



The modeling of concession projects and contractual design

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Much is still being discussed in concession modeling regarding the best contractual design technique with regard to the definition of the concessionaire's obligations in the adequate provision of the service granted. The question to be the object of reflection is to identify the best practice in achieving strategic planning: whether it is more appropriate to set obligations of means (or of conduct) or obligations of result (obligations to achieve a certain result), always aiming at the adequate provision of a service.

These two possibilities interfere in the very legal nature of the contracts, which according to the option made may be a contract of means or of result. Should the Public Administration establish in detail the means to achieve the expected results in the provision of the public service (such as the work contracts of Law 8666/93), or should the means be left to the concessionaire alone, and only require obligations of result, for example, the integral and adequate treatment of the sewage of a city or even, the adequacy of a highway in conditions absolutely safe for its users?

There are situations in which the Administration has already seized all the necessary elements to define the "means" aspects concerning the agreement for delegation of a service. In these cases, it makes sense that they are previously defined in the modeling so that the concessionaire promotes its execution within those parameters set by the state entity.

On the other hand, there are situations in which the technological architecture of the public enterprise to be granted affects so radically the object of the concession that the administrator could frustrate the quality of the service offered, if it were to determine the exact means by which the service should be offered to the community. In fact, at present, this seems to be the main characteristic of the structured projects in progress.

By the same token, it makes sense that concessionaires incorporate such technologies during the execution of the contract, so that users can enjoy all the benefits of a current and modern service, pursuant to the demands of our legislation.

The guidance that must prevail in situations such as these is that the public administrator establishes, in terms of legal modeling, the definition of goals to be achieved, to the detriment of instrumental conceptual elements that will certainly tarnish the achievement of the public interest sought.



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This means that at the moment of project design, it should be at the discretion of the responsible public agent, through the exercise of their discretionary competence, and duly justified by the technical studies prepared during the planning phase of the concession (economic, legal, financial and operational) project, the definition of the necessary calibration of the contractual elements: if they are more focused on the means to achieve the intended purposes with the public enterprise or if they are aimed at fixing the purposes that the Administration intends to achieve in order to satisfy the public interest in the concessionary project, without precisely and rigorously stipulating the means to achieve this.

For these reasons, the question of whether the obligations assumed by virtue of the concession are of means or of result (which transfers the discussion to the very nature of concession contracts, if of means or result) goes through the rigorous analysis of the technical aspects of the object of the concession: if more subject to the variations presented by technological innovations, such as projects involving the so-called smart cities, then the results should be rigorously fixed; if, in turn, it is something more static, such as the construction of sports arenas for later exploration of their capacities, it may have the medium traits, and thus defined in a more detailed and specific manner.

There is no general and abstract rule, previously conceived, that solves the question in an aprioristic manner: the definition must be promoted during the planning of the legal modeling of the respective project, and therefore high expertise and years of practical action are necessary, as well as a holistic understanding of the sector and of the perplexities that will be presented in order for the contractual design to be carried out in a way that meets the needs of both the community and the private sector.