Analysis of the economic viability of concessions and public-private partnerships as an efficiency mechanism

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ABSTRACT
Faced with the need for improvements in infrastructure and in the realization of the rights guaranteed by the Federal Constitution, governments need to seek agreements with the private sector, aiming to implement contracts with economic, financial, environmental and social benefits in favor of the development of society. In this wake, common and special concession contracts emerge - administrative concession and sponsored concession, instruments used to establish the link with the private entity without the need to privatize the sector, but only to grant the exploitation of service or execution of public works. It is intended to analyze the economic and financial viability, and possible social and environmental impacts of these partnerships, as well as to exemplify current contracts in this sense through the bibliographic review and research and consultations with renowned authors.

Keywords: Concession, public-private partnership, economic and financial viability, public administration.

1 INTRODUCTION

The Federal Constitution of 1988 provides for rights and guarantees that must be implemented by the Democratic State of Law, among them we can highlight adequate access to housing, schools, hospitals, railways, means of telecommunications, among other structural elements.

Due to the demand for high investments, these sectors have traditionally been attributed to the public sector, which is responsible for the execution and maintenance of works and services. It happens that, with the accumulation of state activities and responsibilities and the deficit of public accounts due to the government's inability to manage its own resources adequately, the State needed alternatives that would allow the interference of the private sector in structural works to ensure that, in some way, they are executed.

Under European influences, mainly from the United Kingdom, the world was giving way to private sector financing, towards the privatization of various services. The first manifestation of aspects of the privatization of the Brazilian legal system took place from Law No. 8,897/1995, the general law of concessions, which provides for the concession and permission regime for the provision of public services provided for in article 175 of the Federal Constitution.

In ordinary concessions there is no payment by the State for execution, the remuneration of the individual derives from tariff paid by the user or otherwise in the exploitation itself; There is also no

division of contractual risks, which shields the public coffers from possible situations of economic risk and contractual breaches.

In turn, in the Public-Private Partnership (PPP), from Law No. 11,079, of 12/30/2004, under the special forms of sponsored concession and administrative concession, there is pecuniary consideration by the public power, sharing of all contractual risks, including for misconduct of the project, in addition to the need to create a specific company to manage the partnership.

Because it is private financing, PPPs would have no budget limit and, therefore, could be a great alternative in the face of the government's giant budget deficit. It is important to emphasize that there is a need for studies on the efficiency of partnerships, with advantageous projects. Still, the PPP is a way to create competition in the market, especially with regard to infrastructure, a sector controlled by a few.

Studies carried out in several countries show, however, that the result of the PPP may not be what the projects initially want, because in the course of their execution the promises of adequate investments are no longer fulfilled. This occurs in a planned way, there is a rational non-compliance. It is important, then, to avoid this type of occurrence, that the contracts and all their objectives and possible eventualities are analyzed, so that contractual breaches are previously avoided.

The PPP requires efficient and viable projects and contracts that transfer risks to the private sector, as well as reflect on costs and applicability, as well as mechanisms to avoid use as an electoral instrument, for the benefit of certain business groups.

It is sought, at first, to analyze the modality of concessions provided for by the legal system for the purpose of elucidating the possibilities that the public sector has to contract the private entity for the execution of works and services. It is intended to demonstrate the effectiveness of concessions and public-private partnerships based on the need for advanced and complete studies and efficient projects that consider the risks to the public sector and the environmental and social benefits. Finally, an analysis will be made of the contractual provisions of some concessions made and intended to be made, such as, for example, the concession of the Redemption, in the city of Porto Alegre-RS.

2 COMMON CONCESSIONS AND PUBLIC-PRIVATE PARTNERSHIPS: SIMILARITIES AND SPECIFICITIES

According to Di Pietro (2019, p. 181), partnership would be a union between the public and private sectors, which does not constitute a new legal entity, which acts in the interest of the collectivity. Therefore, on the public side, the well-being of the community with the realization of social interests is aimed, and, on the part of the private, one can claim to obtain profit, even if it is not the rule.

Terminologically, we have the expressions public-private partnership, public service concession and administrative concession. The concession of public services is an institute rooted in administrative law for a long time, disciplined by Law No. 8,987/1995 and No. 9,074/1995, with broad legislation that deals with the most varied sectors traditionally attributed to the public sector, such as telecommunications, electricity, airports, etc.

The concession of public services is not something recent, and the interference of the private sector has spread with the worldwide movements of neoliberalism. It happens that the constitutional provisions and the text of Law No. 8,897/1995 (BRAZIL, 1995), which provides for the concession and permission regime for the provision of public services provided for in article 175 of the Federal Constitution are no longer sufficient in view of the increase in public indebtedness with expenses for the maintenance of state activities that could be the object of delegation.

In order to establish a concession contract based on the theory of economic and financial equilibrium, it is essential that the financial clauses are analyzed and very well elaborated, which allow a good cost-benefit ratio, since they deal with tariffs and sources of revenue, as well as unilateral alteration of the clauses by necessity public interest. In addition to the financial economic aspect, for a good contractual execution, precise regulatory clauses are necessary that define how the contract will be executed, as well as its supervision, rights and duties of the interested parties, as well as the termination, penalties, rights of users, etc. (DI PIETRO, 2019, p. 92).

Another important distinction within the scope of concessions is the definition of public works concession and public service permit. Granting a public work means, being Di Pietro (2019, p. 166), transferring to another entity the execution of a public work so that it can carry it out, passing on to it the risks of realization, through remuneration paid through the beneficiaries' tariffs or exploitation of the services and utilities that the work provides.

The author mentions in her work that:

> While the concession is a contract and, therefore, an institute that ensures greater stability to the concessionaire, due to the establishment of reciprocal rights and duties, especially arising from the establishment of a term, the permission is a unilateral, discretionary and precarious act, not involving, therefore, any right of the individual against the Public Administration (DI PIETRO, 2019, p. 167).

The Public-Private Partnership, object under analysis, arises in this wake of concessions of public services. It emerges in the Brazilian legal system from Law No. 11,079, of 12/30/2004, under the forms of sponsored concession and administrative concession, as a method of delegation of the execution of public services by the private entity.

Still, according to Di Pietro (2019, p.74):

> The concession sponsored, by the very legal concept contained in article 2, paragraph 1, of Law No. 11,079, is a modality of concession of public service or public work referred to in

> Law No. 8,987, when it involves, in addition to the tariff charged to users, pecuniary consideration from the public partner to the private partner. The administrative concession, according to the concept contained in article 2, paragraph 2, is the contract for the provision of services of which the Public Administration is the direct or indirect user, even if it involves the execution of work or supply and installation of goods.

The Public-Private Partnership originates in the United Kingdom (Di Pietro, 2019), that is, from a spoiled system, through Comparative Law, the Brazilian State, believing that it can apply the institute in the same way as the Europeans, adopts it in its legal system, providing guarantees to private entities and financiers of projects.

According to the justification presented to the National Congress along with the bill later reformulated by the Senate, in other countries the Public-Private Partnership would have achieved enormous success, so that the benefit of the private sector was in the sense of supplying the scarcity of resources for public spending. It would be, therefore, an alternative of collaboration between public and private entities, as well as a way to leverage the economy, especially in the face of the critical social and economic situation experienced by the country.

It is important to qualify and identify the two forms of Public-Private Partnership. When the contract is a concession of public services or public works, under the terms of Law No. 8,897/1995 (BRASIL, 1995), and to this service provided there is an additional tariff to be paid by users added to the state consideration from the public entity to the private, the type of concession is sponsored, according to the provisions of article 2, §1 of Law No. 11,079/2004. If the Public Administration is a direct or indirect user, even if it involves the execution of work or the supply and installation of goods, and the remuneration is on behalf of the public power, paid after the beginning of the service, it is an administrative concession contract, according to article 2, paragraph 2 of Law No. 11,079/2004 (BRAZIL, 2004).

Regardless of whether it is in the traditional form or in the special forms introduced by Law No. 11,079/2004, the public service concession has the nature of an administrative contract. To promote and encourage concession projects and public-private partnerships there are two measures, which are the Investment Partnerships Program – PPI, created by Law No. 13,334, of 13-9-16 and the participation of the Union in a fund to support the structure and development of concession projects and public-private partnerships, provided for and authorized by Law No. 13,529, of 4-12-2017.

3 ANALYSIS OF THE ECONOMIC VIABILITY AND (UN)CONSTITUTIONALITY OF CONCESSIONS AND PUBLIC-PRIVATE PARTNERSHIPS

The idea of the Public-Private Partnership would be to provide conditions so that the services and works that belong to the State are carried out in a way that is economically more beneficial to the state entity, to the private sector and, mainly, to society. According to FERREIRA; KURACHI (2006)

apud BARACAT; MENEGON (2022), this occurs through the modernization and expansion of the means of provision, encouraging the socioeconomic growth of the private sector, as well as solving the lack of structure of the State, which does not have sufficient conditions for efficient provision and meeting social needs.

On the other hand, MELLO (2015), analyzing a study done by Kioshi Harada and published in the Bulletin of Administrative Law 3/308-315, March/2005, of the NDJ, teaches that the Law of Public-Private Partnerships has several unconstitutionalities. Among them, it lists the binding revenues as a way to guarantee the pecuniary obligations, provided for by article 8, item I, of the law; the Special Guarantee Fund, provided for by article 16 of the law, which violates the form of satisfaction of credits against the Public Power, which will be given through writs (article 100 of the Federal Constitution); and Article 165, paragraph 9, item II, of the Constitution provides that funds established through a complementary law.

The lack of resources used as justification for the elaboration of the legal instrument by itself has no basis, since the contribution of the public power occurs in the two modalities of concession provided for by the law. In addition, guarantees must be provided and the risks must be divided, which generates a certain inconsistency, because if the public power has difficulties in carrying out its own works, so much so that it grants the execution or provision to the private entity, then it will hardly be able to provide safeguard to it.

In Europe and the United States, the objective of reducing state action was to minimize expenses with the maintenance of the public machine. In Brazil, the objective was to reduce state interventionism and the respective structure of the state so that the costs were as low as possible. Although the reduction of the state structure was evident, the path of spending was reversed, that is, the expenses with the management of the public apparatus increased considerably in the decades that followed.

In theory, partnerships between public and private entities would be applied as a way to carry out public works and services that the State does not have, by itself, conditions to do. Observing another aspect, however, one can perceive a certain tendency to privatization of the activities of the Public Administration, not in an integral way, since the contracts are precisely with the public entity, in addition to the supervision and control and submission to the rules of public law.

Everything can be granted with the exception of "the functions of regulation, jurisdiction, the exercise of police power and other exclusive activities of the State", according to article 4, item III of Law No. 11,079/2004. The questioning made by Di Pietro (2019), concerns the possibility of privatization of the Public Administration before possible absence of limitation of contracting due to the annual expenses of the Union (article 22 of the referred Law) and the natural inadequacies of the resources, which could make constitutional norms that establish the public legal regime become

obsolete, and were created precisely to ensure that the public patrimony is protected, as well as to ensure the interest of the community and the state functions.

In analyzing the doctrine, some argue that the Public-Private Partnership is a constitutional institute, applicable and very beneficial to the economic order of the country. On the other hand, however, there are authors who disagree with this, affirming the unconstitutionality of the legal institute and that, as a reflection of globalization and the application of comparative law, it does not fit with the economic and social reality of the Brazilian State.

Despite the doctrinal differences, it is important to highlight important aspects of the economic and financial utility of PPPs provided for in Law No. 11,079/2004, such as pecuniary consideration from the public to the private partner, that if by the fact of the prince and fact of the Administration there is economic imbalance, the public power is responsible for the risks, except in this case the risks are shared between the parties and the Public Administration does not have to bear them alone.

In addition, the economic gains gained by reducing the credit risk of the financing used by the private partner (article 5, IX of Law No. 11,079/2004) must be shared with the government. In addition, the contribution to be made by the government only begins after the service object of the contract is fully or partially made available (article 7, caput and § 1 of Law No. 11,079/2004), then there is financing by third parties, institution of the guarantee fund and linking of revenues, understood, by some scholars, as already mentioned, as unconstitutional. The term of validity of the PPP contract is, according to article 5, item I of the aforementioned law (BRAZIL, 2004), "not less than 5 (five) years, nor more than 35 (thirty-five) years, including any extension".

As Di Pietro (2019, p. 214) teaches, the Ministry or Regulatory Agency holding responsibility for the object of the contract is responsible for opening bidding and indicating the motivation and authorization for the contracts will be provided by the managing body, as disciplined in articles 14 and 15 of Law No. 11,079, and:

> this authorization will be preceded by a technical study on the convenience and timeliness of contracting and compliance with the provisions of the Fiscal Responsibility Law; on this technical study, there will be a reasoned statement from the Ministry of Planning, Budget and Management, regarding the merits of the project, and from the Ministry of Finance, regarding the feasibility of granting the guarantee and its form, regarding the risks to the National Treasury and compliance with the limit referred to in article 22. As seen, the two Ministries no longer exist, and their competences are concentrated in the Ministry of Economy, according to art. 57 of Provisional Measure No. 870/2019 (DI PIETRO, 2009, p. 214).

Regarding the bidding procedure, Article 12 of Law No. 11,079 (BRAZIL, 2004) provides that the contracting of public-private partnerships shall comply with the procedure provided for in the current legislation on bids and administrative contracts. Thus, it is expected that some of the criteria are the combination of the highest offer or lowest consideration to be paid by the Public Administration with the criterion of the best technique.

4 CONCESSION CONTRACTS IN THE CITY OF PORTO ALEGRE - RS

Faced with the increase in partnerships between the public and private sectors, the municipal government of the city of Porto Alegre, capital of the state of Rio Grande do Sul, launched a concession project for some of the city's parks, such as the Farroupilha Park, the Lami Boardwalk, the Brazilian Marine Park and the stretches of the Guaíba Waterfront.

According to the justification presented, the municipal government intends to "boost the socioeconomic and environmental growth of the city and improve the offer of leisure, tourism and culture options with safe environments of coexistence and fun, free and open, daily to the population." (PORTO ALEGRE, 2022).

In search of contributions and suggestions on the drafts of the Notice of the concessions of the public services of operation, administration, maintenance, implementation, reform and improvement of the Farroupilha and Calçadão do Lami Parks (Lot 1); and Brazilian Navy and Stretch 3 of the Guaíba Waterfront (Lot 2), contract etc., the Municipal Secretariat of Partnerships (SMP) published in the Official Gazette of Porto Alegre, on 10/11/2022 (PORTO ALEGRE, 2022).

The contracts are regulated by Federal Law No. 8,987, of February 13, 1995 (General Law of Concessions); in addition to Federal Law No. 14,133, of April 1, 2021 (Bidding Law) and, as provided in the notice, other legal, technical and normative instructions pertinent and applicable to this case. The notice makes no mention of Law No. 11,079/2004, which indicates that it is exclusively a concession and not a public-private partnership.

The city of Porto Alegre has hired the Getúlio Vargas Foundation (FGV) for studies of maintenance costs and economic and financial viability and the Semeia Institute, dedicated to the development of natural and urban park management projects, is assisting the city of Porto Alegre, free of charge, in the modeling of concessions.

It is important to note that the concession notice itself provides that the contracts and the contractual relationship must meet the conditions of regularity, efficiency, security, timeliness, generality, courtesy, equity and continuity. The contracts are valid for 30 (thirty) years, and the concessionaire is responsible for fulfilling the charges and obligations in a timely and efficient manner (PORTO ALEGRE, 2022).

Another area in which the concession is aimed, and perhaps the most controversial, is the Redemption, in which it is foreseen the construction of an underground parking lot with 577 spaces in Redenção, below the Ramiro Souto Park, which would be the form of remuneration of the concessionaire.

Such constructions and improvements generate not only economic, but also environmental and social impact. These last two are perhaps more important than the first, because in addition to profit, it is essential to take into account the environment and the sustainability of a project of such

proportions, which can be beneficial or bring losses, depending on its execution; And as for the social aspect, it is essential that society, especially small traders, street vendors, artists, etc. be heard, because the concessionaire may come to regulate this type of service, which can generate security for these or losses by the bureaucratization of something that is, until then, informal.

Public consultations are important for good projects that take into account the wishes of the community involved and those directly affected. Still, in addition to the opinions of the population, with suggestions for improvements, it is essential that studies are carried out and technical opinions of special opinion are obtained about the economic and financial viability of the contracts, and, as previously mentioned, environmental and social impacts.

5 FINAL CONSIDERATIONS

From the conceptualization and differentiation of the modalities of common concession, sponsored concession and administrative concession, it was intended to verify which institute is the most appropriate for the execution of public works and services according to the concrete case and the objectives intended by the Public Administration.

We also analyzed doctrinal opinions about the viability and constitutionality of the forms of concessions, especially the public-private partnership, more recent and specific among the modalities presented, and it was found that some indoctrinators opine in the sense that the PPP presents unconstitutionalities.

In addition, we sought to exemplify some contracts or possible concession contracts to be signed between the public and private sectors in the municipality of Porto Alegre, capital of the state of Rio Grande do Sul. The public consultation regarding the contracts and studies proved to be fundamental for the proper functioning of the projects and for the economic, environmental and social development of the Porto Alegre community.

Regardless of the modality adopted, whether common concession or public-private partnership, it is essential that the projects are elaborated within the principles that govern public administration, which are legality, impersonality, morality, publicity and efficiency, according to article 37 of the Federal Constitution. It is noteworthy that the goods under concession are public, demanding, therefore, greater care by the Public Administration when preparing partnerships.

From efficient economic and financial projects, well-designed contracts and studies done in a broad and comprehensive way, with equal division of risks and socioeconomic and socio-environmental boosting, communities tend to grow and take good advantage of this partnership between the government and the private sector, since the realization of fundamental rights and the certainty of access to quality and equal environments contributes to the development of society.

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