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**Efficiency contracts in the
New Brazilian Procurement
Law: conceptual framework and
international experience**

**Contratos de eficiência na Nova
Lei Brasileira de Licitações:
perspectiva conceitual e
experiências internacionais**

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Efficiency contracts in the New Brazilian Procurement Law: conceptual framework and international experience*

Contratos de eficiência na Nova Lei Brasileira de Licitações: perspectiva conceitual e experiências internacionais

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Abstract

Objective: To analyze efficiency contracts, a contractual modality whose use was expanded by Law no. 14,133/2021, in its conceptual perspective and based on international experiences. **Methodology:** Qualitative post-positivist research, exploratory-descriptive, carried out from the analysis of Brazilian, French and American legislative texts and dogmatic bibliographic review of national and foreign doctrine that comment on similar legal figures in other legal systems. **Originality or value:** The work is original because it presents a proposal for a conceptual understanding of an institute that has been little applied in the Brazilian legal experience, whose possibility of use was expanded by the new public procurement law (Law no. 14,133/2021), and based on similar figures widely applied in countries like the United States and France. **Conclusions:** Efficiency contracts are an important tool used by public authorities internationally and its provision in the new public procurement law can help to mitigate the resistance of control authorities with their use in Brazil.

Keywords: public administration; public contracts; performance; efficiency; international.

Resumo

Objetivo: Analisar os contratos de eficiência, modalidade contratual cuja utilização foi ampliada pela Lei n. 14.133/2021, em sua perspectiva conceitual e a partir de experiências internacionais. **Metodologia:** Pesquisa qualitativa pós-positivista, de caráter exploratório-descritivo, realizada a partir da análise de textos legislativos brasileiros, franceses e americanos e revisão bibliográfica dogmática de textos da doutrina nacional e estrangeira que comentam figuras jurídicas similares em outros ordenamentos jurídicos. **Conclusões:** Os contratos de eficiência são uma importante ferramenta utilizada pelo Poder Público na experiência internacional e sua previsão na nova lei de licitações e contratos pode contribuir para mitigar a resistência dos ór-

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gãos de controle externo em relação a sua utilização no Brasil. Originalidade ou valor: O trabalho é original pois apresenta uma proposta de compreensão conceitual de um instituto pouco aplicado na experiência jurídica brasileira, cuja possibilidade de utilização foi ampliada pela nova lei de licitações e contratos (Lei n. 14.133/2021), a partir de paralelos com figuras semelhantes amplamente aplicadas em países como Estados Unidos e França.

Palavras-chave: administração pública; contrato administrativo; performance; eficiência; internacional.

1 Introduction

The recently published Law no. 14,133, of April 1st, 2021, reforms the legal framework for public procurement in Brazil. It revokes¹ Law no. 8,666, of June 21st, 1993, and brings together in a single law the advances perceived since then, such as those provided by the Auction (*Pregão*) Law and the Special Regime of Public Procurement (*Regime Diferenciado de Contratações Públicas*, or simply RDC) Law, now applicable to all procurement and public contracts concluded by the Public Administration. One of these innovations is the “efficiency contract”, initially provided for in the RDC.

Article 6th, item LIII of the new Law reads:

Art. 6º For the purposes of this law, the following definitions shall be considered:

[...]

LIII – efficiency contract: contract whose subject is the provision of services, and may include the performance of works or the supply of goods, with the objective of providing savings to the contracting party, in the form of reduction of current expenses, and where the contractor is remunerated based on a percentage of the savings generated;² and ³

Besides defining the efficiency contract, the new Law also introduces a new judgement criterion, applicable exclusively for the procurement of the efficiency contracts, which is the criteria of “the highest economic return” to the Public Administration (Article 33, VI and Article 39, main section, of Law no. 14,133, of April 1st, 2021)⁴.

In reality, this is not exactly a novelty in the forensic practice, since the conclusion of efficiency contracts (also known as performance contracts) was not prohibited by the legal system. However, it was not expressly authorized by law either, which raised doubts as to the possibility of its application to improve efficiency in the Brazilian Public Administration – doubts that were often reinforced by disparate decisions delivered by control authorities.

The approval of the new Law and the introduction of the efficiency contract into the Brazilian legal system, with application to all public contracts, puts an end to these doubts and makes room for the discussion and development of this type of contract in the country. In order to contribute to this debate, this article analyzes experiences with the use of efficiency contracts in France and in the United States, where they are widely used.

¹ Actually, Law No. 14,133/21 creates a transition of two years to the new framework, during which the Public Administration may choose which law to apply, according to Article 193.

² Free Translation “*Art. 6º Para os fins desta Lei, consideram-se: [...] LIII - contrato de eficiência: contrato cujo objeto é a prestação de serviços, que pode incluir a realização de obras e o fornecimento de bens, com o objetivo de proporcionar economia ao contratante, na forma de redução de despesas correntes, remunerado o contratado com base em percentual da economia gerada; [...]*”.

³ BRAZIL. *Lei n. 14.133, de 1º de abril de 2021*. National procurement Law. Available at: http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2021/lei/L14133.htm. Accessed on: 18 May 2021.

⁴ BRAZIL. *Lei n. 14.133, de 1º de abril de 2021*. National procurement Law. Available at: http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2021/lei/L14133.htm. Accessed on: 18 May 2021.

Furthermore, this analysis is compatible with the idea of a “Global Administrative Law”, which envisages the expansion of normative standards that are not restricted to one country or another.⁵ The United States of America and France, whose experiences are presented in this work, are both countries that have signed international agreements (the North Atlantic Trade Treaty and the European Union Treaties, for example) that establish standards for public procurement that, among other objectives, aim for models that implement efficiency in getting results⁶.

To this end, we will firstly analyze the legal doctrine in order to reach a definition of the efficiency (or performance) contract. Next, the paper will present international experiences with the contract type, and, finally, we will make brief comments about the application of the contract in Brazil.

This work is the result of a qualitative research⁷, with a post-positivist bias⁸, carried out through dogmatic bibliographical research⁹, based on documental analysis of normative statements of the Brazilian, French and American legal systems, texts of national and foreign legal doctrine, and with occasional support of court and administrative precedents.

2 Definition of performance contracts

The so-called efficiency contract, or performance contract, is a type of contract in which the contractor’s remuneration is conditioned to the fulfillment of certain performance goals.

It is important to clarify that an “efficiency contract”, as used in this paper, refers to a type of contract which includes a performance clause associated with the standard of remuneration. In other words, the contractor’s payment is contractually conditioned to the success obtained in the performance of his activities. In this context, it is also correct to say that the hired company assumes a portion of the risk of his remuneration and that this contract associates the contractor’s remuneration with the generation of efficiency gains for the contracting party.

Thus, “efficiency contract”, “performance contract”, “performance clause”, “risk contract” or “success contract” are expressions found in the legal doctrine and in the case law of the control authorities to refer to the same phenomenon under different angles, but they all express the general idea of a remuneration tied to the contractor’s productivity gains.

As for the definition, Andréia Vasconcelos and Fernando Marcato consider them as a relation in which the contractor’s remuneration is tied to the achievement of certain performance goals. In their words: “The premise adopted in the modeling of this contract is that the private party is paid for the delivery of results and not only for the execution of a series of tasks as would occur in the outsourcing of services.”^{10 11}

⁵ SILVA, Alice Rocha da; SANTOS, Ruth Maria Pereira dos. A influência do direito administrativo global no processo brasileiro de contratação pública à luz do princípio da transparência. *Revista Brasileira de Políticas Públicas*, Brasília, v. 6, n. 2, p. 59, 2016.

⁶ REZZOAGLI, Bruno Ariel. Contratos públicos y mercado global: un abordaje desde el derecho administrativo del siglo XXI. *Revista Brasileira de Políticas Públicas*, Brasília, v. 6, n. 1, p. 38-51, 2016.

⁷ GUBA, Egon G.; LINCOLN, Yvonna S. Competing paradigms in qualitative research. In: DENZIN, N. K.; LINCOLN, Y. S. *Handbook of qualitative research*. Thousand Oaks, CA: Sage, 1994, p. 105-117. *passim*

⁸ ANDRADE, José Maria Arruda de. *Interpretação da norma tributária*. São Paulo: MP Editora, 2006. p. 167.

⁹ ADEODATO, João Maurício. Bases para uma metodologia da pesquisa em direito. *Revista CEJ*, v. 3, n. 7, p. 143-150, 1999. Available at: <https://revistacej.cjf.jus.br/revcej/article/view/190>. Accessed on: 6 Apr. 2020.

¹⁰ Free translation “A premissa adotada na modelagem desse contrato é a de que o agente privado seja remunerado pela entrega de resultados e não apenas pela execução de uma série de tarefas como ocorreria na terceirização dos serviços”.

¹¹ VASCONCELOS, Andréia; MARCATO, Fernando. Contratos de performance para a melhoria operacional no saneamento. In: LUNA, Guilherme Gomes; GRAZIANO, Luiz Felipe Pinto Lima; BERTOCCELLI, Rodrigo de Pinho. *Saneamento básico: temas fundamentais, propostas e desafios*. Rio de Janeiro: Lumen Juris, 2017, p. 60-61.

In this case, efficiency is viewed as a condition for remuneration. Payments to the contractor shall be made only if certain contractual goals and objectives are reached. These contracts may provide a fixed remuneration, payable if a pre-established result is achieved, or variable remuneration, in accordance with the results obtained.

Thus, performance contracts are those that tie the contractor's remuneration to certain parameters, which demonstrate its performance. Performance contracts, then, necessarily include the so-called "performance clause".

It is also important to emphasize – as states François Lichère *et al.* – that in performance contracts there is a link between the contractor's performance objectives and his remuneration, so that the latter can take into account "the contractor's results, the quality of the services provided, the quality of the works and equipment, and the conditions under which they are made available to the public entity."^{12 13}

Evidently, every contract holds an idea of efficiency. However, in traditional contracts, the evaluation of the contractual performance ("efficiency") stems from a disjunctive judgment (all or nothing) which associates the payment (in a certain and determined amount) to the performance of the subject, that is, in the performance or not of a task, at adequate technical levels, regardless of whether such task has resulted in gains to the contracting Administration, either by reducing expenses or increasing revenue.

In other words, in traditional contracts, if the contractor performs the contractual object, he will be entitled to a payment "x", and if he does not perform, he receives nothing. As long as he performs what is stipulated in the contract, through the means stipulated therein, he will be entitled to the remuneration. Therefore, the usual service contracts are contracts of "means", whereas the performance contracts, on the other hand, are contracts of "results".

It should be noted that part of the legal doctrine lists the concession and public-private partnership (PPP) contracts as result-based contracts, precisely because, unlike the typical public contracts under Law 8,666/1993, the concessionaire is granted greater freedom of means to achieve the goals defined in the contract. However, such contracts differ from the performance (or efficiency) contracts, since they do not fully bind the payment of the private party to the achievement of goals - especially those related to gains for the Public Administration (either by reducing losses and expenses or by increasing revenues).

The Contracts Manual of the International Finance Corporation – IFC corroborates the above as it states that the core of performance contracts is in the fulfillment of pre-established goals: "[t]he performance contract is based on the idea of remunerating the private sector for the delivery of results and not only for the execution of a series of tasks"^{14 15}.

In traditional service contracts, the contractor's assumption of risk is lower, to the extent that it knows both what it needs to do and how much it will receive for its performance. There is also less risk (in the sense of predictability) for the contracting Administration, since it knows in advance the amount it will have to pay for the performance of a given subject.

On the other hand, in contracts in which efficiency is associated with remuneration, the contractor assumes the risk of managing to achieve a gain and receives, as consideration, part of the gain offered. In this

¹² Free translation: "*La rémunération du cocontractant peut être liée à des objectifs de performance. En ce sens, la rémunération peut prendre en compte les résultats du cocontractant, la qualité des prestations de services, la qualité des ouvrages et des équipements et les conditions dans lesquelles ils sont mis à la disposition de la personne publique*".

¹³ LICHÈRE, François *et al.* *Pratique des partenariats public-privé: choisir, évaluer, monter et suivre son PPP*. 2. ed. Paris: LexisNexis: Litec, 2009. p. 77.

¹⁴ Free translation "[o] contrato de performance é baseado na ideia de remunerar o setor privado pela entrega de resultados e não apenas pela execução de uma série de tarefas".

¹⁵ INTERNATIONAL FINANCE CORPORATION. *Manual sobre contratos de performance e eficiência para empresas de saneamento em Brasil*. Washington: IFC, 2013. p. 17.

case, even though the criteria for the variable remuneration are previously established, these are conditioned to the occurrence of a future and uncertain fact: improvement in the Administration's performance. Thus, the contractor assumes the risk of performing his activity and, if no gain is offered for the Administration, he will receive nothing. On the other hand, if the gains are significant, his compensation will also be significant.

In general terms, variable remuneration and efficiency contracts constitute mechanisms through which one intends to tie the remuneration of the private party to the achievement of a predetermined future result about which there is no certainty as to its occurrence. The approach of risk contracts is adopted, in which the contractor assumes the risk of having at least part of his compensation directly linked to the achievement of certain results. The advantage for the Public Administration, on the other hand, is evident, since the duty to remunerate the contractor will arise, at least in part, only if the expected result that generates benefits to the contractor is obtained.¹⁶ and ¹⁷

Since in performance contracts the contractor's consideration is tied to a result, in general, in these contracts the contractor is given greater freedom of means, so that through his efforts and expertise he can produce the results desired by the Administration (thus, a contract of results)¹⁸. In traditional service contracts, the means (that is, the contracted services) are described in detail, and the contractor is required to satisfactorily perform the described activity, even if no results are produced (contract of means).

In contracts with variable remuneration associated with the contractor's performance (efficiency), both the contractual subject (improvement of the service) and the amount of consideration are not determined in advance but are determinable according to certain contractual parameters.

It should be noted that, in these cases, the contracting party often does not know in advance exactly how much the contract will cost, since the contractor's remuneration may vary in accordance with his efficiency. However, even without knowing exactly how much it will pay the contractor, the contracting party is assured that the contract's cost is associated with an effective gain.

Performance contracts, as well as other result-based contracts, suffer from technical and methodological limitations regarding the agreement and measurement of the chosen indicators, which can lead to the underestimation of goals, the focus on more achievable goals at the expense of others, the manipulation of indicators or of performance (such as by focusing on a few measured areas at the expense of others that are not measured), among others, and as such it is essential that the public authorities in charge for the procurement process seek to identify these problems and try to mitigate them.¹⁹

As aforementioned, in Brazil, the RDC, established by Law No. 12,462, of August 4th, 2011, already introduced efficiency contract applicable to contracts in the Special Regime. Seeking to improve efficiency, this law provided for the possibility of variable remuneration based on the performance of the contractor.²⁰

¹⁶ Free translation: "*Em linhas gerais, a remuneração variável e os contratos de eficiência constituem mecanismos pelos quais se pretende subordinar a remuneração do particular à obtenção de um resultado futuro predeterminado acerca do qual não se tem certeza sobre sua ocorrência. Adota-se uma sistemática de contratos de risco, em que o contratado assume o risco de ter ao menos parte de sua remuneração diretamente vinculada à obtenção de certos resultados. A vantagem para a Administração Pública, por outro lado, é evidente, uma vez que o dever de remunerar o contratado surgirá, pelo menos em parte, apenas se for obtido o resultado esperado que gera benefícios ao contratante*".

¹⁷ SCHWIND, Rafael Wallbach. Remuneração variável e contratos de eficiência no Regime Diferenciado de Contratações Públicas (RDC). *Interesse Público*, v. 13, n. 70, p. 221-251, nov./dez. 2011. p. 222.

¹⁸ VASCONCELOS, Andréa; MARCATO, Fernando. Contratos de performance para a melhoria operacional no saneamento. In: LUNA, Guilherme Gomes; GRAZIANO, Luiz Felipe Pinto Lima; BERTOCCELLI, Rodrigo de Pinho. *Saneamento básico: temas fundamentais, propostas e desafios*. Rio de Janeiro: Lumen Juris, 2017. p. 60-61.

¹⁹ MARTINS, Humberto Falcão. Governança para resultados. *Boletim de análise político-institucional*, n. 19, dez. 2018. p. 57-65.

²⁰ ANDRADE, Ricardo Barretto de; VELOSO, Vitor Lanza. Uma visão geral sobre o Regime diferenciado de contratações públicas: objeto, objetivos, definições, princípios e diretrizes. In: JUSTEN FILHO, Marçal; PEREIRA, Cesar A. Guimaraes (coord.). *O regime diferenciado de contratações públicas (RDC): comentários à Lei n. 12.462 e ao Decreto n. 7.581: (atualizados pela Lei n. 12.980 e pelo Decreto n. 8.251, de maio de 2014)*. 3. ed. Belo Horizonte: Fórum, 2014, p. 33-50. p. 39.

The definition in the RDC is very similar to the one provided for in the new Law, which now expands application of the contract type to all public contracts. For this matter, article 23 of Law No. 12,462, also revoked²¹ by the new Procurement Law, stated that:

§ 1º The efficiency contract's subject is the provision of services, and may include the performance of works or the supply of goods, with the objective of providing savings to the contracting party, in the form of reduction of current expenses, and where the contractor is remunerated based on a percentage of the savings generated;^{22 23}

Braga and Braga argue that “public procurement is subject to a heavy regulatory burden, and obstacles to the compatibility between achieving efficiency in results and complying with control and transparency requirements are routinely found”^{24 25}. Although there have been attempts to implement different configurations of performance contract in the Brazilian reality – whether or not based on the provisions of the RDC – the national experience has always been resistant to this contract type. The Court of Auditors of the State of São Paulo (TCE/SP), for example, has rejected the possibility of using performance clauses *per se* in the past, stating that the variation of remuneration presents an excessive risk to the contracting Public Administration, since it would not be able to determine, in advance, exactly how much it would disburse²⁶.

However, this is a trend that is being reversed. Announcing these winds of change is the experience of the State of São Paulo's Water and Sanitation Company (SABESP), which has been using performance contracts for the implementation of water supply optimization plans for years. Such contracts, like performance contracts for energy savings, common on the international scenario, have been validated on more than one occasion by case law, including that of the TCE/SP²⁷.

Moreover, this type of contract is widely used internationally as a tool to improve the provision of public services, especially in the water and sanitation and energy sectors. Lastly, the international experienced described below proves that the conclusion of performance contracts has the potential to improve the performance of the Public Administration as a whole.

²¹ Also in two years' time, in accordance with article 193 of Law No. 14.133/21.

²² Free translation “§ 1º O contrato de eficiência terá por objeto a prestação de serviços, que pode incluir a realização de obras e o fornecimento de bens, com o objetivo de proporcionar economia ao contratante, na forma de redução de despesas correntes, sendo o contratado remunerado com base em percentual da economia gerada.”

²³ BRAZIL. *Lei n. 12.462, de 4 de agosto de 2011*. Available at: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/112462.htm. Accessed on: 18 May 2021.

²⁴ Free translation: “[...] a área de compras governamentais é objeto de pesada carga normativa, encontrando-se, corriqueiramente, obstáculos à compatibilidade entre a obtenção de eficiência nos resultados e o cumprimento dos requisitos de controle e transparência”.

²⁵ BRAGA, Cintia Garcia Vieira; BRAGA, Lamartine Vieira. Aplicação de tecnologias de informação e comunicação na contratação pública: a experiência portuguesa. *Revista Brasileira de Políticas Públicas*, Brasília, v. 1, n. 3, p. 123-143, dez. 2011. p. 127

²⁶ SÃO PAULO. Tribunal de Contas do Estado (TCE/SP). *Process TC-000859/008/14*. Rap. Cons. Antonio Roque Citadini. 2 Aug. 2016. Available at: http://www2.tce.sp.gov.br/arqs_juri/pdf/552600.pdf. Accessed on: 22 May 2021.

SÃO PAULO. Tribunal de Contas do Estado (TCE/SP). *Process TC-000876/001/09*. Rap. Cons. Silvia Monteiro. 27 Feb. 2013. Available at: http://www2.tce.sp.gov.br/arqs_juri/pdf/212851.pdf. Accessed on: 22 May 2021.

SÃO PAULO. Tribunal de Contas do Estado (TCE/SP). *Process TC-000929/007/07*. Rap. Cons. Robson Marinho. 18 Apr. 2012. Available at: http://www2.tce.sp.gov.br/arqs_juri/pdf/72556.pdf. Accessed on: 22 May 2021.

SÃO PAULO. Tribunal de Contas do Estado (TCE/SP). *Process TC-008226/026/09*. Rap. Cons. Subs. of Mr. Josué Romero. 17 Apr. 2012. Available at: http://www2.tce.sp.gov.br/arqs_juri/pdf/175144.pdf. Accessed on: 22 May 2021.

SÃO PAULO. Tribunal de Contas do Estado (TCE/SP). *Process TC-009127/026/11*. Rap. Cons. Silvia Monteiro. 10 Sep. 2013. Available at: http://www2.tce.sp.gov.br/arqs_juri/pdf/247089.pdf. Accessed on: 22 May 2021.

SÃO PAULO. Tribunal de Contas do Estado (TCE/SP). *Process TC-031267/026/10*. Rap. Cons. Edgard Camargo Rodrigues. 08 Dec. 2010. Available at: http://www2.tce.sp.gov.br/arqs_juri/pdf/105478.pdf. Accessed on: 22 May 2021.

SÃO PAULO. Tribunal de Contas do Estado (TCE/SP). *Process TC-24625/026/09*. Rap. Cons. Cláudio Ferraz de Alvarenga. 16 Mar. 2010. Available at: http://www2.tce.sp.gov.br/arqs_juri/pdf/66941.pdf. Accessed on: 22 May 2021.

²⁷ SÃO PAULO. Tribunal de Contas do Estado (TCE/SP). *Process TC-24625/026/09*. Rap. Cons. Cláudio Ferraz de Alvarenga. 16 Mar. 2010. Available at: http://www2.tce.sp.gov.br/arqs_juri/pdf/66941.pdf. Accessed on: 22 May 2021.

SÃO PAULO. Tribunal de Contas do Estado (TCE/SP). *Process TC-008226/026/09*. Rap. Cons. Subs. of Mr. Josué Romero. 17 Apr. 2012. Available at: http://www2.tce.sp.gov.br/arqs_juri/pdf/175144.pdf. Accessed on: 22 May 2021.

3 The French experience

In France, there is specific regulation on efficiency contracts concluded by the Public Administration. According to Article 34 of Ordonnance No. 2015-899 of July 23, 2015, these contracts are called “*marchés globaux de performance*”²⁸.

As the name implies, it is a type of “*marché public*”, a genus that encompasses any contract entered into between the Administration and public or private parties, in order to meet the former’s needs of works, supplies or services, and where the contractor’s payment is made in full by the Administration²⁹.

These contracts are defined by Article 34 of Ordonnance No. 2015-899 as those that tie the operation or maintenance to the “[...] execution or design and subsequent performance of services in order to meet quantified performance objectives defined, notably, in terms of level of activity, quality of service, energy efficiency or ecological impact” [...] ^{30 31}.

These contracts, initially applied in France to achieve energy goals, had their use extended to other public policies. In these contracts “the quantified objectives to be achieved are thus comparable to obligations of result. It is therefore during the award and dialogue phase that these objectives can be decided. These are data, measurable performance commitments.”^{32 33}.

Moreover, in these efficiency contracts, the expected performance goals are taken into account when determining the remuneration of the private party responsible for the maintenance or operation of the goods and services at hand. The contractor’s remuneration shall therefore be modulated in case his performance is above or below expectations.

Finally, the French legal system, as well as the Brazilian, distinguishes the traditional public contracts from the concession contracts, in which the concessionaire shall be remunerated exclusively by the revenues from the exploitation of the delegated services³⁴. Therefore, the public administrators must ensure that the contractor’s remuneration in the *marché globaux de performance* is not substantially linked to the results of the exploitation of the service, so as to protect against a possible requalification of the *marché* into a concession contract³⁵.

3.1 Energy Savings Contracts

Prior to the creation of the *marchés globaux de performance* described above, the French *Code de Marchés Publics* of 2006 already provided for many similar contracts in its Article 73, generically referred to as contracts

²⁸ FRANCE. *Ordonnance n. 2015-899*. 23 Jul. 2015. Available at: <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000030920376>. Accessed on: 18 May 2021.

²⁹ FRANCE. *Code des marchés publics*. 2006. Available at: <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000005627819&idSectionTA=&dateTexte=20160331>. Accessed on: 18 May 2021.

³⁰ Free translation “[...] à la réalisation ou à la conception-réalisation de prestations afin de remplir des objectifs chiffrés de performance définis notamment en termes de niveau d’activité, de qualité de service, d’efficacité énergétique ou d’incidence écologique [...]”.

³¹ FRANCE. *Ordonnance n. 2015-899*. 23 Jul. 2015. Available at: <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000030920376>. Accessed on: 18 May 2021.

³² Free translation: “[...] les objectifs chiffrés à atteindre sont donc assimilables à des obligations de résultat. C’est donc lors de la passation, de la concertation que ces objectifs pourront être décidés. Ce sont des données, des engagements de performance mesurables”.

³³ VOLPELLIÈRE, Yoan. *L’obligation de résultat de l’Administration*. Thesis (Doctor Degree in Law) – Université Montpellier, Montpellier, France, 2015. p.104.

³⁴ In France, the term “*délégations de services publics*” is adopted, which includes several types of “*concessions*”. Moreover, the definition of concession presented is similar to the definition of public service concession contract (or common concession) in Brazilian law, as provided for in article 2, II, of Federal Law No. 8.987/1995 (BRAZIL. *Lei n. 8.987, de 13 de fevereiro de 1995*. Available at: http://www.planalto.gov.br/ccivil_03/leis/18987compilada.htm. Accessed on: 18 May 2021.).

³⁵ FRANCE. Legal affairs department. *Fiche technique: contrats globaux*. 2018. Available at: <https://www.economie.gouv.fr/daj/contrats-globaux-2018>. Accessed on: 18 May 2021.

which associated conception, execution and exploitation or maintenance of its subject (“*marchés associant conception, réalisation et exploitation ou maintenance*”).

Such contracts were widely used in the energy sector with the objective of reducing power consumption in the country. Called “energy performance contracts” (*contrats de performance énergétique*), these agreements encouraged the contractor to reduce electricity consumption, since the amount of his remuneration is directly linked to the energy saved. They “fulfill three main functions: guarantee energy performance after the renovation of a building; use energy to finance energy renovation and externalize investments”³⁶ and ³⁷.

The *Code de Marchés Publics* was revoked by Ordonnance 2015-899 of July 23, 2015 and later replaced by the broader *Code de la commande publique* (Public Procurement Code, or simply CCP). In the latter, the energy performance contracts are defined as a type of the *marchés globaux de performance*, as described above³⁸.

These energy performance contracts are defined as:

[...] all contracts concluded by the administration with an energy efficiency services company in order to guarantee, in relation to a contractual reference situation, an improvement in the energy performance of a facility, verified or measured during the duration of the contract, through investments in works, supplies, or services.³⁹ ⁴⁰

The aim of the energy performance contract in France, therefore, is to increase the energy efficiency of a given public facility to the level previously established in the contract. If it fails to meet this level, the contractor shall pay compensation corresponding to the economic equivalent of the difference between the pre-determined level in the contract and the level effectively performed. On the other hand, if the contractor exceeds the pre-established levels, he shall be entitled to a bonus in his remuneration⁴¹.

3.2 Drug Development Contracts

Furthermore, there is precedent, not only in France, but in several other countries, of contracts concluded by the State with pharmaceutical companies for the development of drugs, which characterize performance contracts. In these contracts, the contracting authority sets certain parameters that must be met by the drug, whose non-compliance by the contractor means no remuneration shall be due.

In France, Megerlin states that the LEEM-CEPS framework agreement of December 2012, concluded between the Association of French pharmaceutical companies and the French Government’s Commission for health products, allows performance contracts to be concluded. Several other countries, such as the United Kingdom and the United States, also employ these types of contracts⁴².

Moreover, according to the author, the performance contract in the pharmaceutical industry seeks to tie the contractor’s remuneration to the achievement of indexes called Key Performance Indicators (KPI), whi-

³⁶ Free translation: “[...] remplissent trois grandes fonctions : garantir une performance énergétique après la réhabilitation d’un ouvrage ; utiliser d’énergie pour financer la rénovation énergétique et externaliser les investissements”.

³⁷ NICINSKI, Sophie. Les contrats de performance énergétique. *Annuaire des collectivités locales*, n. 33, p. 147-154, 2013. p. 148.

³⁸ CENTRE SCIENTIFIQUE ET TECHNIQUE DU BATIMENT. Observatoire des contrats de performance énergétique. *Les premiers résultats de l’observatoire des contrats de performance énergétique*. 2017. Available at: <http://www.cstb.fr/assets/documents/ocpe-chiffres-cles-novembre-2017-fr-291117.pdf>. Accessed on: 18 May 2021.

³⁹ Free translation “ tout contrat conclu entre un pouvoir adjudicateur et une société de services d’efficacité énergétique visant à garantir, par rapport à une situation de référence contractuelle, l’amélioration de la performance énergétique d’un bâtiment ou d’un parc de bâtiments, vérifiée et mesurée dans la durée, par un investissement dans des travaux, fournitures ou services.”

⁴⁰ FRANCE. Ministry of Ecology. *Présentation des contrats de performance énergétique*. 2012. Available at: <http://www.acheteurs-publics.com/marches-publics-encyclopedie/contrats-globaux-de-performance>. Accessed on: 18 May 2021.

⁴¹ FRANCE. Ministry of Ecology. *Présentation des contrats de performance énergétique*. 2012. Available at: <http://www.acheteurs-publics.com/marches-publics-encyclopedie/contrats-globaux-de-performance>. Accessed on: 18 May 2021.

⁴² MEGERLIN, F. Médicaments innovants et prix conditionnels: le contrat de performance, à l’opposé du partage de risques. *Annales pharmaceutiques françaises*, v. 71, 2013. p. 296.

ch, when combined, would determine both the method of verification of the developed drug's properties, as well as would allow the discovery (and eventually the appreciation) of even superior properties⁴³.

The French regulation, as demonstrated by the aforementioned examples, allows the Public Administration to sign performance contracts in which the contractor's remuneration is tied to the efficiency gains offered, in a similar fashion to those included in Brazil's New Public Procurement Law. Lastly, the reality in the United States is no different, as demonstrated below.

4 The American experience

In the United States, performance contracts concluded by the Public Administration are very common. As in Brazil, this type of contract represented a break with the traditional model of public contracts, in which the private party was paid for the activity performed (contract of means), in opposition to the results obtained (contract of results).

However, unlike what happened in Brazil, the conclusion of performance contracts in the United States was the aim of a specific public policy, provided by Policy Letter 91-2 of 1991, of the Office of Federal Procurement Policy, which directed the Federal Public Administration Agencies to employ, to the maximum extent possible, performance contracts in their service contracts with individuals.

The Policy Letter's goal was to ensure that the quality of the service provided achieved appropriate levels, as well as that the contractor would be paid only for services that met the expected parameters. This idea is clearly expressed by Aristigueta and Foote, who, when addressing the new movement toward performance contracts, state that it is based on the premise that an effective way to induce the contractor to achieve a certain objective of public interest is to pay him only when he does something that contributes to it.

The new philosophy of performance contracting is based on the assumption that an effective way to get a contractor to help accomplish a specific public purpose is to pay that contractor only when it actually does something that contributes to achieving the purpose. The vendor is not explicitly instructed on how to complete the task but rather is given flexibility on the implementation as long as the results are achieved.⁴⁴

According to the authors, performance contracts should then establish the objective parameters to be achieved by the private contractor, without, however, determining the means by which the contractor should do so. In other words, only the final aim of the contract should be determined, and it is up to the private contractor to use his expertise to select the best means to achieve it. This way, the responsibility for achieving the expected level of quality of service (which, in turn, shall be reflected in the contractor's remuneration) is fully transferred to the contractor.

Finally, Behn and Kant argue that the performance contract established a cooperative relationship between the Public Administration and the private contractor, as opposed to the adversarial relationship. Additionally, it is also a form of inducing private behavior through economic incentives that differs from the traditional path of normative regulation⁴⁵.

⁴³ MEGERLIN, F. Médicaments innovants et prix conditionnels: le contrat de performance, à l'opposé du partage de risques. *Annales pharmaceutiques françaises*, v. 71, 2013. p. 296-297.

⁴⁴ ARISTIGUETA, Maria; FOOTE, Lynne. The use of performance contracts for delivery of social services in the United States. *Theoretical and applied economics*, v. 3, n. 532, 2009. p. 5.

⁴⁵ BEHN, R. D.; KANT, P. Strategies for avoiding the pitfalls of performance contracting. *Public productivity and management review*, v. 22, n. 4, 1999. p. 474.

4.1 Energy savings contracts

In the United States there is also a specific type of performance contract in the water and energy sectors, called Energy Savings Performance Contracts (ESPC). In these contracts, the Administration hires a company to perform maintenance and improvement work that will increase the efficiency of a given public facility in terms of energy or water consumption.

In these contractual arrangements, the contractor is remunerated according to the energy efficiency gains offered by its work. More specifically, part of the fraction of the public budget that would otherwise have been spent on energy inefficiency expenses, now corrected by the contractor, will be used to remunerate the contractor over time. Thus, the private party assumes the risk of providing the promised gains in efficiency, since its remuneration is directly linked to its performance.

As defined by the US Department of Energy:

ESPC, or performance contracting, is a budget-neutral approach to performing building improvements that reduce energy and water use while increasing operational efficiency. ESPC enables owners to implement cost-saving projects now, without capital budgets. The resulting cost savings pay for efficiency projects over time. [...]

In an ESPC project, the projected savings are guaranteed. A third party generally finances the total project cost, using the guaranteed annual projected savings to pay for the improvements over time, often within 15 years. Therefore, facility owners can make the building improvements right away without asking for appropriations and without impacting the capital budget.⁴⁶

Therefore, performance contracts are perceived as a way to save water and power, as well as to increase the operational efficiency of public facilities at zero cost – that is, without impacting the public budget.

More specifically, in these contracts the private party must submit an annual performance guarantee, which represents the estimated amount that will be saved by the government after the services are performed. The logic is that this value given as collateral should be greater than the annual costs of financing the project. In other words, the contractor guarantees that the savings he provides will be greater than the costs that the government (or the external financier, if applicable) will have to pay him. The contractor will then carry out the necessary works to ensure the proposed savings in water or energy and will be remunerated on the basis of a fraction of these saved costs. This amount should then be sufficient to amortize the initial investments over the duration of the contract. Thus, the project will be financed with the budgetary resources saved on water or energy bills as a result of the works carried out by the contractor in the performance contract⁴⁷.

In the ESPC, the contractor's performance is measured according to the amount of energy or water saved. If they do not achieve the estimated level of savings, they must then make up for the difference⁴⁸.

Finally, it should be noted that successful ESPC programs have been developed by the states of Colorado, Hawaii, Massachusetts, Pennsylvania, Utah and Washington⁴⁹.

⁴⁶ UNITED STATES OF AMERICA. U. S. Department of Energy. *Energy savings performance contracting: guidelines for developing, staffing, and overseeing a State program*. 2016. Available at: https://www.energy.gov/sites/prod/files/2016/04/f30/ESPC%20Program%20Guidelines_April%202016_FINAL.pdf. Accessed on: 18 May 2021.

⁴⁷ UNITED STATES OF AMERICA. National Association of Energy Services Companies. *Introduction to energy performance contracting*. 2007. Available at: https://www.energystar.gov/ia/partners/spp_res/Introduction_to_Performance_Contracting.pdf. Accessed on: 18 May 2021.

⁴⁸ UNITED STATES OF AMERICA. U. S. Department of Energy. *Energy savings performance contracting: guidelines for developing, staffing, and overseeing a State program*. 2016. Available at: https://www.energy.gov/sites/prod/files/2016/04/f30/ESPC%20Program%20Guidelines_April%202016_FINAL.pdf. Accessed on: 18 May 2021.

⁴⁹ UNITED STATES OF AMERICA. U. S. Department of Energy. *Energy savings performance contracting: guidelines for developing, staffing, and overseeing a State program*. 2016. Available at: <https://www.energy.gov/sites/prod/files/2016/04/f30/ESPC%20>

4.2 Performance contracts for the provision of social services

Furthermore, a study conducted by the University of Delaware analyzed three precedents of performance contracts signed in that American state, referring to the provision of social services. In these contracts, the remuneration of the contractor was linked to the objectives actually achieved, and the private party was free to define the most appropriate means to achieve such results. The government, in turn, did not remunerate the mere provision of services, but only to the extent that the pre-established objectives in the contract were successfully achieved⁵⁰.

These contracts were used primarily in the areas of vocational rehabilitation, substance abuse, mental health and family assistance. The first set of contracts delegated the provision of job training services for the unemployed to the contractor, in which the private sector was paid accordingly to the rates of (i) participants who completed the program, (ii) participants who were employed after the program, and (iii) participants who remained in employment after 6 months, as well as (iv) the wages they received in their new jobs⁵¹.

In the second set of contracts for the provision of social services, the rehabilitation of drug addicts was delegated to the private sector. In these contracts, their remuneration was paid according to criteria related to the presence of participants in the program and the rate of those who effectively completed it. The contracts also established the maximum remuneration that the contractor could receive, so that the remuneration would increase for each participant that completed the program, up to a limit of 15 participants, after which the remuneration would be the same⁵².

Finally, in the third set of contracts, the private party would provide a number of services related to family counseling. An example is the provision of services that seek to find children who have been separated from their families and reintegrate them. In these cases, the contractor's remuneration was tied to the achievement of a previously determined goal (such as 80% of families successfully reunited). Payment was not made if the goal was not met, but if it was exceeded the contractor would be entitled to a bonus⁵³.

Based on these experiences, the University of Delaware's study concluded that there is great potential for using performance contracts in the provision of social services. The contracts in the three precedents analyzed obtained positive results, also provoking greater accountability on the part of service providers and an improvement in the relationship between them and the Administration, since the providers felt safer with clear objectives to meet and appreciated the greater flexibility of means that the contract provided⁵⁴.

However, these contracts are also subject to criticism regarding performance measures and incentives:

If a government's objectives or interests are explicit and the total value of the services to be provided is a contractible performance measure, designing an optimal performance-based contract should be relatively straightforward. However, in public welfare programs (as in many other government domains), objectives are not always clearly defined, and there is often no single, verifiable measure of contractor performance that adequately characterizes the value of services provided. In these cases, a performance measure will neither create the right incentives for the service provider nor will it necessarily provide an

Program%20Guidelines_April%202016_FINAL.pdf. Accessed on: 18 May 2021.

⁵⁰ ARISTIGUETA, Maria; FOOTE, Lynne. The use of performance contracts for delivery of social services in the United States. *Theoretical and applied economics*, v. 3, n. 532, 2009. p. 16.

⁵¹ ARISTIGUETA, Maria; FOOTE, Lynne. The use of performance contracts for delivery of social services in the United States. *Theoretical and applied economics*, v. 3, n. 532, 2009.

⁵² ARISTIGUETA, Maria; FOOTE, Lynne. The use of performance contracts for delivery of social services in the United States. *Theoretical and applied economics*, v. 3, n. 532, 2009.

⁵³ ARISTIGUETA, Maria; FOOTE, Lynne. The use of performance contracts for delivery of social services in the United States. *Theoretical and applied economics*, v. 3, n. 532, 2009.

⁵⁴ ARISTIGUETA, Maria; FOOTE, Lynne. The use of performance contracts for delivery of social services in the United States. *Theoretical and applied economics*, v. 3, n. 532, 2009.

accurate signal to the government of total value produced by the provider.⁵⁵

The main criticisms on the use of performance contracts in social assistance contracts are associated with the fact that the objectives and goals are, in many cases, not easily measurable, which can affect the quantification of the service provider's remuneration. However, this criticism points to a weakness in performance contracts in general (and not specifically of those in the social assistance sector), and it is up to the public authorities to choose consistent and sufficient result indicators to adequately indicate the provider's performance.

5 Conclusion

The above demonstrates that performance contracts are widely used internationally and that countries have achieved satisfactory results with their application in various sectors, such as health care, social assistance, energy and sanitation.

Furthermore, it is also understood that the types of contracts analyzed in this paper, especially energy and water saving contracts, are perfectly applicable to the Brazilian reality. The Brazilian legal framework authorizes – as well as encourages, by prescribing efficiency as a guideline for the Public Administration's performance – the conclusion of contracts that aim to provide greater efficiency to the public authorities when performing its activities. Moreover, the recently enacted Public Procurement Law (Law No. 14,133/21) explicitly mentions the “efficiency contract” and creates a specific judgment criterion for its procurement.

Article 39 of Law No. 14,133/21, for that matter, states that the bidder's offer in the procurement procedure must contain both a (i) work proposal, which explains the activities proposed and the estimated economy, and (ii) a price proposal, which shall correspond to a percentage of the estimated savings (§ 1º of Article 39). The “economic return” shall thus be the amount of the estimated economy minus the price proposal (§ 3º of Article 39).

Moreover, the new framework also outlines first characteristics of efficiency contracts in Brazil. Article 39, § 4, for example, states that the contracts must establish both (i) an estimated economy, below which the contractor's remuneration shall be reduced in accordance with his inefficiency, and (ii) a minimum economy limit, below which the contractor is subject to further sanctions.

So far, however, attempts to implement this type of contract in Brazil have usually stumbled against decisions of control authorities disallowing the use of variable remuneration clauses in public contracts. Moreover, we expect that the introduction of this type of contract in the new Public Procurement Law will encourage its application throughout the country, confirming once and for all that its use is possible and even desired.

However, as with any other public contract, its application requires care and specific conditions, which shall be designed gradually by legal doctrine and case law. We hope that this article has contributed to start an academic discussion that shall certainly follow, by bringing successful examples of the application of performance contracts around the world that may inspire their use in Brazil.

⁵⁵ HEINRICH, Carolyn; CHOI, Youseok. Performance based contracting in social welfare programs. *The American Review of Public Administration*, v. 37, n. 4, p. 409-435, 2007. p. 415.

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