

## THE DIFFERENTIAL PUBLIC PROCUREMENT REGIME (“RDC”) FOR THE 2014 BRAZIL FIFA WORLD CUP AND THE 2016 RIO OLYMPICS

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**ABSTRACT.** On August 5, 2011, Brazil enacted the Federal Law number 12.462 creating a special regulation for the government procurement of goods, services and works needed for the 2014 FIFA World Cup and the 2016 Olympics. The so-called Differential Public Procurement Regime (“RDC”, in Portuguese) is a series of profound changes in the Brazilian government purchases regulation. It aims at expediting bidding procedures and allowing for more comprehensive, turn-key contracts. On October 11, 2011, the President of Brazil published Regulation number 7.581 to regulate the RDC.

This paper presents, from a legal perspective, the mains aspects of the RDC as part of the Brazilian experience to build infrastructure for the largest global sports events taking place in the country in the next years. It describes the positive innovations, such as variable remuneration linked to performance and the so-called “efficiency contracts”, as well as criticizes some controversial aspects, mainly the confidential valuation and the integrated procurement.

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## INTRODUCTION

Faced with the proximity of the 2014 World Cup and the 2016 Olympic Games, and considering the need to prepare the essential infrastructure for these events, the Brazilian Federal Government has mobilized its congressmen with the objective of approving a new regime for tenders and contracts.

Though in the Brazilian Congress there already was a bill, in an advanced state of negotiation, and proposed by the Executive Power itself, to promote an ample reform in the Procurement Law (Law n. 8.666, of 21/June/1993)<sup>1</sup>, an option was made for the easier and quicker route of introducing into the text of a new Law specific rules to discipline the disputes and procurement of works, services and purchases related to these games. Thus, the RDC Law - The Differential Public Procurement Regime (Regime Diferenciado de Contratacoes Publicas - "RDC", in Portuguese) was included through Law n. 12.462, of 05/August/2011.

Later, the President of Brazil published Regulation ("Decreto", in Portuguese) number 7.581, of 11/October/2011 (RDC Regulation) to regulate the RDC. Regarding the RDC Law, the Regulation establishes that only works that appear in the Responsibilities Matrix can use their own legislation, as well as innovations including the possibility to substitute the consortia responsible for the works, the creation of parameters to choose the one with the highest price for contracts that will bring revenue to the public administration, and the efficiency contracts. However, the Regulation still leaves some points with little explanation, such as the so-called Auxiliary Procedures for Tenders in the RDC, and others with practically no explanation at all, as is the case of the confidential valuation and integrated procurement.

The RDC Law has some positive innovations that could well be included in the Procurement Law itself, such as variable remuneration linked to performance and the efficiency contracts where the remuneration of the contracted party will be proportional to the economy generated for the Public Administration, which will be discussed in this article.

The RDC Law, however, has several controversial aspects, especially the issues regarding confidential valuation and integrated procurement that will also be discussed in this article.

### **TENDERS SUBMITTED TO THE RDC**

A first point to be analyzed is the scope of RDC. As disposed in article 1 of the RDC Law, this regime may be adopted for tenders and contracts needed for: a) the 2016 Olympic and Para-Olympic Games, included in the Olympics Projects Portfolio defined by the Olympic Public Authority (Autoridade Publica Olimpica - APO, in Portuguese); b) the 2013 Confederations Cup and the 2014 World Cup, restricted to, in the case of public works, those contained in the Responsibilities Matrix signed by the Union, States, Federal District and municipalities and; c) works of infrastructure and services for airports of capitals of States of the Federation that are over 350km from the cities that will host the aforementioned events.

For total understanding of this scope, it is important to assess that which is stated in the Olympics Projects Portfolio, as well as in the referred Responsibilities Matrix. For the first, with the election of Rio de Janeiro to host the 2016 Olympic Games, the Union, State and Municipality of Rio de Janeiro formalized a Protocol of Intentions, converted into Law n. 12.396, of 21/March/2011. Its basic objective was the creation of the APO, a special autarchy responsible for the approval of the Olympics Projects Portfolio, defined as a set of works and services selected by the APO as being essential for the realization of the 2016 Olympic and Para-Olympic games. Thus, the works and services contained in the Olympics Projects Portfolio may be submitted to the new regime.

The Responsibilities Matrix, in turn, is defined as a joint document that stipulates the obligations of each of its signees for the organization and realization of the Games. In this document, signed by the Union, States and municipalities that will host the games of the 2013 Confederations Cup and the 2014 World Cup are listed the works and services needed for the realization of the events and which may also be contracted by using the RDC<sup>2</sup>.

The RDC does not revoke, exclude or limit the application of ordinary modes of public procurement already established in the law. The RDC, in reality, is presented as an alternative for the bidding entities, allowing them to use this tool whenever they feel it is convenient to carry out this regime. However, when opting to use the RDC, the Procurement Law may not be used.

The limits conferred with the use of this exceptional regime require special attention to the requirements created by the existence of the expression "necessary" in the law text. This concept should be applied when the eligibility of the procurement is to adopt the special regime destined for the expected events. Once this examination has been done, the public administrator will have the option of using the systematized precepts of differential regimes to confirm its contracting.

It is not possible to state that any procurement that has the possibility of being used during the events will have its tender completed through the RDC. Due to the requirement of necessity, demanded by the RDC, the conclusion that is inferred is: the RDC Law will only authorize the RDC for those tenders and contracts without which the sports events would not be able to be carried out or would greatly lose their essential qualities and characteristics.

The article 2 of the RDC Law establishes new definitions. The first change concerns the definition of the basic project (clause IV and sole paragraph). The sole paragraph determines that the basic project should contain the same requirements as those established in the Procurement Law, however without frustrating the competitive characteristic of the tender procedures. Item II of the sole paragraph also innovates when it alludes expressly to the possibility of differences between the Executive Project and the Basic Project, when restricted to "situations duly evidenced in an act motivated by the Administration". Item V repeats the Procurement Law when defining that the Basic Project will establish subsidies for the tender, emphasizing that this will not be applied in the case of integrated procurement.

In relation to the legal principles that are applicable to the RDC, article 3 of the RDC Law repeats those listed in the Procurement

Law, adding the principles of efficiency, economy and sustainable national development.

The article 4 of the RDC Law contains important policies regarding standardization of the objects of procurement and procedures for tenders, with the scope of seeking greater advantage for the Administration. One policy that stands out is the adoption of procurement conditions that are compatible with those of the private sector, including remuneration based on performance, as will be seen in another chapter of this study. There is, furthermore, a demand for the preferential use of labor, materials, technologies and raw materials from the place of execution and the division of the object. To finalize this legal disposition, there are determinations regarding sustainability criteria, including the surroundings and cultural heritage, and also requirements regarding accessibility.

### **GENERAL TERMS OF RDC LAW**

The new legislation ranges from the basic principles ruling the bidding procedures to the specificity of administrative sanctions applicable to fraudulent behavior. Some of the changes seem adequate for the purpose of expediting the procedures. There are three key modifications to speed up the process.

First, article 13 provides that all bids will preferably be electronic (online). Although Brazil is currently very familiar with online procurement auctions for ordinary goods and services, construction works and complex contracts are still physically tendered. The new Law will lift any restriction on online tendering.

Second, according to article 15, the minimum time for advertisement of the invitations for bids is greatly reduced. Complementing this procedural change, article 12 provides that the general rule will now be the post-qualification of bidders. Under Procurement Law, in most procurement methods the bidders must be shortlisted in a pre-qualification phase. In addition, article 27 provides that only one administrative appeal will be admitted, after the post-qualification of the bidders. These procedural changes,

combined with the use of online methods, are likely to significantly shorten bidding procedures.

Another important change in comparison with Procurement Law practice is the provision of article 6. The budget for the government purchase will no longer be disclosed in the invitation for bids. This aims at causing greater competition between the bidders. Under the current regulation, most procuring agencies will disclose the budget as a reference price. A novelty of the bill is the creation of a judgment criterion based on the “highest discount” offered by the bidder on the procuring agency’s budget for the purchase. Due to its great importance, the new provision will be discussed in a proper chapter of this paper.

The articles 8 and 9 intend to advance contracts under turn-key arrangements, in which all steps including basic design are comprised in the scope of the contract. Although turn-key contracts have been always widely used for government works in Brazil, the new regulation tries to remove any obstacle to the adoption of full turn-key arrangements, in which the author of the basic design could also be the contractor responsible for the works. This new provision will also be discussed in a separate chapter of this paper.

The RDC Law creates new administrative penalties for defective performance and wrongful practices, including fraudulent behavior of the bidders and contractors. These are harsher than those under Procurement Law. However, the new Law ensures that the essential current due process rules will remain applicable.

These are the most important rules included in the new Law in order to aim at making public procurement procedures faster and more cost-effective. Some of the changes have been tried before in more limited areas, such as the purchase of ordinary goods and services. Some are truly new and their effect will need to be verified in practice.

## **THE MOST PRAISED INNOVATIONS OF RDC LAW**

**a) *Variable remuneration linked to performance***

The mechanism of linking the contracted party's remuneration to his performance may allow significant advantages to the Public Administration.

There is no objection that the Administration remunerates their renderers in the proportion of an effective advantage supplied by that procurement, without taking into account exclusively the efforts employed by the contracted party. On the other hand, linking remuneration to the attainment of a previously determined advantage may be the most advantageous solution.

Linking remuneration to the attainment of an uncertain final result involves considering the desired advantage and the risks involved. It is not necessarily an aggravation to the situation.

So, this following question arises: how should the Administration pursue the best possible quality within the necessities related to the procurement, isn't it unfitting to pay additional remuneration if a determined result is obtained? Or this result would be mandatory, or unnecessary, which would prevent it from being accepted as a factor to define remuneration.

Variable remuneration may be linked to attainment of an additional advantage for the Public Administration. In other words, there may be determined parameters of quality, and if parameters that are superior to these are achieved, and these effectively generate additional benefits, they may be linked to an additional remuneration.

Therefore, there is no abdication of the duties of either quality or the obligations taken on by the contracted party. In certain situations, the link between remuneration and the attainment of a result is the most advantageous solution for the Public Administration itself, which will only effect payment if it effectively obtains an advantage with the procurement.

Besides this, remuneration that is linked to the result obtained by the individual is a counterpoint for the increased assumed risk. It is evident that the uncertainty regarding the final result justifies the

perception of a higher remuneration. The counterpart for the Administration is that the remuneration will only be due if the desired advantages are effectively obtained.

This mechanism intends to find a fair measure between the relevance of the desired benefit and the value of the remuneration to be paid to the contracted party. The impact of the real advantages should be stipulated and assessed for each case, so that the remuneration due can be measured in a fair manner.

An example of variable remuneration is the Acquisitions Based on Performance mentioned in item 3.14 of the procurement rules of the Inter-American Development Bank (IADB) and the World Bank. The rules established by the two institutions, which for this point have the same wording, state that, in some cases, awards may be paid for better quality products. In other words, it is possible to have a greater remuneration if the products present superior quality. This mechanism is similar to the variable remuneration of the RDC.

The variable remuneration as a result of performance of the contracted party in the scope of the RDC is fitting in the procurement of works and services, including engineering.

The RDC Law establishes that variable remuneration may be established based on targets, quality standards, criteria of environmental sustainability and delivery time defined in the summons and the contract. The increase in remuneration of the contracted party, due to compliance with targets and standards depends on a prior definition by the Administration, regarding the utility and relevance of these targets. As reaching certain targets will have the economic effect of increasing the spending of public resources, it is indispensable that the demands established result in effective and useful benefits for the public interest. The criteria that influence the variable remuneration of the contracted party should be clear, objective and previously established in the invitation for bids and, later, in the contract.

The RDC Law also establishes that the variable remuneration will be motivated and will respect the budget limit fixed by the Public Administration for the procurement. The need for motivation is applied both to adoption of this contractual system and to

establishing the criteria that will influence the variable remuneration. Although there are uncertainties regarding the effectively due remuneration (since it is not known beforehand whether the contracted party will achieve the targets that grant an increase), there should be a budget limit for the spending of public resources.

The RDC Regulation establishes rules pertaining to the use of variable remuneration. The value of the remuneration should be in proportion to the benefit generated for the Administration, and eventual efficiency gains offered by the Administration may not be considered as performance of the contracted party.

**b) *Efficiency contracts***

By means of the efficiency contract, the contracted party assumes the obligation to reduce the expenses of the Administration, and its remuneration will correspond to a percentage of the generated saving. This is a risk procurement system, in which the remuneration owed to the individual, in absolute terms, will be as great as the saving generated for the Administration. If it does not reach the saving established in the contract, there may be a discount in the remuneration of the individual or even the application of a sanction.

The RDC Law states that the efficiency contract will have as its objective, rendering services that may include the realization of works and the supply of goods. The idea is that the efficiency contract should not be employed to carry out works when these do not include also the rendering of a service – which is natural for the objective pursued with this type of procurement.

The objective of the efficiency contract is, therefore, to offer a saving to the contracting Public Administration, in form of a reduction of “current expenditure”, being understood as cost expenses<sup>3</sup> and current transfers<sup>4</sup>. So that there is no doubt regarding the amounts due to the contracted party, it will be necessary to establish, beforehand and clearly, the total current expenditure incurred by the Administration before the procurement. There should be a secure

reference so that the saving generated for the Administration can be calculated and, consequently, the remuneration due to the contracted party.

It should be remembered, furthermore, that an eventual reduction in current expenditure is not necessarily linked to the action of a company contracted by the Administration to render a service. Variations in current expenditure depend, also, on a decision of the Legislative Power, when elaborating the annual public budget. The need to individualize each of the reasons that lead to variations in the current expenditure may make it very difficult to administer contracts signed as a result of tenders that use the new criterion. Furthermore, current expenditure may increase through the simple expansion of services rendered by the Administration, even if the company that is contracted has effectively carried out the actions that allow a saving for the contracting party.

The RDC Law mentions only that remuneration of the individual will correspond to a percentage of the saving generated, without going into greater detail. Thus, it is important that the invitation for bids and the contract mention clearly the moment when the saving generated by the efficiency contract is measured, since the failure to reach a certain level of saving may penalize the contracted party.

In efficiency contract tenders, the interested parties should present proposals for work and price. The examination by the Administration will not be restricted to the choice of a proposal that is committed to offering the highest discount, but it should also be sure that the work proposal obeys the legislation.

As a criterion for judgment, tenders of this mode will use "greatest economic return" for the Administration. The RDC Regulation specifies that the content of the work proposals and price should be presented by the bidders. The work proposal should contemplate the object and respective time for its fulfillment, as well as the estimated saving - expressed in monetary units and in unit measurements associated to the object. The price proposal will consist of a percentage over the estimated saving during a certain period. The economic return is defined as a result of the saving that

is estimated will be generated with the execution of the work proposal, minus the price of the proposal.

Thus, to identify the greatest economic return, it will be necessary to combine two variables: the amount of the reduction of current expenditure and establishing the percentage owed to the contracted party. This means that it is possible that the proposal that contemplates the greatest remuneration will still be the most advantageous for the Administration. Despite this, it is possible to imagine situations in which the Administration establishes one of the variables and identifies the most advantageous proposal only by measuring the other.

Not achieving the contracted saving will imply in a loss for the contracted party. If the difference between the contracted saving and that effectively obtained is superior to the maximum limit established in the contract, other sanctions will be applicable. While if the saving effectively obtained is inferior to the contracted, and the situation does not fit into the dispositions of the RDC Law, the difference will be discounted from the remuneration of the contracted party, without applying a fine or other type of sanction.

## THE MOST CONTROVERSIAL INNOVATIONS

### ***a) The issue of confidential valuation (the “reserve price”)***

The article 6 of the RDC Law establishes as follow:

*“Art. 6. Observing what is set out in 3<sup>rd</sup>. paragraph, previously estimated valuation for the procurement will be made public only and immediately after the tender is finished, without prejudice of the disclosure of quantitative and other information needed to elaborate the proposal.*

*(...)*

*3<sup>rd</sup>. Paragraph. If not included in the summons, the information referred in the ‘caput’ of this article may be of confidential character*

*and be made available strictly and permanently to the organs of internal and external control.”*

As observed in the legal text, the “caput” of article 6 forbids the disclosure of the valuation during the course of the tender. While the expression “if not included in the summons”, found in 3<sup>rd</sup>. paragraph, gives the possibility of disclosure of the valuation together with the opening invitation for bids. Or, this expression only intends to refer to the assumption already mentioned in 1<sup>st</sup>. and 2<sup>nd</sup>. paragraphs of the same article, in which the prior disclosure of the valuation is mandatory by the nature of the disputes it establishes (judged according to the criteria of highest discount or best technique), or the confidentiality of the valuation is an Administration right (not an obligation).

Whether as an alternative, or as an imposition, the confidentiality of which article 6 speaks will be in effect during the entire tender process, at the end of which the valuation will be made public. During the dispute, only the internal and external control organs will have permanent access to the valuation information, or, at any time these organs may access the procedure and check how the Administration estimated the value for a determined procurement.

It is true that it is unusual to have the estimated value of the procurement disclosed in the invitation for bids of the tender according to worldwide practices of government procurement. But, in the case of Brazil, there is no doubt that the new rule collides with the Procurement Law that (i) determines the valuation in quantitative spreadsheets with unit prices forming an attachment to the invitation for bids; (ii) forbids the use of any element, criteria or factor that is confidential, secret, subjective or reserved that may even indirectly omit the principle of equality among the bidders; and (iii) establishes that the tender will not be confidential, and the acts of its procedure will be public and accessible to the public, except the terms of the proposal.

As informed in the press<sup>5</sup>, the Federal Government defends this confidentiality arguing that it avoids the practice of elevating prices and forming a cartel.

But, obviously, the forming or not of a cartel does not depend on the disclosure of the valuations previously elaborated by the Administration that promotes the dispute. With or without valuation, cartels can be formed. What may vary is the success of this strategy. Cartels usually divide the public works market by combining the proposal prices presented by their participants. The bidder who will win each dispute is previously chosen. All the other participants offer proposals with superior values, in order to allow this winning. This way, and having access to the valuation previously disclosed, the participant of the cartel may offer a price proposal that is near the maximum value admitted by the Administration, but which does not surpass it, avoiding disqualification<sup>6</sup>.

In a world without corruption of public agents, maintaining the valuation confidential may work as a strategy to combat the practice described above. In reality, not knowing the maximum value admitted by the Administration, the bidder (even in the case of combining prices through a cartel) will have incentives to reduce the value of its proposal, fearing that it will be disqualified, which would result in greater discount margins for the Public Office, related to the amount of the valuation.

It is certain that, if applied adequately (and without distortions), the rule of article 6 of the RDC Law has the potential to generate additional benefits, without any prejudice to the values protected by impositions that derive from the principle of publicity.

It can't be said that, in the scope of the RDC, the bidders would not have parameters to elaborate their proposals. It should be noted that the RDC Law has not cancelled the duty of the Administration to supply, together with the invitation for bids, the quantitative of the tender's object and all other elements necessary to elaborate the proposal. Besides this, the values considered by the Administration should necessarily correspond to market values.

The RDC Regulation also clarifies that the remaining acts of the dispute are not affected by confidentiality, and should receive ample publicity.

However, in Brazil's reality, this idea, conceived to combat frauds by the bidders, may be inefficient if it is found corruption of public

agents who have access to confidential information, or competitors who refuse to lower the price of their proposals. The first can easily be understood: if the participants of a cartel obtain privileged information from corrupt public agents, the practice described above will continue to be possible. In the second case, if the bidders continue to offer proposals with prices that are superior to the valuation of the Administration, it will be necessary to renew the tender process, until one of them presents a proposal with an amount that is inferior to the valuation, or negotiate a reduction with the bidder of the best proposal until the value established by the Administration is reached. The bidders could discover the amount of the Administration's valuation, through trial and error, and the initial valuation would have little importance.

As an alternative, the contracting party may hold a direct procurement, based on the Procurement Law, which establishes that the tender is dispensable when the proposals presented establish prices that are manifestly superior to those practiced in the local market, or incompatible with those fixed by the competent official organs, cases in which direct awarding of the goods or services will be admitted, for a value that is not superior to that contained in the price registration.

Another assumption for depreciating proposals invoked for confidential valuation is to alter the initially elaborated valuation after the proposals have been opened, to avoid the renovation of the tender process, when none of the bidders presents a proposal below the minimum value originally defined by the Administration. The public agent may be tempted to adopt this expedient to avoid delays in the schedule for carrying out the object, especially when faced with a short time left for the start of the afore mentioned sports events.

A way of avoiding this would be, as stated by the Organization for Economic Co-operation and Development (OECD)<sup>7</sup>, to maintain one copy of the valuation, closed, and under protection of a public authority that is not linked to the contracting party (a Court of Audit, for example). Another alternative would be to make public the valuation after the delivery of the proposals, but before their envelopes are opened. In any case, the simple provision of unrestricted access to the valuation information by internal and

external control organs already constitutes an important mechanism to mitigate the risks of practices such as those mentioned above.

**b) *Integrated procurement***

The integrated procurement is a new regime for indirect execution of engineering works and services, in which the contracted party is responsible not only for the execution of the works and services, but also for the prior phases of elaboration and development of the corresponding Basic and Executive Projects.

Formally, the RDC Law opposes the Procurement Law that determines that: (i) the works and services may only be bid when there is a Basic Project approved by the competent authority and available for examination by those interested in participating of the bidding process, and that there exists a detailed valuation on spreadsheets that expresses the composition of all its unit costs; and (ii) the Basic and/or Executive project with all its parts, drawings, specifications and other supplements constitutes an attachment to the invitation for bids, being part of it.

Materially, the integrated procurement may lead to situations that offend the objective and isonomic judgment principles. This is because even the elaboration of the Basic Project is left to winning bidder. Thus, the Public Office will hold the dispute without even minimum limits of what it wishes to have done. The lack of comparative parameters prejudices the gauging of the degree of propriety of the proposals to the needs of the Public Office and gives margin to subjectivity in the judgment. Excessive power is given to the contracted party to define what and how it will be executed.

The provision of the RDC Law goes, therefore, against the efforts to assure better planning of public works, which avoids problems of execution, increased costs for the Administration and the contractual amendments. Brazil's experience shows that the requirement of only one Basic Project has served, after procurement, to reveal the unfeasibility of executing the contract and, thus, to justify alterations that normally multiply the contracted value, while, in the absence of an Executive Project, it becomes impossible to estimate the cost of

the future procurement (AMARAL, 2002, p. 69). In other words, the absence of an Executive Project brings serious risks of frustration of the legal principle that all and any procurement implies sufficient financial resources. This practice has been, regrettably, much used in Brazil.

This is why a Basic Project should be elaborated previously. Without a well-elaborated Basic Project and a detailed valuation, the judgment of the proposal itself may be compromised, with the violation of the principle of isonomy.

According to the RDC Law, the engineering preliminary project should contemplate the technical documents that allow the possibility of characterizing the work or service. Evidently, the level of details and precision of this preliminary project will not be comparable to the Basic Project, because, if this was so, this new law provision would have no reason to exist.

The jurisprudence of the Brazilian Court of Audit<sup>8</sup> emphasizes the mandatory need for a Basic Project in tenders for procurement for engineering works and services<sup>9</sup>.

The RDC Law states, apparently to compensate the possibility of holding disputes without a Basic Project, the existence, in integrated procurement, of contractual amendments will be forbidden. However, this disposition itself makes an exception to these prohibitions, admitting them to recompose the financial-economic balance resulting from *force majeure*, as well as the need to alter the project or specification for greater technical adjustment to the objectives of the procurement, by request of the Public Administration, and not as a result of errors or omissions by the contracted party, once observed what is disposed in the RDC Law and the limits in the Procurement Law.

Now, in a situation where the Public Office has not even previously defined, with sufficient precision, what should be executed, it would be expected that situation in which the contracting party believes it to be necessary to sign contractual amendments are not uncommon, which could represent, as per the rules of the Procurement Law, an increase of up to 25% of the initial value of the

contract, or up to 50% in the specific case of refurbishment of a building or equipment.

The provision of a contractual regime that dispenses the elaboration of a Basic Project by the Administration reveals more than a search for greater efficiency in public procurements. In truth, it seems to reflect also a concern with a serious planning problem that has marked public tenders in Brazil. For several reasons, practical experience says that project planning and elaboration by the Administration are two of the main obstacles that risk the efficiency of signed contracts. Lack of planning itself produces a risk which, usually, generates losses both to the individual and, invariably, a waste of resources and time also for the Public Office.

In a last analysis, the institution of an integrated procurement regime shows the attempt to eliminate these risks provoked by deficient planning. However, integrated procurement itself cannot go without adequate planning, which confirms both the use of transferring technical responsibility to the individual as well as the viability of controlling the activity of the future contracted party, preserving the independence that is bestowed upon it to justify the adoption of integrated procurement. The absence of a Basic Project will imply new problems and will demand a new posture of control by the Administration during execution of the contract. To obtain an effectively more efficient procurement it is essential to have parameters that sufficiently guide the elaboration of the proposals, as well as to analyze these proposals in an objective form and to control their future execution..

#### **DIRECT UNCONSTITUTIONALITY LAWSUIT FILED BY THE FEDERAL PROSECUTOR GENERAL AGAINST THE RDC**

The Federal Prosecutor General filed at the Federal Supreme Court a Direct Unconstitutionality lawsuit against the RDC (ADIN n. 4655). The Federal Prosecutor General questioned in the lawsuit that the RDC does not establish minimum parameters to identify works,

services and purchases to be followed, and therefore does not ensure equal conditions to all competitors, as is defined in article 37 of the Federal Constitution of Brazil. This authorization would represent an enormous risk, since, on occasion of the Pan-American Games in 2007, the Union, State and Municipality of Rio de Janeiro were unable to organize and identify works and services that should have been carried out, and for this reason the initial valuation of the event at R\$ 300 million (US\$ 166 million), was absurdly surpassed with a final expenditure of R\$ 3 billion (US\$ 1.6 billion).

The Federal Prosecutor General also questions the lack of an update of the Responsibilities Matrix and states that this shows serious deficiencies in the Executive Power's planning and organization to hold the 2014 FIFA World Cup. The transfer to the Executive Power of the legal regime of a public tender, with no legal pre-ordained criteria conspires against the principles of impersonality, morality, probity and administrative efficiency.

There are also doubts, regarding the preferential option for integrated procurement in the case of engineering works and services, which implies one tender for the Basic Project, Executive Project and execution of works and services, all together. The first irregularity is that the Federal Prosecutor General understands that works and services contracted without having previously clearly defined its object, makes the comparison process for competing proposals difficult. The second irregularity is in the integrated procurement of turn-key contracts adopted by the RDC, when it allows one contracted party to concentrate the Basic Project and the execution of works and/or services, which misrepresents the entire purpose of the tender. This is because the project outlines the shape of the work or the service, which later will be bid and for which the author of the project would be able to visualize, beforehand, possible competitors, which could attempt to exclude or hamper free access by potentially interested parties.

The request for a preliminary injunction filed by the Federal Prosecutor General still has not been examined by the Federal Supreme Court. It is impossible to know when the judgment of this lawsuit will take place (it may occur in few months or only after long years).

### **THE FIRST EXPERIENCES WITH THE RDC**

After the RDC Regulation became effective, the first tenders were launched in the scope of the RDC. Until the end of this study (February/2012), there has been known only seven tenders for procurement of works and services exclusively for airports.

All those held up to the moment were presential, with open disputes ruled by the criteria of lowest price. The processes follow some of the innovations proposed by the RDC: inversion of phases, the possibility of having intermediary bids and the use of confidential valuation during the opening phase of the tenders.

In the first tender under the RDC, only one consortium presented a proposal to modernize the passenger terminal of the International Airport of Rio de Janeiro. However, the contract was not signed, as the bidder considered the amount excessive, and there is still an ongoing investigation regarding the possible leakage of the confidential valuation.

The most recent tender using the RDC – for procurement of the company to carry out the works at the airport of the city of Fortaleza – was finalized without mishaps. The tender began on 06/February/2012 and ended on 10/February/2012.

Finally, still in the area of airport works and services, the first electronic invitation for bids under the RDC was launched to create a Price Register.

## CONCLUSIONS

The RDC rationalized the procurement process. This rationalization is what will allow the events to be held within their time limits, that the works will be delivered and that the services will be contracted. It grants public administration a position of advantage over the private interests of the market.

The greatest positive innovations of the RDC are the efficiency contracts and variable remuneration as a result of the contracted party's performance, establishing very interesting mechanisms to stimulate efficiency in public procurements. These use the logic of risk contracts as a way to link the expenditure of public resources to the attainment of effective advantages for the Administration.

In general lines, the variable remuneration and the efficiency contract constitute mechanisms by which it is intended to subordinate the remuneration of the individual to the attainment of a future pre-determined result, regarding which its occurrence is uncertain. A risk contract system is adopted, in which the contracted party assumes the risk of having at least part of its remuneration directly linked to the attainment of determined results. The advantage for the Public Administration, on the other hand, is evident, since the duty to remunerate the contracted party will occur, at least in part, only if the expected result that generated benefits to the contracting party is obtained.

The use of these mechanisms in the scope of the RDC will be an important test to identify their potential. If well conceived, the efficiency contracts and the settlements that contemplate variable remuneration will be able to offer relevant economy to public expenditures. Thus, it doesn't make sense that its application scope be restricted to the RDC.

Whereas the most controversial points of the RDC are confidential valuation and integrated procurement.

Aware of rule violations of the Procurement Law, the efficacy of the establishment of confidential valuation is doubtful for the justification that it could combat cartelistic strategies. In a cartel

market, the participants of the scheme would only need to continue with their current practices to obtain results that are similar to those currently seen. If everyone offers proposals with prices superior to the confidential valuation of the Administration, this will result in negotiating better conditions with the author of the best proposal, as established in the RDC Law, until the price offered by it is equal to that of the valuation.

As far as the integrated procurement regime, the idea of flexibility of the identification of the object of the tender is taken to extremes, since there is no object that is defined to serve as a parameter for several proposals that may be objectively comparable. In other words, it does not have the definition of the object to be contracted. In truth, given the proximity of the sports events in 2014 and 2016, the purpose of allowing works to be tendered without the technical elements required in a basic project is evident.

Experiences are still too recent and their number too small to assess the impact of the RDC on public tenders in Brazil: of the seven tenders that have been launched, only two have already been finalized, one without a contract signed (and with the suspicion of irregularities in the matter of confidential valuation) and the other successfully.

If the Government's aim, with the approval of the RDC, was to accelerate the procurement procedures of works and services for the World Cup and the Olympics, the precipitated manner in which the institution of the new regime occurred, may, as opposed to what was initially believed, work against the intended speed, giving cause to legal disputes regarding the validity of the new Law itself, exemplified by the Direct Unconstitutionality lawsuit of the RDC filed by the Federal Prosecutor General. Only time will tell.

## NOTES

- 1 The Procurement Law establishes general rules on bidding and administrative contracts regarding works and services, including publicity, purchases, disposals, and leases within the scope of the federation, states, federal district and municipalities. This law is based on safeguarding the principles of supremacy and public interest. It guides the activities of the public administration under the concept that purpose overrides will and establishes the rules for bidding processes and contracts with the public administration.
- 2 The list of works and services related to the Responsibilities Matrix may be consulted on the website: <http://www.portaltransparencia.gov.br/copa2014/matriz> (only in portuguese).
- 3 Budget allocations for maintaining services previously created, among which are included personnel, material, consumption and third party expenses, among others.
- 4 Budget allocations for expenses that do not correspond to direct counter-rendering for good or services, among which are included social and economic subsidies, expenses with passives, pensions, intergovernmental transfers and interest on debts.
- 5 See website: <http://www1.folha.uol.com.br/poder/931459-dilma-diz-que-sigilo-de-orcamentos-da-copa-foi-mal-interpretado.shtml> (available only in Portuguese).
- 6 According to the Procurement Law, the proposals with total value superior to the established limit should be disqualified, and it is mandatory that the invitation for bids inform the criterion of acceptability of unit and total prices, allowing maximum prices to be established.
- 7 “Use a maximum reserve price only if it is based on thorough market research and officials are convinced it is very competitive. Do not publish the reserve price, but keep it confidential in the file or deposit it with another public authority” (“Guidelines for fighting bid

rigging in public procurement” in [www.oecd.org/dataoecd/27/19/42851044.pdf](http://www.oecd.org/dataoecd/27/19/42851044.pdf)).

8 The Brazilian Court of Audit (“Tribunal de Contas da Uniao” – TCU, in Portuguese) audits the accounts of administrators and other persons responsible for federal public funds, assets, and other valuables, as well as the accounts of any person who may cause loss, misapplication, or other irregularities to the public treasury. Such administrative and judicative authority, among others, is provisioned in article 71 of the Brazilian Constitution.

9 Brazilian Court of Audit, Decision n. 339/2000 (published in DOU 10/may/2000).

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