also receives non-pecuniary consideration from the Administration (numerals III and IV of article 6 of the PPP Law) and other alternative revenues.

And what is the sense of these rules that exclude from the PPP contract concept those without pecuniary remuneration by the Administration to the concessionaire? It is simple to understand. The PPP Law was drafted to address concession contracts that involve special financial challenges: to organize the undertaking of long-term commitments by the Public Authority and to guarantee their effective payment to the private partner. Regarding concessions without such commitments, the PPP Law would have nothing to say.

For the concessions of public services ruled exclusively by the Law of Concession (those now called common concessions), there are no minimum or maximum legal lengths, nor legal minimum investment; it all depends on the Administration's decisions in each in case, to be provided for in the contract. However, when addressing the sponsored concession, the PPP Law prohibited the Public Administration from committing itself contractually to paying tariff supplement in certain public service concessions: those where the investment to be made by the concessionaire does not reach R$20 million (article 2, paragraph 4, I), and when the contract is for less than five or more than thirty-five years, including extension (both article 2, paragraph 4, II, and article 5, I, combined).

There are two types of administrative concession: of public services and of services to the State.

The administrative concession of public services is the one in which the object is the public services referred to in article 175 of the Constitution, that are rendered directly to managed parties without the collection of any tariff, and the concessionaire is remunerated by the awarding authority in pecuniary consideration (with or without other alternative revenues). In this case, although the managed parties are the immediate beneficiaries of the payments, the Public Administration is considered an indirect user, and has the economic rights and responsibilities that otherwise would belong to the concessionaire.

The administrative concession of services to the State is the one whose object are the same services referred to in article 6 of the Law of Public Procurement, that is, the rendering of utilities to the Administration, which will be the direct user of the services and will pay the corresponding remuneration. Regarding these aspects, the administrative concession of services to the State is close to the administrative contract of services ruled by the Law of Public Procurement. But there are significant elements that distinguish them, and that bring the administrative concession of services to the State closer to the traditional concession of public services. While the contract of services is limited to the rendering of services, the administrative concession of services to the State also includes a minimum investment of R$20 million by the concessionaire (PPP Law, article 2, paragraph 4, I) in the creation, expansion or recovery of the necessary infrastructure for the services, by means of the execution of works or supply of goods (article 2, paragraph 2) , that will be carried out for at least five years (article 2, paragraph 4, II). While the administrative concession of services to the State is in force, and the investment is not amortized, this infrastructure will constitute the concessionaire's asset, and may be reverted to the awarding authority at the end, if provided in the contract (article 3, *caput,* of the PPP Law and articles 18, X, and 23, X, of the LC combined). Thus, the contractual structure and the economic rationale of the administrative concession of services to the State and of the traditional concession of public services are identical.

The literal text of the PPP Law does not include the expressions that, for didactic reasons, we use here to explain the two types of administrative concession. But the corresponding categories are the creation of the law itself that, in its article 2, paragraph 2, defined the administrative concession as "the contract of service rendering of which the Administration is the direct user" (the hypothesis that we call administrative concession of services to the State) "or indirect user" (the hypothesis that we call administrative concession of public services).

The administrative concession of public services is a type of concession of public services referred to in article 175 of the Federal Constitution, together with the common concession and the sponsored concession. The three types are distinguished by the form of remuneration of the concessionaire, as explained above.

Now the administrative concession of services to the State is a type of administrative contract of services to the State. This includes two forms: the administrative contract of services of the Law of Public Procurement, whose object is restricted to the rendering of services; and the contract of administrative concession of services to the State, whose object also includes private investment to create, to expand or recover public infrastructure.

The PPP Law, to prevent confusion between the administrative concession and any of contracts ruled by the Law of Public Procurement – thus disorganizing the legal system – imposed *complexity* as an essential characteristic of the object of this new contract.

The administrative concession is not a simple service rendering contract, in contrast with the impression gathered from isolated reading of article 2, paragraph 2, since it will always include the investments by the concessionaire for the creation, expansion or recovery of infrastructure, to be amortized along the length of the contract (article 5, I), amounting to at least R$20 million.

Likewise, the administrative concession cannot be restricted to the execution of public works (article 2, paragraph 4, III), that is characteristic of the contract for public works under the Law of Public Procurement. It is true that the administrative concession can include the works (article 2, paragraph 2), but two other requirements must be present: the concessionaire will have to make a minimum investment of R$20 million and, after the infrastructure is ready, it should be used for the rendering of services for a period of at least five years (article 2, paragraph 4, II). These requirements do not exist in mere public works contracts. The requirements of rendering of services for a minimum time and of remuneration always tied to service rendering (article 7) – not, therefore, tied to the execution of portions of he works – prevents the administrative concession from becoming a simple contract of works with the contractor's financing.

Moreover, the administrative concession, although it can include the supply of goods for creation of infrastructure (article 2, paragraph 2), cannot be restricted to this (article 2, paragraph 4, III). The law intended to hinder the use of the concession as a simple alternative to the purchase contract under the Law of Public Procurement, as well as the financed purchase of goods. The minimum investment of R$20 million, as well as the rendering of services linked to such goods for at least five years, are indispensable.

Finally, when speaking of services as the object of the administrative concession, one is referring to the independent execution of service rendering to achieve previously established results. The PPP Law does not consider as such the mere supply of human labor (that is, of "man power") to work under the management of the Administration (article 2, paragraph 4, III).

The administrative concession, in its two types, is subject to the legal regime of the Law of Concession (according to PPP Law, article 3, *caput* and article 11, *caput*), except for: *a)* norms not pursuant to the new concession, relative to the conceptualization (articles 1 and 2), to the tariff matter and to the economic protection of the users (articles 6 to 13), and other aspects (articles 16, 17 and 26); and *b)* other norms that have corresponding norms in the PPP Law (articles 3, 4, 5, 14 and 20) or in the LP (article 22).

Article 6 of the PPP Law provides for various possible modalities for the offering of consideration by the Administration: there is the pecuniary considerations (by means of "banking order" or "cession of non-taxable credit") and non-pecuniary considerations (rights over government goods and over other rights of the Administration).

This raises the doubt on whether a contract can be categorized as an administrative concession when, although the consideration is entirely paid by the Administration, its nature is not pecuniary.

The answer is that, if the contract involves the public rendering of services to the managed party, it will be a common concession, remunerated exclusively with alternative revenues (LC, article 11). On the other hand, if the contract is for rendering of services to the Administration, and the other requirements of article 2, paragraph 4 are met (especially the private investment of at least R$20 millions and the minimum period of 5 years), it should be considered an administrative concession.

It should be noted that, when defining administrative concession, article 2, paragraph 2 left it implicit that the remuneration of the concessionaire is the responsibility of the Administration, not of the managed parties, because the Administration is the direct or indirect user of the services. But, in contrast with the sponsored concession (article 2, paragraph 1), the law does not require that, in the administrative concession, the consideration of the awarding authority be in money. It can be so under the other forms provided by article 6. The only form of remuneration that would remove the characteristics of the administrative concession is the receiving of a tariff by the concessionaire of the managed parties specifically to remunerate its services.

Concession is not a univocal term in the administrative legislation. Contracts that involve the transfer of the execution of public services and contracts that confer the right to the exclusive use of public goods by private entities are both denominated concession contracts. The common trait of these contractual figures is their long duration, justified by the need to allow the amortization of the concessionaire's investments. This explains why the PPP Law chose this term to denominate the new contractual modality that it was creating: after all, it was a deal where the private partner undertakes to make a significant initial investment, in order to create, expand or recover public infrastructure, thus enabling its use in the subsequent rendering of services. But the legislative option was not only terminological. The aim was to use, in new objects, the contractual structure and the economic rationale of contracts ruled by the Law of Concessions. Therefore, the PPP contracts were submitted to this law (according to article 3 of the PPP Law).

The PPP Law was drafted to provide private financing options for the creation, expansion or recovery of public infrastructure. The aim was to avoid generating the traditional state indebtedness, through purely financial contracts, with the subsequent contracting of contractor for the execution of works and, at the end, the infrastructure is taken over by the Administration itself.

Thus, to achieve the political objectives of the PPP program, its contracts cannot be limited only to execution of services or works. They must, necessarily, include the private investment. The R$20 million is the minimum private investment considered by the law to justify the award to the contracted party of the benefits of the concession regime – the long duration, the special safeguards against termination, etc.

One of the problems of traditional contracts of works is the economic lack of interest of the contracted party for the good execution of the contract. The only risk of poor execution is that the Administration might refuse to receive the object. But, apart from this only being a risk if the Administration has the technical capacity to identify the flaws – which it often does not – the fact is that fraud in the execution generates enough resources for the contracted party to bribe the inspection of the works and to attain easily the definitive receiving of the object. By preventing the PPP contracts from being limited to execution of works or supply of equipment (article 2, paragraph 4, III), the PPP Law linked the remuneration of the private partners directly to the fruition of the services by the Administration or the managed parties (article 7) and enabled its variation according to the performance of the private partner, according to established quality and availability targets and standards (article 6, only paragraph). Therefore, the good or bad quality of the works or goods used in the infrastructure will directly impact the determination of the amount to be received by the private partner. This should arouse, for the private partner, an interest in the proper execution of the part related to the infrastructure, since the services must be rendered for at least five years and the infrastructure must be capable of resisting well throughout this period.

The contractual regime of the sponsored concession is, in broad lines, similar to the one of the common concessions (PPP Law, article 3, paragraph 1), including not only the rules of the Law of Concessions relate to the text of the contract, but also to the responsibilities of concessionaire and awarding authority, the intervention and the extinction of the contract (LC, articles 23 to 39, with exception under article 26, on sub-concession, which is not applicable). But there are some peculiarities, foreseen in some topics of article 5 of the PPP Law.

Article 5, in its many numerals, in general repeats or better clarifies the sense of the provisions that are already in the Law of Concession and that, therefore, are also applicable to the common concessions. This is also the case of article 11, III, related to the use of arbitration, which was already authorized (LC, article 23, XV).

However, there are certain contractual requirements that are applicable to the sponsored concessions, but not to the common ones. They are foreseen in article 5, numeral I (regarding the minimum and maximum periods of effectiveness) and V (relative to pecuniary insolvency of the awarding authority). Moreover, paragraph 1 of the same article 5 creates for the concessionaire a right to tacit homologation of price readjustment or correction that does not exist in the other administrative contract modalities.

The second paragraph of article 5 authorizes the introduction, in the sponsored concession, of contractual clauses to protect the financial agents that have contracted, with the concessionaire, the financing of the project undertaken by the concessionaire. In the Brazilian context, the rule tends to protect, particularly, the interests of a state entity, the Brazilian Economic and Social Development Bank - BNDES, which is the great financier of this type of projects. The measures can include the taking over of societary control of the concessionaire by the bank, to promote the reorganization of the business (article 5, paragraph 2, I), as well as direct payment to it, by the awarding authority or guarantor entity, both of the invoices of the services (article 5, paragraph 2, II) as well as of indemnities for anticipated extinction (article 5, paragraph 2, II), such payments being used for partial or total repayment of the financial obligations of the concessionaire vis-à-vis the bank.

Another contractual topic of the sponsored concessions that does not exist in the common concessions refers to the guarantees of payment of the pecuniary obligations of the awarding authority, in the modalities under article 6.

Finally, the sponsored concession can only be granted to a specific purpose society, that is, one created exclusively for this purpose (article 9).

As to the administrative concession contracts, they are subject to the same regime as that of the sponsored concessions, since the legal rules on the subject are indistinctly applicable to both modalities. The difference regarding content is only in the tariff matter, which does not exist in the administrative concession, since this concessionaire does not receive tariffs from the users (which, by the way, is why articles 6 to 13 of the Law of Concession do not apply to the administrative concessions). ■